

## Becoming an International Arbitrator: Qualifications, Disclosures, Conduct, and Removal

Richard M. Mosk  
Tom Ginsburg

*Overview:* This chapter discusses the qualifications involved in becoming an international arbitrator, the appointment process, disclosure requirements, arbitrator ethics with the parties and each other, challenges to arbitrators, resignation and replacement of arbitrators, and financial and liability issues.

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## § 9.01 In General

### [1] The Growth in the Market for Arbitrators

Not so long ago there were few individuals who specialized in arbitration—either domestic or international. Just a few multinational law firms engaged in the practice of international arbitration. Only a small number of well-known and well-connected individuals were called upon to act as arbitrators in significant international arbitrations.<sup>1</sup> Concomitantly, there were few international arbitral institutions. The most prominent, the International Court of Arbitration of the International Chamber of Commerce (“ICC”), had 100 requests for arbitration filed in 1968, as compared with 663 in 2008.<sup>2</sup>

Increased international trade, reduced political and trade barriers, the growth of multinational law firms, and the expansion of alternative dispute resolution have all contributed to the growth of international arbitration. Businesses recognized that resolving disputes through international

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<sup>1</sup> See Dezalay & Garth, *Dealing in Virtue* 18-29 (1996).

<sup>2</sup> 2008 Statistical Report. 20:1 ICC Int’l Ct. Arb. Bull. 5 (2009).

arbitration was preferable to being a party in a foreign court; lawyers became more sophisticated in drafting dispute resolution clauses; more nations acceded to the New York Convention on the Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”)<sup>3</sup> making enforcement easier; and the establishment of the Iran-United States Claims Tribunal in 1981 exposed many American lawyers, who previously had no such experience, to the field of international arbitration. As the popularity of international arbitration grew, many countries modernized their national laws on arbitration, and new international arbitral institutions have developed. Governments are increasingly requiring international arbitration in investment and trade treaties.<sup>4</sup> More and more businesses are providing for arbitration in private agreements.

## **[2] Considerations in Selecting an Arbitrator**

***Practitioner’s Hint:** Practitioners will find that Americans are not usually appointed as arbitrators in foreign-based international arbitrations, for a myriad of reasons. Most arbitrations in which an American is appointed as an arbitrator take place in the United States.*

The principles discussed in this chapter relate primarily to the selection of arbitrators in international commercial arbitrations rather than to intergovernmental arbitrations or claims settlement mechanisms, although they often employ the same or similar practices. This is especially so with regard to those intergovernmental processes that utilize rules that are common in international commercial arbitration.<sup>5</sup>

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<sup>3</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. §§ 201-208 (1999). *See generally*, Chapter I.8 above.

<sup>4</sup> For example, the North American Free Trade Agreement (“NAFTA”) provides for mandatory arbitration of investment disputes and requires governments to encourage international arbitration of commercial disputes. *See* North American Free Trade Agreement, Art. 2008, 32 I.L.M. at 695 [providing for arbitral panels for dispute resolution between the Parties]; Arts. 1120-38, 32 I.L.M. at 642-47 [establishing arbitration mechanism for settlement of disputes between party to NAFTA and investor of another NAFTA party]; Art. 2022(1), 32 I.L.M. at 698 [“[e]ach party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area”]; *see generally* Born, *International Arbitration* 1-144 (2009).

<sup>5</sup> *See* Mosk, *Party-Appointed Arbitrators in International Arbitration: The Experience*

In selecting arbitrators, parties involved in international arbitration focus on such factors as language ability, availability, experience in international arbitration, an academic or governmental background and experience in the country where the arbitration is to take place. When designating a party-appointed arbitrator, the party relies heavily on those factors in order that the person appointed operates effectively and has credibility with the other arbitrators.

The leading nationalities among ICC-appointed arbitrators as chair or sole arbitrator are Swiss, French, British, and American.<sup>6</sup> Americans received 211 appointments in the 11 years from 1989-1999, compared with 289 for France, 258 for Switzerland, 196 for U.K.<sup>7</sup> When a United States person is a party to an international arbitration, the sole arbitrator or chair of the arbitration panel generally is not a United States citizen.

The best opportunity for an American to serve as an arbitrator in an international arbitration is to become a party-appointed arbitrator. If, however, the international arbitration does not involve an American party and is overseas, parties are simply reluctant to select an American as an arbitrator for a number of reasons, two of which are the lack of familiarity with local law and a lack of facility with the chosen language.

Americans are more likely to participate as arbitrators in international arbitrations that not only take place in the United States, but have parties with a strong American presence. In that situation, there is less likelihood of a party insisting on a specific nationality for arbitrators. Other opportunities for Americans in international arbitration exist in specialized areas, such as intellectual property, construction, entertainment, and other fields in which the parties believe knowledge of the industry is important. Moreover, in arbitrations in certain industries, non-lawyers with knowledge of the field are frequently selected as arbitrators.<sup>8</sup> The American Arbitration Association (“AAA”) panels include engineers, business consultants, accountants, and other types of specialized experts in addition to attorneys.<sup>9</sup>

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*of the Iran-U.S. Claims Tribunal*, 1 Trans. Law. 253 (1988).

<sup>6</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 730 (3d ed. 2000).

<sup>7</sup> *Id.* at 729.

<sup>8</sup> Non-lawyers are frequently found in arbitrations involving labor disputes and certain commodity disputes in the United States. *See, for example*, Gershenfeld, *Alternatives for Labor Arbitrators*, 53 WTR Disp. Resol. J. 53, 56 (1998); Hoellering, *Textile and Apparel Industry Disputes*, *Wide World of Arbitration* 53 (Charlotte Gold et al. eds., 1978) (textile industry).

<sup>9</sup> Coulson, *Business Arbitration—What You Need to Know* 9 (5th ed. 1993).

### [3] Enhancing the Prospects of Becoming an Arbitrator

*Practitioner's Hint: Being active in organizations which support international arbitration is a major factor in becoming an international arbitrator. Additionally, you must find a way to be added to the list of arbitrators which most arbitration organizations maintain.*

A practitioner who wishes to become active as an international arbitrator will find significant and growing competition among persons who seek to be appointed as international arbitrators.<sup>10</sup> To enhance the opportunity to become an arbitrator in international arbitrations, one can act as counsel to parties in international arbitrations, become active in the field of domestic arbitration, develop special expertise in an industry with an international component, attend programs on international law and arbitration, develop contacts with the international arbitration community, such as with national arbitration committees of the ICC, and be active in international organizations, such as the International Bar Association ("IBA") and the ICC, as well as with the AAA. Indeed, as shown in section 9.02 just below, arbitrators are often selected from an institution's list of arbitrators. Thus, inclusion on such a list can be a prerequisite to appointment as an arbitrator.

Being included on a list of arbitrators, however, is only the first step. Generally, arbitrators may have to meet certain requirements and must also disclose any special relationships with a party or its counsel. The extent of institutional or judicial scrutiny over these requirements varies from system to system. Arbitrators should be aware that arbitrations are generally governed by the law of the country in which the arbitrations are held, unless the parties specify otherwise, as well as the relevant arbitral rules. Any potential arbitrator must not only consider the jurisdiction's legal and ethical requirements, but must also consider such factors as necessary qualifications, time requirements, and compensation. Most of those points are discussed in this chapter.

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<sup>10</sup> Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, *Disp. Res. Mag.* 22, 22 (Spring 1998); Drahozal, *Commercial Norms, Commercial Codes and International Commercial Arbitration*, 33 *Vand J. Transnat'l. L.* 79, 106 (2000).

## § 9.02 Appointment Practices

***Practitioner’s Hint:** Practitioners will find that the process of selecting arbitrators to serve on a panel is varied. When the parties have selected a set of arbitral rules (promulgated by the ICC or by the AAA, for example), the rules will contain the selection method. The parties generally are not bound by that method, generally, and may adopt their own method of selection. A common method is to have each party appoint a party-arbitrator who, in turn, select the third arbitrator to act as the chair.*

### [1] Methods of Appointment

A dispute can be submitted to a sole arbitrator or multiple arbitrators, typically three.<sup>11</sup> The appointment of a particular arbitrator will be a function of the parties’ agreed method for selecting the arbitrator(s).<sup>12</sup> The arbitrator or arbitrators can be selected mutually by the parties or designated by an appointing authority, such as the ICC or the AAA. One variation that combines party selection with an independent designation allows each party to designate one arbitrator (often known as a “party-appointed arbitrator”), and then provides for those two designated arbitrators to select a third arbitrator or chair, or for the appointing authority to designate the third arbitrator. Many institutions maintain lists of arbitrators from whom arbitrators must be drawn.<sup>13</sup> The parties are normally free to agree on the size and composition of the panel.

### [2] Party Appointment

Party participation in appointing the decision-makers is one of the key features that distinguish arbitration from judicial processes. The opportunity to choose the decision-makers is especially valuable in the context of international disputes, in which the nationalities of the parties differ. Often a party is more comfortable if one member of the panel is appointed solely by that party and therefore presumably is familiar with the domestic laws and business environment in which that party operates. The party-arbitrator, if he or she is doing his job properly, will assist the

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<sup>11</sup> Such a three-person panel is sometimes referred to as a “tripartite” panel.

<sup>12</sup> See § 2.05, above.

<sup>13</sup> See, e.g., China International Economic and Trade Arbitration Commission (“CIETAC”) Arbitration Rules Art. 1.10 (2005).

other arbitrators as they work to understand the relevant aspects of the appointing party's national law and business conditions.

The parties can jointly appoint all members of the panel if the parties can agree on who should be members of the panel. Alternatively, the parties might agree to submit to each other lists of names of prospective arbitrators with the understanding that any common names will be designated as the arbitrators to decide the dispute. Or, as noted, each party can select its own arbitrator, with the two arbitrators or appointing authority selecting the chair.

### **[3] Appointment of Arbitrators Absent Party Agreement**

#### **[a] *Ad-hoc* Arbitration**

In *ad-hoc* arbitrations—those not administered by an arbitral institution—selection processes vary according to the dispute resolution clause of the contract, the submission agreement, the applicable rules, or the applicable law. Absent agreement of the parties, the mechanism used for selecting arbitrators can include direct appointment by an appointing authority or a methodology such as a list procedure that ranks people on a list to see if there are any common names acceptable to the parties.<sup>14</sup>

The parties can, by agreement, utilize the influential Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”)<sup>15</sup> in *ad-hoc* arbitrations. Under the UNCITRAL Rules, the Permanent Court of Arbitration in The Hague can designate an appointing authority for arbitrations upon the request of either party.<sup>16</sup>

#### **[b] Institutional Arbitration**

Parties who agree to conduct an arbitration pursuant to rules of a particular institution agree, by implication, to make appointments of the arbitrators pursuant to those rules when the parties fail to agree.<sup>17</sup>

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<sup>14</sup> See Blackaby, Partasides, Redfern & Hunter, Redfern and Hunter on International Commercial Arbitration 251-53 (5th ed., 2009).

<sup>15</sup> G.A. Res. 31/98 (1976), U.N. Doc. A31/17, 31<sup>st</sup> Sess., Supp. No. 17.

<sup>16</sup> UNCITRAL Rules Art. 6(2); see discussion in Blackaby, Partasides, Redfern & Hunter, Redfern and Hunter on International Commercial Arbitration 257-58 (5th ed., 2009).

<sup>17</sup> Many institutions are willing to act as an appointing authority even for arbitrations not conducted under their rules. Blackaby, Partasides, Redfern & Hunter,

Looking at the Rules of the ICC, for example, the practitioner will find that all appointments must be confirmed by the International Court of Arbitration (“ICC Court”), and the Court can appoint an arbitrator when a party fails to nominate one.<sup>18</sup> Other institutions have comparable rules.<sup>19</sup> The ICC Court also appoints the chair or third arbitrator should the parties fail to agree upon another procedure.<sup>20</sup> Whenever the ICC Court is called upon to appoint an arbitrator, it does so upon the proposal of the National Committee of the ICC of the country from which the arbitrator is to be appointed.

We have noted, from time to time, that an institution may not accept a party’s choice of arbitrator. For instance, the ICC Rules require the ICC Court and the panel to “make every effort to make sure that the Award is enforceable at law.”<sup>21</sup> This could be seen as requiring the ICC Court to refuse to confirm a party nominee or parties’ nominee if the ICC Court believed the appointment of such a nominee would increase the risk of a non-enforceable award. An example of such refusal to confirm might occur if the designated arbitrator lacked the degree of independence and impartiality required under the applicable law. Thus, although the parties may agree to waive the requirements of independence and impartiality in ICC arbitrations,<sup>22</sup> a question may arise as to whether the ICC Court of Arbitration can or will ignore party autonomy and override the selection by a party or parties.

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Redfern and Hunter on International Commercial Arbitration 2543 (5th ed., 2009).

<sup>18</sup> Rules of the International Chamber of Commerce Art. 8(4), *reprinted in* Special Supplement to the ICC Int’l Ct. Arb. Bull. 82 (Nov. 1997).

<sup>19</sup> The London Court of International Arbitration (“LCIA”) Rules provide for appointment by the LCIA Court on a party’s nomination and allow the Court to make the appointment itself whenever a party does not make a nomination. LCIA Rules Art. 7(2), *reprinted in* 23 Y.B. Comm. Arb. 369 (1998). The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Institute”) allow it to make an appointment where a party fails to do so, but have no provisions for confirmation of party-appointed arbitrators. Stockholm Chamber of Commerce Arbitration Institute, Arbitration Rules Art. 13(2-3). The AAA International Rules allow the AAA to make appointments on the request of either party after 45 days after the commencement of the arbitration. American Arbitration Association, International Arbitration Rules Art. 6(3), *reprinted in* 22 Y.B. Comm. Arb. 303 (1997).

<sup>20</sup> ICC Rules Art. 8(4).

<sup>21</sup> ICC Rules Art. 35.

<sup>22</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 212 (3d ed. 2000) (noting that such agreements are “rare in ICC practice”).

**[c] Judicial Appointment**

If no appointing authority is provided for by the parties or by the relevant rules, or if an appointing authority does not make an appointment, national courts may be called upon to appoint arbitrators. The United States Federal Arbitration Act (“FAA”) provides for judicial appointment of arbitrators,<sup>23</sup> as do the national laws of most other leading arbitral centers. The UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”), a model arbitration code adopted by a number of jurisdictions, also uses that approach.<sup>24</sup> In international disputes, an issue can arise as to which court is entitled to appoint arbitrators. For instance, if the contract specifies a particular place of arbitration, courts in that country will likely have jurisdiction to make an appointment. If the parties have selected a national law to govern the contract, courts in that country (that is, the country which laws will govern the contract) might also have jurisdiction to appoint an arbitrator or arbitrators.<sup>25</sup> Assuming that an appropriate arbitration clause exists, the New York Convention requires courts in any contracting state to “refer the parties to arbitration” at the request of

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<sup>23</sup> 9 U.S.C. § 5 (1999) (judicial appointment of arbitrators acceptable on application of either party if no method provided in agreement or if parties fail to or lapse in implementing the agreement). *See, e.g.*, *Neptune Maritime, Ltd. v. H & J Isbrandtsen, Ltd.*, 559 F. Supp. 531 (S.D.N.Y. 1983) (compelling arbitration and appointing arbitrator); *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7<sup>th</sup> Cir. 1987) (upholding judicial appointment of arbitrator); *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9<sup>th</sup> Cir. 1987) (upholding judicial appointment of umpire after months of party impasse when only seven of twelve contracts in dispute contained an arbitration clause); *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978) (court authorized to appoint when named authority no longer conducted arbitrations); *ATSA of California, Inc. v. Cont'l Ins. Co.*, 702 F.2d 172 (9<sup>th</sup> Cir. 1983), amended on other grounds, 754 F.2d 1394 (9<sup>th</sup> Cir. 1985) (judge must give parties a chance to implement their dispute resolution clause before appointing arbitrator).

