PARTY-APPOINTED ARBITRATORS

IN

INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

This thesis is a study of the system of party-appointed arbitrators in international commercial arbitration: an attempt to provide a comprehensive assessment of the system, in which the main questions about it are addressed and a set of answers to those questions is offered. The assessment takes a three-pronged approach: historical, theoretical and empirical. It includes an historical analysis of unilateral nominations, a theoretical assessment of how the system presently works and a comparative empirical study of challenges of arbitrators in ICC practice.

The theoretical assessment of the system of unilateral appointments is a critical analysis of arbitration rules, laws, case law, other authors’ reflections on the system and other written materials (such as, for instance, the works of the United Nations Commission on International Trade Law and of the International Bar Association). This assessment addresses many questions, including, amongst others: the limits to the right of the parties to make unilateral appointments, the risks to the principle of equality of the parties in the constitution of the arbitral tribunal in certain situations (e.g. multiparty arbitrations, consolidation, joinder), the specific problems of bias in tribunals with party-appointed members, the repeat appointments of an arbitrator by the same party or counsel, the question of whether a different standard of impartiality and independence in party-appointed arbitrators makes any sense, the presumption that party-appointed arbitrators can do things that presiding arbitrators cannot (e.g. the so-called ‘special role’ of party-appointed arbitrators and certain unilateral communications between appointors and appointees) and the question of whether it is worth keeping the system of unilateral appointments as the default method for the constitution of multiple-member tribunals.

The study also includes some suggestions on how to improve the system, namely in order to increase the trust of each party in the arbitrator appointed by the other party and to allow an accurate match between what arbitration end-users may want from party-appointed arbitrators and what they ultimately get.
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Table of Contents

CHAPTER 1. INTRODUCTION 8
1.1. Why this thesis? – Motivation – Original contribution ............................................... 8
1.2. Research questions – What is in and out of scope of this work ..................................... 11
1.3. Structure and methodology ........................................................................................................ 13
  1.3.1. Chapter 2. History ........................................................................................................ 14
  1.3.2. Chapters 3 to 5. Assessment of unilateral appointments nowadays ...................... 15
  1.3.4. Chapter 7. Summary of conclusions and suggestions for the future ....................... 18

CHAPTER 2. HISTORICAL BACKGROUND 20
2.1. Ancient times .............................................................................................................................. 20
  2.1.1. Ancient Greece ............................................................................................................. 21
     A) Arbitration between private disputants ........................................................................... 21
     B) Interstate arbitration ....................................................................................................... 24
  2.1.2. Ancient Rome and Early Byzantium .............................................................................. 26
2.2. Middle Ages to the Eighteenth Century .................................................................................. 28
2.3. The Nineteenth Century ........................................................................................................... 33
     A) Arbitration between private disputants ........................................................................... 33
     B) Treaty-based arbitration ................................................................................................. 36
2.4. The Twentieth Century ........................................................................................................... 40
  2.4.1. Arbitration reserved for states ...................................................................................... 41
  2.4.2. International commercial arbitration ........................................................................... 46
     A) Three-member tribunals with two party-appointed arbitrators ..................................... 46
     B) Express requirement for all arbitrators to be impartial and independent ..................... 53
Conclusions ...................................................................................................................................... 58

CHAPTER 3. THE RIGHT TO MAKE A UNILATERAL APPOINTMENT 61
3.1. Strong presence in arbitration practice ................................................................................... 61
3.2. Limits .............................................................................................................................................. 64

3.2.1. Qualifications agreed to by the parties........................................................................................... 65
   A) Meaning and importance .................................................................................................................. 65
   B) Restriction of the unilateral choice to a list drawn up by a third person ........................................... 66
   C) Discrimination of eligible arbitrators on sensitive grounds ............................................................ 67

3.2.2. Principle of equality of the parties in the constitution of the tribunal ............................................. 70
   A) Meaning and importance .................................................................................................................. 70
   B) Particular problems in tribunals with party-appointed arbitrators ..................................................... 72
      B.1. Multiparty cases ........................................................................................................................ 73
      B.2. Other situations .......................................................................................................................... 78
   C) Is it waivable? .................................................................................................................................. 79

3.2.3. Impartiality and independence .................................................................................................. 80
   A) Meaning and importance .................................................................................................................. 80
   B) Is it waivable in party-appointed arbitrators? ..................................................................................... 81

3.3. Is it worth keeping unilateral nominations by default in international arbitration? ................................ 88

Conclusions ............................................................................................................................................. 97

CHAPTER 4. THE STANDARD OF IMPARTIALITY AND INDEPENDENCE 100

4.1. The principle of impartiality and independence .............................................................................. 101
   4.1.1. A standard for all arbitrators in international arbitration ............................................................ 101
   4.1.2. An impartial and independent arbitrator ...................................................................................... 105
      A) An unbiased mind ........................................................................................................................ 114
      B) An unbiased behaviour ................................................................................................................. 118
      C) A minimum distance, or the absence of unacceptable links ............................................................ 125

4.2. Is it worth requiring this standard by default from party-appointed arbitrators in international arbitration? 129

Conclusions ............................................................................................................................................. 136

CHAPTER 5. PROBLEMS OF BIAS IN PARTY-APPOINTED ARBITRATORS 138

5.1. The weaker appearance of lack of bias ............................................................................................ 140
   5.1.1. By hypothesis.............................................................................................................................. 140
   5.1.2. Through the influence of other factors .......................................................................................... 142
5.2. The questionable presumption of a special role ................................................................. 144
5.3. The questionable presumption of acceptable unilateral communications ..................... 150
5.4. Repeat appointments ........................................................................................................ 159
  5.4.1. Factors to decide whether there is conflict of interest or not ........................................ 160
  5.4.2. The questionable approach taken by the IBA Guidelines ........................................... 172
5.5. A different standard of impartiality and independence? .................................................... 179
  5.5.1. One less (but still) unbiased mind or unbiased behaviour? ........................................... 179
  5.5.2. A still closer minimum distance? .................................................................................. 192
    A) When the parties agree on it ......................................................................................... 192
    B) When the parties have not agreed on it ......................................................................... 194
Conclusions ............................................................................................................................ 200

CHAPTER 6. PROBLEMS OF BIAS: A COMPARATIVE EMPIRICAL VIEW 203
6.1. Scope and limitations ........................................................................................................ 203
6.2. Methodology .................................................................................................................... 205
6.3. Findings .......................................................................................................................... 209
  6.3.1. Challenges ................................................................................................................. 209
  6.3.2. Accepted challenges .................................................................................................. 218
  6.3.3. Is anything changing over the years? ......................................................................... 223
Conclusions ............................................................................................................................ 230

CHAPTER 7. CONCLUSIONS AND SUGGESTIONS FOR THE FUTURE 235
7.1. The past .......................................................................................................................... 235
7.2. The present ...................................................................................................................... 238
  7.2.1. How is the right to make unilateral nominations currently configured? .................... 238
    A) Meaning and importance of this right ........................................................................... 238
    B) Limits ........................................................................................................................... 239
  7.2.2. How do unilateral nominations coexist with the modern configuration of
    the duty of all arbitrators to be impartial and independent? ........................................... 241
    A) Specific theoretical problems. ..................................................................................... 241
    B) What are the problems of impartiality and independence of party-appointed
       arbitrators in practice and how do they compare to those of non-party-appointed
       arbitrators? .................................................................................................................... 241
C) Do arbitral tribunals with party-appointed arbitrators give rise in practice to more problems than those without party-appointed members? ........................................ 242
D) Repeat appointments........................................................................................................ 243
E) Does a different standard of impartiality and independence for party-appointed arbitrators make any sense? ................................................................. 244

7.2.3. Are party-appointed arbitrators expected to do the same job as non-party-appointed arbitrators? The questionable presumptions of a special role and of some acceptable unilateral verbal communications between appointors and appointees ................................................................. 245

7.3. Looking ahead.................................................................................................................. 246

7.3.1. It is worth keeping the system of ‘impartial and independent party-appointed arbitrators’ as the default method to constitute multiple-member tribunals in international arbitration ................................................................. 246
A) It is not worth getting rid of the ‘party-appointed’ .................................................................. 246
B) It is not worth getting rid of the ‘impartial and independent’ ................................................. 247

7.3.2. Room for improvement of the system of ‘impartial and independent party-appointed arbitrators’ .................................................................................................................. 247
A) Removal of ambiguities as to their role .................................................................................... 248
B) More transparency with full disclosure of repeat appointments ............................................ 248
C) Better arbitral education or training of party-appointed arbitrators ........................................ 248
D) Other possible ways of improvement ...................................................................................... 251
   D.1. To let the non-appointing party have some limited say in the appointment ................. 252
   D.2. To expressly agree on a special role .................................................................................... 252

APPENDIX TO CHAPTER 6 ....................................................................................................... 257

ABBREVIATIONS .................................................................................................................. 267

SELECTED BIBLIOGRAPHY ............................................................................................... 270
CHAPTER 1. INTRODUCTION

1-1 This is a study of the system of party-appointed arbitrators in international commercial arbitration: an attempt to assess how this system works and to make some suggestions for the future.

1.1. WHY THIS THESIS? – MOTIVATION – ORIGINAL CONTRIBUTION

1-2 The initial motivation for this research, when I barely knew anything about arbitration, was a sort of love-hate fascination with the possibility for each party to appoint one of the members of an arbitral tribunal. I had been said that arbitrators are private judges and it was intriguing to me that party-appointed arbitrators did not fulfil two elementary requirements of any judge in the world: not being chosen by one of the disputing parties and not having the right to remuneration come out of the choice of one of the disputing parties.

1-3 After a decade of practice in international arbitration, my fascination with unilateral nominations had grown in the opposite direction of love and hate. While unilateral nominations sometimes brought added value to the arbitration, on other occasions they were no more than an encumbrance one had to live with. How was it that arbitration end-users so often had resort to this distinctive as much as unpredictable feature of arbitration, where good and evil seemed to live together?

1-4 I also noticed that, in all cases, the presence of party-appointed arbitrators brought unique questions to the arbitral process. What are the parameters of the right of each party to make a unilateral nomination? How do unilateral nominations coexist with the modern duty of all arbitrators to be impartial and independent? Are party-appointed arbitrators expected to do the same job as non-party-appointed arbitrators? Do arbitral tribunals with party-appointed arbitrators pose more problems in practice than those without party-appointed arbitrators? Is it worth keeping the system of party-appointed arbitrators, in its current configuration, as the default method to set up multiple-member tribunals in international arbitration?
My motivation grew to permanently remain when I realised that I did not have clear answers to some of those questions and that, when I found answers, they were often many and contradictory. How is it, for instance, that arbitration rules and laws do not provide for any such thing as a special role of party-appointed arbitrators whereas many authors (such as Lowenfeld, Redfern and Hunter, Blackaby and Partasides, Bishop and Reed, Lew, Mistelis and Kröll, De Fina and Werner) admit its existence? Or how is it that a different standard of impartiality and independence in party-appointed arbitrators has been denied by certain authors (such as Jarrosson, Clay and Henry) and admitted by others (such as Lalive, Bucher and Tschanz)?

Some months after I had embarked on this research, Jan Paulsson sparked the debate on the question of whether unilateral nominations in international arbitration are worth keeping. This increased my motivation to address one of the questions about the system of ‘impartial and independent party-appointed arbitrators’: is it worth keeping? How is it that, while many scholars and practitioners seem to be reasonably satisfied with the system, others consider that we should get rid of ‘impartial and independent’ (Lauterpacht, Coulson) or ‘party-appointed’ (Arnold, Smit, Paulsson)?

Much has been written about party-appointed arbitrators in international arbitration. I owe a word of gratitude to all the authors who preceded me in devoting time and effort to such curious creatures. Beyond intellectual coincidences or discrepancies, they have all inspired this work. How could one possibly forget, for instance, René David’s pioneering attempts to open the debate in modern times about the convenience of requiring the impartiality and independence from party-appointed arbitrators in the course of his work at UNIDROIT in the 1950s? Or Pierre Lalive’s works on the neutrality of arbitrators and the delicate matter of whether a different standard of impartiality and independence of party-appointed arbitrators should be acknowledged? Or the reflections by Eugenio Minoli, Pierre Bellet and Robert Coulson on the possible different roles of non-neutral party-appointed arbitrators? Or those of Martin Hunter, Andreas Lowenfeld, Julian Lew, Loukas Mistelis and Stephan Kröll on the special role of impartial and independent party-appointed arbitrators? Or the contribution by Doak Bishop and Lucy Reed on acceptable unilateral communications between unilateral appointors and appointees? Or that of Charles Jarrosson on what a party-appointed arbitrator may and may not be under his
vision of the notion of arbitration? Or Thomas Clay’s monumental work on the arbitrator and his later thorough observations on what the International Bar Association did not get right in its Guidelines on Conflicts of Interest? Or Marc Henry’s indispensable work on the arbitrator’s impartiality and independence? Or the sharp criticism by Frédéric Eismann, Elihu Lauterpacht, Serge Lazareff, Alan Redfern, Hans Smit, Tom Arnold and Jan Paulsson of the system of unilateral nominations?

One cannot help feeling a bit overwhelmed by all those names and many others when it comes to explaining what the original contribution of this work may be. Perhaps the questions with no answers or with unclear or contradictory answers are still there for good reason and there is no point in trying to push them any further.

I think that the original contribution of this work lies in its scope, its methodology and some of the suggestions it provides in order to improve the system of unilateral appointments.

As to scope, this work is, as far as I know, the first attempt to provide a comprehensive critical assessment of the system of unilateral nominations, in which all the most relevant questions about the system are addressed and a complete set of answers to such questions is offered.

The methodology followed to make the assessment is also original in its three-level approach: historical, theoretical and empirical. I thought that, in order to achieve a comprehensive assessment of the system of unilateral nominations, it was necessary but not sufficient to undertake a theoretical critical analysis of arbitration rules, laws, case law, other authors’ reflections about the system and any other available written materials (such as, for instance, the works of the United Nations Commission on International Trade Law and of the International Bar Association). To have a clearer picture of the system, it was also necessary to fill two vacuums in arbitration literature: an in-depth historical analysis of unilateral nominations and a comparative empirical study of problems of bias taking into account the method of appointment of the arbitrator.
When I undertook this research, I did not know what my conclusions would be nor whether they would be original in any respect. I actually did not mind if they were not original as long as the assessment of the system of unilateral nominations was serious enough. I sought a diagnosis, whatever the result.

The fact is that now, at the end, I find that some of the conclusions of this thesis are not at all original (e.g. the advisability of requiring impartiality and independence from party-appointed arbitrators by default) whereas others, for better or worse, have a certain degree of originality. The latter is the case, for example, of the conclusion that suggests a new way to approach an old problem (should a different standard of impartiality and independence in party-appointed arbitrators be acknowledged?); or the conclusion that suggests a way to improve the system of unilateral nominations which questions certain positions of many distinguished authors in the arbitration world (to reject the presumptions of a special role of party-appointed arbitrators and of certain acceptable unilateral communications between appointors and appointees); or the conclusion that suggests a possible way for some parties to improve the system that is unexplored in modern arbitration literature (party-appointed arbitrators with a two-tier role of party representatives for conciliation purposes and, if conciliation fails, impartial decision-makers).