<sup>24</sup> *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 53, at 308, U.N. Doc. A/40/53 (1985), App. Doc. 7, Arts. 11(3) and 11(4). Amendments to the Hong Kong Arbitration Ordinance, which generally is based on the Model Law, have taken the default appointing power from the court and vested it in the Hong Kong International Arbitration Centre (“HKIAC”). Kaplan, *An Update on Hong Kong's Arbitration Law*, Special Supplement to the ICC Int'l Ct. Arb. Bull. 11, 17 (Nov. 1998).

<sup>25</sup> Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 255-57 (5th ed., 2009).

either party, subject to certain narrow exceptions.<sup>26</sup> Although that provision means that the court is not entitled to decide the dispute, the court is entitled to retain jurisdiction to compel arbitration or make appointments of arbitrators to the extent it is granted such power under the law applicable to the arbitration.<sup>27</sup>

### § 9.03 Qualifications of Arbitrators

#### [1] Nationality

*Practitioner's Hint:* As a general practice, arbitrators are frequently of nationalities different from those of the parties. The policy normally is followed strictly when a sole arbitrator or the chair of a panel is appointed.

Absent any legal or institutional requirements, the parties can appoint arbitrators of any nationality. The rule or practice of the arbitral institution administering the arbitration, however, can limit that right. Commonly, in international arbitrations, the sole arbitrator or chair is of a different nationality from the parties. Some believe that provision enhances the image of arbitral neutrality.<sup>28</sup> If neither of the parties is a national of the situs of the arbitration, generally the chair or sole arbitrator will be located in and be a national of that country.<sup>29</sup>

The UNCITRAL Rules do not require the sole or third arbitrator to be of a different nationality from the parties, but the appointing authority must consider the “advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.”<sup>30</sup> The ICC Rules allow a third arbitrator to be of the same nationality as a party, but generally the ICC Court of Arbitration appoints chairs from third countries—usually the site of the arbitration.<sup>31</sup> The LCIA Court, also

<sup>26</sup> New York Convention, Art. II(3).

<sup>27</sup> van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* 131, 159 (1981).

<sup>28</sup> See Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, *Swiss Essays on International Arbitration* 23, 24 (1984) (referring to neutrality as national neutrality).

<sup>29</sup> See §§ 2.06[1], 4.01[1] and 4.02[3], above, concerning the impact of the selection of the place of arbitration on the selection of the arbitrators.

<sup>30</sup> UNCITRAL Rules Art. 6(7).

<sup>31</sup> Article 9(5) of the ICC Rules allows in “suitable circumstances” the appointment as a chairman or sole arbitrator of a national of one of the parties where there is no objection.

known as the London Court of International Arbitration, only allows the presiding or sole arbitrator to have the nationality of one of the parties if the other party agrees in writing.<sup>32</sup> The International Arbitration Rules of the AAA provide that upon either party's initiative or upon the initiative of the administrator of the arbitration, an arbitrator of a nationality other than those of the parties may be appointed.<sup>33</sup>

Under the Arbitration Rules of the International Centre for the Settlement of Investment Disputes ("ICSID Rules"), even the party-appointed arbitrators may not be of the same nationality as either party or as each other.<sup>34</sup> The World Intellectual Property Organization ("WIPO") Arbitration Rules provide that if the parties have not agreed otherwise, the sole or presiding arbitrator should have a different nationality than the parties, "in the absence of special circumstances such as the need to appoint a person having particular qualifications."<sup>35</sup> The UNCITRAL Model Law takes a contrary approach, providing that persons should not be precluded by reason of nationality from acting as arbitrators, absent party agreement.<sup>36</sup> Some institutions, such as the Independent Film and Television Alliance, have no requirements regarding the nationality of arbitrators, but rather focus on experience in a particular industry.<sup>37</sup>

As discussed below<sup>38</sup> the laws of certain countries may have requirements regarding the nationality of arbitrators in some situations.

## [2] Language

***Practitioner's Hint:** A practitioner should consider the wisdom of accepting membership on a panel which will hear an arbitration in a language in which the practitioner is not proficient. Not only may he or she not be confirmed, he or she may be removed from the panel even if is seated as a result of that deficiency.*

Although not always specified by arbitral rules, arbitrators are often

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<sup>32</sup> LCIA Rules Art. 6(1).

<sup>33</sup> AAA International Arbitration Rules Art. 6 (4).

<sup>34</sup> Art. 3(1)(a)(i).

<sup>35</sup> WIPO Arbitration Rules Art. 20.

<sup>36</sup> UNCITRAL Model Law Art. 11(1).

<sup>37</sup> Independent Film and Television Alliance ("IFTA") Rules for International Arbitration Rule 4.1 (1997).

<sup>38</sup> See § 9.03[6] below.

required to be familiar with the designated language of the arbitration, absent a contrary agreement of the parties. The arbitrator's knowledge of the language of the arbitration saves time and expense that would otherwise be required for translation and interpretation. Arbitrators can be removed or can fail to be confirmed should they not be able to work in that language. For example, the ICC Court has refused to confirm an arbitrator who did not know the language of the proceedings.<sup>39</sup>

Generally, the language of the arbitration will be the language of the contract, but parties are free to designate any language or languages for the arbitration. English is widely used in international arbitrations.<sup>40</sup>

### [3] Occupation

*Practitioner's Hint: Arbitrators not only come in all sizes and shapes but they engage in a variety of occupations. Arbitral rules generally do not limit the choice of arbitrators from a list of lawyers. The problem that most non-lawyer arbitrators face, however, is that arbitration is essentially a legal proceeding. Nevertheless, the final choice of arbitrators who will compose the panel normally is up to the parties.*

One need not be a lawyer to serve as an arbitrator.<sup>41</sup> In many specialized arbitrations, shipping or commodities arbitrations, for example, non-lawyers, who have knowledge of the trade, are commonly selected as arbitrators. That selection generally will advance the arbitral process by ensuring substantive expertise is available and by reducing costs.<sup>42</sup>

Still, because international arbitrations are primarily of a "legal nature," most arbitrators are lawyers. A lawyer is a particularly likely selection as an arbitrator when the arbitration calls for a sole arbitrator because legal issues concerning such issues as choice of law and evidence often arise. A non-lawyer who is selected as a sole arbitrator or chair may find that he or she is well advised to ask for the services of a

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<sup>39</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 11 (1995).

<sup>40</sup> Under LCIA Rules, Article 17(1), a non-participating or defaulting party cannot object if the proceedings are conducted in English.

<sup>41</sup> See Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 260 (5th ed., 2009).

<sup>42</sup> See Aksen, *Arbitration and the Unauthorized Practice of Law in Wide World of Arbitration* 180, 185 (Charlotte Gold et al. eds., 1978).

lawyer on legal issues.<sup>43</sup>

Arbitral institutions can also specify their own qualifications for arbitrators who serve under their rules. For example, the ICSID Convention requires persons “of high moral character and recognized competence in the fields of law, commerce, industry or finance.”<sup>44</sup> The Panel of International Arbitrators of the Hong Kong International Arbitration Centre claims its arbitrators have substantial international experience. The Independent Film and Television Alliance (“IFTA”) specifies that its panel is composed of those familiar with the entertainment industry.<sup>45</sup>

In addition to those qualifications, parties can require the members of the panel have specific qualifications. For example, the parties can require the members be from a particular profession or have specified experience. The parties can also explicitly waive any occupational requirements, but some institutions may not honor such a waiver.

Sometimes, the parties may designate an entity to be the arbitrator. For example, in a transaction involving the application of Generally Accepted Accounting Principles (“GAAP”), an accounting firm may be designated to resolve any disputes. Of course, ultimately, an individual or individuals in that firm must operate as the arbitrator or arbitrators. In such an instance, the firm selects the individuals within the firm to act as arbitrators, who are ultimately responsible for the award.

#### [4] Availability and Competence

*Practitioner's Hint:* A practitioner who agrees to act as an arbitrator in an international arbitration is confirming that he or she will be available to conduct the arbitration and possesses has sufficient knowledge about the subject matter to act in a competent manner during the arbitration.

Arbitrators undertake to be available and able to conduct the arbitration. The arbitrator has a duty to make inquiries to assure himself or herself that he or she will be available and competent to resolve the

<sup>43</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 93 (3d ed. 2000) (discussing an ICC case in which such a solution was adopted).

<sup>44</sup> Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 575 U.N.T.S. 159 (“ICSID Convention”) Art. 14(1). Article 14(2) requires that those arbitrators designated by the ICSID Chairman be appointed with consideration given to ensuring representation of the principal legal systems of the world.

<sup>45</sup> IFTA Rules for International Arbitration Rule 4.1 (2009).

dispute.<sup>46</sup> Those requirements may encompass a responsibility to be aware of all applicable laws that might affect the validity of the award. Competence may include knowledge of and experience in the subject matter of the arbitration. Availability might even encompass residency at the place of arbitration.

Institutional rules sometimes include an explicit duty of availability. For example, under the ICC Rules, “by accepting to serve, every arbitrator undertakes to carry out his responsibilities.”<sup>47</sup> That responsibility includes the arbitrator’s obligation to complete the arbitration in a timely manner.<sup>48</sup> International arbitral rules often require the arbitral panel to proceed promptly or at least within a specified period of time to resolve the matter.<sup>49</sup> Notwithstanding those rules, practitioners have found that, as a practical matter, the institution cannot easily control the pace of the proceedings once arbitrators are appointed. One reason is that the panel, upon request and for good cause shown, will extend those time limits, an action with which the institutions usually concur. The time problem may be more acute with *ad hoc* arbitrations, for the parties may be more reluctant to deal with the arbitrators directly with respect to such matters.

## [5] Experience

One authority has written, “[p]robably the most important qualification for an international arbitrator is experience in the law and practice of arbitration.”<sup>50</sup> As in any other endeavor, experience and training of the arbitrator in conducting arbitrations enhance the likelihood that the arbitration will be administered properly, and that the result will be appropriate. As noted, being a lawyer is not necessarily essential, but knowledge and experience are. Most arbitral institutions run education and training sessions for arbitrators.

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<sup>46</sup> CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed New Model Rule of Professional Conduct for the Lawyer as Third Party Neutral Rule 4.5.1 (b) (2002) (“CPR-Georgetown Commission”) (“[a] lawyer serving as a third party neutral should decline to serve in those matters in which the lawyer is not competent to serve”).

<sup>47</sup> Art. 7(5). Article 9(1) of the Rules requires the Court of Arbitration to take availability and ability into account in confirming or appointing arbitrators.

<sup>48</sup> See Calvo, *The Challenge of the ICC Arbitrators: Theory and Practice*, 15:4 J. Int’l Arb. 63, 65 n.6 (1998).

<sup>49</sup> See, e.g., ICC Rules Art. 24; AAA International Arbitration Rules Art. 27(1).

<sup>50</sup> Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 197 (5th ed., 2009).

**[6] Restrictions**

Certain persons may be prevented from serving as arbitrators by virtue of national law or other rules. For example, the American Bar Association's ("ABA") Model Code of Judicial Conduct prevents sitting judges from serving as arbitrators.<sup>51</sup> Swedish law states that an arbitrator may not be a minor.<sup>52</sup> The ICC restricts the ability of members of its Court of Arbitration to serve as arbitrators or counsel in ICC arbitrations.<sup>53</sup> Under the International Commercial Arbitration Law of Iran, an Iranian party cannot agree in advance of any dispute to arbitration by an arbitrator of the same nationality as the non-Iranian party.<sup>54</sup>

**[7] Independence and Impartiality**

As discussed in the following section, independence and impartiality may be required of the arbitrator. By agreeing to serve, arbitrators undertake to conduct the proceedings in a fair and impartial manner.<sup>55</sup>

**§ 9.04 Independence and Impartiality****[1] Applicability**

In all forms of adjudication, the decision-maker is usually expected to be independent of the parties and impartial, unless the parties otherwise consent. While that requirement of independence is indisputably valuable with respect to a sole arbitrator or a chair of a panel, views differ as to the application of that standard with respect to party-appointed arbitrators. One of the reasons that views do differ is that domestic and

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<sup>51</sup> Model Code of Judicial Conduct Canon 4 (2004).

<sup>52</sup> Swedish Arbitration Act of 1999, Section 7.

<sup>53</sup> Internal Rules of the International Court of Arbitration, Art. 2 (Chairman and members of Secretariat cannot act as arbitrators or counsel, and Court cannot appoint members to serve, but parties can do so with disclosure.)

<sup>54</sup> See Law Concerning International Commercial Arbitration (Oct. 20, 1997), Art. 11.1 ("The Iranian party can not, as long as a dispute does not occur, bind himself in any manner whatsoever that in case of occurrence of a dispute it shall be resolved by way of arbitration of one or more arbiters or by a board of arbiters, having the same nationality as that of the party to the transaction."). See also Civil Procedure Code of Iran, Art. 633 (similar provision).

<sup>55</sup> CPR-Georgetown Commission Proposed Rule 4.5.3.

international arbitration standards may differ.<sup>56</sup>

## [2] Impartiality and Independence Distinguished

*Practitioner's Hint:* One can easily confuse the concepts of “independence” and “impartiality” in the arbitration context. “Independence” means that the arbitrator is not connected with any of the parties or someone closely connected with a party; “impartiality” means that the arbitrator does not have a bias in favor or against one of the parties.

Impartiality and independence are distinct concepts. The International Bar Association’s set of non-binding guidelines for international arbitrators (“IBA Rules”)<sup>57</sup> defines partiality as arising “where an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.”<sup>58</sup> Lack of independence “arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.”<sup>59</sup> Independence is thus an objective fact based on a connection with the parties and can be addressed after full disclosure of relevant relationships.

The requirements of independence and impartiality differ according to the institutional rules or governing law. The ICC rules and Swiss law explicitly require arbitrator independence, but not impartiality, not because arbitrators are allowed to be partial, but rather because someone concluded that a governing body will find a lack of independence easier to ascertain through objective factors as compared with the more subjective notion of partiality.<sup>60</sup>

In contrast, the English Arbitration Act 1996 specifies only impartiality as a requirement, because a strict interpretation of independence was thought to be inconsistent with the need to obtain experienced arbitrators, and because impartiality can include the relevant considerations of independence.<sup>61</sup>

The UNCITRAL Model Law and Rules require both impartiality and

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<sup>56</sup> Party-appointed arbitrators are discussed below at § 9.05[2].

<sup>57</sup> International Bar Association, Ethics for International Arbitrators, *reprinted in* 26 I.L.M. 583, 585-86 (1987).

<sup>58</sup> Section 3(1).

<sup>59</sup> *Id.*

<sup>60</sup> ICC Rules Art. 7(1); Switzerland Act on Private International Law, Art. 180.

<sup>61</sup> Sections 1(a) and 24(1)(a); *see* Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arb. Int’l 395, 399-400 (1998).

independence for all arbitrators,<sup>62</sup> as do the Rules of the LCIA<sup>63</sup> and the Stockholm Chamber of Commerce.<sup>64</sup> ICSID Rules do not specifically use the terms independence or impartiality, but require a declaration that arbitrators will “judge fairly as between the parties.”<sup>65</sup> The ICSID Convention requires that the arbitrator must “be relied upon to exercise independent judgment.”<sup>66</sup> The WIPO Rules provide that each member of the panel shall be “impartial and independent.”<sup>67</sup> The term “conflict of interest” is sometimes used in connection with matters for arbitrators to avoid and disclose.<sup>68</sup>

### [3] Standards of Impartiality and Independence

*Practitioner's Hint:* Once the practitioner focuses on the issues of independence and impartiality, he or she needs to understand how the standards are applied. One key to avoiding later problems is early disclosure. The arbitral candidate should disclose actual and apparent conflicts. Even with disclosure, some factors are so strong that disclosure alone will not remove the taint of partiality.

#### [a] General

The standards of impartiality and independence may interact with rules on disclosure and challenge procedures but they are not necessarily identical. For example, factors that otherwise might be disqualifying may not result in a disqualification if disclosed in a timely manner. Sometimes, factors that are generally not seen to compromise independence and impartiality may become suspect because the selected arbitrator failed to disclose them or because the case has circumstances which unexpectedly convert theretofore innocuous factors into suspect factors.

A factor which, for purposes of an appointment, was acceptable may turn out to be disqualifying at the time of enforcement. Accordingly, potential arbitrators and parties are well advised to review the law for

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<sup>62</sup> See UNCITRAL Model Law Art. 11(5) (impartiality and independence are criteria the court should take into account when serving as appointing authority in the event normal appointment procedures fail) and Art. 18 (equal treatment of the parties).

<sup>63</sup> Art. 5(2).

<sup>64</sup> Art. 14(1).

<sup>65</sup> ICSID Rules of Procedure for Arbitration Proceedings Rule 6(2).

<sup>66</sup> Art. 14(1).

<sup>67</sup> Art. 22(a).

<sup>68</sup> CPR-Georgetown Commission Proposed Rule 4.5.4.

enforcing the arbitral award, including that of the jurisdiction in which the arbitration is held and of the jurisdiction in which the award will be enforced (usually through application of the New York Convention), as the parties, in particular, examine whether the arbitral candidates meet the applicable standards of independence and impartiality.

It should be noted that a failure to raise an objection at an appropriate time can often be considered a waiver of the right to challenge.<sup>69</sup> Also, the criteria in domestic arbitrations are not necessarily applied to international arbitrations.

### **[b] Appearance of Impartiality**

Generally, when an arbitral candidate demonstrates a material appearance of lack of either independence or impartiality and a party objects, that person will almost always not be designated as an arbitrator in the matter. On the other hand, even when a candidate has an appearance of bias the other party may be satisfied with full disclosure, so no objection will be made.

In the United States, the FAA allows courts to vacate an award rendered in the United States for “evident partiality” of an arbitrator.<sup>70</sup> The leading case involving “evident partiality” is the United States Supreme Court case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, in which the Supreme Court vacated a unanimous award after it was revealed that the “neutral” arbitrator had failed to disclose that he had provided consulting services to one party over a five-year period.<sup>71</sup> In a plurality opinion, Justice Black stated that arbitrators, like judges, must not only avoid bias but “even the appearance of bias.”<sup>72</sup>

The Court’s statement created confusion for courts as to whether the mere appearance of bias was sufficient to constitute evident partiality. Later opinions have defined “evident partiality” to exist when a reasonable person would believe that the arbitrator was partial to one party.<sup>73</sup> The courts reaching those decisions have adopted the reasoning

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<sup>69</sup> See, for example, UNCITRAL Model Law Art. 4 (a party that knows of a violation yet proceeds with arbitration without objecting in a timely manner is deemed to waive right to object).

<sup>70</sup> 9 U.S.C. § 10(b) (1999).

<sup>71</sup> 393 U.S. 145, 151-52, 89 S.Ct. 337, 21 L. Ed. 2d 201 (1968).

<sup>72</sup> 393 U.S. at 150.

<sup>73</sup> *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2<sup>nd</sup> Cir. 1984) (father-son relation between arbitrator and officer of

of Justice White's concurrence in *Commonwealth Coatings* that arbitrators should not be disqualified automatically by a business relationship with the parties if all the parties are informed in advance.<sup>74</sup> So long as a disclosure is made without objection, the arbitrator's questionable relationship may not be disqualifying. Those rulings lead to the conclusion that at least those courts believe that arbitrators are subject to standards less strict than those applied to judges.<sup>75</sup>

### [c] Suspect Factors

The IBA Rules lists the following factors that can, and are widely considered to, give rise to justifiable doubts as to an arbitrator's impartiality or independence: a material interest in the dispute, a position already taken in relation to the dispute, a current direct or indirect

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international union constituted evident partiality where party was a local affiliated union); *but see* Consolidation Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 129-30 (4<sup>th</sup> Cir. 1995) (rejecting familial relationship as a *per se* grounds for vacatur). *See also* Ky. River Mills v. Jackson, 206 F.2d 111 (6<sup>th</sup> Cir. 1953) (mere personal friendship with a party does not disqualify an arbitrator); Standard Tankers (Bahamas) Co., Ltd. v. Motor Tank Vessel, Akti, 438 F. Supp. 153, 159 (E.D.N.C. 1977) (arbitrator's ownership of small number of shares in a party's parent corporation was not sufficient to constitute evident partiality, nor was the fact that arbitrator's law firm had been involved in cases for and against a party); Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), 500 F.2d 921 (2<sup>nd</sup> Cir. 1974) (arbitrator's consistently finding for one party not evident partiality in absence of showing of predisposition or improper motives); Uhl v. Komatsu Forklift Co., 512 F.3d 294 (6<sup>th</sup> Cir. 2008) (evident partiality" standard is not met when the arbitrator failed to disclose that he worked as co-counsel on two prior cases with the appointing-party's attorney, and on six other cases where the appointing-party's attorney intervened in cases to join the arbitrator's side where he was representing a plaintiff).

<sup>74</sup> 393 U.S. at 150 (White, J., concurring).

<sup>75</sup> 28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(b) lists additional grounds for disclosure, including prior employment as a lawyer in the matter, financial interest in the parties or dispute by the judge or a relative, etc. *See also* Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (applying a less stringent standard than for federal judges, finding evident partiality where a reasonable person would have to conclude that the arbitrator was partial); Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9<sup>th</sup> Cir. 1994) (standard for determining partiality for arbitrators differs from standard for judges); *see also* discussion in Bader, *Arbitrator Disclosure*, 12 J. Int'l Arb. 39, 45-46 (1995). The general subject is further discussed with regard to disclosure in §9.06 below and to challenges in § 9.07 below.

relationship with a party or potentially important witness, and continuous and substantial social or professional relationships with a party or potentially important witness.<sup>76</sup> Other factors that should be considered disqualifying for a proposed arbitrator in an international arbitration are relationships with counsel; involvement in any settlement discussions of the parties; a family member's relationship with a party or counsel, or interest in the subject matter of arbitration; adversary relationships with a party; and significant business referral relationships with a party. The interests and relationships of a law firm generally should be imputed to any member of that firm.<sup>77</sup> All of those factors and others might reasonably create the *appearance* of partiality or bias.<sup>78</sup>

#### [d] Non-disqualifying Factors

A past business or professional relationship with or against a party or its counsel is not usually considered a bar unless it is of such a magnitude or nature as to be likely to affect an arbitrator's judgment or is a recent relationship, thereby creating an appearance of partiality.<sup>79</sup> Other factors that generally should not lead to disqualification include professional writings and lectures on a subject involved in the arbitration; relationship with the arbitral institution conducting the arbitration; a position in the same industry as a party; and prior rulings involving similar issues.<sup>80</sup>

Still, parties may wish to consider those and other factors as relevant in connection with their decision to select an arbitrator. Moreover, those factors might be considered disqualifying if they are present to an unusual extent. For example, it has been said that the ICC would be reluctant to appoint "a presiding arbitrator who had publicly taken extreme and detailed views on political or economic issues central to the

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<sup>76</sup> IBA Rules §§ 3(2), 3(3), and 3(5).

<sup>77</sup> See CPR-Georgetown Commission Proposed Rule 4.5.3(c); whether there can be an effective screening process is a subject of some debate.

<sup>78</sup> Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 408 (1998).

<sup>79</sup> IBA Rules § 3(4); Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 *Am. Rev. Int'l Arb.* 153, 168 (1992).

<sup>80</sup> Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 *Am. Rev. Int'l Arb.* 153, 168 (1992); Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 412 (1998).

arbitration.”<sup>81</sup>

Whether or not matters that are generally non-disqualifying should be disclosed is another question. As Justice White said in *Commonwealth Coatings*, “arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.”<sup>82</sup>

### [e] Institutional Practice

The practice of arbitral institutions sheds some light on how those standards for independence and impartiality are applied in practice. The institutions are generally strict in order to minimize the risk that the panel will issue a non-enforceable award.

The ICC Court, for example, has refused to confirm an arbitrator whose law firm was acting as counsel in the arbitration for the appointing party; an arbitrator whose firm was providing services to the opposite party; and an arbitrator who had previously provided legal advice to one party.<sup>83</sup> The ICC Court has refused to confirm candidates even when no objection has been raised by the other party, when the objection, had it been made, would have prevailed. But the ICC Court has confirmed as arbitrators those who have worked for one party's counsel many years previously and those who have held what was considered to be an insignificant amount of stock in one of the parties.<sup>84</sup>

In past cases, an ICSID panel accepted the pre-challenge resignation of an arbitrator who disclosed to the Centre several years into the arbitration that he had become a director of one of the parties.<sup>85</sup> Yet, in

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<sup>81</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 231 (3d ed. 2000). For other cases see *Perenco v. Ecuador*, PCA Case No. IR2009/1 Decision dated 8 Dec. 2009 (ICSID Arbitrator under challenge removed by Permanent Court of Arbitration for Comments Made in Interview); see also *Tanzania Electric Supply Company Ltd. V. Independent Power Tanzania Ltd.*, ICSID Case No. ARB/98/8).

<sup>82</sup> 393 U.S. at 150 (White, J., concurring).

<sup>83</sup> Calvo, *The Challenge of the ICC Arbitrators: Theory and Practice*, 15:4 J. Int'l Arb. 63, 68 (1998).

<sup>84</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 11 (1995).

<sup>85</sup> *Holiday Inns/Occidental Petroleum v. Morocco*, ICSID Case ARB/72/1, cited in *Tupman, Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 44 (1989).

another case, ICSID arbitrators rejected a challenge to a party-appointed arbitrator who had provided tax advice to the individual controlling the appointing party, stating that the mere appearance of partiality was not a ground for disqualification.<sup>86</sup> The foregoing are just some examples of how the standards are applied by international institutions and are not exhaustive.

## § 9.05 Role of the Party-Appointed Arbitrator

### [1] Distinction between International and Domestic Arbitrations

*Practitioner's Hint: Practitioners who are familiar with the party-appointed arbitrator in the United States may be misled into viewing a party-appointed arbitrator in the international context as being similar to the United States party-appointed arbitrator. That conclusion is incorrect. In the international context, a party-appointed arbitrator is to be held to the same standards of independence and impartiality as the third arbitrator.*

In domestic three-arbitrator arbitrations in the United States, a party might in some instances expect the arbitrator whom it appoints to serve as its advocate during hearings and deliberations. That is customary in any number of domestic arbitrations.

The Code of Ethics for Arbitrators in Commercial Disputes, approved by the American Bar Association and American Arbitration Association in 1977 (“ABA/AAA Code”), recognized that an arbitrator appointed by one party may not observe all of the same standards as the third arbitrator and may be “non-neutral.”<sup>87</sup> A 2004 revision provided a presumption of neutrality, but still permitted parties to agree to allow non-neutral arbitrators who “may be predisposed toward the party who appointed them.”<sup>88</sup>

United States courts have made various comments on the status of a party-appointed arbitrator and generally will allow some partisan

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<sup>86</sup> Amco Asia Corp. v. Indonesia, ICSID Arb./81/1, Decision on the Proposal to Disqualify an Arbitrator (24 June 1982), discussed in Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 44-45 (1989).

<sup>87</sup> ABA/AAA Code Canon VII, reprinted in 10 Y.B. Comm. Arb. 131, 139 (1985).

<sup>88</sup> ABA/AAA Code Canon IX (2004).

orientation.<sup>89</sup> One court stated that “party-designated arbitrators are not and cannot be ‘neutral’, at least in the sense that the third arbitrator or judge is.”<sup>90</sup> Another court described party-appointed arbitrators as “partisans once removed from the actual controversy.”<sup>91</sup> Nevertheless, partisanship has its limitations. A number of courts have held that even “non-neutral” arbitrators are obligated to participate in the process in a fair, honest and good-faith manner.<sup>92</sup>

In contrast to a view in the United States with regard to domestic arbitration, the party-appointed arbitrator in international arbitrations is supposed to be impartial and independent. Most international institutional rules do not make a distinction between party-appointed and non party-appointed arbitrators for purposes of their independence and impartiality; the standards of behavior are the same for all members of a panel. The AAA developed special international rules that conform to international practice, requiring all arbitrators to be impartial and independent.<sup>93</sup> As a result, the ABA/AAA Code once recognized that “in cases conducted outside the United States, the applicable law might require that all arbitrators be neutral.”<sup>94</sup>

In general, absent party consent, party-appointed arbitrators in international arbitration should be impartial and independent of the parties.<sup>95</sup> Indeed, in some instances, courts have rejected the view that a party-appointed arbitrator ought to be subject to different standards than

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<sup>89</sup> *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 754 F.2d 1394, 1395 (9<sup>th</sup> Cir. 1983) (“Generally partisan arbitrators are permissible”).

<sup>90</sup> *Astoria Med. Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 87 (N.Y. 1962) (allowing appointment of an arbitrator who was a manager in party's company). *See generally*, Mosk, *The Role of Party-Appointed Arbitrators*, *ADR Currents*, Summer 1996, at 19.