1.2. RESEARCH QUESTIONS – WHAT IS IN AND OUT OF SCOPE OF THIS WORK

The basic research questions of this thesis are how the system of party-appointed arbitrators works and what could be an accurate diagnosis of the system. These basic questions unfold in many other sub-questions that, in my view, are appropriate to assess the system of unilateral appointments in arbitration. The principal questions are the following:

- How did we get here?
  - Were there party-appointed arbitrators in different historical periods and, if so, under what form of tribunal?
  - What was the system of decision-making in tribunals with party-appointed arbitrators?
- What was the role of party-appointed arbitrators?

- How is the right to make a unilateral nomination currently configured?

- What is the meaning and importance of this right?

- What is the scope and limits of this right?

- How do unilateral nominations coexist with the modern duty of all arbitrators to be impartial and independent?

- Do arbitral tribunals with party-appointed arbitrators pose theoretical problems of their own, which are not encountered in tribunals without party-appointed members?

- What are the problems of impartiality and independence of party-appointed arbitrators in practice and how are they compared to those of non-party-appointed arbitrators?

- Do arbitral tribunals with party-appointed arbitrators give rise in practice to more problems than those without party-appointed members?

- How should repeat appointments be dealt with?

- Does a different standard of impartiality and independence for party-appointed arbitrators make any sense?

- Are party-appointed arbitrators expected to do the same job as non-party-appointed arbitrators?

- Is it good for arbitration for a presumption to exist that party-appointed arbitrators can do things that the presiding arbitrator cannot, such as perform a special role with respect to the appointing party or engage in certain unilateral communications with the appointing party?

- Is it worth encouraging the parties to agree on a special role of party-appointed arbitrators in certain cases and, if so, what special role would that be?

- Is it worth keeping the system of 'impartial and independent party-appointed arbitrators' as the default method of constituting multiple-member tribunals in international arbitration?

- Should we get rid of the 'party-appointed'?
• Should we get rid of the ‘impartial and independent’?

- Is there room for improvement in the system of ‘impartial and independent party-appointed arbitrators’?

This thesis is therefore focused on the specific reality and the specific problems of arbitral tribunals with party-appointed arbitrators. It is not a thesis on arbitrators, nor does it address the issues that affect party-appointed and non-party-appointed arbitrators alike, except to the extent that may be necessary to address the question of whether party-appointed arbitrators, either at the theoretical level or for practical purposes, are or should be considered as a different species of arbitrators.

This study says in its title ‘international commercial arbitration’. By way of exception, the chapter concerning the historical background of unilateral nominations is not restricted to commercial arbitration but rather purports to cover all available international arbitration sources, including old sources relating to interstate arbitration and treaty-based arbitration. As to the remaining parts of the thesis, most of the considerations that this work contains can equally apply to other types of arbitration. Nevertheless, the restriction in the title is necessary because some of the problems that are addressed in this work, when assessed in other types of arbitration, need an additional analysis that has not been done here. This is the case, for instance, of certain problems of impartiality and independence in investment and sport arbitrations. The sporadic references that are made in this work to some rules and cases of the investment and sport arbitral systems do not justify removing the warning that this study is focused on commercial arbitration.

1.3. STRUCTURE AND METHODOLOGY

The study is divided into seven chapters. The first chapter is this Introduction, chapter two deals with History, chapters three to five contain a theoretical critical assessment of the system of unilateral nominations as it is today, chapter six contains a comparative empirical study of challenges of arbitrators taking into account the method of appointment of the arbitrator and chapter seven contains a summary of conclusions and some suggestions on how to improve the system of unilateral appointments.
Some of the findings of the comparative empirical study presented in chapter six have also been considered, where appropriate, in other chapters.

Below is a brief explanation of what is covered in each chapter and the methodology followed to make the assessment.

1.3.1. CHAPTER 2. HISTORY

The first chapter is devoted to the historical evolution of unilateral nominations. Its purpose is to ascertain where we come from, turning to look backwards as far as possible. Knowing where we come from should allow a better understanding of where we are today and, hopefully, should provide anyone interested in suggesting where we should be going in the future with a better basis to do so. In my case, I must say, reviewing the historical background of party-appointed arbitrators has been important in deciding what I do and do not suggest in other parts of this work.

The methodology I followed to address the historical part of this thesis was to outline certain basic questions and then look for the answers to those questions in each historical period considered, starting as far back in time as possible. These basic questions are three: (i) were there party-appointed arbitrators and, if so, under what form of tribunal?; (ii) what was the system of decision-making in tribunals with party-appointed arbitrators?; and (iii) what was the role of party-appointed arbitrators?

Four historical periods have been considered: (i) Ancient times, from the first available sources in the Eighth Century B.C. to the Sixth Century; (ii) Middle Ages, from the Twelve Century, to the Eighteenth Century; (iii) the Nineteenth Century; and (iv) the Twentieth Century. These periods are quite uneven in terms of length: fourteen centuries, seven centuries, one century and one century, respectively. Yet, they have been chosen for reasons of convenience, taking into account the primary and secondary sources that I found available for each of them (which are more numerous in nearer periods) and the interest in keeping the sections corresponding to the different periods similar in length.
The main difficulty that I encountered when drafting the historical part of this thesis was that the modern secondary sources that I found, no matter how good, were not enough to give complete answers to the basic questions that I sought to answer for each and every historical period. This was indeed my mistake, as I had wrongly taken for granted that modern secondary sources would suffice. I was then forced to search further back in time, in older secondary sources and primary sources, for all the historical periods considered. What I thought would be a three-month job ended up taking seven months, including some weeks at the Institute of Classical Studies in London searching and reviewing English translations of old Greek and Roman sources. Ever since I much more appreciate what historians do for the rest of us.

Chapter two has longer footnotes than other chapters. The main reason for this is the interest in making the historical exposition self-contained, enabling the reader to have direct knowledge of old secondary and primary sources that are not easily accessible.

1.3.2. CHAPTERS 3 TO 5. ASSESSMENT OF UNILATERAL APPOINTMENTS NOWADAYS

Chapters three to five address the question of how the system of unilateral nominations presently works. The methodology I followed for this assessment was basically the same in all three chapters. For each issue, I undertook a theoretical analysis of arbitration rules, laws, case law, other authors’ reflections and other available written materials in order to present the issue as clearly as possible and, where appropriate, to present my own views.

Chapter three is focused on the right of the parties to make unilateral appointments of arbitrators. It starts by noting the widespread recognition and use of this right in international arbitration, together with reflections on its importance. The scope and limits of this right are then addressed.

Within the analysis of the limits to the right of the parties to make unilateral appointments, certain particularly debatable issues are addressed, namely: (i) the advisability to restrict the unilateral choice of each party to a list of arbitrators drawn up by a third person; (ii) the possibility for the parties to discriminate arbitrators on
grounds that, outside arbitration, would not be acceptable; (iii) the meaning of the principle of equality of the parties in the constitution of the arbitral tribunal; (iv) the risks to this principle in certain situations (e.g. multiparty arbitrations, consolidation, joinder); and (v) the waivability of the requirement of impartiality and independence in party-appointed arbitrators.

1-28 The last section of chapter three is devoted to the question of whether it is worth keeping unilateral nominations by default in international arbitration.

1-29 Chapter four is entitled ‘The standard of impartiality and independence’. Section 4.1.1 reviews the virtually universal principle that all arbitrators, regardless of the method used for their appointment, must be impartial and independent.

1-30 Section 4.1.2 may appear out of place in this thesis. I mentioned earlier that this is not a general thesis on arbitrators nor does it address the issues that affect party-appointed and non-party-appointed arbitrators alike. However, this section is devoted to suggesting a notion of what is an impartial and independent arbitrator.

1-31 I had doubts as to whether I should include my reflections on what an impartial and independent arbitrator is in this thesis. Eventually, I decided to include them because, without them, it was more difficult for me to address the question (dealt with in chapter five, section 5.5) of whether a different standard of impartiality and independence in party-appointed arbitrators should be acknowledged.

1-32 The last section of chapter four is devoted to the question of whether it is worth requiring the standard of impartiality and independence from party-appointed arbitrators in international arbitration by default.

1-33 Chapter five is devoted to problems of bias in party-appointed arbitrators. How do unilateral nominations coexist with the duty of all arbitrators to be impartial and independent? Attention is paid to the specific problems of bias that unilateral nominations create.

1-34 Within the analysis of what specific problems of bias are caused by unilateral nominations, certain particularly debatable issues are addressed, namely: (i) the presumption of a special role of party-appointed arbitrators; (ii) the presumption of
certain acceptable unilateral communications between appointors and appointees; (iii) the factors that may be considered in order to decide whether the repeat appointments of the same arbitrator by the same party or counsel should lead the arbitrator to not hold office or to step down; (iv) the decision by the International Bar Association, in its Guidelines on Conflicts of Interest, to put quantitative limits on the repeat appointments that arbitrators should disclose; and (v) the acknowledgement of a different standard of impartiality and independence in party-appointed arbitrators.

1.3.3. CHAPTER 6. EMPIRICAL STUDY OF ICC CHALLENGES OF ARBITRATORS 1992-2009

Chapter six includes a comparative empirical study of challenges of arbitrators taking into account the method of appointment of the arbitrator. This study was carried out in 2010 and took around six months: one month and a half for the design, one month and a half for data collection at the International Court of Arbitration of the International Chamber of Commerce and three months for data processing and drafting.

This empirical study sought to answer two basic questions: what are the problems of impartiality and independence of party-appointed arbitrators in practice, and how are they compared to those of non-party-appointed arbitrators?

The study covers all the challenges of arbitrators filed in ICC arbitrations over eighteen years, from 1992 to 2009: 518 challenges. It takes a comparative approach taking into account the type of arbitrator. Party-nominated arbitrators, presiding arbitrators and sole arbitrators are compared.

For each challenge, five parameters were recorded: (i) who was challenged (claimant-nominated arbitrator, respondent-nominated arbitrator, presiding arbitrator, sole arbitrator or non-party-nominated co-arbitrator); (ii) who filed the challenge (claimant, respondent or both); (iii) what grounds were invoked by the challenging party (distinguishing twenty categories –ten main categories and, for each main category, whether a failure to disclose was invoked or not); (iv) the time of the
challenge (early or late in the procedure); and (v) the outcome of the challenge (distinguishing four categories).

1-39 Accordingly, data were recorded on an Excel worksheet with 34 columns × 518 rows. Additional worksheets were prepared comprising only data on party-appointed arbitrators (245 rows), presiding arbitrators (171 rows) and sole arbitrators (93 rows). Challenges of non-party-appointed co-arbitrators were not considered for the purposes of comparison, as there were very few (9) and, therefore, the comparative analysis could not offer any representative findings on them.

1-40 A comparative analysis was then performed taking into account the method of appointment of the challenged arbitrator.

1-41 The empirical study carried out for this research shows different symptoms for each type of arbitrator and may be useful as a basis for anyone to make his or her own diagnosis*. As far as I am concerned, and as said above with regard to the historical chapter, the empirical findings of this research have been important to decide what I suggest and do not suggest in other parts of this work.

1.3.4. CHAPTER 7. SUMMARY OF CONCLUSIONS AND SUGGESTIONS FOR THE FUTURE

1-42 Chapter seven summarises the conclusions on the questions that are set forth in paragraph 1-14 above.

1-43 It is difficult to provide a summary indication of the conclusions in this Introduction without being unnecessarily reiterative. Given that this thesis is an assessment of the system of party-appointed arbitrators in international commercial arbitration, where many different questions are addressed, some findings are that things work well while others are that things do not work so well. If the conclusions had to be summarised in just one idea, it could be said that the system of unilateral appointments works reasonably well but could be improved in some respects, namely in order to increase the trust of each party in the arbitrator appointed by the other

* This is the only occasion that I use the two-fold gender formula, for the sake of brevity. All generic references to the masculine (‘he’, ‘his’ or ‘him’) obviously include the masculine and feminine.
party and in order to allow an accurate match between what arbitration end-users may want from party-appointed arbitrators and what they ultimately get.
CHAPTER 2. HISTORICAL BACKGROUND

The presence of party-appointed arbitrators in arbitral tribunals has been a recurrent phenomenon throughout History. Many arbitrations of all kinds, involving either private parties or states, or both, have witnessed the common wish of the disputing parties to each have its own space of freedom to influence the composition of the arbitral tribunal by deciding, alone, the identity of part of its members. Such phenomenon, however, has undergone some changes over the time. For instance, arbitral tribunals solely composed of party-appointed arbitrators, close links between these and their respective appointing parties, or arbitral awards which could not be rendered without the agreement of each and every party-appointed arbitrator, are three arbitration features which have generally gone out of fashion. This chapter purports to add some light on the pervasive yet changing figure of the party-appointed arbitrator over the centuries, paying particular attention to international disputes.

Four historical periods have been considered: (i) Ancient times, from the first available sources in the Eighth Century B.C. to the Sixth Century; (ii) Middle Ages, from the Twelve Century, to the Eighteenth Century; (iii) the Nineteenth Century; and (iv) the Twentieth Century. These periods have been chosen for reasons of convenience, taking into account the available sources and the interest in keeping the sections corresponding to the different periods similar in length.

For each historical period considered, three main questions have been explored. Firstly, were there party-appointed arbitrators and, if so, under what form of tribunal? Secondly, what was the system of decision-making in tribunals with party-appointed arbitrators? And thirdly, what was the role of party-appointed arbitrators?

2.1. ANCIENT TIMES

Clear traces of arbitral tribunals with party-appointed arbitrators can be found in the ancient Greek world during the Fifth and Fourth Centuries B.C. Such traces have not
been noticed in earlier times, either in Greece or elsewhere. The most recent comprehensive study on the practice of arbitration between private parties in ancient Greece does not report any case involving party-appointed arbitrators during the Archaic period, in the Eighth, Seventh and Sixth centuries B.C.\(^1\) Outside Greece, we know that the practice of two parties choosing persons to resolve—or to try to resolve—a dispute dates much further back, at least to the Third Millennium B.C.\(^2\) However, prior to ancient Greece, no evidence has been found of disputing parties agreeing that each party would be free to choose some of the individuals called upon to decide the matter.

### 2.1.1. ANCIENT GREECE

#### A) Arbitration between private disputants

Party-appointed arbitrators in ancient Greece could form part of tribunals with an even or odd number of members. Examples of this are found in three speeches written by the Attic orators Lysias (459-380 B.C. approx.), Isaeus (420-343 B.C. approx.) and Demosthenes (384-322 B.C.) during the Classical and Hellenistic periods. These speeches make reference to arbitration cases which fall within what has been categorized by later authors as ‘private arbitration’\(^3\). In the first of such

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\(^2\) Sophie Lafont, “L’arbitrage en Mésopotamie”, Rev. Arb., 2000, No. 4, pp. 585-586. The author reports several cases, including one which is said to be the best available example of arbitration at that time. This case concerns a civil dispute between the owners of two adjacent properties and houses. It appears that the owner against whom the other owner had claims gathered the members of the neighbourhood who knew both owners, and that this body of neighbours, after examining the declarations of both parties, presented a solution in favour of the claiming owner and encouraged the other to accept it.