<sup>91</sup> *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

<sup>92</sup> *Astoria Med. Group*, 182 N.E.2d at 89; *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Ins. Co.*, 780 F. Supp. 885, 892-93 (D. Conn. 1991); *Am. Eagle Fire Ins. Co. v. N.J. Ins. Co.*, 148 N.E. 562, 564 (N.Y. 1925); *Barcon Assoc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 219 (N.J. 1981).

<sup>93</sup> Art. 7.

<sup>94</sup> Canon VII (1985). This provision has now been abandoned.

<sup>95</sup> The then-President of the American Arbitration Association criticized that standard as unrealistic. *See* Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4:2 *J. Int'l Arb.* 103 (1987). *See also* Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 *Am. Rev. Int'l Arb.* 153, 166-67 (1992). Others have called for incorporating the distinction between party-appointed and neutral arbitrators into international arbitration. *Orlandi, Ethics for International Arbitrators*, 67 *UMKC L. Rev.* 93, 105 (1999).

a non party-appointed arbitrator. In *Efxinos Shipping Co. Ltd v. Rawi Shipping Lines Ltd.*, an Italian court enforced an award where, in accordance with the English Arbitration Act, a party-appointed arbitrator issued an award as sole arbitrator after the other party failed to make an appointment.<sup>96</sup> The court found that a party-appointed arbitrator “does not lack impartiality *per se*.”<sup>97</sup>

Some commentators suggest that the notion of independence prevalent in international arbitration is a “pretense.”<sup>98</sup> Others disagree.<sup>99</sup> What can be said with some certainty is that a party is entitled to nominate an arbitrator “compatible with its national and economic circumstances.”<sup>100</sup>

We are unsure to what extent the parties to an international arbitration may agree that each can appoint someone as a party-appointed arbitrator who is manifestly not independent or impartial. The answer may depend on the law of the location of the arbitration, the jurisdiction in which enforcement may be sought,<sup>101</sup> and the institutional rules that govern the arbitration. For example, under ICC rules, the requirements of independence and impartiality appear to be waivable, but they are not waivable under the UNCITRAL Model Law.<sup>102</sup> It is advisable that at the outset of the proceeding, all parties have a clear understanding of the role of the party-appointed arbitrator, and this understanding should be consistent with the law of the place of the arbitration.

## [2] Proper Role of the Party-Appointed Arbitrator

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<sup>96</sup> Judgment of 2 May 1980, Corte di Appello, Genoa, *reported in* 8 Y.B. Comm. Arb. 381 (1983).

<sup>97</sup> *Id.*; *but see* ATSA of Cal., Inc. v. Cont'l Ins. Co., 754 F.2d 1394, 1395 (9<sup>th</sup> Cir. 1983).

<sup>98</sup> Higgins, Brown and Roach, *Pitfalls in International Commercial Arbitration*, 35 Bus. Law. 1035, 1043 (1980).

<sup>99</sup> *See, e.g.*, Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l L.J. 59, 69 (1995).

<sup>100</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 224 (3d ed. 2000).

<sup>101</sup> *See, for example*, Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 52 (1989) (noting that in West Germany parties cannot waive due process rights that may incorporate arbitrator impartiality).

<sup>102</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 212, 213 (3d ed. 2000) (ICC); Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 250 (5th ed., 2009) (UNCITRAL).

Notwithstanding the requirements of arbitrator independence and impartiality, a party to an international arbitration usually desires to nominate an arbitrator who at least shares with the party a certain outlook and legal background. That set of criteria is generally regarded as proper.<sup>103</sup> One prominent practitioner stated, “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.”<sup>104</sup> The role of the party-appointed arbitrator should include ensuring that the process is fair, and when appropriate, conveying to the other arbitrators the legal and cultural concepts of the appointing party's country.<sup>105</sup> By serving those roles while examining all evidence and arguments impartially, party-appointed arbitrators can insure the confidence of the appointing party and its counsel in the fairness of the process.

While, to a certain extent, the ethical rules about arbitrator advocacy discussed above are self-enforcing, most international arbitrators realize that, should a party-appointed arbitrator be too unabashed in its support of the nominating party, he or she risks losing credibility with the other arbitrators and would thereby be rendered ineffective.

## § 9.06 Disclosure Requirements

### [1] Introduction

***Practitioner's Hint:** A practitioner who has been approached about being an arbitrator should be prepared to disclose to all parties as much as possible about his background. That disclosure should include the practitioner's history with other firms, especially if one or more of those relationships might form the basis for a claim of conflict.*

Disclosure rules require potential arbitrators to divulge any information that might give rise to justifiable doubts about their independence and impartiality. Timely disclosure allows the parties to object, or waive

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<sup>103</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 231 (3d ed. 2000).

<sup>104</sup> Hunter, *Ethics of the International Arbitrator*, 53 *Arb.* 219, 223 (1987).

<sup>105</sup> Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 405 (1998).

their right to do so, prior to the appointment of the arbitrators. Although some of the disclosure requirements are framed as occurring at appointment, the requirements continue to cover any potentially objectionable facts that arise during the arbitration itself. Practitioners are always well advised to disclose as much as feasible with an eye to avoid later disqualification or enforceability issues. Customarily, prospective arbitrators submit a personal resume. Even better, a nominated arbitrator should consider supplying a complete professional history so that all parties will be in a position to inquire further about any issue which a party determines needs clarification.

Matters that the practitioner should consider disclosing include past or present financial, business, professional, family or social relationships with any of the parties or attorneys or with any known witnesses; prior representation of any of the parties, attorneys or witnesses; service as an arbitrator or mediator for any of the parties or attorneys; interest in the subject matter or outcome of the proceedings; any other source of possible bias or prejudice; and any disclosure required by law or contract. Relationships to be disclosed by the arbitrator include those involving his or her immediate family members, businesses, partners, associates and law firms, past and present.

The prospective arbitrator should make a diligent effort to ascertain all relevant facts because the appearance later of a non-disclosed fact could prove embarrassing. The prospective arbitrator should also check with his or her present and past firms or employers for the purpose of identifying any facts which might be compromising and imputed to him or her. In addition, arbitrators should keep some record of their arbitrations for purposes of subsequent disclosures.

In some instances, a prospective arbitrator may not have access to potentially relevant information. For example, a lawyer may not be able to check with a former firm about relationships that could be imputed to the prospective arbitrator. In such instances, the prospective arbitrator's disclosure should state that a check was not made of his old firm. The prospective arbitrator should also bear in mind that he or she may not be able to divulge information about confidential arbitrations or representation. In such circumstances, the arbitrator may have to disclose as much as possible and indicate that certain information could not be divulged. Thus, it is up to the arbitrator and the parties to determine the risks and consequences of non-disclosure.

**[2] Ethical Codes and Arbitral Rules**

***Practitioner's Hint:** Many rules specifically require disclosure by arbitrators of any matters which might give the appearance of partiality or a lack of independence. Generally, the disclosure requirement includes the burden of making reasonable inquiry to ensure full disclosure.*

Adequate disclosure is an important obligation of arbitrators. The ICC rules require disclosure of anything that “might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties.”<sup>106</sup> Similar standards are found in most rules.<sup>107</sup> A recently proposed addition to the Model Rules of Professional Conduct for lawyers in the United States imposes a duty on lawyer-arbitrators to conduct a reasonable inquiry to ensure that there are no circumstances that ought to be disclosed.<sup>108</sup>

Some institutions require a statement of independence or disclosure. For instance, ICSID requires arbitrators to make a written declaration of any relationships with the parties.<sup>109</sup> Likewise, the ICC requests a statement of independence from all arbitrators; if this is qualified by a disclosure, the arbitrator can be confirmed as long as there are no objections.<sup>110</sup> One author has suggested that the adoption of the disclosure statement requirement has reduced the number of challenges of arbitrators.<sup>111</sup> Under LCIA rules, each arbitrator must submit to the LCIA Registrar a resume of past and present professional positions and must sign a declaration that there are no circumstances likely to give rise

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<sup>106</sup> Art. 7(2).

<sup>107</sup> AAA International Rules Art. 7(1); ABA/AAA Code Canon II; UNCITRAL Model Law Art. 12; UNCITRAL Rules Art. 9; IBA Rules § 4(1); Singapore International Arbitration Centre, Arbitration Rules Rule 11.3, *reprinted in* 22 Y.B. Comm. Arb. 424, 429 (1998); Stockholm Chamber of Commerce Arbitration Institute, Arbitration Rules Art. 17; Cairo Regional Centre of International Commercial Arbitration Code of Ethics Rule 3, *reprinted in* 23 Y.B. Comm. Arb. 269 (1998); CIETAC Arbitration Rules Art. 25.

<sup>108</sup> CPR-Georgetown Commission Proposed Rule 4.5.3(b)(2) (lawyers serving as third-party neutrals should “conduct a reasonable inquiry and effort to determine if any interests or biases” exist such that the lawyer might not be perceived to be impartial).

<sup>109</sup> Rule 6(2).

<sup>110</sup> Arts. 7(2), 7(3), and 9(2).

<sup>111</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 11-12 (1995).

to justifiable doubts about impartiality and independence, other than those disclosed.<sup>112</sup>

Conversely, failure to disclose relationships in the statement of independence has been the basis for successful challenges before the ICC Court.<sup>113</sup> The IBA Rules provide that a failure to disclose all facts that might give rise to justifiable doubts as to the arbitrator's impartiality or independence may result in disqualification.<sup>114</sup> The theory behind that rule, apparently, is that an arbitrator's failure to disclose may create an appearance of bias and possible grounds for disqualification, even if the disclosed information would not be disqualifying.

### [3] Legal Requirements

In a number of jurisdictions, disclosure by potential arbitrators is mandated by national law. For example, French, English and German laws have duties of disclosure.<sup>115</sup> Spanish law requires arbitrators to sign a statement of independence upon their appointment.<sup>116</sup> Swiss law does not contain an explicit requirement of disclosure, but most practitioners generally recognize that a duty to disclose does exist.<sup>117</sup> The mandatory approach to disclosure has been followed in Article 12.1 of the UNCITRAL Model Law, providing that potential arbitrators "shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

In the United States, the Federal Arbitration Act does not contain a duty of disclosure. After *Commonwealth Coatings*, however, courts have interpreted the need to avoid "evident partiality"<sup>118</sup> as requiring adequate disclosure.<sup>119</sup> Justice White, in a concurring opinion in that case,

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<sup>112</sup> Art. 5(3).

<sup>113</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 15 (1995).

<sup>114</sup> Section 4(1).

<sup>115</sup> Smith, *Impartiality of the Party-Appointed Arbitrator*, 6 Arb. Int'l 320, 327 (1992); Orlandi, *supra* note 95, at 99. *See also* Mustill & Boyd, *Commercial Arbitration* (2d ed. 2000) (England); Section 1036 ZPO (F.R.G.) *quoted in* Orlandi at 98 (Germany). Note that Italian law does not have such a duty.

<sup>116</sup> Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. Rev. 93, 99 (1999).

<sup>117</sup> *Id.* at 100.

<sup>118</sup> 9 U.S.C. 10(a)(2) (2010).

<sup>119</sup> 393 U.S. at 151-52 (White, J., concurring). Bishop and Reed note that this case is only about failure to disclose, as the relationships might not have been disqualifying had they been initially disclosed. Bishop & Reed, *Practical Guidelines for Interviewing*,

emphasized that arbitrators should err on the side of disclosure because it is “better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship.”<sup>120</sup> Other American cases have elaborated on the duty of disclosure, and the prevailing law now seems to be that a reasonable impression of partiality may be enough to vacate an award if there has not been adequate disclosure.<sup>121</sup> Notwithstanding the duty of disclosure, the prospective arbitrator need not go as far as providing the parties with a “complete and unexpurgated business biography.”<sup>122</sup>

The practitioner might also bear in mind that individual states in the United States may have their own disclosure requirements. For instance, in California, neutral arbitrators and any arbitrators involved in international commercial arbitration must disclose information “which might cause their impartiality to be questioned,”<sup>123</sup> as well as information regarding service in prior arbitrations involving the same parties or attorneys.<sup>124</sup> This last requirement may conflict with the general principle of confidentiality of arbitral proceedings if arbitrators are required to reveal the parties, subject or results of previous arbitrations. The ABA/AAA Code resolves this conflict by allowing an exception to normal confidentiality principles when local law requires information to be revealed.<sup>125</sup>

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*Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arb. Int'l 395, 427 (1998).

<sup>120</sup> 393 U.S. at 151 (White, J., concurring).

<sup>121</sup> *Woods v. Saturn Distrib. Corp.* 78 F.3d 424, 427 (9<sup>th</sup> Cir. 1996) (“In nondisclosure cases, vacatur is appropriate where the arbitrator’s failure to disclose information gives the impression of bias in favor of one party.... [but] [t]he appearance of impropriety, standing alone, is insufficient to establish evident partiality in actual bias cases”); *but see Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981) (finding public policy in favor of international arbitration outweighed need for full disclosure where non-disclosed relationship had not “tainted the proceedings” and that mere appearance of bias was insufficient to vacate award under New York Convention).

<sup>122</sup> *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1203 (11<sup>th</sup> Cir. 1982).

<sup>123</sup> Cal. Civ. Proc. Code § 1297.121 (international arbitration); *see also* Cal. Civ. Proc. Code § 1281.9 (neutral arbitrators in any arbitration); Minn. Stat. § 572.10(2) (establishing affirmative disclosure requirements for arbitrators); Fla. Stat. §766.107 (disclosure for neutral arbitrators in medical malpractice disputes); Conn. Gen. Stat. §50a-112 (international arbitration); Tex. Civ. Prac. & Rem. Code Ann. §172.056 (international arbitration); Or. Rev. Stat. §36.476 (international arbitration); Ohio Rev. Code Ann. §2712.22 (international arbitration); N.C. Gen. Stat. §1-567.42 (international arbitration); 710 Ill. Comp. Stat. Ann. 30/10-15 (international arbitration).

<sup>124</sup> Cal. Civ. Proc. Code § 1281.9 (domestic arbitration) and § 1297.1212 (international arbitration).

<sup>125</sup> ABA/AAA Code Canon VI (requiring confidentiality unless agreed by the parties

## § 9.07 Objections and Challenges

### [1] What Generally Happens When an Arbitrator Is Challenged

*Practitioner's Hint:* Just because an arbitrator is challenged does not mean that he or she should step aside, although some arbitrators do so as a matter of policy. If, however, both parties join in the challenge, prudence and, at times, the law, require the challenged arbitrator to step aside. Challenges may wind up in court.

When an arbitrator is proposed, the parties generally have a time period within which to object.

Often, when a reasonable justification given for the objection, the arbitrator—especially if he or she is the sole arbitrator or the chair—will not be appointed. If the facts suggest the appearance of a lack of independence or impartiality, the proposed arbitrator generally will decline the appointment at the outset. Some arbitrators may withdraw on the theory that if a party lacks confidence in him or her at the outset, for whatever reason, it may be wise to withdraw. A party-appointed arbitrator may be less likely to decline the appointment. Any dispute about the appointment may have to be resolved by the appointing authority, or if there is none, by a court.

If a challenge is made to an arbitrator after the appointment, the arbitrator must at least consider resigning. If the challenge is made sufficiently early in the proceedings and appears to have some merit—even if the arbitrator disagrees with the basis of the challenge—he or she should seriously consider whether to resign because to do otherwise might jeopardize enforcement of the award; refusal to step down may also result in an immediate appeal, depending upon the jurisdiction's laws. Resignation in such circumstances does not imply acceptance of the grounds of the challenge.<sup>126</sup>

On the other hand, if the arbitrator believes the challenge to be without merit, then he or she is justified in allowing the matter to be resolved by the appropriate challenge procedure. If, however, both parties agree that the arbitrator should withdraw, the arbitrator's refusal

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or required by applicable law); *but see* IBA Rules § 9 (no such exception for legal proceedings unless arbitrator considers it his duty to disclose misconduct or fraud).

<sup>126</sup> See AAA International Rules Art. 8(3); UNCITRAL Rules Art. 13(3).

to do so may be unwise.<sup>127</sup> In some cases, refusal to withdraw under those circumstances may be illegal.

Arbitrators can be challenged for a variety of reasons. The standards for a challenge can be found in arbitral rules that govern the arbitration or the law of the place of the arbitration. Typically, arbitral rules allow a challenge based on justifiable doubts as to the independence or impartiality of an arbitrator,<sup>128</sup> and sometimes when there are allegations of incapacity or misconduct.<sup>129</sup> Under the Rules of the LCIA, a party may challenge an arbitrator it has nominated “only for reasons of which it becomes aware after the appointment has been made.”<sup>130</sup> The grounds for challenge under ICC Rules are unique in that they include a lack or independence “or otherwise.”<sup>131</sup> The phrase “or otherwise” is of uncertain scope, but we assume that the idea includes such matters as lack of impartiality, improper behavior, and inability or unwillingness to complete the arbitration within a reasonable time.<sup>132</sup>

In some cases, parties have cited previous and repeated challenges against an arbitrator as the basis of an allegation of impartiality, contending that the arbitrator could not remain impartial in the face of the challenges. That argument has been rejected, as such an approach would encourage frivolous challenges.<sup>133</sup> Although, in theory, all arbitrators on a panel are supposed to be equally impartial, in reality, we have found that successfully challenging a party-appointed arbitrator is

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<sup>127</sup> Some rules so provide. *See, for example*, Chamber of Commerce and Industry of Geneva (“CCIG”) Arbitration Rules Art. 14.1, reprinted in 18 Y.B. Comm. Arb. 195, 199 (1993) [removal by written agreement of the parties].

<sup>128</sup> *See, for example*, UNCITRAL Model Law Art. 12(2). This standard is also reflected in Article 12 of the UNCITRAL Rules, Article 7(1) of the AAA International Rules, and Article 10(3) of the LCIA Rules.

<sup>129</sup> The LCIA Rules also allow the Court to remove an arbitrator if an arbitrator deliberately violates the arbitration agreement or Rules, does not act impartially, or does not conduct the proceedings with reasonable diligence. Art. 10(2). The UNCITRAL Rules allow for replacement of an arbitrator for failure to act. Art. 12(3). ICSID allows parties to propose the disqualification of arbitrators for any reason indicating a “manifest lack” of the qualities required for selection, including the requirements that arbitrators be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance.” (ICSID Convention Art. 57 [referring to standards in Art. 14(1)]).

<sup>130</sup> Art. 10(3).

<sup>131</sup> Art. 11(1). Article 12 allows replacement of an arbitrator if the arbitrator is prevented from fulfilling his functions under the rules or within prescribed time limits.

<sup>132</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 13-16 (1995).

<sup>133</sup> *Id.* at 12.

more difficult than challenging a chair or sole arbitrator because of the right of a party to nominate an arbitrator who is “compatible with its national or economic circumstances” is reasonably well established in the arbitral community.<sup>134</sup>

You might note that a party who makes and loses a meritorious challenge during the middle (or later) of the proceedings does not necessarily have a sound basis for challenging the award even if the challenge, had it been made earlier would have been allowed. As a practical, if not legal, matter, the standards for upholding a late challenge are much narrower than are the standards applied to deny appointment or confirmation of an arbitrator initially.<sup>135</sup> One of the reasons for that difference is that the arbitrator and the parties will not have invested as much time and money in the arbitration at its initial stage as they will have later in the proceedings. Although some pre-appointment objections can be successful simply if there are circumstances that give rise to a lack of confidence, most successful challenges require evidence of partiality or lack of independence.<sup>136</sup>

## [2] Procedure under Arbitral Rules

Arbitral rules normally provide procedures for addressing challenges in which the arbitrator does not resign. Challenges under UNCITRAL Rules are decided by a designated appointing authority, or if the parties have not designated one, by an authority appointed by the Secretary-General of the Permanent Court of Arbitration.<sup>137</sup> Under ICC Rules, challenges are decided by the ICC Court of Arbitration. Similarly, challenges under the AAA’s International Rules are decided by the AAA.<sup>138</sup> ICSID allows the non-challenged arbitrators to decide challenges as long as the challenge does not relate to the majority of the

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<sup>134</sup> W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 224 (3d ed. 2000).

<sup>135</sup> See, for example, Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int’l* 395, 427-28 (1998) (ICC Court is more likely to sustain an objection to an arbitrator than to admit a challenge after confirmation).

<sup>136</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 *Int’l Ct. Arb. Bull.* 4, 7-11 (1995) (gives examples of challenges before ICC Court, both successful and unsuccessful).

<sup>137</sup> Arts. 12(1), 6(2).

<sup>138</sup> Art. 9.

panel.<sup>139</sup> Otherwise, or in the event of deadlock, challenges are decided by the Chairman of the ICSID Administrative Council. Under most rules, a challenge usually must be filed within a particular time after the ground for the challenge has become known.<sup>140</sup>

### [3] Challenges under National Law

***Practitioner's Hint:** The practitioner should bear in mind that challenges to an arbitrator's capacity to sit generally may be raised at any one of a number points in the proceedings. Additionally, challenges may be made at various levels. A challenge may be made before the institution conducting the arbitration, such as the ICC; a challenge may be made in a court of the country in which the arbitration is being heard and may be made in a court where the claimant is seeking to enforce the arbitral award.*

#### [a] Pre-award Challenges

National laws vary on whether an arbitrator can be subject to removal or injunction by judicial authorities based on the arbitrator's purported partiality before the panel decides the case on the merits. The law of the site of the arbitration may be relevant to whether and when an arbitrator can be challenged. For example, under the Federal Arbitration Act in the United States, parties generally cannot obtain judicial review of a challenge to an arbitrator until after an award has been rendered, absent more specific rules of procedure that provide for it.<sup>141</sup> Swedish law is much the same.<sup>142</sup>

Most other national laws, however, allow pre-award judicial review

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<sup>139</sup> ICSID Rules Rule 9(4).

<sup>140</sup> ICC Rules Art. 11(2) (challenge must be made within thirty days of time when party learned of the facts giving rise to the challenge); UNCITRAL Rules Art. 13 (1) (fifteen days); UNCITRAL Model Law Art. 13 (2) (fifteen days); LCIA Rules Art. 10(4) (fifteen days); AAA International Rules Art. 8(1) (fifteen days).

<sup>141</sup> *But see* the State case *Astoria Med. Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 86 (N.Y. 1962) ("in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered"); *see also* *Metro. Property and Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.*, 780 F. Supp. 885, 896 (D. Conn. 1991) (injunction of arbitrator).

<sup>142</sup> Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. Rev. 93, 100 (1999).

of a refusal to remove an arbitrator perceived to be partial.<sup>143</sup> For example, English law allows the removal of an arbitrator “where the arbitrator has misconducted himself or the proceedings,”<sup>144</sup> which commentators assert involves actual or potential bias. The Model Law vests the challenge decision in the other arbitrators initially and then with a court of competent jurisdiction.<sup>145</sup>

### **[b] Relationship between Institutional Rules and National Laws**

Institutional rules may sometimes provide that the institution’s decision on challenges is final and by implication cannot be appealed to national courts. That was formerly the case under ICC Rules.<sup>146</sup> Thus, parties making a challenge need to consider both the institutional rules as well as the national laws.

In one case, a French court refused to annul a decision by the ICC Court to remove an arbitrator on the grounds that the decision was an “administrative act” by the arbitral institution and hence not subject to French legal requirements.<sup>147</sup> The appeals court, however, reviewed the decision of the ICC and affirmed on different grounds, implying that institutional decisions are reviewable under national law.<sup>148</sup> To what

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<sup>143</sup> The UNCITRAL Model Law, Article 13, allows the appeal of an unsuccessful challenge to a court. Article 180(1) of the Swiss Private International Law Act allows challenges when the rules adopted by the parties provide a ground, or there are justifiable doubts about arbitrator independence. French law allows challenges during the course of proceedings. French Code of Civil Procedure, Arts. 1457 and 1463. Article 836 of the Italian Code of Civil Procedure allows challenges of arbitrators in international arbitration for the same grounds as allowed for judges, unless parties have agreed otherwise. English law provides for the removal of an arbitrator if “circumstances exist that give rise to justifiable doubts as to his impartiality” along with several other grounds. Arbitration Act 1996 § 24. Australian courts have also allowed pre-award challenges. (Gas and Fuel Case (1978) VR 383, 413.) In Spanish law, the arbitrator can be challenged but can refuse to withdraw. If so, the challenging party must raise the challenge again by contesting the final award. Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. Rev. 93, 99 (1999).

<sup>144</sup> Arbitration Act of 1996 § 24.

<sup>145</sup> UNCITRAL Model Law Art. 13.

<sup>146</sup> ICC Rules Art. 2(13) (1988). See Art, *Challenge of Arbitrators: Is an Institutional Decision Final?*, 2 Arb. Int’l 261, 263 (1986).

<sup>147</sup> *Raffineries de pétrole d’Homs et de Banias v. Chambre de commerce internationale*, Judgment of Mar. 28, 1984, Tribunal de grande instance, Paris, *discussed in* Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int’l & Comp. L.Q. 26, 36-37 (1989).

<sup>148</sup> Judgment of May 15, 1985, Cour d’appel, Paris, *cited in* Tupman, *Challenge and*

extent a court can act, notwithstanding institutional provisions for finality, is problematic. Perhaps in recognition of the potential problems that could arise if challenge decisions could be routinely appealed to national courts, the LCIA Rules provide that all decisions of the LCIA Court, including decisions on challenges, are “conclusive and binding upon the parties.”<sup>149</sup> The Rules then state that by adopting the Rules, the parties waive any right of appeal to a court, subject to any mandatory provisions of the law of the seat of arbitration.<sup>150</sup>

Allowing pre-award challenges made early enough in the proceeding may be more efficient to the extent that they avoid the wasted efforts of an arbitration. On the other hand, if a challenge is issued late in the proceeding, the relevant authority may prefer to allow the completion of the arbitration and leave the matter to the courts. Nonetheless, parties should be aware that in systems when pre-award challenges are allowed, the party that knows of facts justifying a challenge but waits until after an award to challenge an arbitrator may be found to have waived its right to challenge.<sup>151</sup>

### [c] Challenges to the Enforcement of the Award

Parties can also challenge the enforcement of awards based on the partiality of an arbitrator under the New York Convention or national law. Under the New York Convention, arbitrator partiality can be asserted as a ground for non-enforcement of an award for a violation of public policy or due process.<sup>152</sup> Challenges to the award based on the public policy exception to enforceability under the New York

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*Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 37 n. 74 (1989).

<sup>149</sup> Art. 29(1).

<sup>150</sup> Article 29(2).

<sup>151</sup> Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 285 (5th ed., 2009). *See, e.g.*, *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1500 (S.D.N.Y. 1987) (confirming award where party learned of a questionable relationship in a newspaper article during the arbitration but made no objection until after the award); *Health Serv. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7<sup>th</sup> Cir. 1992) (losing party waived right to object to arbitrator based on prior business relationships because it did not object for over two months after learning of circumstances, waiting until third day of hearing).

<sup>152</sup> New York Convention, Art. V(2)(b) (contrary to public policy); Art. V(1)(b) (party not given proper notice or otherwise unable to present case); *see van den Berg, supra* note 27, at 377-78. *See also* Chapter 8, § 8.05[4][a] for a discussion how Article V(1)(d) can be a basis for asserting arbitrator partiality.

Convention generally require a showing of actual bias to be successful.<sup>153</sup> One can understand why most courts require more than mere circumstances that create an appearance of impartiality before refusing enforcement.<sup>154</sup> As an example of judicial reluctance to deny enforcement of an award based on potential bias, courts in many countries have rejected such challenges that are based on prior relationships with the parties.<sup>155</sup>

Apart from the New York Convention, national law may allow non-enforcement or vacation of an award under certain circumstances.<sup>156</sup> French law, for example, allows the setting aside of arbitral awards “if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed.”<sup>157</sup> In the United States, under the Federal Arbitration Act, awards can be vacated if there is evident partiality on the part of any arbitrator, when the arbitrators are guilty of specified misconduct, or engage in misbehavior that prejudices a party’s rights.<sup>158</sup> As mentioned, a party’s failure to raise a timely objection can be considered a waiver under both national law and the New York Convention.<sup>159</sup>

Presumably, the parties could agree in advance to allow certain acts that might otherwise be viewed as indicating partiality, such as pre-appointment communications with or nondisclosure by the arbitrators, because the “federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”<sup>160</sup> Whether

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<sup>153</sup> See 21 Y.B. Comm. Arb. 506 (1996).

<sup>154</sup> See van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* 131, 378; *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979) (rejecting contention that appearance of bias sufficient to deny enforcement where party-appointed arbitrator’s firm had pursued related claim against other party in another arbitration); see also *Imperial Ethiopian Gov’t v. Baruch-Foster Corp.*, 535 F.2d 334 (5<sup>th</sup> Cir. 1976) (enforcing award over objection that president of tribunal had participated in drafting Ethiopian civil code 16 years previously).

<sup>155</sup> van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* 131, 378 (1981).

<sup>156</sup> See § 8.05[5][b], N 146 above.

<sup>157</sup> Art. 1504, Code of Civil Procedure. See Art, *Challenge of Arbitrators: Is an Institutional Decision Final?*, 2 Arb. Int’l 261, 263 (1986).

<sup>158</sup> 9 U.S.C. § 10(a).

<sup>159</sup> *Island Territory of Curaçao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 12 (S.D.N.Y. 1973) (party “was fully advised as to the employment of the arbitrator [as a judge in the courts of the other party] and remained silent.”).