The question of whether it is better to characterize this example as arbitration, rather than as mediation or conciliation, may be debatable. Insofar as the solution found by the body of neighbours did not seem to constitute a decision that both parties had beforehand agreed to abide by, but rather a proposed settlement that each party seemed to be able to accept or reject, this case perhaps would be nearer of what is generally considered as a mediation.

\(^3\) Two forms of arbitration were used to settle disputes between individuals in ancient Greece: ‘private arbitration’ and ‘public arbitration’. Only the former allowed multiple-member arbitral tribunals and left the parties freedom to agree on the method of appointment of the arbitrators.

The system of arbitration in ancient Greece that has been categorised by later authors as ‘public arbitration’ or ‘official arbitration’ was created in Athens around 403 B.C. and later used in other parts of Greece as part of the public system of resolution of civil disputes, until about 322 B.C., when its use appears to have ceased. It was the mandatory procedure that the parties had to follow in matters involving more than ten drachmas before the case could be brought, in a second instance, to the
cases, Lysias does not indicate the number of members of the arbitral tribunal. It nevertheless appears that all of them were party-appointed arbitrators (‘my friends and yours’) and hence the number could probably be even, half of the arbitrators being chosen by each disputing party. The second case, referred to by Isaeus, involved an arbitral tribunal composed of four party-appointed arbitrators, two of them chosen by each party. It appears that the arbitral decision in these two cases had to be unanimous. In contrast, an odd-numbered tribunal which could reach a decision by a majority vote is mentioned by Demosthenes in the third case. This arbitral tribunal was composed of three members, one appointed by each party and the third by both parties jointly. Apart from these three examples, other speeches written by Attic orators make reference to cases where seemingly, although less clearly, party-appointed arbitrators could have been present as well.

ordinary judges or jurors. The arbitrator was a sole arbitrator not chosen by the parties, but by lots among citizens between their 59th and 60th anniversary, the one-year period immediately after their retirement from military service. The main ancient source on this type of arbitration is Aristotle’s Constitution of Athens, from about 330-320 B.C. For a monographic study on this subject in the Twentieth Century, Hansen Carmine Harrell, “Public arbitration in Athenian law”, University of Missouri, 1936.

4 “Against Archebiades”, fragment nº 5 in Lysias, The Oratory of Classical Greece, Vol. 2, translated by S. C. Todd, University of Texas Press, 2000, p. 362: “So I beg you not to regard my youth as a godsend, but instead gather together my friends and yours, and explain how the debt originated. If they decide you are telling the truth, you will have no need for a trial but can take what belongs to you and go”.

5 “On the Estate of Dicaeogenes”, in Isaeus, translated by Edward Seymour Forster, L.C.L., 1943, paras 31-32, p. 183: “Leochares and Dicaeogenes [the speaker’s opponents, the latter not being the ‘Dicaeogenes’ who appears in the title of the speech] asked us to postpone the action and submit the matter to arbitration. We, just as though we had suffered only slight injuries, agreed to this and submitted the matter to four arbitrators, two of whom were nominated by us and two by our opponents. In their presence we agreed to abide by their decision and swore an oath to this effect”.

6 “If they decide you are telling the truth, you will have no need for a trial but can take what belongs to you and go” (see footnote 4 above, emphasis added). “[W]e agreed to abide by their decision” (see footnote 5 above, emphasis added).

7 “Against Apaturius”, in Demosthenes, Vol. IV, Private Orations XXVII-XL, translated by A. T. Murray, L.C.L., 1984, speech nº 33, paras 14-15, pp. 211-212: “[T]hey proceeded to an arbitration, and after drawing up an agreement they submitted the matter to one common arbitrator, Phocritus, a fellow-country-man of theirs; and each one appointed one man to sit with Phocritus, Apaturius choosing Aristocles of Oea, and Parmeno choosing me. They agreed in the articles that, if we three were of one mind, our decision should be binding on them, but, if not, then they should be bound to abide by what the two should determine”.

8 For instance, the speeches “On behalf of Phormio” and “Against Neaera”, both by Demosthenes. The first shows an arbitral tribunal composed of four arbitrators, two of whom being relatives to the claimant, which suggests that they might have been chosen by him and that the other two arbitrators might have been chosen by the respondent. In “Against Neaera”, the reference is to a three-member
Close links between each party and the arbitrator appointed by such party appear to have been normal in the ancient Greek world. Some of the arbitration cases mentioned suggest that the selection of an arbitrator by one party could often be based on the existence of family or friendship relationships between the former and the latter. In turn, an arbitrator not chosen by one of the parties, but jointly by them, would be someone with a similar relationship, such as friendship, with all of the parties. The term which was usually used to make reference to an arbitrator who had not been appointed by either party, but jointly by both, was koinos, often translated as ‘common’ but sometimes also as ‘impartial’ or ‘the impartial one’.

Party-appointed arbitrators were expected to support their respective appointing parties while trying to mediate between them. However, they were later expected to give a decision based only on what they regarded as just, under oath, if mediation failed and they ultimately had to make an award. The attempt to mediate between arbitral tribunal where two of the arbitrators appear to be party-appointed arbitrators, although the method of appointment of each and every arbitrator is not clear.

Lysias’ “Against Arechibiades” refers to “friends” of each party (see footnote 4 above). Similarly, the speaker in Isaeus’ “On the Estate of Dicaeogenes” recalls, without showing any criticism or surprise, that one of the arbitrators nominated by his opponents was the brother-in-law of one of them (Isaeus, footnote 5 above, para 33, p. 183).

The non-party-appointed arbitrator is referred to as “one common arbitrator… a fellow-country-man of theirs” in Demosthenes’ “Against Apaturius” (Demosthenes, footnote 7 above).


Roebuck, footnote 1 above, p. 164: “Where each party has chosen its own arbitrator, the two of them may choose a third, less closely identified with either, or, better still as the Greeks seem to have viewed it, equally close to both. They will call him koinos, common”; p. 349: “Koinos then meant ‘friend not only of one side only but of both sides (perhaps equally)’”

Ibid., p. 179.

Isaeus’ “In the Estate of Dicaeogenes”, footnote 5 above, para 32, p. 183: “The arbitrators said, that if they could effect a compromise without putting themselves under an oath, they would do so; otherwise they would themselves also take an oath and declare what they regarded as just”.

Roebuck, footnote 1 above, p. 205: “Mediation was expected to come first. Private arbitration could be by a single arbitrator but it was more common for each side to appoint one, or sometimes two. These were considered to be ‘friends’ or ‘supporters’ of the parties appointing them, which was not inappropriate because their first responsibility was to help them reach a settlement. They might take an oath to do so. If mediation failed, they would usually go on to adjudicate, even if reluctantly, and would then take the oath appropriate for anyone sitting in judgment, as dikasts [ordinary judges or jurors] did”.

According to James Farley Cronin’s “The Athenian juror and his oath”, University of Chicago, 1936, p. 18, citing Frankel’s “Der Attische Heliasteneid”, the oath that dikasts had to take was as follows: “I
the parties, however, was not expected from party-appointed arbitrators only. The first and ever-present role of the arbitrators in ancient Greece, no matter how they were appointed and even if the arbitrator was just one, was to mediate between the parties and try to reconcile them, either by aiding the parties to reach an agreement themselves or by presenting them with a solution and inviting them to accept it\textsuperscript{14}. Only if the arbitrators failed in their attempt to persuade the parties to reach a settlement, did they move to undertake, when the parties had empowered them to do so, the further role of deciding the rights in the dispute, for which they were usually obliged to take an oath\textsuperscript{15}.

B) Interstate arbitration

Arbitration was also used by the Greek city-states (poleis) to settle their differences. There is evidence of over two hundred instances of arbitration and mediation (approximately half of each) from the Eighth Century to the First Century B.C., about sixty of them being dated before the Hellenistic period and the rest from 337 B.C. onwards\textsuperscript{16}. Most of the disputes concerned the delimitation of boundaries, although there were also controversies on other matters such as possession of land,

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shall vote according to the laws and the decrees of the Athenian people and the Council of the Five Hundred, but concerning things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity. I shall judge concerning those things which are at issue and shall listen impartially to both the accusation and the defense. I swear these things by Zeus, by Apollo, by Demeter. May there be many blessings on me if I keep my oath, but if I break it may there be destruction on me and my family”.

\textsuperscript{14} Roebuck, footnote 1 above, p. 351: “It was taken for granted in the ordinary run of private arbitration, apparently at all times and places, that the tribunal would first and indeed at all times try to mediate the parties to a settlement”. In the same sense but with regard to ‘public arbitration’, Harrell, footnote 3 above, p. 23: “The first duty of the arbitrator was to attempt to bring about a reconciliation between the parties”.

\textsuperscript{15} Roebuck, footnote 1 above, p. 76, footnote 63, making reference to Gerhard Thür, “Oaths and Dispute Settlement in Ancient Greek Law”, 1996: “Arbitrators and adjudicators of all kinds in all times in Greece seem to have taken an oath, particularly as they moved from mediation to adjudicating”.

debts and compensation due to a state for damages caused by another. The parties sometimes belonged to a same league or confederation of city-states, it being doubtful whether there was always voluntary acceptance of the arbitration in such case. There were also arbitration cases between poleis of different leagues, more genuinely international.

It was rare for the ancient Greek city-states to directly choose the identity of the members of a collegiate arbitral body, either by a joint decision or through the appointment of one or more arbitrators each. The disputing poleis sometimes referred the dispute for arbitration to an individual (e.g. a king or a high official) or to a pre-existing body (e.g. the council of a league or, in later times, the Roman senate). However, more frequently the parties appointed a third city-state, referred to as ‘the city that must judge’ or ‘the chosen city’, and entrusted it with the organisation of the arbitral tribunal. It was then for such city to choose, normally from amongst its own citizens, the individuals who would decide the matter. Out of all the cases mentioned in the previous paragraph, only one involving party-appointed arbitrators has been found. It concerned a dispute of boundaries between Stratos and Agrai, two communities of different leagues, the former belonging to the Aitolian league and the latter to the Akarnanian league. A treaty between these two leagues, dated around 263 B.C., provided for arbitration should Stratos and Agrai be unable to reach a settlement. The arbitral tribunal would be composed of twenty commissioners, ten from each league. The arbitration agreement further provided that the ten commissioners from each league would be appointed by all the cities of that league.

18 There appears to have been an obligation to resort to arbitration among the states belonging to a same league. Ræder, footnote 17 above, p. 233; Tod, footnote 17 above, p. 74.
19 Ræder, footnote 17 above, p. 253. Reference to ‘the chosen city’ is also made as ‘the arbitrating state’. Tod, footnote 17 above, p. 96; Ager, footnote 16, above, p. 9.
20 In some cases the ‘chosen city’ or ‘arbitrating state’ appointed an assembly with a large number of members, over the decene or even hundreds, chosen by lot. However, it was more frequent for it to appoint an arbitral commission of a few members (3, 5 or more), who were chosen for their qualities or skills. More rarely, the parties appointed more than one arbitrating state. Ræder, footnote 17 above, pp. 253-257; Tod, footnote 17 above, pp. 94-97.
except for the disputing one (Stratos and Agrai, respectively). With respect to decision-making, we do not know if a majority sufficed to render the award or if this could only be reached by unanimous vote.

2.1.2. ANCIENT ROME AND EARLY BYZANTIUM

In ancient Rome, where the appointment of a sole arbitrator was more common, the question of whether arbitral tribunals with party-appointed members existed appears to be, even nowadays, still unanswered. No trace of party-appointed arbitrators is found in the Twelve Tables, the oldest Roman legal text that has survived until the present day (dated about 450 B.C.). The Twelve Tables contain references to both a single arbiter and three arbiters, all of them appointed by a Roman official, the magistrate. Roman sources of later times contain references to collegiate arbitral bodies but do not give any conclusive proof of the presence of party-appointed arbitrators in multiple-member tribunals. Modern studies on Roman arbitration do not rule out the possibility that party-appointed arbitrators could have been involved in the practice of arbitration *ex compromisso*, but neither do they report any actual example of this possibility either in law or in practice. Under other forms of Roman arbitration such as arbitration by *bonus viri* and arbitration by *iudex arbitri*, it seems unlikely that party-appointed arbitrators – and indeed multiple-member tribunals – were present.

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21 Tod, footnote 17 above, p. 103; Ager, footnote 16 above, p. 107; Magnetto, footnote 16 above, pp. 171-172.


23 Arbitration *ex compromisso*, attested in sources since the Third Century B.C., was based on the *pactum compromissi*, which was the agreement between the parties to submit their dispute to the decision of one or more arbiters, and on the *receptum arbitri*, the agreement between the parties and the arbiter in which the latter accepted the office.


24 With respect to arbitration by *bonus viri*, Roebuck and de Loynes de Fumichon, footnote 22 above, p. 175. The authors note that all the reviewed evidence relates only to a sole arbiter. They deem it unlikely, albeit not impossible, that the parties would choose multiple arbiters under this form of arbitration.
In what could be a rare exception to the silence on party-appointed arbitrators in ancient Rome, one passage by the historian Livy seems to refer, almost by chance, to a case where the parties might each have had the possibility of choosing one of the arbitrators of a three-member arbitral tribunal\textsuperscript{25}. However, the question of whether the parties actually enjoyed such possibility is still in this case open to doubt\textsuperscript{26}.

In later Early Byzantine times, there is no mention of party-appointed arbitrators in the part of the Justinian’s Digest which is devoted to arbitration (Chapter 8 of Book Four), despite the Digest (dated about 533) being a compilation of several centuries of Roman law and, by far, the largest available primary source on Roman arbitration. We know that some of the excerpts included in the Digest make reference to the

\textsuperscript{25} In his History of Rome, Livy reports a dispute between two soldiers of the Roman army near the victory of Roman general Scipio over New Cartaghe in 146 B.C. “Livy with an English translation in fourteen volumes”, translated by Frank Gardner Moore, The Loeb Classical Library, 1963, vol. VII, pp. 183-185:

\[\text{[T]he special distinction of a mural crown belonged to the man who had been the first to climb the wall; let him who thought himself deserving of that gift declare himself. Two came forward as claimants, Quintus Trebellius, a centurion of the fourth legion, and Sextius Digitius, a marine. And these men themselves were not so much hotly competing with one another, as already fanning the partisanship of the men of their respective arms of the service. The marines were supported by Gaius Laelius, admiral of the fleet, the legionaries by Marcus Sempronius Tuditanus. When the strife was verging on mutiny, Scipio announced that he would name three arbitrers to hear the claims, and after taking testimony, to decide which of the two had been the first to climb over the wall into the town. Then in addition to Gaius Laelius and Marcus Sempronius, who represented this faction and that, he named Publius Cornelius Caudinus, a neutral, and ordered the three arbiters to sit down and hear the case. This was argued with all the more heat because the persons withdrawn, men of such high character, were restraining party feelings rather than representing their factions.}\]

\textsuperscript{26} Livy’s account of the facts mentions that the three arbitrators were named by the head of the Roman army, Scipio. This, which would initially exclude the presence of party-appointed arbitrators, further seems to be consistent with Livy’s use in the original text of the Latin term recuperatores to refer to the three arbitrators, as the recuperatores were members of certain tribunals that were not appointed by the parties, but by a Roman official (Roebuck and de Loynes de Fumichon, footnote 22 above, p. 31; for a monographic study on the recuperatores, Yvonne Bongert, “Recherches sur les Récupérateurs”, in Faia - Etudes de Droit Romain, Tome I, Recueil Sirey, Paris, 1952). However, the circumstances of the case suggest, although the evidence is insufficient to confirm, that Scipio’s decision to appoint Gaius Laelius and Marcus Sempronius as arbitrators may have been made following each party’s respective choice.
appointment of two or three arbiters. However, none of those passages makes reference to the appointment of any arbiter by one of the disputing parties.\(^{27}\)

2.2. MIDDLE AGES TO THE EIGHTEENTH CENTURY

The presence of party-appointed arbitrators was commonplace across Europe in the Middle Ages, both in arbitration between private parties and between public powers.