<sup>160</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

the parties may agree to allow arbitrators to violate the standards of “evident partiality” if they expect the award to be enforced in the United States under the Federal Arbitration Act is not clear. One writer has said that, “the FAA’s statutory grounds for vacating an award cannot be limited or excluded by agreement of the parties.”<sup>161</sup>

Some courts have held that circumstances that would lead a reasonable person to believe the arbitrator was biased are sufficient to deny enforcement, as those circumstances indicate that the arbitrator has not acted in an impartial manner. In a recent Hong Kong case, a court denied enforcement to an award in favor of one party when the chief arbitrator, in the absence of and without informing the other party, inspected equipment in successful party’s factory in the presence of its employees.<sup>162</sup> The court provided that the appropriate test is whether in all the circumstances of the case, there appears to be a real danger or possibility of bias, rather than sufficient evidence of actual bias.

## § 9.08 Resignation, Removal and Replacement of Arbitrators

### [1] Resignation

*Practitioner’s Hint:* Arbitrators sometimes resign. Whether that resignation causes problems for all concerned depends on the timing of the resignation. The later in the proceedings that the resignation occurs, the more difficulty the resignation creates. A resignation may present the ruling institution with issues of compensation for the resigning arbitrator, rehearing demands by one of the parties, replacement problems and reputation issues.

#### [a] Reasons

Arbitrators sometimes resign. An arbitrator might resign as a result of a challenge, as a result of an illness, or as a result of other unforeseen circumstances that make the arbitrator’s continued involvement impracticable.

When a sitting arbitrator tenders his resignation, the arbitral institution or appointing authority must determine whether the grounds

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<sup>161</sup> Hamlin, *Contractual Alteration of the Scope of Judicial Review: The US Experience*, 15:4 J. Int’l Arb. 47, 56 (1998).

<sup>162</sup> Hebei Imp. & Exp. Corp. v. Polytek Eng’g Co. Ltd., Ct. Appeal, Hong Kong SAR (16 Jan. 1998), reported in 22 Y.B. Comm. Arb. 666, 676-80 (1998).

of resignation are reason enough to allow the resignation to stand. Although, in some cases, the institution may decide not to accept the resignation, all parties recognize that an arbitrator cannot be compelled to perform. That leaves the institution with little power to force the arbitrator to continue, other than to sanction the arbitrator by refusing to pay for services rendered and perhaps a demand for repayment of any advances or monies already paid to him. Additionally, unless the arbitrator has immunity in the jurisdiction in which the arbitration occurs, the parties might have a claim for their expenses.

In an intergovernmental or claims mechanism, resignations are common and often appropriate.<sup>163</sup> Under those circumstances, the resigning arbitrator may have an obligation to complete a case or phase of a case that was the subject of a hearing on the merits on which he or she sat.<sup>164</sup>

### **[b] Compensation**

The institution governing the arbitration, in the event of an arbitration, is faced with a decision about the extent to which the resigning arbitrator will receive compensation, if at all. In addition to compensation not paid but which the arbitrator claims, the institution may also be faced with an issue of claiming a return of fees that have already been paid. Certainly, the arbitrator must return any fee not earned.<sup>165</sup>

### **[c] Rehearing**

Unless the resignation occurs very late in the proceedings, such that it is appropriate to truncate the tribunal, the tribunal may decide to repeat hearings, particularly if the arbitrator had ceased to exercise his or her functions.<sup>166</sup>

The resigning arbitrator may be either a party appointed arbitrator or the chair of the panel. The status of the arbitrator may impact how the resignation is handled. When all concerned recognize that the resignation is for good cause, normally all work together to make the transition or

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<sup>163</sup> Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* 18-23 (1996); Brower & Brueschke, *The Iran-United States Claims Tribunal* 138-52 (1998).

<sup>164</sup> Iran-United States Claims Tribunal Rule 13.4.

<sup>165</sup> CPR-Georgetown Commission Proposed Rule 4.5.5(b).

<sup>166</sup> UNCITRAL Rules Art. 15, AAA International Rules Art. 11(2).

subsequent proceedings as smooth as circumstances warrant.

When, however, the resignation is not for good cause, any action taken by almost anyone propels the parties, the panel and the institution into a gray area. That uncertainty may occur even when the resigning arbitrator is a party-appointed arbitrator.

As an example of how difficult matters can get when an arbitrator resigns, note the case when a party-appointed arbitrator in an ICC arbitration withdrew at a late stage of the proceedings, but the ICC Court refused to accept the resignation.<sup>167</sup> The arbitrator did not participate further, and the panel proceeded to issue an award as a truncated tribunal. The award, however, was ultimately quashed in Swiss court, and the arbitration had to be conducted again from the outset. Although that result has been severely criticized,<sup>168</sup> the court's ruling demonstrates the risk of taking action—other than starting all over again—in the event of an arbitration.

#### **[d] Reputation**

Any resignation, whether justified or not, may damage the arbitrator's reputation. That risk may be sufficient, in and of itself, to encourage the appointed arbitrator to give thoughtful consideration to his or her availability for the entire period of the hearing before accepting an appointment.

#### **[2] Removal**

Under some institutional rules, arbitrators can be removed by the institution on its own initiative if it decides that the arbitrator has failed or will fail to fulfill his or her functions.<sup>169</sup> That failure might include failure to complete work within prescribed time limits or acting in

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<sup>167</sup> Ivan Milutinovic v. Deutsche Babcock AG, ICC Case No. 5017, Partial award of 8 November 1987, *discussed in* Schwebel, *The Authority of a Truncated Tribunal*, in *International Council for Commercial Arbitration, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 314, 315-316 (van den Berg, ed., 1999). At the Iran-United States Claims Tribunal, under a rule known as the "Mosk Rule", a resigning arbitrator continued to hear cases in which he had participated. See *Iran v. U.S.*, 38 *Iran-U.S. Claims Tribunal Reports* 177 (2010).

<sup>168</sup> Schwebel, *id.* at 316.

<sup>169</sup> See, for example, ICC Rules Art. 12(2).

deliberate violation of the arbitration agreement or rules.<sup>170</sup>

### [3] Replacement

Replacement of an arbitrator can occur after a successful challenge, or in the event of the death, resignation, or removal of an arbitrator. Typically, under such circumstances, a substitute arbitrator is appointed using the same method as was used in appointing the original arbitrator.

In some intergovernmental tribunals with multiple cases, substitute arbitrators may be appointed to take the place of an arbitrator who is temporarily unavailable. While that step is not feasible in international commercial arbitration, the parties could specify individuals to serve as replacement arbitrators if replacement ever becomes necessary.

## § 9.09 Communications with Parties

### [1] Introduction

*Practitioner's Hint: Practitioners, as a general rule, should avoid private conversations with a party or its representative. When such a conversation occurs, the arbitrator should summarize the substance of the conversation and provide copies to all parties.*

In any adjudication process, *ex parte* communications—that is, communications between the decision-maker and one party or party representative—are generally considered to be inappropriate. Such communications violate ethical requirements and endanger the validity of a judgment. Questions concerning the extent of proper *ex parte* communications between an arbitrator and a party are thus considerably important to the arbitrator because the arbitrator who engages in unauthorized *ex parte* communications may find that the panel's award is being challenged or that he or she might be removed.

As a practical matter, however, some *ex parte* communications with a party are unavoidable. A common *ex parte* communication arises when one of the parties wishes to interview a prospective arbitrator before appointment. Communications concerning such matters as scheduling and other logistical matters may also be necessary during the proceedings. Still, although certain types of domestic arbitrations seem to

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<sup>170</sup> LCIA Rules Art. 10(2).

require *ex parte* communications between the party and its appointed arbitrator, any substantive *ex parte* communication is highly unusual in international arbitrations.

Under the FAA in the United States, there is no statutory prohibition against an *ex parte* communication with a party, but courts have interpreted the restriction against “evident partiality” to prohibit many private communications.<sup>171</sup> Some ethical codes also preclude such communications.<sup>172</sup>

Since *ex parte* communications may be in written form, as well as spoken, the best approach for an arbitrator is to make sure that copies of all written communications to and from a party are received by the other party. That practice will avoid allegations that communications were *ex parte*. If *ex parte* oral communications are necessary and do not deal with substantive matters, the content should immediately be transmitted to the other party.<sup>173</sup>

## [2] Pre-appointment Communications

*Practitioner's Hint: Pre-appointment interviews with a prospective arbitrator are necessary for a number of procedural reasons (scheduling, availability). The potential arbitrator should be thoughtful about avoiding substantive discussions of the facts of the case during the screening interview. Virtually all institutional rules recognize the probability of a pre-hearing interview with prospective arbitrators.*

### [a] Scope of Communications

Some arbitrators will avoid a pre-appointment interview entirely.<sup>174</sup> Some pre-appointment communications between the parties or counsel and potential arbitrators are, however, unavoidable in the selection

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<sup>171</sup> See *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F. Supp 2d 1118 (D. Haw. 2000); see also Article 1469 French Code of Civil Procedure (2 May 1981) (providing an explicit duty to keep deliberations secret).

<sup>172</sup> See, for example, IBA Rules § 5(3).

<sup>173</sup> *Id.* See Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 423.

<sup>174</sup> See Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 423.

process. The parties must communicate about the potential arbitrator's interest in the appointment and his availability.

Some have suggested that potential arbitrators avoid pre-appointment discussions of the case in any but the most general terms.<sup>175</sup> One universal guideline is to avoid discussing the merits of the case beyond a general description of the issues to satisfy oneself that one can meet the duties of impartiality, independence, and availability described above. The potential arbitrator must also avoid any hypothetical questions on positions that might be taken in the arbitration and should avoid discussions of substantive positions even in general terms. Discussions concerning potential third arbitrators generally are considered acceptable, however.

Some authors suggest that potential arbitrators inform the interviewing party that the arbitrator will make notes of the interview and will provide those notes to the other parties.<sup>176</sup> Although perhaps not necessary, that approach would certainly create a strong disincentive for the interviewing party to exceed the bounds of propriety.

One authority lists the following subjects as proper subjects of communication in the initial interview:

- the identities of the parties, counsel and witnesses;
- the estimated timing and length of hearings;
- the general nature of the case to allow the potential arbitrator to determine his or her competence and availability to decide the dispute, and whether he or she has disclosures to make;
- the arbitrator's qualifications and background, including publications, expert witness appearances, and prior service as an arbitrator;
- whether there is anything in the arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, or otherwise require disclosure; and
- the arbitrator's competence and availability.<sup>177</sup>

Newer practitioners in the field will find that predesignation

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<sup>175</sup> Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 *Tex. Int'l L.J.* 59, 61 (1995).

<sup>176</sup> Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 425 (1998).

<sup>177</sup> Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 395, 424 (1998).

discussions are more common with party-appointed arbitrators than they are potential sole arbitrators or chairs. The custom is justified on the ground that a party has a desire to insure that its party-appointed arbitrator has the knowledge of, and the ability to communicate, the laws and customs of the party and has the time to devote to the matter.

At times a party wishes to compensate a candidate for appearing at the interview. Although some may differ on the matter, our view is that a party may reimburse a potential arbitrator for out-of-pocket expenses in connection with a pre-appointment interview so long as they are reasonable and not in reality a benefit, but not for the candidate's time.

Notwithstanding the foregoing discussion, the scope of pre-appointment communications and reimbursements clearly has limits. In *Metropolitan Property and Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.*, a United States court enjoined an arbitrator who had discussed merits of defenses with the appointing party before selection, accepted "hospitality" from the party, and attempted to discuss the merits with the other party-appointed arbitrator before the selection of the presiding arbitrator.<sup>178</sup> Those actions were found to constitute evident partiality and arbitrator misconduct.

Because lengthy interviews can give rise to an appearance of substantive discussions, they ought to be avoided. The ICC Court of Arbitration once refused to confirm a party-appointed arbitrator who spent 50-60 hours with the party before appointment.<sup>179</sup>

### [b] Arbitral Rules

We are unaware of any institutional rules that prohibit pre-appointment interviews. The IBA Rules allow pre-appointment communication to determine the suitability of the potential arbitrator, but the merits are not to be discussed.<sup>180</sup> The other party is to be informed in writing of the substance of the conversation.<sup>181</sup> The Rules of the LCIA require all pre-appointment communications to be made through the

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<sup>178</sup> 780 F. Supp. 885, 888 (D. Conn. 1991); but see *Barlow v. Healthextras, Inc.*, 2006 U.S. Dist. LEXIS 86007 (2006) (10th Circuit District Court holding FAA did not authorize the courts to remove an arbitrator prior to the issuance of an award.)

<sup>179</sup> Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6:2 Int'l Ct. Arb. Bull. 4, 7-8 (1995).

<sup>180</sup> Section 5(1).

<sup>181</sup> *Id.*

Registrar.<sup>182</sup>

The AAA International Arbitration Rules prohibit *ex parte* communications between parties or anyone acting on their behalf with prospective arbitrators except “to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence.”<sup>183</sup> A similar provision is found in WIPO Rules.<sup>184</sup> That prohibition contrasts with the ABA/AAA Code, used in domestic arbitrations in the United States, under which “non-neutral” arbitrators may communicate with the appointing party, presumably including the merits, so long as the fact that such communications took place is disclosed to the other party.<sup>185</sup>

### [c] Solicitation

Most practitioners in the field consider solicitation to be an arbitrator inappropriate. In other words, a potential arbitrator should not solicit appointment as an arbitrator in a case by contacting the parties or their attorneys.<sup>186</sup> Practically speaking, those seeking arbitration assignments take other steps to publicize their availability and their qualifications to act as an arbitrator. Assuming reasonably good taste, that activity is appropriate. As with so many other endeavors, however, the line between promotion and questionable “solicitation” is not always clear.

### [3] Communications Regarding Selection of Third Arbitrator

*Practitioner’s Hint:* A party-appointed arbitrator may consult with the party that appointed him about the selection of the third arbitrator. The party-appointed arbitrator does not normally engage in *ex parte* communications with the third arbitrator.

Once the party-appointed arbitrators are selected, the parties and their appointed arbitrators are faced with the questions of how much contact a party arbitrator may have with the party that appointed him or her, as

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<sup>182</sup> Art. 13(1).

<sup>183</sup> Art. 7(2). There is also an exception for discussion of the suitability of candidates for selection as third arbitrator. *Id.*

<sup>184</sup> Art. 21.

<sup>185</sup> Canon X(C).

<sup>186</sup> IBA Rules § 2(4); Cairo Regional Centre Code of Ethics Rule 1.

well as how much contact may either of them have with the possible presiding arbitrator. Customarily in international and domestic arbitrations, party-appointed arbitrators can and do consult with the appointing party or its counsel concerning candidates for the third or presiding arbitrator.<sup>187</sup> The IBA Rules provide that an arbitrator is allowed, although not required, to obtain the party's views as to acceptability.<sup>188</sup> A similar provision is found in the AAA International Arbitration Rules.<sup>189</sup>

Conversely, a party, its counsel, or even its party-appointed arbitrator will not normally engage in *ex parte* communications with a potential chair. Since the relevant rules do not contain a distinction between a party-appointed arbitrator communications and communications with the chair, one might be tempted to argue that a similar approach should be followed in the practice regarding pre-appointment communications. Certainly the parties should be entitled to information from a prospective chair or sole arbitrator concerning his or her availability, knowledge, competence and background. Even those limited communications should, in practice, be approved in advance by the other parties, or at the very least, should be disclosed before selection of the chair.