In arbitration between private parties, often related to real estate, commercial and family matters, the right for each party to appoint one or more members of the arbitral tribunal is well attested, for instance, in the Medieval territories of England, France, Italy and Switzerland. In England, it was common for each party to appoint an equal number of arbitrators and for arbitral tribunals to be composed of an odd or an even number of members, without either being the general preference. Collegiate arbitral bodies comprised of 2, 4 or 6 individuals were normal, although an additional arbitrator was usually called upon to intervene when necessary to break a deadlock in the decision-making process. The function of this additional arbitrator could be either to join the other arbitrators, making a majority possible, or to render a decision alone.

\(^{27}\) The passages of the Digest which refer to multiple-member arbitral tribunals are largely outnumbered by those referring to a sole arbiter. Some of these passages deal with potential problems that could arise in the decision-making process of each type of collegiate arbitral body. For instance:

- Digest 4.8.17.6-7, citing Ulpian: “6. Yet, in the first instance, let us take the question, if an arbitration has been referred to two persons, ought the praetor to compel them to make an award because, considering how prone by nature men are to disagree, the matter is never likely to come to an end? For where an arbitration is referred to an unequal number of persons, the reference is valid not because all will easily agree but because, although they disagree, a majority is found whose opinion will stand. But it is common for an arbitration also to be referred to two persons and the praetor ought to compel the arbitri, if they do not agree, to select a particular third person whose authority may be obeyed. 7. Celsus, in the second book of his Digest, writes that if an arbitration is referred to three persons, it is certainly sufficient that two agree […]”.

- Digest 4.8.27.3, citing Ulpian: “If there were several arbitri and they made different awards, these will not be allowed to stand. But, if the majority agree, their opinion will stand and, if it is not obeyed, the penalty is incurred. Hence, Julian raises the question: If one of the three arbitri condemns for fifteen, the second for ten, and the third for five, which opinion stands? And Julian writes that five ought to be paid because all have agreed on this amount”.

In another passage (Digest 4.8.8, citing Paul), the possibility for the parties to appoint two arbitrators and later resort to either of them to decide the matter alone is contemplated: “But if the reference was made upon terms, for example, that the opinion of either is valid, Titius [one of the arbitrators] may be compelled [to give an award]”.

as ‘umpire’\(^{28}\). In France, the appointment by each party of 1, 2, 3 or 4 arbitrators, along with the parties’ provision for a ‘tiers-arbitre’ to avoid an eventual impossibility of rendering an award, were common practices in Medieval Bourgogne and Champagne, where two-member arbitral tribunals were particularly frequent between the Twelfth and the Fifteenth Centuries\(^{29}\). During this same period, it appears to have also been very common in Venice for the parties to submit their disputes to two-member arbitral tribunals, the two arbitrators being empowered, should they be unable to reach a joint decision, to choose a third arbitrator with the specific function of overcoming the impasse\(^{30}\). Furthermore, arbitral panels composed of an equal number of arbitrators appointed by each party (e.g. 1, 4) and a ‘tiers-arbitre’ may be found during the Middle Ages in the territories of the present French-speaking Switzerland\(^{31}\).

With respect to arbitration between public powers (e.g. states in their earliest forms and princes), it was relatively common for the disputing parties to submit the dispute to a sole arbitrator, who used to be someone invested with some political or religious authority (e.g. a king or the Pope), or a reputed private individual or moral person. Nonetheless, the preference in practice over the Twelfth and Thirteenth Centuries was for ‘arbitral commissions’ and, more particularly, arbitral commissions with an even number of members (e.g. 2, 4, 6, 12, 24), half of them chosen by each party\(^{32}\). Sometimes the parties agreed on a system to overcome the impossibility for the arbitral commission to reach a unanimous decision. This system could consist of allowing the decision to be taken by a majority vote, appointing a ‘sur-arbitre’, or even drawing lots\(^{33}\). In other cases, however, no provision was made to avoid a


\(^{29}\) Yves Jeanclos, “La pratique de l’arbitrage du XIIe au XVe siècle: éléments d’analyse”, Rev. Arb., 1999, No. 3, pp. 443-444. Pursuant to an empirical study carried out by the author, he further remarks that 63.9% of the arbitration agreements in the Fourteenth Century provided for two-member tribunals.

\(^{30}\) Fabrizio Marrella, “L'arbitrage à Venise (XIIe-XVIe siècles)”, Rev. Arb., 2002, No. 2, p. 279. It is yet not made clear in this work whether each party, in the cases with a two-member arbitral tribunal, was usually allowed, or not, to appoint one arbitrator.


\(^{33}\) Ibid., p. 96.
deadlock and thus the dispute, according to the common wish of the parties, could remain unsettled 34.

The role of Medieval party-appointed arbitrators, both in arbitration between private parties and in arbitration between public powers, appears to have been ambivalent. Some cases show that the disputing parties expected the party-appointed arbitrators to act as representatives who would defend their respective claims 35. Other cases show a wish of the parties to have party-appointed arbitrators who would be deemed as impartial decision-makers by all the parties 36. The parties do not seem to have often separated both expectations. It has been noted that arbitral tribunals composed of party-appointed arbitrators sought conciliation and an amicable settlement before proceeding to judge 37. This suggests a two-fold role of party-appointed arbitrators which resembles the two-tier role of party-appointed arbitrators in ancient Greece, although without the neat separation that was made in ancient Greece between the time to conciliate and the time to adjudicate. Yet, similarly to ancient Greece, the two-fold ambivalent role of party-appointed arbitrators in the Middle Ages seems to

34 Ibid., p. 95: “On désirait, semble-t-il, atteindre une solution suffisamment équitable et acceptable pour les deux Gouvernements en présence, qui pût contenter une majorité indiscutable des membres de la commission nommés de part et d’autre: 2 (unanimité), 3 contre 1, 4 contre 2, etc. On ne cherchait donc pas à obtenir, coûte que coûte, une décision formelle quelconque, –qui serait très souvent, dans une commission de 3, 5 ou 7 membres, une décision personnelle du président,– mais on semblait rechercher avant tout une solution vraiment stable, un accord susceptible de servir de base à une réconciliation et à une pacification durable entre les deux parties en litige”.

35 Jeanclos, footnote 29 above, p. 442.

36 Marrella, footnote 30 above, p. 282: In an arbitration between two corporations, each party could appoint four arbitrators from the members of the other; Taube, footnote 32 above, p. 95: In an arbitration agreement in 1218 between Milan-Plaisance and Parme-Crémona, it was recommended that the members of the arbitral commission that whoever party could appoint should be citizens of the other party.

Similar provisions were sometimes imposed by law rather than by virtue of the arbitration agreement. See, e.g., Marrella, footnote 30 above, pp. 284-285: A law of 1555 provided that, in arbitration about family disputes (one of the obligatory forms of arbitration in Medieval Venice), each party had to present to the judge a list of fifteen candidates to exercise the office of arbitrator, then the judge could request that party to replace some of these candidates if he thought that they were unfit for the office and, ultimately, it was the other party who chose, out of the list of the former, two arbitrators.

be related to the broad powers that arbitrators in general were frequently given (as ‘peace-makers’ or *amicable compositeurs*)\(^{38}\).

In the Modern era, it appears to have been a normal practice in France for arbitral tribunals to be composed of two party-appointed arbitrators and for them to be expressly empowered in the arbitration agreement to jointly appoint an additional arbitrator (either a ‘tiers arbitre’ or a ‘surarbitre’) if they disagreed\(^{39}\). Arbitrators in general were appointed as arbitrators and *amicable compositeurs* as far as it could be useful\(^{40}\). Each party often expected that the arbitrator whom it appointed was going to defend its interests. The ambivalent role of party-appointed arbitrators was criticized by a French author of the Seventeenth Century\(^{41}\).

\(^{38}\) Medieval arbitrators in general were often given broad powers, broader than those of judges at that time and those of both judges and arbitrators nowadays. In the English case, the role of arbitrators, irrespective of the method of their appointment, could normally be seen as that of restoring peace between the parties as ‘peace-makers’ (Roebuck, “L’arbitrage en droit anglais avant 1558”, footnote 28 above, pp. 551-552). In the French, Italian and Swiss cases, it was common for the arbitrators to be appointed as ‘arbitres, arbitrators and *amicable compositeurs*’ (Jeanclous, footnote 29 above, p. 439; Marrella, footnote 30 above, p. 286; Poudret, footnote 31 above, p. 6). This also appears to have been the case in arbitration between public powers; Ralston, footnote 37 above, p. 179:

The later authorities declare that the arbitrators were called without distinction “arbitres,” “arbitrators,” and “*amicable compositeurs*,” no distinction being made between the terms, a difference later made by the French code being too subtle and too learned for the writers of the compromis of the Middle Ages.

Mérignhac agrees that before the Eighteenth Century it was often very difficult, sometimes impossible, to clearly separate cases of mediation and of arbitration, either because the terminology was not yet very well defined, or because the expressions employed were equivocal, or that the difference was not clearly in the thought of the negotiators.


\(^{40}\) Ibid., p. 199.


Comme il arrive souvent que dans les compromis chaque partie nomme son arbitre, et le considère moins comme son juge que comme son avocat, engagé à la défense de ses intérêts, que pour cette raison on nomme des furnumeraires, cette intention des parties n’empêche pas que ceux qu’elles nomment ne soient en effet arbitres, obligés à discerner les droits de part et d’autre et à former en conscience leurs sentiments sur les différends qui sont à juger; ainsi c’est un devoir pour eux de ne pas se considérer comme Arbitres pour une partie, obligez à juger plutôt en sa faveur qu’en faveur de l’autre, mais ils doivent se regarder comme médiateurs de la paix entre les parties; ce qui les oblige dans le choix des tempéraments à ne pas pencher par acceptation des personnes à diminuer plutôt des droits d’une des parties de ceux de l’autre; mais d’avoir les mêmes égards à toutes les deux, et ne pas distinguer le plus ou moins de retraitement sur les droits de l’une des deux que par les vues des différences de ces mêmes droits, comme le feraient ceux à qui les parties seraient inconnues, car cette acceptation de personnes serait une injustice, que la liberté des tempéraments permis aux Arbitres ne saurait excuser.
In England, the first legislation on arbitration—of 1698—did not expressly contemplate the presence of party-appointed arbitrators in arbitral tribunals, although it recognised that merchants and traders had the right to submit their disputes “to the award or umpirage of any person or persons”\textsuperscript{42}, the umpirage normally being the decision made by one individual, the umpire, when two party-appointed arbitrators did not agree.

Certain formulas outside the field of arbitration, albeit akin to it, are also worth noting. For instance, in the field of international trade, a treaty signed at Paris on 24 February 1606 by James I, of England, and Henry IV, of France, created international commercial tribunals composed of party-appointed members. The treaty provided for the establishment of two tribunals aimed at settling disputes arising out of the commerce between both countries. On the one hand, a four-member tribunal including “two noted French merchants in the city of Rouen, men of substance and experience”, appointed by the king of France, and two English merchants of like quality appointed by the British ambassador in France, would deal in Rouen with the complaints of English merchants. On the other hand, a four-member tribunal including two English merchants appointed by the king of Britain and two French merchants appointed by the French ambassador would deal in London with the complaints of French merchants. In case of disagreement, the four merchants at Rouen were to choose a fifth French merchant, while the four merchants at London were to choose a fifth English merchant. The judgment had to be passed, in both cases, by a “plurality of voices”\textsuperscript{43}. In another example, a similar provision for an international commercial tribunal with party-appointed members was included in a treaty between Spain and the Netherlands signed in Munster on 30 January 1648\textsuperscript{44}. This treaty included an arbitration agreement providing for an even-numbered tribunal of judges, half of them being appointed by each state. This tribunal was

\textsuperscript{42} 9 & 10 Will. III. c. 15.
\textsuperscript{43} John Bassett Moore, “History and digest of the international arbitrations to which the United States has been a party, together with appendices containing the treaties relating to such arbitrations, and historical and legal notes on other international arbitrations ancient and modern, and of the domestic commissions of the United States for the adjustment of international claims”, Government Printing Office, Washington, 1898 (six volumes), Vol. 5, p. 4832.
\textsuperscript{44} Ibid., p. 4832.
aimed at settling certain kinds of disputes which could arise in the commerce of goods. The wording of the arbitration agreement suggests that the arbitral decision had to be reached by unanimous vote\(^{45}\).

2.3. THE NINETEENTH CENTURY

A) Arbitration between private disputants

The typically Medieval composition of the arbitral tribunal whereby a non-party-appointed arbitrator was called to intervene only if a disagreement between the two party-appointed arbitrators arose is well attested during the Nineteenth Century in countries such as France\(^{46}\), England\(^{47}\) and Spain\(^{48}\). This comparative uniformity is yet more apparent than real, because the role of the non-party-appointed arbitrator could sometimes be considerably different from one country to another. For instance, while

\[^{45}\text{An old translation into French of this treaty (original in Latin) is available in Clive Parry, “The Consolidated Treaty Series”, Oceana Publications, Vol. 1, pp. 70-91. Article XXI (pp. 78-79) contains the above-mentioned arbitration agreement, which reads as follows (language updated):}\]

\[
\text{Seront commis de part et d’autre certains juges en nombre égal, en forme de chambre mi-partie, qui auront séance dans les provinces du Pays-Bas, et en tels lieux qu’il conviendra, et ce par tour, tantôt sous l’obéissance de l’un, tantôt de l’autre, selon qu’il sera convenu par consentement mutuel, lesquels juges commis de part et d’autre, conformément à la commission et instruction qui leur sera donnée, et sur laquelle ils feront serment selon certain formulaire qui de part et d’autre sera arrêté à ce sujet, auront égard aux négociations des habitants desdites provinces des Pays-Bas, et aux charges et impositions qui seront levées de l’un et de l’autre côté sur les marchandises; Et si lesdits juges comprennent que de l’un et de l’autre, ou bien des deux côtés y soit fait aucun excès, ils régleront et modéreront ledit excès. De plus lesdits juges examineront les questions touchant la défaillance d’exécution du traité, comme aussi les contraventions de celui-ci, qui en temps et lieu pourraient survenir tant dans les Pays de deça, comme aussi dans les royaumes lointains, pays, provinces et îles de l’Europe, et en disposeront sommairement et de plein, et décideront ce qu’ils trouveront convenir en conformité du traité; [...]}
\]

\[^{46}\text{French Code of Civil Procedure of 1806, arts. 1012, 1016, 1017 and 1018.}\]


\[^{48}\text{Act of 24 July 1830 about procedures for settlement of commercial disputes, art. 259. According to this provision, the arbitration agreement had to meet the requirement of expressly including, among other things, the indication of whether the arbitrators had been jointly appointed by the parties or each party had appointed one, as well as the appointment of a third arbitrator “for the case of disagreement” between the others, or alternatively the identity of the person who would be empowered to appoint that third.}\]
the French ‘tiers arbitre’ was bound to choose the opinion of one of the other arbitrators\(^{49}\), the English ‘umpire’ could decide on his own\(^{50}\).

2-21 Arbitral tribunals with two party-appointed arbitrators and one non-party-appointed arbitrator could follow a different scheme, whereby the three arbitrators sat and worked together as a collegiate body from the outset of the arbitration. The non-party-appointed arbitrator, this time often referred to as the ‘third arbitrator’ or ‘troisième arbitre’, had equal weight to the party-appointed arbitrators in the decision-making process, normally under the rule that an award could be made by unanimous decision or by a majority vote of any two of them, but not if each and every arbitrator disagreed with the others. In England, this scheme appears to have been a new trend during the Nineteenth Century\(^{51}\) and yet already common practice by then\(^{52}\).

A certain disparity amongst countries can be observed in the Nineteenth Century in regard to the system that the disputing parties could agree to apply when one of them failed to appoint an arbitrator. Several English legal sources of this period show that the parties who had agreed on the appointment of one arbitrator by each of them could also agree that if either of them, despite being requested to appoint the arbitrator, failed to do so, the other party would be entitled to make such appointment\(^{53}\) or, in other cases, to appoint the arbitrator initially chosen by it to act as sole arbitrator\(^{54}\). This does not appear to have been contemporary practice in

\(^{49}\) French Code of Civil Procedure of 1806, art. 1018, second para: “Si tous les arbitres ne se réunissent pas, le tiers arbitre prononcera seul; et néanmoins il sera tenu de se conformer a l'un des avis des autres arbitres”.

\(^{50}\) Russell, footnote 47 above, p. 214: “When two arbitrators are appointed, the submission often provides that in case of their not agreeing in an award, the matters shall be decided by a third person, who is styled an umpire”.

\(^{51}\) In Marsh, 1847, L. J., Q. B., vol. 16 (new series), p. 331, the system of two party-appointed arbitrators and a third arbitrator was expressly referred to as “a modern practice in references”, in contrast with the “old system” of submitting disputes to two arbitrators and an umpire.

\(^{52}\) Russell, footnote 47 above, p. 207: “[T]he submission frequently goes on to prescribe that the two arbitrators shall name a third, and that an award made by any two, if they cannot all agree, shall be sufficient”.


\(^{54}\) “An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the Constitution of Companies incorporated for carrying on undertakings of a public nature” (8 May 1845), 8&9 Vict. c. 16., sec. 128; “An Act for consolidating in one Act certain provisions usually
Continental Europe, where the appointment of one arbitrator in lieu of a defaulting party had traditionally been reserved for a judge. Moreover, the parties’ concern about a possible refusal to make an appointment by one of them was probably lower in Continental Europe inasmuch as the express mention of the names of the arbitrators in the arbitration agreement was required by law.

The assumption by party-appointed arbitrators of the role of supporters of their respective appointing parties appears to have been frequent as much as criticised in the Nineteenth Century. An English author contended in 1849 that it was in general much better for the parties to agree on a single arbitrator because of the troubling confusion of roles that the party-appointed arbitrators, on the one hand, and the non-party-appointed arbitrator, on the other, usually incurred in practice. As he put the problem, “notwithstanding the objectionable nature of such a course, the arbitrators named by the parties often seem to think that they are to represent their respective nominors, and act rather as advocates than judges, while the third arbitrator frequently supposes that he is an umpire, and that his active interference is not to commence until the others have differed finally.” The main case referred to by this author in support of his view, which ended with the arbitral award being set aside, contains strong criticism of the judiciary against such confusion. Besides, the

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55 See, e.g., French Act of 16-24 August 1790, art. 13, first sentence: “Chacune des parties nommera deux arbitres: et si l’une s’y refuse, l’autre pourra s’adresser au juge, qui, après avoir constaté le refus, nommera des arbitres d’office pour la partie refusante”.


57 Russell, footnote 47 above, p. 207.

58 Templeman & Reed, 1841, Dow., vol. 9, p. 966: “I am, therefore, upon the whole, brought to the conclusion that the objection is made out, and that the miscarriage arose from the arbitrators mistaking the duty they had to perform. Holt seems to have thought that his active interference was not to commence till Keyton and Buxton differed finally, and Keyton and Buxton that they were to represent their respective nominors, and act as advocates instead of judges. Courts of law will always construe awards, and hear motions respecting them with a desire to sustain the judgment of the tribunal which the parties have selected, and which in so many instances act most beneficially for them; but I must say that I the less regret the conclusion I am now brought to, because references of this kind, which are frequently resorted to, are, in my opinion, senseless and mischievous, founded on a totally wrong principle, expensive in their operation, and constantly ending in failure and disappointment”.
principle that party-appointed arbitrators were obliged to act as judges, not as agents or advocates of the appointing parties, was repeatedly stressed by state courts.\(^5^9\)

**B) Treaty-based arbitration**

At an interstate level, the end of the Eighteenth Century and the whole Nineteenth Century were particularly prolific in bilateral —and to a much lesser extent multilateral— treaties signed across the world with the aim of avoiding having to resort to arms or of strengthening commercial relations. Hundreds of these treaties, from the ‘Jay Treaty’ of 1794 between Great Britain and the United States until the end of the Nineteenth Century, contain an arbitration agreement.\(^6^0\) In many cases, the arbitrators were referred to by the term ‘commissioners’. Disputes were often related to boundaries and to commercial matters. In a good number of cases, the dispute had arisen between companies or private individuals from one contracting state and the other contracting state, for injuries or damages suffered by the former’s citizens or property.

Both the schemes of a multiple-member tribunal and a sole arbitrator are often found in interstate arbitration in this period. In the case of arbitral tribunals, it was most common for them to be composed of one arbitrator appointed by each party, or less

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\(^6^1\) See, e.g., the following treaties providing for one arbitrator appointed by each party and one non-party-appointed arbitrator (parties, year and a source): Great Britain-United States 1794 –art. V, boundary issue—, Moore, footnote 43 above, vol. 5, pp. 4720-4728; Spain-United States 1795, Moore, vol. 5, pp. 4796-4798; Colombia-Peru 1829, Manning, footnote 60 above, p. 8; Guatemala-Honduras 1845, Manning, pp. 26-27; Colombia-United States 1857, Manning, pp. 37-40; Paraguay-United States 1859, Manning, pp. 45-48; Costa Rica-United States 1860, Manning, pp. 50-54; Costa Rica-Nicaragua 1861, Manning, p. 55; Ecuador-United States 1862, Manning, pp. 57-59; United States-Venezuela 1866, Manning, pp. 68-71; Mexico-United States 1868, Manning, pp. 72-76; Peru-United States 1868, Manning, pp. 79-83; Colombia-Great Britain 1872, Moore, vol. 5, pp. 4697-4698; Great Britain-France 1873, Edward Hertslet, “A complete collection of the treaties and conventions, and reciprocal regulations at present subsisting between Great Britain and foreign powers”, Butterworths, London, 1820-1880, vol. 14 (1880), pp. 340-346; Colombia-United States 1874, Manning, pp. 101-102; France-United States 1880, Moore, vol. 5, pp. 4715-4718; Bolivia-Chile 1884, Manning, p. 137; Colombia-Ecuador 1884, Manning, pp. 140-144; Germany-Chile 1884, Parry, footnote 45 above, vol. 164, pp. 243-255; Guatemala-Mexico 1888, Manning, pp. 172-177; Chile-United States 1892, Manning, pp. 202-206; Argentina-Uruguay 1899, Manning, pp. 262-265.
frequently two\(^2\), together with an additional arbitrator appointed either by agreement of the parties or the party-appointed arbitrators, or by decision of a third person. In the vast majority of cases, the non-party-appointed arbitrator had to be appointed at the outset of the arbitration, after the appointment of the party-appointed arbitrators, but before they had commenced their duties. Arbitral tribunals composed of non-party-appointed arbitrators only were less common\(^3\).

The scheme of a three-member tribunal with two party-appointed arbitrators, so commonly provided for, as shown above, in the Nineteenth Century, was recommended by the *Institut de Droit International* in 1875 as the scheme to apply in interstate arbitration when the parties had not agreed otherwise\(^4\).

Treaties in the Nineteenth Century providing for an arbitral tribunal including party-appointed arbitrators and one non-party-appointed arbitrator were not uniform as to the system of decision-making. Many of these treaties, seemingly even most of them, empowered the non-party-appointed arbitrator, in the case of disagreement between the party-appointed arbitrators, to decide alone (as an umpire could do)\(^5\). However,

\(^2\) See, e.g., the following treaties providing for two arbitrators appointed by each party and one non-party-appointed arbitrator (parties, year and a source): Great Britain-United States 1794 –arts. VI and VII, losses and damages issues–, Moore, footnote 43 above, vol. 5, pp. 4720-4728; United States-Mexico 1839, Manning, footnote 60 above, pp. 13-17; Peru-United States 1863, Manning, pp. 62-65; Great Britain-Spain 1868, Hertslet, footnote 61 above, vol. 12 (1871), pp. 1204-1206; Chile-Peru 1868 –not a treaty, but an agreement between the Peruvian Government and a Chilean citizen–, Manning, pp. 78-79; Haiti-United States 1885, Manning, pp. 144-146.

As a particular case, France-Netherlands 1815, Moore, vol. 5, pp. 4866-4869: a seven-member arbitral commission with two commissioners appointed by each party and three non-party-appointed commissioners.

\(^3\) One example can be found in the Protocol for the arbitration of the Delagoa Bay Railway Claim, signed by Portugal, Great Britain and the United States on 13 June 1891. The parties asked the *Conseil Fédéral Suisse* to appoint “trois jurisconsultes, choisis parmi les plus distingués”, as members of the arbitral tribunal. Moore, footnote 43 above, vol. 5, pp. 4795-4796.

\(^4\) Provisional rules of procedure of international tribunals of arbitration, adopted by the Institute of International Law at its session at the Hague in 1875, art. 2, second para.

\(^5\) See, e.g., footnotes 61 and 62 above: Guatemala-Honduras 1845; Colombia-United States 1857; Costa Rica-United States 1860; Ecuador-United States 1862; United States-Venezuela 1866; Mexico-United States 1868; Peru-United States 1868; Colombia-Great Britain 1872; Great Britain-France 1873; Colombia-United States 1874; Colombia-Ecuador 1884; Guatemala-Mexico 1888; United States-Mexico 1839; Peru-United States 1863; Great Britain-Spain 1868; Chile-Peru 1868; Argentina-Uruguay 1899.
there were many other treaties which did not grant the non-party-appointed arbitrator such power and only allowed the award to be rendered unanimously or by a majority vote\textsuperscript{66}, in line with the decision-making process promoted by the \textit{Institut de Droit International} in 1875\textsuperscript{67}. In yet other cases, the treaty only appeared to allow a unanimous award\textsuperscript{68}.

Most of the arbitration agreements in the Nineteenth Century which provided for the right of each state to appoint one or more arbitrators show a wish of the parties to have impartial party-appointed arbitrators in the tribunal. Occasionally, this aim was sought by means of an express prohibition in the arbitration agreement of links of nationality or domicile between each party and its appointee, along with an express prohibition of any interest of the latter in the issues submitted to arbitration\textsuperscript{69}. Also occasionally, the arbitration agreement provided for a mechanism to let each party have some influence in the selection of arbitrators by the other party\textsuperscript{70}. By far, however, the most frequent way for the parties to provide that the party-appointed arbitrators should act impartially consisted of requiring them – as was the non-party-appointed arbitrator – to take an oath or make a solemn declaration including such duty\textsuperscript{71}. Sometimes the reference to the impartiality in the oath or declaration was

\textsuperscript{66} See, \textit{e.g.}, footnotes 61 and 62 above: Great Britain-United States 1794 – arts. VI and VII, losses and damages issues; Spain-United States 1795; Great Britain-United States 1871 – arts. I-XI, ‘Alabama claims’ – (there were three non-party-appointed arbitrators in this particular case); France-United States 1880; Germany-Chile 1884; Chile-United States 1892.

\textsuperscript{67} Provisional rules of procedure, footnote 64 above, art. 21.

\textsuperscript{68} See, \textit{e.g.}, footnote 61 above, Great Britain-United States 1794 – art. V, boundary issue.

\textsuperscript{69} See, \textit{e.g.}, footnote 61 above, Argentina-Uruguay 1899, art. IV: “No one of the arbiters shall be a citizen of the contracting states or domiciled in their territory. Neither shall have an interest in the questions submitted to arbitration”.

\textsuperscript{70} See, \textit{e.g.}, footnote 61 above, Guatemala-Honduras 1845, art. VIII: “[E]ach of the states shall propose three persons and of these the other shall select one”.

\textsuperscript{71} See, \textit{e.g.}, footnotes 61 and 62 above, the following treaties providing for an oath or a declaration which included an express reference to the duty of impartiality of the arbitrators: Great Britain-United States 1794 – art. V, boundary issue; Spain-United States 1795; Colombia-United States 1857; Paraguay-United States 1859; Costa Rica-United States 1860; Ecuador-United States 1862; United States-Venezuela 1866; Mexico-United States 1868; Peru-United States 1868; France-United States 1880; Colombia-Ecuador 1884; Chile-United States 1892; Great Britain-United States 1794 – arts. VI and VII, losses and damages issues; United States-Mexico 1839; Peru-United States 1863; Great Britain-Spain 1868; Great Britain-United States 1871 – arts. I-XI, ‘Alabama claims’; art. II (here the reference is not made in the context of an oath or a declaration).

In other cases, the impartiality was not expressly mentioned in the declaration but clearly implied in it. See, \textit{e.g.}, footnote 61 above, Guatemala-Mexico 1888, art. IV: “[B]efore entering on their duties they
followed by an explanatory statement that the arbitrator should act without fear, favor, leaning or affection towards his country. Cases where no oath or declaration from the arbitrators was required seem to have been less common.

The extent of the duty of impartiality on the party-appointed arbitrators, in a case where they had to make a declaration in this regard, was particularly addressed in one of the cases between Mexico and the United States (J.G.A. McKenny v. Mexico) that were settled under a Convention between both countries of 1868. This Convention provided for an arbitral body comprised of two commissioners, one appointed by each party, and a third person to act as an umpire when the first two differed in opinion. It also provided that the party-appointed commissioners “shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice, and equity, without fear, favor, or affection to their own country”, upon all the claims that were brought before them. The umpire, once later appointed, had to make a solemn declaration in a form similar to the one followed by the other two arbitrators.