#### [4] *Ex Parte* Communications during Proceedings

*Practitioner's Hint:* As a general rule, communications during the proceedings between a party and an arbitrator about the merits of the case are prohibited.

Arbitral rules vary in connection with their reference to *ex parte* communications between a party and an arbitrator during the proceedings. Generally, any such discussions concerning the merits of the case or the status of deliberations are prohibited. Under the IBA Rules one must inform the other party of any unilateral communications with arbitrators, and such communications are to be avoided.<sup>190</sup>

The IBA Rules also include an explicit duty to maintain confi-

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<sup>187</sup> *But see* Code of Ethics for Vancouver Maritime Arbitrators Rule 10 ("No arbitrator shall confer with the party or counsel appointing him regarding the selection of a third arbitrator").

<sup>188</sup> Section 5(2).

<sup>189</sup> Art. 7(2).

<sup>190</sup> § 5(3).

dentiality of the deliberations of the tribunal,<sup>191</sup> as do the AAA International Arbitration Rules.<sup>192</sup> Although neither the UNCITRAL Model Law nor the ICC Rules explicitly require the secrecy of deliberations, disclosing the content of deliberations would be strong evidence of a lack of impartiality and independence and could therefore lead to a challenge of an arbitrator. The LCIA Rules take a stringent approach with regard to *ex parte* communications, requiring all contacts with the parties to be communicated in writing through the LCIA Registrar, unless the tribunal orders otherwise.<sup>193</sup> Similarly, the ICSID Rules require the Secretary-General to serve as the channel of written communications between parties and arbitrators.<sup>194</sup>

### [5] Post-Award Communications

Communications between an arbitrator and a party are presumably acceptable once an award has been paid or is otherwise not subject to further proceedings.<sup>195</sup> Still, arbitrators should be discreet about doing or saying anything that might suggest there was a lack of impartiality during the arbitration. The principle of the confidentiality of deliberations continues after the arbitration, and that principle must be maintained in any post-award communications with the parties and with third parties. The only exception to the duty of confidentiality is if the arbitrator is compelled to testify in legal proceedings or considers it his or her duty to disclose fraud or misconduct.

### [6] Post-Award Representation

Potential arbitrators should also be aware that serving as an arbitrator may prevent a lawyer from representing potential clients in the same or substantially related matters in the future if such potential clients have been parties to the proceeding, absent disclosure and party consent.<sup>196</sup>

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<sup>191</sup> § 9.

<sup>192</sup> Art. 34. *See also* Cairo Regional Centre Code of Ethics Rule 8 (arbitrators bound by “utter confidentiality in all matters related to the arbitration proceedings”).

<sup>193</sup> Art. 13(2).

<sup>194</sup> ICSID Admin. and Fin. Reg. 24(1).

<sup>195</sup> Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arb. Int'l* 427 (1998).

<sup>196</sup> CPR-Georgetown Commission Proposed Rule 4.5.4.

One might question an arbitrator's judgment in commencing to represent a party to the arbitration too soon after the arbitration is over.

## § 9.10 Relations with Other Arbitrators

### [1] General

*Practitioner's Hint:* Panel arbitrators should be aware of and try to control any misbehavior by one of the panel members.

Arbitrators cannot challenge each other, but are able to inform the panel of circumstances that in their view give rise to doubts as to another arbitrator's independence. For example, under the IBA Rules, an arbitrator can inform the other arbitrators if he or she becomes aware of improper communications between an arbitrator and a party.<sup>197</sup> If the improper behavior was sufficiently egregious or continues, the remaining arbitrators can inform the other party, but generally informing a party of circumstances that could lead to a challenge of an arbitrator should be considered only in extreme circumstances, and only after informing all arbitrators that such action is contemplated.

### [2] Communications among Arbitrators

Most practitioners consider communications with the entire panel to be the better practice than communications between just two members at a time on a significant matter, unless the arbitrators agree otherwise.<sup>198</sup> Practically, some communications among only part of the panel are inevitable. One arbitrator cannot, of course, be excluded from the deliberative process.<sup>199</sup>

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<sup>197</sup> Section 5(4).

<sup>198</sup> See W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 730, 241 (3d ed. 2000) (arbitrator should not discuss merits with another arbitrator in the absence of the third arbitrator). This practice differs from the deliberation process in United States appellate courts.

<sup>199</sup> For example, in the *Dickson Car Wheel Company* and *International Fisheries* cases before the United States-Mexican General Claims Commission, the dissenting American Commissioner complained that, despite a requirement that awards be rendered at a public sitting, "[t]he other two Commissioners have signed the 'Decision' in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner in this case." Feller, *The Mexican Claims Commissions* 59 (1935).

### [3] Truncated Tribunal

Occasionally, an arbitrator will simply refuse to sign an award, be unavailable to perform his or her functions, or tender a resignation without justification. The governing body's response to that resignation generally will dictate the body's response to that act. When the resignation occurs late in the proceedings, the governing body may conclude that, for practical purpose, it cannot appoint a new arbitrator without causing undue delay. The problem is particularly acute in those arbitrations in which the rules require a majority decision for an award.<sup>200</sup> Some rules, however, provide that the chair or presiding arbitrator may render an award when there is no majority of the arbitrators.<sup>201</sup>

In some cases these circumstances may reflect an attempt to disrupt the conduct of the arbitration. The Iran-United States Claims Tribunal faced that issue several times in its early years.<sup>202</sup> In such instances, there have been cases when an award has been rendered by the remaining arbitrators acting as a truncated tribunal.<sup>203</sup> In recognition of the problem, the AAA International Arbitration Rules authorize the two remaining arbitrators to continue the arbitration when the third arbitrator fails to participate.<sup>204</sup> A similar provision is found in the LCIA Rules<sup>205</sup> and the Swedish Arbitration Act of 1999.<sup>206</sup>

### [4] Separate Opinions

*Practitioner's Hint: The rules under which arbitrations are conducted do not prohibit separate opinions, but many do not provide for them, either. Whether a separate opinion will be*

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<sup>200</sup> See e.g., AAA International Rules Art. 26(1).

<sup>201</sup> ICC Rules Art. 25(1).

<sup>202</sup> See Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* 22-23 (1996); Brower & Brueschke, *The Iran-United States Claims Tribunal* 125-52 (1998).

<sup>203</sup> See Feller, *The Mexican Claims Commissions* 59, 70-77 (1935); Stephen Schwebel, *International Arbitration: Three Salient Problems* 144-296 (1987); Stephen Schwebel, *The Validity of an Award Rendered by a Truncated Tribunal*, 6:2 ICC Int'l Ct. Arb. Bull. 19 (1995).

<sup>204</sup> Art. 11(1).

<sup>205</sup> Art. 26(4).

<sup>206</sup> Section 30, para. 1.

*attached to the award is generally a decision that the arbitration's governing body makes.*

None of the rules under which arbitrations are conducted prohibit separate opinions; conversely, arbitral rules generally do not explicitly provide for them either. Under some rules, however, dissenting opinions are expressly permitted, mostly in the context of arbitrations involving states.

Examples of rules that allow dissenting opinions include those of ICSID<sup>207</sup> and the Iran-United States Claims Tribunal.<sup>208</sup> The ICC Court of Arbitration may also allow a panel to attach dissenting opinions to the arbitral award, but it may refuse to do so when the dissent might impair the enforceability of the award. That circumstance might arise when the award is to take effect in a civil law country that does not recognize separate opinions.<sup>209</sup> The ICC Court regularly refused to allow separate opinions to be attached to awards that might be enforced in Switzerland before the passage of the Federal Act on Private International Law there in 1987.<sup>210</sup>

When a panel member is tempted to issue a dissent, he or she should bear in mind the situation in which he would issue the dissent. Some rules require a majority award so the dissenter should weigh the value of issuing a dissent against the possibility that the opinion will jeopardize the existence of a true majority.<sup>211</sup> For intergovernmental arbitrations, the International Court of Justice has held that the vote of the arbitrators is decisive and not the expression of disagreement with the award in a separate opinion or declaration.<sup>212</sup> Some rules do not require a majority,

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<sup>207</sup> Art. 47(3).

<sup>208</sup> Tribunal Rules of Procedure, Art. 32 (“Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefor be recorded.”).

<sup>209</sup> Simpson & Fox, *International Arbitration: Law and Practice* 226-27 (1959).

<sup>210</sup> Levy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 *Arb. Int'l* 35, 38 n.9 (1989); *see generally*, Mosk & Ginsburg, *Dissenting Opinions in International Arbitration*, in *Liber Amicorum Bengt Broms* 259 (M. Tupamaki ed., 1999).

<sup>211</sup> *See* Schwebel, *May the Majority Vote of an International Arbitral Tribunal be Impeached?*, 13 *Arb. Int'l* 145 (1997).

<sup>212</sup> Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1991 I.C.J. 53, 64-65 (“it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned”); *see also* Separate Opinion of Richard M. Mosk in *The Islamic Republic of Iran and The United States of America*, Partial Award No. 597-A11-FT (7 Apr. 2000), *reprinted in* 20 *Iran-*

allowing the chair to issue an award when a majority simply does not exist.<sup>213</sup>

Separate opinions are not customary in many countries, although they are becoming more common in international arbitration. Custom and consideration for colleagues suggests that an arbitrator who is planning on issuing a separate opinion should inform his fellow panel members of his intentions and circulate a copy of the substance of the separate opinion before issuance of the award. The dissenting arbitrator should restrict his dissent to issues of fact and law, and, above all, remain civil in both tone and content.

Professional arbitrators are always careful not to issue a separate opinion for improper reasons or violate his duties of impartiality and independence.<sup>214</sup> In extreme circumstances, however, arbitrators may feel compelled to write a separate opinion to disclose aspects of the award that might indicate that it is subject to vacation.<sup>215</sup>

## § 9.11 Arbitrator Liability

### [1] Arbitral Immunity

*Practitioner's Hint: Immunity for an arbitrator may fall into either of two categories: immunity for alleged misconduct and failure to discharge his duties under the arbitral agreement. The scope of immunity may vary, depending on the jurisdiction where the action against the arbitrator is brought.*

In some systems, arbitrators have immunity from civil liability, rooted in the concept of judicial immunity. At common law, arbitrators have immunity for “arbitral acts” undertaken in an arbitration.<sup>216</sup> In the

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U.S. Ct. Trib. Rep. 84, 162.

<sup>213</sup> See, for example, ICC Rules Art. 25(1); LCIA Rules Art. 26(3). Swiss and Swedish law have similar provisions. Levy, *supra* note 213, at 39 n.12; Swedish Arbitration Act of 1999, Section 30, para. 2.

<sup>214</sup> See Mosk & Ginsburg, *Dissenting Opinions in International Arbitration*, Liber Amicorum Bengt Broms 280 (M. Tupamaki ed., 1999).

<sup>215</sup> *Id.* at 280-81.

<sup>216</sup> Redfern, *The Immunity of Arbitrators*, Special Supplement to the ICC Int'l Ct. Arb Bull. 121, (Dec. 1995); Sponseller, *Note: Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 *Hastings L.J.* 421, 428 (1993). See also *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970 (N.D. Cal. 1992) (arbitration granted immunity because of similarity to judicial process).

United States, courts have broadly applied the doctrine of judicial immunity to the arbitration process. This immunity is absolute and protects the arbitrators from liability for acts performed in what is viewed as their quasi-judicial capacity. In addition, arbitrators in the United States are generally protected from being required to testify about their awards in court or discovery unless a party has asserted arbitral misconduct.<sup>217</sup>

Because arbitrators are also bound by contract to the parties, issues as to the relationship between arbitral immunity and contract law can arise. In a 1983 case, a California court refused to grant immunity to an arbitrator who failed to issue an award within the period required by statute and AAA Rules.<sup>218</sup> The court distinguished a breach of the arbitration contract from the situation in which an arbitrator is accused of misconduct, for which immunity applies.

Following that decision, the California legislature amended the California Code of Civil Procedure to grant arbitrators judicial immunity when acting in the capacity of an arbitrator under any statute or contract, and while that statutory protection has lapsed, statutory immunity currently exists for international commercial arbitration.<sup>219</sup> Some assert that the statutory immunity is coextensive with that under the common law,<sup>220</sup> while others have argued that statutory immunity does not protect an arbitrator who fails to perform his obligations under the arbitration agreement.<sup>221</sup> In a 2010 case, a California Court of Appeal held that arbitrator immunity attached so long as the arbitrator issued an award, even though it may not have been timely.<sup>222</sup> In dicta the court suggested

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<sup>217</sup> See Lawyers Arbitration Letter, AAA, Vol. 7, March 1983. Practices and law may be different in other jurisdictions.

<sup>218</sup> *Baar v. Tigerman*, 189 Cal. Rptr. 834 (Cal. Ct. App. 1983); see also *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026 (5<sup>th</sup> Cir. 1977), rehearing granted in part, 559 F.2d 268 (5<sup>th</sup> Cir. 1977).

<sup>219</sup> See Cal. Civ. Proc. Code § 1297.119. See also Fl. Stat. § 44.107 (judicial immunity for arbitrators); *Feichtinger v. Conant*, 893 P.2d 1266 (Alaska 1995) (establishing absolute arbitral immunity for quasi-judicial actions).

<sup>220</sup> Sponseller, *Note: Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 *Hastings L.J.* 421, 434-35 (1993).

<sup>221</sup> Nolan & Abrams, *Arbitral Immunity*, 11 *Indus. Rel. L.J.* 228, 252-53 (1989) (nonfeasance the only justified exception to arbitral immunity); *Mattera, Has the Expansion of Arbitral Immunity Reached its Limits After United States v. City of Hayward?*, 12 *Ohio St. J. on Disp. Resol.* 779, 796 (1997); but see *Coopers & Lybrand v. Superior Court*, 212 Cal. App. 3d 524 (Cal. Ct. App. 1989) (finding that California legislature intended to grant complete immunity in its statutory provisions).

<sup>222</sup> *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413 (2010).

that immunity might not attach if the award had not yet been issued.

Immunity provisions have begun to appear in arbitral rules as well.<sup>223</sup> For example, under the ICSID Convention, arbitrators have immunity from legal process with respect to acts performed in the course of their official functions.<sup>224</sup> The AAA International Arbitration Rules specifically limit arbitrator liability to instances of conscious and deliberate wrongdoing.<sup>225</sup>

For additional safety, a practicing lawyer should consider obtaining a special rider to his or her malpractice insurance policy in case the insurance company does not consider acting as an arbitrator to be covered under the policy. A full-time arbitrator should consider having malpractice or liability insurance for arbitral activity.