In the particular case of J.G.A. McKenny v. Mexico, the claimant sought compensation for the destruction of property by allegedly Mexican authorities in 1859, while Mexico contended that it was not liable for such acts because the persons who had destroyed the property of Mr McKenny were not Mexican authorities but members of the revolutionary movement which, led by Félix Zuloaga, had raised against the constitutional authorities at the end of 1857. The commissioner appointed by the United States, Mr William Henry Wadsworth, while reasoning his view that there was no liability on the part of Mexico, rejected the argument made by the claimant that he, as the commissioner appointed by the United States, was bound by

shall make and sign a solemn declaration that they will carefully examine and decide according to their best judgment, and in accordance with public right, justice, and equity, and without fear, favor, or leaning towards their respective country, on all those claims (...).”

72 See, e.g., footnotes 61 and 62 above: Guatemala-Honduras 1845; Colombia-Great Britain 1872; Great Britain-France 1873; Colombia-United States 1874; Germany-Chile 1884; Argentina-Uruguay 1899; Haiti-United States 1885.

73 Convention for the arbitration of all pending claims of the citizens of either state against the government of the other, signed in Washington on 4 July 1868. The arbitration provisions of this Convention are available, for instance, at Manning, footnote 60 above, pp. 72-76.
the recognition of the Zuloaga government which had been made by a minister of the United States in January of 1858. According to Mr Wadsworth’s opinion, his authority derived from both the United States and Mexico, he was not more bound to represent the interests of one party than those of the other, and he was obliged to act impartially for the benefit of both countries.\footnote{“Répertoire de la jurisprudence arbitrale internationale - Repertory of International Arbitral Jurisprudence”, vol. I (1794-1918), Vincent Coussirat-Coustère and Pierre Michel Eisemann, Martinus Nijhoff Publishers, 1989, p. 395. Also in Moore, footnote 43 above, pp. 2883-2884:}

2.4. THE TWENTIETH CENTURY

The Twentieth Century, from its very outset, witnessed a boom of initiatives in the field of international arbitration, promoted by several organisations, with the common aim of achieving standards which may receive international acceptance.\footnote{The Institute of International Law (Institut de Droit International, established in 1873), the International Law Association (1873), the International Chamber of Commerce (1919), the International Institute for the Unification of Private Law –UNIDROIT– (1926), the American Arbitration Association (1926), the United Nations (1946), the Council of Europe (1949) and the United Nations Commission on International Trade Law –UNCITRAL– (1966), among others, may be mentioned in this regard.} Some of these initiatives ultimately gained great international support, while others did not. All of them, though, may offer insights to understanding the evolution of international arbitration and, more particularly, the presence of party-appointed arbitrators in arbitral tribunals.
The distinction between arbitration for private parties and arbitration for states loses a considerable part of its usefulness in this period. Perhaps with the only exception of the Permanent Court of Arbitration from its establishment to the year 1962, the main systems of arbitration which were internationally promoted in the Twentieth Century were open to both private parties and states, not surprisingly in light of the increasing encounter of public and private parties in international trade. Moreover, arbitration cases involving private parties and states, state entities or state-controlled corporations were quite common in the century, particularly in the second half. These cases took place under all-purpose institutional or ad hoc rules (e.g. ICC, UNCITRAL), under specific rules requiring at least one party to be a state (e.g. ICSID) or on a purely ad hoc basis. Because of this, the analysis of the Twentieth Century will here be divided into two categories: arbitration reserved for states, on the one hand, and international commercial arbitration, on the other.

2.4.1. ARBITRATION RESERVED FOR STATES

The Hague Conventions of 1899 and 1907 promoted the use of different methods to resolve international disputes between states: good offices and mediation, international commissions of inquiry and international arbitration. These methods involved the appointment of persons and the role of the appointees was clearly established in each case. While the role of the mediator consisted in trying to reconcile the parties only by the way of advice, and the role of the international

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76 The Permanent Court of Arbitration (PCA) was established by the Hague Conventions of 1899 and 1902. Its rules were reserved to state-to-state arbitration for over sixty years. In 1962 the PCA adopted a set of ‘Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is a State’, later superseded by other rules.


78 Conventions for the Pacific Settlement of International Disputes of 29 July 1899 and 18 October 1907, adopted at the first and the second Hague Peace Conferences, respectively.

79 Art. 4 Conv. 1899: “The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance”. Art. 6 Conv. 1899: “Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice, and never have binding force”.

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commissions of inquiry was to issue a report limited to a statement of facts, leaving
the parties free to determine the effects of the statement\(^{80}\), the role of the
international arbitrator was to settle disputes on the basis of respect for law\(^{81}\) and by
means of a binding arbitral award\(^{82}\). On these premises, which resemble the ones
applied by many arbitral commissions of the Nineteenth Century, the Permanent
Court of Arbitration (hereinafter, ‘PCA’) was established.

The Hague Convention of 1899 provided for the scheme of a five-member arbitral
tribunal with four party-appointed arbitrators\(^{83}\). In principle, all the arbitrators had to
be included in the PCA list of arbitrators, which mirrored its list of members\(^{84}\). A
member of the PCA had to meet the requirements of being “of known competency in
questions of international law, of the highest moral reputation, and disposed to accept
the duties of Arbitrator”\(^{85}\). Nevertheless, the Convention left the disputing parties
free to choose arbitrators from outside the PCA list of arbitrators\(^{86}\).

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\(^{80}\) Arts. 9 and 14 Conv. 1899.

\(^{81}\) Art. 15 Conv. 1899: “International arbitration has for its object the settlement of disputes between
States by judges of their own choice and on the basis of respect for law.” In equal terms, art. 37 Conv.
1907.

\(^{82}\) Arts. 18 and 56 Conv. 1899. According to the former: “The Arbitration Convention implies the
engagement to submit loyally to the Award”. In similar terms, replacing “loyally” with “in good faith”,
art. 37, second para, Conv. 1907.

\(^{83}\) Arts. 24 and 32 Conv. 1899.

\(^{84}\) Art. 24, first para, Conv. 1899. In similar terms, art. 45, first para, Conv. 1907.

Both conventions granted each signatory state the right to choose up to four persons to be inscribed as
members of the PCA (art. 23 Conv. 1899, art. 44 Conv. 1907). It has often been noted that, at the time
of its creation, the PCA was actually just that, a list of arbitrators corresponding to its list of members,
rather than a permanent arbitral institution.

\(^{85}\) Art. 23 Conv. 1899 and art. 44 Conv. 1907. Whether the requirements were met by a particular
person was left to the assesment of each state at the time of deciding its nominees for the list of
members of the PCA.

It has been observed that the purpose of the PCA list of arbitrators was to allow the expedite
constitution of tribunals by including candidates whose qualifications had been assured in advance to
meet the requirements set by the Conventions. Howard M. Holtzmann, “The Permanent Court of
Arbitration and the Evolution of a Worldwide Arbitration Culture”, in International Alternative
Dispute Resolution: Past, Present and Future - The Permanent Court of Arbitration, Centennial
Papers, International Bureau of the Permanent Court of Arbitration, Kluwer Law International, 2000,
pp. 101-102.

\(^{86}\) Arts. 21 and 32, first para, Conv. 1899. The former allowed the parties to agree to institute a special
tribunal. According to the latter: “The duties of arbitrator may be conferred on one arbitrator alone or
on several arbitrators selected by the parties as they please, or chosen by them from the Members of
The Hague Convention of 1907 basically maintained the above scheme (five arbitrators, four of them party-appointed and all from the PCA list of members), although restricting each party’s freedom to select two arbitrators by providing that only one of them could be either a national of the state or one of the members of the list who had been nominated by such state.\(^{87}\) Given that both Conventions provided that the award required at least a majority vote,\(^{88}\) this change opened the possibility for the award to be rendered by three arbitrators none of whom of the same nationality as any party or a member of the PCA due to nomination by any party.

The Hague Convention of 1907 also contemplated a summary procedure following a scheme of a three-member arbitral tribunal with two party-appointed arbitrators, the tribunal’s decisions requiring a majority vote.\(^{89}\)

By mid-century, a project to study the possible revision of the Hague Convention of 1907 was carried out under the auspices of the United Nations. The Special Reporter in this project proposed to adopt the scheme of a five-member arbitral tribunal, although not with four party-appointed arbitrators but only two.\(^{90}\) This change

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87 Art. 45, third para, Conv. 1907.

88 Arts. 51 and 52 Conv. 1899; art. 78 Conv. 1907.

89 Arts. 86 and 87 Conv. 1907.

towards the presence of a majority of non-party-appointed arbitrators in the tribunal was then said to be informed by experience for the purpose of greater objectivity within the arbitral tribunal. Nonetheless, this scheme of a five-member tribunal with two party-appointed members was then solely proposed as a fall-back solution, with the parties being able to agree otherwise. It appears that it was then sought to strike a balance between a wish not to limit the freedom of the parties to agree on the composition of the arbitral tribunal and a wish to recommend how such freedom could be better exercised.

The concern about the insufficient objectivity of party-appointed arbitrators was shared by other legal minds during the first half of the Twentieth Century. For instance, a North-American author commented in 1929, referring to interstate arbitration in general, that party-appointed arbitrators could often lack the necessary freedom to exercise a judicial function. He found two reasons for this: firstly, the likelihood for a party-appointed arbitrator to be “influenced by national prejudices and therefore disposed to give the benefit of any possible doubt to his own nation”; and secondly, the fear that such an arbitrator sometimes had of adverse consequences on his fortunes should he decide against the state which had appointed him.

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91 Ibid., para 22, p. 122: “bien que l'expérience soit en faveur d'un tribunal de cinq membres, plutôt que de trois, comportant une majorité de ressortissants de pays tiers fournissant toute garantie d'objectivité”.

92 Ibid., para 22, p. 121: “Ce n'est donc pas seulement le choix des arbitres qui est de la nature de l'arbitrage, mais la totale liberté du choix, et il ne saurait être question dans un projet de codification de limiter cette liberté quelle que puisse être l'opinion de la Commission sur les conditions qui qualifient les arbitres. Le projet ne saurait, au maximum, qu'indiquer des préférences pratiques, de même qu'en ce qui concerne la composition du tribunal”.

93 Ibid., para 34, p. 125. It was proposed to expressly include the following recommendation in the instrument of codification to be drafted: “Toutefois, d'une façon générale, et réserve faite des circonstances de l'affaire, il est recommandé par l'expérience: a) de choisir comme arbitres des personnalités répondant aux qualifications énumérées dans l'Article 2 du Statut de la CIJ; b) de choisir l'arbitre unique ou les arbitres en majorité dans les ressortissants d'Etats n'ayant aucun intérêt direct ou indirect dans le litige et de composer le tribunal d'un nombre impair de juges, cinq de préférence, et d'en confier la présidence à l'un des juges neutres”.

Article 2 of the Statute of the International Court of Justice requires the members of the Court to be “independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”.

94 Ralston, footnote 37 above, p. 29:

Some of the real weaknesses of boards of arbitration may be summed up as follows: The ordinary board consists of an equal number of representatives of the parties in controversy, with an odd man
Moreover, as this same author also recalls, a Belgian author noted in 1910 that there was a tendency of party-appointed arbitrators to decide in favor of the parties choosing them. In 1935, another North-American author expressed his view that the ‘umpire’ type of tribunal emphasized the national character of the party-appointed arbitrators, “often resulting in reducing them to the position of mere advocates for their governments”.

Aside from arbitration, the right of each party to choose one or more members of a tribunal was also present, albeit more limited, in the two main judicial systems for the resolution of disputes between states which were established in the first half of the Twentieth Century. These two systems were the Permanent Court of International Justice (PCIJ), created in 1922 under the auspices of the League of Nations, and the International Court of Justice (ICJ), created in 1946 under the auspices of the United Nations. Both systems granted the parties or some of them, in special circumstances, the power to appoint one of the judges of the court. This, it may be added, did not seem to please certain eminent persons at that time. For instance, the Scelle report of 1950 within the International Law Commission of the United Nations noted that: “Le juge Loder, premier des présidents de la CPJI [PCIJ], en inaugurant la première session de cette haute juridiction, pouvait déplorer ouvertement et courageusement cette concession faite à la faiblesse humaine”.

to settle the differences. Sometimes the odd man sits in the first instance with his associates in judgment and sometimes he settles their differences in appeal, his function in this respect being determined by the compromis creating the board. In either event under the circumstances named, the odd man is likely to become the sole ultimate judge, this because of the difficulty a national arbitrator has in doing anything which may be contrary to the assumed interest of his own nation. This difficulty arises from the fact that he is bound to be influenced by national prejudices and therefore disposed to give the benefit of any possible doubt to his own nation and because in some instances he fears the results upon his own fortunes if he goes contrary to the contentions of his own nation. Bearing in mind the personal effect of his decisions, he thus becomes really a party in interest. In no sense, at least not often, is he a free agent acting in a capacity enabling him to determine judicially the questions before him.

95 Ibid., p. 29, citing Ernest Nys.


97 Art. 31 of the Statute of the PCIJ and art. 31 of the Statute of the ICJ. The judges appointed by one party, in this context, are commonly referred to as ‘national judges’.

2.4.2. INTERNATIONAL COMMERCIAL ARBITRATION

Looking at the evolution of the figure of the party-appointed arbitrator in the Twentieth Century, it is probably a good start to point out that the New York Convention of 1958, often regarded as one of the two most important achievements of international arbitration in that century or even ever\(^99\), does not provide for any obligation to be met by the parties as to the number of arbitrators or the method of their appointment. Leaving a wide margin to the autonomy of the parties, the Convention did not adopt the requirement set by the Geneva Convention of 1927 for obtaining the recognition or enforcement of an award that the constitution of the arbitral tribunal had been in conformity with the law of the place of arbitration\(^100\). It has been suggested that, under the New York Convention, when there is an agreement between the parties on the composition of the arbitral tribunal, the law of the seat has not to be taken into account\(^101\).

Two salient trends affecting party-appointed arbitrators can be observed during the Twentieth Century. Firstly, the increasing international presence of the scheme of a three-member tribunal with two party-appointed arbitrators and a presiding non-party-appointed arbitrator, especially when the latter is empowered to render the award alone if no majority is reached. And secondly, the increasing international acceptance of expressly requiring all arbitrators to be ‘independent’ and ‘impartial’.

A) Three-member tribunals with two party-appointed arbitrators

The first Rules of Arbitration of the International Chamber of Commerce, approved in 1922, and of the London Court of Arbitration (LCA), approved in 1935, provided

\(^99\) The other being the UNCITRAL Arbitration Rules and Model Law of 1976 and 1985, respectively.

\(^100\) Convention for the Execution of Foreign Arbitral Awards signed at Geneva on 26 September 1927, art. 1, second para (c): “To obtain such recognition or enforcement, it shall, further, be necessary: [...] That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure”. See also Protocol on Arbitration Clauses signed at Geneva on 24 September 1923, prov. (2): “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place”.

for three possible schemes of arbitral body: a sole arbitrator, two arbitrators and an umpire, and three arbitrators\textsuperscript{102}. Both sets of rules also provided for the appointment of a sole arbitrator unless otherwise agreed by the parties. Also very early, since 1927 in the ICC case and since the first Rules of 1935 in the LCA case, was the arbitral institution empowered to opt for a multiple-member arbitral body when, despite the inexistence of an agreement between the parties on the number of arbitrators, it considered such scheme more appropriate than that of a sole arbitrator in the circumstances of a particular case\textsuperscript{103}.

When the arbitrators were more than one, the ICC Rules of 1922 did not yet contemplate the right of each party to appoint one arbitrator. Such right was firstly envisaged in the revised Rules of 1927 in order to meet the demand in certain countries for greater freedom of action by the parties. The then Secretary General explained it as follows:

Hitherto arbitrators were appointed only by the Court of Arbitration. In some countries a demand has arisen to allow for the parties greater freedom of action in regard to the Court, and to give them the right each to appoint an arbitrator should they so agree, the Court appointing an umpire. This will be allowed under the revised Rules. If the parties agree that the case be tried by three arbitrators \textit{one of whom is to be chosen by each party}, they will be allowed to do so and \textit{the Court will appoint an umpire}, to be nominated by the National Committee of a country other than those of the parties. [emphasis in the original]\textsuperscript{104}

The scheme of a three-member tribunal with two party-appointed arbitrators became increasingly popular in international commercial arbitration during the following decades. As early as 1950, the International Law Association approved a set of Rules

\textsuperscript{102} Rules of Procedure for Arbitration of the International Chamber of Commerce, officially approved by the Council of the ICC at its meeting of 10 July 1922, art. XII (section B), equal to art. XXXII (section C); London Court of Arbitration Rules of 1935, art. 11(a).

\textsuperscript{103} International Chamber of Commerce, “Arbitration - Revision of the Rules of Conciliation and Arbitration”, Brochure No. 50, 1927, p. 11, Arbitration Rules, art. 11.2, second para. The Court was enabled to depart from the scheme of a sole arbitrator if the importance of the case warranted it. In the case of the London Court of Arbitration Rules of 1935, art. 11(a) enabled the Court to such departure if it deemed it fit.

\textsuperscript{104} International Chamber of Commerce, Arbitration - Revision of the Rules, footnote 103 above, p. 4, Report of the Secretary General comparing the old and new Rules and describing the principal amendments, Section III.
on International Commercial Arbitration (‘Copenhagen Rules’) where this scheme was adopted when the parties had not agreed otherwise\textsuperscript{105}. The question of what composition the arbitral tribunal should have when the parties had not specifically agreed to one was discussed in the drafting process of these Rules. Some considered that there should be a sole arbitrator as it was the simplest solution, while others thought that the provision for a sole arbitrator “does not suit parties residing at a great distance from each other who will find some difficulty in selecting a sole arbitrator”\textsuperscript{106}.

The UNCITRAL Arbitration Rules, following the Copenhagen Rules and many other previous international examples\textsuperscript{107}, adopted the fall-back scheme of a three-member tribunal with two party-appointed arbitrators and one non-party-appointed arbitrator\textsuperscript{108}. The question of which fall-back scheme should be adopted was again discussed during the drafting process. On the one hand, it was then contended that when the parties had not agreed on the number of arbitrators, only one should be appointed as this would allow the arbitration proceedings to be rendered less

\begin{enumerate}
\item Arts. 2, 3 and 4 of the Rules on International Commercial Arbitration formulated by the International Law Association in 1950, in conjunction with art. 1, first para, of the same Rules. The full text of these Rules is available in English and French in the Report of the Forty-Fourth Conference of the International Law Association (Copenhagen 1950), Cambrian News (print.), 1952, pp. 271-276.
\item Aside from arbitration, the same fall-back scheme had already been proposed in some earlier works within the International Law Association. For instance, the French branch had presented in 1934 a proposal of a bilateral treaty for the constitution of a ‘Permanent Court for International Private Law’ to decide upon disputes of civil or commercial nature between private parties, states or both. This court would be a ‘mixed tribunal’ composed of three members, two of whom would be national judges appointed by the government of each contracting state and the third, of a different nationality, by common agreement. Report of the Thirty-Eighth Conference of the International Law Association (Budapest 1934), Eastern Press (print.), 1935, pp. 71-112.
\item Henri Cochaux (Belgian branch), rapporteur, at the session of the International Law Association of 1 September 1950, Report of the Forty-Fourth Conference, footnote 105 above, p. 256.
\item See, e.g.: Copenhagen Rules 1950, arts. 2, 3 and 4; Draft Uniform Law on Arbitration in Respect of International Relations of Private Law prepared by the International Institute for the Unification of Private Law (UNIDROIT) in 1954, art. 7; Draft Uniform Law on Inter-American Commercial Arbitration approved by the Inter-American Council of Jurists in 1956, art. 7; Draft Uniform Law on Arbitration in Respect of International Relations of Private Law prepared by UNIDROIT and amended by the Legal Committee of the Consultative Assembly of the Council of Europe in 1957, art. 7; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed in Washington in 1965 (ICSID Convention), art. 37.2.b; European Convention Providing a Uniform Law on Arbitration of 1966, arts. 5.3 and 6; Arbitration Rules of the United Nations Economic Commission for Europe (ECE) of 1966, art. 4, third para.
\item UNCITRAL Arbitration Rules (1976), arts. 5 and 7 –arts. 7.1 and 9.1 of the UNCITRAL Arbitration Rules as revised in 2010.
\end{enumerate}
expensive. On the other hand, in support of a three-member tribunal, it was said that “it was the commonly accepted practice in international commercial arbitration” and that, in arbitrations with a substantial amount in dispute, “the presence of three arbitrators was necessary to ensure that the tribunal possessed a sufficient degree of competence and expertise”. Furthermore, in favour of the particular scheme of a three-member tribunal including two party-appointed arbitrators, it was suggested that each of the party-appointed arbitrators, “who was usually of the same nationality as the party nominating him, brought to the tribunal a special knowledge of the commercial law and practice of the country to which the party who nominated him belonged”, this being “of great benefit to the presiding arbitrator”.\textsuperscript{109}

The UNCITRAL’s preference in 1976 for the fall-back scheme of a three-member tribunal with two party-appointed arbitrators, also present in the UNCITRAL Model Law of 1985, has not gained full acceptance across the world. The UNCITRAL solution has been followed by some national legislations (e.g. Germany, Sweden, Japan and Peru\textsuperscript{110}) and a few arbitral institutions (e.g. PCA\textsuperscript{111}). However, most of the leading arbitration rules have opted for the fall-back scheme of a sole arbitrator, notwithstanding the power of the institution to choose the three-arbitrator scheme in the light of the circumstances, on a case-by-case basis (e.g. ICC, LCIA, AAA and Swiss Rules\textsuperscript{112}). Furthermore, a good number of arbitration laws which were passed after 1985, some of them being UNCITRAL-based legislations, opted for the fall-back scheme of a sole arbitrator (e.g. England, India, Singapore and Spain\textsuperscript{113}). Other national legislations on arbitration which were passed after 1985 left the decision as

\begin{itemize}
  \item \textsuperscript{110} German Code of Civil Procedure (as amended in 1997), secs. 1034.1 and 1035.3; Swedish Arbitration Act (1999), sec. 13; Japanese Arbitration Law (2003), arts. 16.2 and 17.2; Peruvian Arbitration Act (2008), arts. 19 and 23.b.
  \item \textsuperscript{111} Arts. 5 and 7.1 of the following sets of rules: 1992 PCA Optional Rules for Arbitrating Disputes Between Two States; 1993 PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State (these Rules superseded the ones of 1962 cited in footnote 76 above); 1996 PCA Optional Rules for Arbitration Involving International Organizations and States; and 1996 PCA Optional Rules for Arbitration between International Organizations and Private Parties.
  \item \textsuperscript{112} ICC Arbitration Rules (2012), art. 12.2; LCIA Arbitration Rules (1998), art. 5.4; AAA International Arbitration Rules (2009), art. 5; Swiss Rules of International Arbitration (2012), art. 6.2.
  \item \textsuperscript{113} English Arbitration Act (1996), sec. 15.3; Indian Arbitration and Conciliation Act (1996), sec. 10.2; Singapore International Arbitration Act (2002), sec. 9; Spanish Arbitration Act (2002), art. 12.
\end{itemize}
to the number of arbitrators and their appointment, when the parties had not agreed on these issues, to the national court (e.g. The Netherlands, Switzerland and France\textsuperscript{114}).

Something similar has happened with the UNCITRAL’s preference for the need of a majority to render the arbitral award\textsuperscript{115}. Following UNCITRAL and other previous examples in the international field\textsuperscript{116}, some national laws (e.g. The Netherlands, India, Germany, Singapore and Japan\textsuperscript{117}) and arbitration rules (e.g. PCA, AAA\textsuperscript{118}) state that the award must be made by a majority of the arbitrators unless otherwise agreed by the parties. However, other national laws (e.g. Switzerland, England, Sweden, Spain and Peru\textsuperscript{119}) and arbitration rules (e.g. ICC, LCIA and Swiss Rules\textsuperscript{120}), in line with other previous examples of the Twentieth Century\textsuperscript{121}, have preferred the option of empowering the presiding arbitrator to render the award alone if a majority is not attained.

\textsuperscript{114} Netherlands Arbitration Act, art. 1026.2; Swiss Federal Private International Law Act (1987), art. 179; French Code of Civil Procedure (as revised in 2011), arts. 1452.2 and 1506.

\textsuperscript{115} UNCITRAL Arbitration Rules (1976), art. 31.1; UNCITRAL Model Law (1985), art. 29.

During the preparation of the UNCITRAL Arbitration Rules, there was general agreement that the provision requiring a majority was acceptable. Report of the UNCITRAL on the work of its Eighth Session (Geneva, 1-17 April 1975), document A/10017. UNCITRAL Yearbook, 1975, vol. VI, annex I (summary of the deliberations), para 176.

\textsuperscript{116} See, e.g.: Copenhagen Rules of 1950, art. 14; Draft Uniform Law on Inter-American Commercial Arbitration of 1956, approved by the Inter-American Council of Jurists, art. 17; ICSID Convention of 1965, art. 48.1; European Convention Providing a Uniform Law on Arbitration of 1966, art. 22.

\textsuperscript{117} Netherlands Arbitration Act (1986), art. 1057.1; Indian Arbitration and Conciliation Act (1996), art. 29.1; German Code of Civil Procedure (1997), sec. 1052.1; Singapore International Arbitration Act (2002), sec. 3.1; Japanese Arbitration Law (2003), art. 37.2.

\textsuperscript{118} PCA rules in footnote 111 above, art. 31.1; AAA International Arbitration Rules (2009), art. 26.1.

\textsuperscript{119} Swiss Federal Private International Law Act (1987), art. 189.2; English Arbitration Act (1996), sec. 20.4; Swedish Arbitration Act (1999), sec. 30, second para; Spanish Arbitration Act (2003), art. 35.1; Peruvian Arbitration Act (2008), art. 52.1.


The prevalence of this option at the ICC appears to have its roots in one of the provisions that its Court of Arbitration approved when it amended its Rules of Conciliation and Arbitration in 1927. Such provision was curiously motivated by the presence of party-appointed arbitrators in arbitral tribunals and was based on the power of the umpire to render the award alone. The ICC Rules of 1922, which did not yet contemplate—as discussed above—the parties’ right to agree that each of them would appoint one arbitrator, provided for two alternative systems of decision-making in the case of multiple-member tribunals. On the one hand, if the tribunal was comprised of two arbitrators and an umpire, the latter was empowered to render the award alone. On the other hand, if the tribunal consisted of three arbitrators, the decision of the majority would be binding and, should a majority not be reached, the Court would appoint three new arbitrators to hear and decide the case afresh. When the ICC Rules of 1927 introduced the possible appointment of one arbitrator by each party, the two above-mentioned systems of decision-making were kept in the Rules basically in the same way. However, it was only the first of those systems (the non-party-appointed arbitrator being an umpire) which was allowed when there were party-appointed arbitrators in the tribunal. These Rules further provided that the umpire was not bound to adopt the opinion of either of the other arbitrators.

122 ICC Rules of 1922, footnote 102 above, art. XIV (section B), equal to art. XXXV (section C).
123 The decision-making process under the scheme of two arbitrators and an umpire remained the same. However, when the reference was to three arbitrators, the consequence of not reaching a majority did change. Even though the ICC Rules of 1927 still required a majority to render the award (footnote 103 above, art. 20), they no longer provided that, should a majority not be reached, the Court would appoint three new arbitrators to hear and decide the case afresh. The dispute could ultimately remain unsettled.
124 See footnote 104 above and the related quotation in the main text. See also ICC Rules 0f 1927, footnote 103 above, p. 11, Arbitration Rules, art. 11.2, second para.
125 This provision, perhaps superfluous at first sight, was not present in the ICC Rules of 1922. It could be due to the fact that the French version of the 1922 ICC Rules used the words ‘tiers arbitre’ when the English version said ‘umpire’ (footnote 102 above, art. XIV.a of section B and art. XXXV.a of section C), despite the historical difference between these two figures (see footnotes 49 and 50 above). ‘Umpire’ may be better translated into French as ‘surarbitre’.

Some efforts to clarify the right nomenclature of the non-party-appointed arbitrator in each case have been made in the past. For instance:

- “Arbitrage International Commercial - International Commercial Arbitration”, Pieter Sanders (Rapporteur General), Union International des Avocats, Dalloz et Sirey, 1962, p. 17:

The arbitrator who will join the two already appointed may have the capacity of a „tiers arbitre”, who must concur with the views of one of the two original arbitrators. It may also be that he is
When the ‘umpire’ disappeared from the ICC Rules in 1955\textsuperscript{126}, it did not do so completely. The ICC Rules of 1955 provided that the reference could be to a sole arbitrator or to a three-member tribunal, the latter composed of two party-appointed arbitrators and a third arbitrator unless otherwise agreed by the parties\textsuperscript{127}. All references to an ‘umpire’ were then omitted. However, one of the essential powers of the umpire was granted at the same time, and for the first time in the ICC Rules, to the third arbitrator. Article 7.2 of the Rules provided that the third arbitrator would be the chairman of the arbitral tribunal, whereas article 24 empowered the chairman to make the award alone if a majority was not reached. Ever since, this special power of the third arbitrator has remained in the ICC Rules.

In contrast to the fall-back composition of the arbitral tribunal and the fall-back system of decision-making, high international uniformity can be found in the Twentieth Century as to the question of what consequence the refusal of one of the parties to appoint an arbitrator should have if the parties do not agree anything in this regard. In practically all international instances throughout the century, including for

\begin{quote}
\textsuperscript{126} The distinction between a three-member tribunal composed of two arbitrators and an umpire, on the one hand, and a three-member tribunal composed of three arbitrators, on the other, remained in the ICC Rules of 1931, 1933, 1939 and 1947. See ICC Rules of 1927 (footnote 103 above) in conjunction with the following amendments to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (year and source): 1931, Brochure No. 77, pp. 28-30; 1933, Brochure No. 83, pp. 23-24; 1939, Brochure No. 100, pp. 13-15; 1947, Brochure No. 117, pp. 73-77.
\end{quote}

\begin{quote}
\textsuperscript{127} Since 1947, the ICC Rules provide that if the parties have agreed on three arbitrators but not on the method for their appointment, each party would appoint one arbitrator.
\end{quote}
example the 1931 ICC Rules, the 1950 Copenhagen Rules, the 1954 and 1957 UNIDROIT drafts of a uniform law on arbitration, the 1965 ICSID Convention, the 1966 ECE Rules, the 1976 UNCITRAL Rules, the 1985 UNCITRAL Model Law and the 1985 LCIA Rules, together with the vast majority of national legislations, the answer has been to empower a third person to appoint the arbitrator in lieu of the defaulting party\textsuperscript{128}. The most remarkable exception is found in a few national laws on arbitration which, often following long-standing tradition, still allow the arbitrator appointed by the other party upon request of the latter, unless otherwise agreed by the parties, to become a sole arbitrator\textsuperscript{129}.