## **[2] Unauthorized Practice of Law**

***Practitioner's Hint:** The unauthorized practice of law issue has been a vexing one. Laymen who act as arbitrators in an action which raises legal issues may or may not be engaging in the practice of law; lawyers who represent clients in an arbitration in a jurisdiction in which the lawyers or arbitrators are not admitted may be engaged in the unauthorized practice of law.*

Arbitrators should generally be aware of prohibitions on the unauthorized practice of law, as those prohibitions might apply to arbitrators. Whether or not serving as an arbitrator is the “practice of law” is a matter of some controversy.<sup>226</sup> Because lay persons can be and often are arbitrators, one might well argue that custom alone should allow a layman who acts as an arbitrator to avoid allegations that he or she is engaging in the unauthorized practice of law.

In at least one jurisdiction, however, arbitration of legal issues is limited to lawyers. That conclusion might lead to a challenge to any award issued by a non-lawyer arbitrator.<sup>227</sup> In line with the overall confusion about the issue, we do not know whether that rule extends to arbitrators who are lawyers from a foreign country. In a parallel issue, at least one state court has held that a non-lawyer had engaged in the

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<sup>223</sup> ICC Rules Art. 34; LCIA Rules Art. 31(1).

<sup>224</sup> Art. 21(a).

<sup>225</sup> Art. 35.

<sup>226</sup> CPR-Georgetown Commission at 5.

<sup>227</sup> Spanish Arbitration Act 1988, Art. 12(2).

unauthorized practice of law while acting as a mediator.<sup>228</sup>

Subsequent efforts to clarify the issue have defined the practice of law to include only professional legal services when there is a client relationship. That rule appears to exclude the actions of a lay or lawyer arbitrator.<sup>229</sup>

If acting as an arbitrator is viewed as practicing law—an unsettled proposition—then the rules that regulate lawyers who represent a client in arbitration may be relevant to determining the extent of any risk to arbitrators that they are engaged in the unauthorized practice of law. Local rules in some countries which preclude foreign, non-admitted lawyers from representing a party in an arbitration exemplify the problem.

In Japan, for example, at least until 1996, foreign lawyers could not represent parties in international arbitrations conducted in Japan.<sup>230</sup> In Singapore, in what turned out to be a rather notable case, a Singapore court enjoined a New York law firm from representing a client before an arbitral panel in Singapore, and held that any work related to such an arbitration was the unauthorized practice of law.<sup>231</sup> The case was subject to criticism<sup>232</sup> and was later superseded by legislation.<sup>233</sup> Sometimes parties to an arbitration retain local co-counsel to avoid similar disputes. The good news is that the number of jurisdictions which prohibit foreign lawyers from engaging in arbitrations is declining.<sup>234</sup>

In the United States, federal law does not preclude representation in arbitration by non-admitted lawyers.<sup>235</sup> That permissive approach is

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<sup>228</sup> *Discussed in Ravindra, Balancing Mediation Rules on Unauthorized Practice*, 18 *Alternatives* 21 (Feb. 2000).

<sup>229</sup> *Id.*; Krohnke, *Multidisciplinary Practice and ADR: The Minnesota Bar Takes a Stand*, 18 *Alternatives* 41, 61 (Mar. 2000).

<sup>230</sup> Stevens, *Foreign Lawyer Advocacy in International Arbitrations in Japan*, 13 *Arb. Int'l* 103 (1997). *See also* § 4.03[7][e], above.

<sup>231</sup> *Builders Federal (Hong Kong) Ltd. And Joseph Gartner & Co. v. Turner (East Asia) Pte. Ltd.*, Mar. 20 1988, *reprinted in* 5 *J. Int'l Arb* 141 (1988). The decision was not appealed because the underlying dispute was settled.

<sup>232</sup> Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen?*, 5 *J. Int'l Arb.* 71 (1988).

<sup>233</sup> *Singapore to Remove Barriers to Foreign Lawyers*, Mealey's *Int'l Arb. Rep.*, Aug. 1991, at 7; Singapore Legal Profession Act, Sec. 34A (1992). When Singapore law is applicable to the dispute, however, representation by a Singapore counsel is still required, although foreign counsel may assist. (*See* § 4.03[7][a], above).

<sup>234</sup> *See Rivkin, Keeping Lawyers Out of International Arbitrations*, *Int'l Fin. L. Rev.*, 11 (Feb. 1990).

<sup>235</sup> *See Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982). (“An arbitration tribunal is not a court of record; its rules of evidence and

followed by some American states and is reflected in a number of professional ethical requirements. For example, the Committee on Professional Ethics of the Association of the Bar of the City of New York has stated that “as a matter of New York law and professional ethics, parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing, including lawyers not admitted to practice in New York.”<sup>236</sup>

Other jurisdictions take a more restrictive approach.<sup>237</sup> A California case, for example, found that out-of-state attorneys were engaged in the unauthorized practice of law when they made preliminary arbitration arrangements for a California client,<sup>238</sup> although a statute subsequently nullified that rule.<sup>239</sup> California also has a statutory exception for international conciliation that allows appearance by any person of the party’s choosing, but it has not extended that exception to international arbitration.<sup>240</sup>

Although generally not a risk, one should be aware of the possibility of a restriction on acting as an arbitrator in another jurisdiction.

## § 9.12 Compensation and Financial Issues

### [1] Fee Arrangements

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procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys”); *see also* Am. Auto. Ass’n v. Merrick, 117 F.2d 23 (D.D.C. 1940) (lay representation of a party in arbitration does not constitute unauthorized practice of law).

<sup>236</sup> Committee on Professional Ethics of the Association of the Bar of the City of New York, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York, 49 Record of the Association of the Bar of the City of New York 47 (1991).

<sup>237</sup> Illinois Ethics Op. No. 94-5 (1994) (holding out-of-state lawyer who regularly represents Illinois clients in arbitration proceedings in Illinois engages in the unauthorized practice of law).

<sup>238</sup> *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, (Cal. 1998).

<sup>239</sup> Cal. Civ. Proc. Code § 1282.4 (representation by members of other State bar allowed if a certificate filed); *see* discussion of *Birbrower* in 94 Am. J. Int’l L. 400 (2000) (criticizing the decision and suggesting it may be superseded by treaty).

<sup>240</sup> Cal. Civ. Proc. Code § 1297.351 (a person need not be a member of the legal profession or licensed to practice in California to represent a party in international conciliation).

***Practitioner's Hint:*** *Although the arbitrator's fee should be reasonable, considering all of the factors involved, the issues surrounding fees are potentially complex. The arbitrator may negotiate his own fee or the fee may be set by the institution; the fee may be paid directly to the arbitrator or indirectly through the institution or the chair.*

The fees of an arbitrator, just as those of an attorney, should be reasonable, taking into account the sum in dispute, the complexity of the case, the time and effort required of the arbitrator, and any other relevant circumstances of the case. Fees can be based on time spent, fixed for the arbitration as a whole, or set as a percentage of the amount in dispute. Complex arbitrations sometimes involve a specified "commitment fee" or "cancellation fee" that will be paid to an arbitrator in the event of settlement or rescheduling.

A prospective arbitrator can specify prior to appointment any fee he or she wants. The appointing party then considers the prospective arbitrator's fee requirement, of course, in its appointment decision. The arrangements concerning the arbitrator's compensation, whatever they are, should be specified in writing prior to or upon appointment of the arbitrator.

As a result of the general fee arrangements in arbitrations, a prospective arbitrator may find that the time he or she spends prior to the appointment may not be covered by compensation arrangements. As a result, a potential arbitrator who spends time on pre-appointment interviews and disclosures will likely receive nothing if not appointed and even may not be compensated for that time when he or she is appointed.

In a typical United States *ad-hoc* arbitrations involving three arbitrators, each party will pay for the services of its own nominee, and the two parties will split the costs of the third arbitrator. We question, however, whether, in international arbitrations, a party which pays its arbitrator directly is acting in an appropriate manner, because that payment might suggest a lack of independence. Preferably, payments should be made through an account established and managed by the chair. Fee arrangements in *ad-hoc* arbitrations should explicitly be agreed upon early in the proceedings.

For arbitrations conducted under institutional auspices, the institution usually will arrange for, set, collect and disburse the fees. Some institutions require a specified hourly rate, often less than the prevailing rate. Under other institutional guidelines, potential arbitrators will not be

compensated on the basis of time. Thus, they may receive less than they would receive under their normal fee arrangements.

While some institutions treat the role of the arbitrator as one of public service and therefore provide for limited compensation, that is generally not the case in international arbitration. Some industry arbitration mechanisms, however, such as the Independent Film and Television Alliance, provide for reduced compensation, considering the arbitration process to be a service provided to members. That mode of compensation leaves the arbitrator at risk of not receiving the amount he or she normally receives for legal or arbitral services. A few arbitrators command large fees, sometimes as much as hundreds of thousands of dollars per arbitration.

Increasingly, the compensation of arbitrators is addressed in institutional rules. The LCIA Rules are among those with the most detailed provisions regarding fees. Those Rules require the arbitrator to agree in writing upon fee rates conforming to a Schedule of Costs attached to the Rules. Although those rates can vary with the complexity of the case and special qualifications of the arbitrators, the Rules do contain a specified range of rates per working day.

Under the ICC Rules, the ICC Court fixes the costs of arbitration according to an appended schedule of minimum and maximum fees set as a percentage of the amount in dispute.<sup>241</sup> In setting arbitrator fees, the ICC Court is required to consider the diligence of the arbitrator, the time spent, the speed of the proceedings and the complexity of the dispute. In exceptional circumstances, the Court can set the fees outside the specified range.<sup>242</sup> Separate fee arrangements between the arbitrators and the parties are prohibited.<sup>243</sup> The ICC Rules also specify that the parties are responsible for paying any taxes applicable on fees, including Value-Added Taxes that apply in some jurisdictions.<sup>244</sup>

Courts periodically become involved with fee issues. Those that have considered fee arrangements between arbitrators and parties have generally upheld them.<sup>245</sup> In one case, a retainer agreement between the

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<sup>241</sup> Art. 31(1). The schedule is attached as Appendix III of the Rules.

<sup>242</sup> Art. 31(2).

<sup>243</sup> Appendix III, Art. 2(4).

<sup>244</sup> Appendix III, Art. 2(9).

<sup>245</sup> *See, for example*, *Hunt v. Mobil Oil Corp.*, 654 F. Supp. at 1507-11 (arbitrators' fees of \$225 per hour and \$1,500 for each day of hearing, agreed to by parties, were not excessive in light of complexity of the issues in the arbitration, number of parties, and the need for arbitrators with background of unusual experience, ability, and sophistication in

appointing party's counsel and the arbitrator led to termination of the arbitration.<sup>246</sup> Courts have also held that in the absence of a contrary agreement, parties are jointly and severally liable for payment of arbitrators' fees.<sup>247</sup>

This discussion suggests to both practicing and potential arbitrators that the contractual relationships among party, counsel and arbitrator can give rise to complex issues, including questions about who is responsible for payment of arbitrator fees under various circumstances, such as in the event of withdrawal of a party's counsel.<sup>248</sup>

Although unusual, a party, from time to time, may be unable to pay the deposit requested by the arbitrator or arbitrators. That circumstance presents a difficult situation, especially when it occurs at the outset of the arbitration. To resolve the problem, the other party will pay the entire amount. Since, however, the claimant is usually the party who is unable to pay, the respondent is unlikely to pay the amount owing by the claimant. The institution is then faced with the questions of whether, when a party cannot pay the amount requested for the arbitrator or arbitrators, the arbitration agreement is "incapable of being performed" within the provisions of article II (3) of the New York Convention or whether enforcement of the arbitration clause would be considered unjust.

In the event the arbitrators and the parties cannot agree on the financial arrangements—in, for example, an ad hoc arbitration—generally, the designated arbitrators can resign. The matter of compensation can also be left up to a court. Sometimes, an arbitrator, once named, who then tries to negotiate with the parties over fees is considered suspect, at best. The reason is that proposed arbitrators should specify the arrangement before being selected. When fees are not specified in advance, problems can, and occasionally do, arise, especially if one party desires to cause an impasse by refusing to agree on the fees. Those problems may not be common, but they can arise.<sup>249</sup>

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an oil arbitration).

<sup>246</sup> Discussed in Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, 3 Am. Rev. Int'l Arb. 177 (1992).

<sup>247</sup> *Theofano Maritime Co., Ltd. v. 9,551.19 Long Tons of Chrome Ore on Bd. The Aliakmon*, 122 F. Supp. 853 (D.Md. 1954).

<sup>248</sup> Rumbaugh & Powell, *Do You Really Want to be a Party-Appointed Arbitrator?*, Disp. Res. Times 14, 16 (Apr. 2000).

<sup>249</sup> See Varady, *Remuneration of Arbitrators as a Threshold Issue: Economic Sense and Procedural Realities*, in *Corporations, Capital Markets and Business in the Law* 585 (Baum, Hopt and Horn, eds. 2000).

## [2] Expenses

Arbitrator expenses are usually covered in the fee arrangements and handled in an identical fashion. Expenses can either be addressed on a reimbursement basis or through a fixed daily payment of arbitrator's living costs.<sup>250</sup>

Reimbursement for pre-appointment expenses may be treated in the same way as compensation. A question may also arise as to whether an arbitrator may be reimbursed for his expenses in connection with traveling to and attending a pre-appointment interview. A party seeking to discuss the possibility of appointment with a potential arbitrator—at least as a party-appointed arbitrator—probably may reimburse the latter for reasonable expenses in connection with a meeting.<sup>251</sup>

## [3] Taxes

Arbitrators should consider whether being an arbitrator in a foreign jurisdiction exposes them to any taxes in that jurisdiction. The laws of the various countries diverge on the question, even those within the common Value-Added Tax regime of the European Union.<sup>252</sup> Depending on the jurisdiction, the arbitral institution or the parties may have to comply with certain reporting requirements with respect to payments made to arbitrators. That comment may be particularly true with regard to payments in a different currency made outside the country. Moreover, there may be exchange or other restrictions on payments in, or repatriation of, United States currency.<sup>253</sup>

## § 9.13 Conclusion

Many arbitrators or potential arbitrators have a desire to serve in an international arbitration because they often involve interesting issues and novel situations. No matter how desirable an arbitration may appear, a

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<sup>250</sup> Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Commercial Arbitration* 308-09(5th ed., 2009).

<sup>251</sup> *But see* Metro. Property and Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co., 780 F. Supp. 885 at 888 (D. Conn. 1991) (pre-appointment hospitality one factor in injunction of arbitrator).

<sup>252</sup> Le Gall, *The Fiscal Status of the Arbitrator*, Special Supplement to the ICC Int'l Ct. Arb. Bull. 100 (Dec. 1995).

<sup>253</sup> *See generally*, Rhoades & Langer, *International Taxation and Tax Treaties* (Matthew Bender 2000).

potential arbitrator must give consideration to whether he or she is legally qualified to act and whether he or she is appropriate for the position. In addition, one must consider whether the compensation, time, logistical factors, legal and ethical requirements, and other matters make service on the arbitration panel undesirable. Although there may be more people interested serving as international arbitrators than there are available opportunities, the continued globalization of transactions should ensure that there will always be a need for highly qualified international arbitrators.