Probably the most outstanding milestone since the UNCITRAL Model Law to date, as far as the composition of arbitral tribunals including party-appointed arbitrators is concerned, is the French Supreme Court decision of 1992 in the \textit{Dutco} case. This decision led many arbitration rules and national arbitration laws to provide for a possible exclusion of the right of the parties to each appoint one arbitrator in multiparty cases\textsuperscript{130}.

\textbf{B) Express requirement for all arbitrators to be impartial and independent}

During the first half of the Twentieth Century, no express requirement for the ‘independence’ or ‘impartiality’ of arbitrators could normally be found in international instruments on arbitration, arbitration rules or national laws. The need for an arbitrator to have such qualities, insofar as it may logically amount to the need for him to be willing and able to decide the case without favouritism towards any party\textsuperscript{131}, was probably deemed to be obvious and hence not needing to be explicitly

\textsuperscript{128} See, \textit{e.g.}: “Amendments of the Rules of Conciliation and Arbitration of the International Chamber of Commerce”, 1931, Brochure No. 77, p. 28; Copenhagen Rules 1950, art. 6, second para; Draft Uniform Law on Arbitration in Respect of International Relations of Private Law prepared by the International Institute for the Unification of Private Law (UNIDROIT) in 1954, art. 9; Draft Uniform Law on Arbitration in Respect of International Relations of Private Law prepared by UNIDROIT and amended by the Legal Committee of the Consultative Assembly of the Council of Europe in 1957, art. 9; 1965 ICSID Convention, art. 38; Arbitration Rules of the United Nations Economic Commission for Europe (ECE) of 1966, art. 4, fourth para; UNCITRAL Arbitration Rules of 1976, art. 7.2; UNCITRAL Model Law of 1985, art. 11.3(a); 1985 LCIA Rules, art. 3(4).

\textsuperscript{129} See, \textit{e.g.}, English Arbitration Act (1996), sec. 17, and footnote 54 above.

\textsuperscript{130} Siemens AG and BKMI Industrienlagen \textit{GmbH} v. \textit{Dutco Construction Co.}, Cass., ruling of 7 January 1992. This case is further addressed in chapter 3, section 3.2.2.B.2.

\textsuperscript{131} On the notion of impartiality and independence nowadays, see chapter 4, section 4.1.2.
provided for as far as non-party-appointed arbitrators are concerned. In respect of party-appointed arbitrators, however, the situation seemed to be different. Probably the need for them to have such qualities was also obvious for many legal minds. National legislators around mid-century, for instance, usually provided that arbitrators could be challenged for the same reasons as judges\textsuperscript{132}. However, and perhaps paradoxically, some of the same legal minds preferred not to require the ‘impartiality’ or ‘independence’ from party-appointed arbitrators for the sake of consistency with what they often saw in practice. The UNIDROIT draft of a uniform law on arbitration of 1954, for example, allowed the challenge of an arbitrator “if any circumstances exist capable of casting doubt on his impartiality or independence”, but it excluded this ground of challenge in the case of party-appointed arbitrators\textsuperscript{133}. The reason then given for this exclusion was that party-appointed arbitrators should not be open to being challenged for lack of impartiality or independence when the practice, deemed unsatisfactory by the UNIDROIT’s drafters, often showed that they had no such qualities\textsuperscript{134}. It appears that the absence of an express requirement for the arbitrators’ qualities of ‘independence’ and ‘impartiality’ could in the past have served the dual purpose of avoiding the superfluous (in the case of the presiding arbitrator) and also avoid making the theory irreconcilable with a significant part of the practice (in the case of party-appointed arbitrators).


\textsuperscript{134} Ibid., Explanatory Report, p. 43:

The draft does not admit this cause for challenge in respect of all the arbitrators. The only arbitrator who may be so challenged is the arbitrator designated by agreement between the parties, by the court, by the other arbitrators, or by a third person.

On the other hand, the arbitrator nominated by one of the parties may not be challenged because of some doubt with regard to his impartiality, except in the case where such arbitrator has become the president of the arbitral tribunal. The distinction thus admitted in the draft constitutes in theory a big change having regard to certain existing legal systems; but it did not seem desirable to the members of the Committee to confine themselves to a theoretical point of view and it was not possible to ignore the unsatisfactory practice, according to which arbitrators nominated by the parties too often tend to conduct themselves as advocates for the parties which have nominated them, the only really judicial function being then, in truth, reserved for the third arbitrator.
Be that as it may, the following steps in the field of international arbitration towards the express requirement for the ‘independence’ and ‘impartiality’ of arbitrators, from the late 1950s to the 1970s, almost unanimously abandoned the idea of making any distinction between party-appointed and non-party-appointed arbitrators. The isolated position of UNIDROIT in 1954 was indeed reversed by the same institution a few years later. Similarly to the common practice in state-to-state arbitration during the Nineteenth Century of expressly requiring all arbitrators to act impartially, the UNIDROIT draft of a uniform law on arbitration of 1957, which was prepared with the participation of the Council of Europe, allowed the challenge of any arbitrator for lack of impartiality or independence. The rule was added that, unless otherwise agreed by the parties, one of them could challenge the arbitrator appointed by it only for a cause that had arisen after the appointment, or for a cause of which such party could prove it was not aware until after the appointment. Nearly ten years later, new provisions allowing the parties to question the impartiality and independence of an arbitrator by means of a challenge, irrespective of the method of appointment of the arbitrator, were adopted by the ECE Rules and the ECAFE Rules of 1966, both of which added that the doubts as to the impartiality or independence of the arbitrator had to be “justifiable”. And this same approach, with slight change in the wording, was the one adopted a decade later by UNCITRAL.

In the drafting process of article 10.1 of the UNCITRAL Arbitration Rules, which provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, the question of whether or not the requirement of impartiality and independence should apply to party-appointed arbitrators was raised again. In favour of an affirmative answer, it was said that the institution of arbitration would gain greater respect if the arbitrators acted with independence and impartiality; that the provision was in accord with the arbitration law of many countries, it would be widely acceptable and would not


conflict with the applicable law governing the arbitration; and that the parties, in any case, were free to waive this requirement by agreement. On the other hand, it was stated that “it was impractical and unrealistic to impose such an obligation on a party-appointed arbitrator”, one reason being that such an arbitrator “would often depend for his fees on the party who appointed him”. Within this discussion, it was suggested that the possibility of a challenge on these grounds should be restricted to the challenge of a presiding arbitrator; and also that the grounds for challenging party-appointed arbitrators, rather than being any circumstances that gave rise to justifiable doubts as to their impartiality or independence, should be restricted to any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party’s counsel or agent.\textsuperscript{138}

The ICSID Convention of 1965 approached the task of putting into words the idea of the independence of the arbitrators in a different way. It provided that arbitrators had to be persons “of high moral character (...) who may be relied upon to exercise independent judgment”. These requirements applied to all arbitrators, without any distinction as to the method of their appointment, and regardless of whether they belonged to the panel of arbitrators of the institution\textsuperscript{139} or were chosen from outside that panel\textsuperscript{140}.

In the case of the ICC Rules, the express requirement for the arbitrators to be independent appeared for the first time in 1975 and only in relation to the party-


\textsuperscript{139} The International Centre for Settlement of Investment Disputes (ICSID) was entrusted by the Convention with the task, amongst others, of maintaining two lists or panels: one of conciliators and one of arbitrators. Each contracting state was entitled to designate up to four persons to each of these two panels, who could be but needed not be its nationals. In addition, the Chairman of the ICSID could designate up to ten persons to each panel, each of a different nationality and “pay[ing] due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity” (arts. 3, 13 and 14.2).

According to art. 14.1 of the ICSID Convention: “Persons designated to serve on the Panels [the Panel of Conciliators and the Panel of Arbitrators] shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators”.

\textsuperscript{140} ICSID Convention, art. 40.2.
appointed arbitrators. Such requirement, as observed by the Honorary Secretary General of the ICC’s Court of Arbitration at the time, constituted the main limitation that the ICC Rules imposed on the freedom of the parties to select the arbitrators as they wished. Another author, commenting on these Rules and other contemporary authors, then noted that the requirement for the independence of party-appointed arbitrators, despite not always being the practice, would contribute to the good administration of justice in arbitration.

Nowadays, the express requirement of independence and impartiality of all the arbitrators, irrespective of how they are appointed, is present in the vast majority of national legislations and arbitration rules. It was suggested in the 1960s, speaking of arbitrators in general, that the Twentieth Century was a period when personal trust and links between parties and arbitrators ceased to be the key factor in the appointment of the latter by reason of the new trust placed by parties in arbitral

141 Art. 2.4 of the ICC Rules of Conciliation and Arbitration of 1975 stated that each party-appointed arbitrator “shall be independent of the party nominating him”. The silence in these Rules about the need for the presiding non-party-appointed arbitrator to be independent was probably due to the assumption that it could just be taken for granted. Nevertheless, the ICC Court’s Internal Rules of 1980 clarified that all arbitrators—not only the party-appointed ones—had to be independent from the disputing parties (Derains and Schwartz, A Guide to the ICC Rules of Arbitration, 2nd ed., p. 117).

It has been suggested that the requirement of independence of party-appointed arbitrators already existed in the ICC practice before 1975 (Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 3rd ed., pp. 209-210). Nevertheless, it seems that such requirement was not present since the beginning of the activity of the Court or, otherwise, that it did not apply in some cases (David, Arbitration in International Trade, p. 253). David notes that the first case of arbitration administered under the auspices of the ICC in 1920 involved a three-member arbitral tribunal where the two party-appointed arbitrators were not expected to be impartial.


143 Lazare Kopelmanas, “Le role des règlements d’arbitrage dans le développement des procédures arbitrales applicables au règlement de litiges commerciaux a caractère international (a propos de quelques règlements et projets de règlements d’arbitrage récents)”, A.F.D.I., 1975, vol. XXI, pp. 301-302:

La longue controverse doctrinale qui a régné sur ce dernier problème de la récusation des arbitres désignés par les parties, a été ainsi résolue par les Règlements récents d’arbitrage en faveur de l’indépendance de cette catégorie d’arbitres. Il est en effet évident que si l’on admet la possibilité de récuser l’arbitre désigné par une partie, cet arbitre est également considéré comme indépendant et non pas comme un représentant de la partie qui l’a désigné. Cette solution ne correspond peut-être pas entièrement à la réalité de nos jours, mais elle va certainement dans la voie de la bonne administration de la justice par la voie de l’arbitrage et mérite d’être retenu à ce titre.
institutions\textsuperscript{144}. Now, with over forty more years of hindsight, it might be fair to add that the trend of rule-makers to expressly require all arbitrators to be ‘independent’ and ‘impartial’, so especially visible from the 1970s onwards, ultimately ended up being more far-reaching than the new trust in arbitral institutions as far as changes in personal trust and links between parties and party-appointed arbitrators are concerned.

Notwithstanding the virtually world-wide acceptance of the requirement for the ‘independence’ and ‘impartiality’ of all arbitrators, a special role of the party-appointed arbitrator is nowadays accepted by many authors\textsuperscript{145}. It has been said, for example, that possibly one of the duties of the party-appointed arbitrator is to ensure that the case presented by the party who appointed him is properly understood by all the members of the arbitral tribunal\textsuperscript{146}.

\section*{CONCLUSIONS}

\textit{Constant presence}.– At least since ancient Greek times and with the only –and certainly remarkable– exception of ancient Rome, party-appointed arbitrators have been present in arbitral tribunals. Moreover, the presence of party-appointed arbitrators appears to have been frequent practice at all times and places considered, save for interstate arbitration in ancient Greece, where such presence appears to have been exceptional.

\textit{Increase of odd-numbered tribunals with one non-party-appointed arbitrator}.– Arbitral tribunals composed of an even number of party-appointed arbitrators, without any intervention whatsoever by an additional non-party-appointed arbitrator, seemed to be common in ancient Greece, rare from the Middle Ages until the Eighteenth Century and marginal in the Nineteenth and Twentieth Centuries. From


\textsuperscript{145} This issue is dealt with further below. See chapter 5, section 5.2.

\textsuperscript{146} Redfern and Hunter, \textit{Law and Practice of International Commercial Arbitration}, 3\textsuperscript{rd} ed., p. 193.
the Middle Ages to the Nineteenth Century, it appears to have been more common for arbitral tribunals to be composed of an even number of party-appointed arbitrators and one additional non-party-appointed arbitrator, the latter only being allowed to intervene in the decision-making process if such intervention was necessary to break a deadlock. In the Twentieth Century, the scheme of an odd-numbered tribunal with two party-appointed arbitrators and one non-party-appointed arbitrator, the latter being allowed to intervene in the decision-making at all times, consolidated itself as the prevailing scheme of multiple-member tribunal in international practice.

2-61 Loss of weight of the party-appointed arbitrators (when they disagree) in the decision-making process.—In arbitral tribunals solely composed of party-appointed arbitrators, mainly observed in ancient Greece, it appears that the arbitral award could not generally be rendered without the agreement of each and every party-appointed arbitrator. This became rare in later times. From the Middle Ages to the Nineteenth Century, party-appointed arbitrators usually formed part of tribunals in which the intervention of a non-party-appointed arbitrator was foreseen under one of the following three systems of decision-making: (i) Possible award by unanimous vote or by majority vote, the non-party-appointed arbitrator being free to postulate— not to render alone—the decision that he deemed appropriate (‘third arbitrator’, ‘troisieme arbitre’); (ii) Possible award by unanimous vote or by majority vote, the non-party-appointed arbitrator being obliged to concur with the opinion of one of the party-appointed arbitrators (‘tiers arbitre’, ‘referee’); and (iii) Possible award by unanimous vote, by majority vote or—failing a majority—by decision of the non-party-appointed arbitrator alone (‘umpire’, ‘surarbitre’). In the Twentieth Century, only systems (i) and (iii) gained significant presence in arbitration rules and national laws. It must be noted, however, that the non-party-appointed arbitrator under system (iii) in the Twentieth Century is a third presiding arbitrator who, as far as the decision-making process is concerned, is a hybrid between the umpire and the third arbitrator of earlier times. Nowadays, this system (iii) appears to be the prevailing one in practice. Today, when the party-appointed arbitrators disagree, the rules governing the arbitration usually allow the arbitral award to be rendered without the agreement of any of them.
Reinforcement of the judicial role of arbitrators.– Party-appointed arbitrators in ancient Greece often had close links of kinship or friendship with their respective appointing parties. Like all arbitrators in the ancient Greek world, they assumed the two-fold role of mediators and arbitrators. It further appears that party-appointed arbitrators at that time were expected to support their respective appointing parties while trying to mediate between them, although they were also expected to impartially perform their adjudicatory role, under oath, if mediation failed. From the Middle Ages to the Eighteenth Century, the judicial role of arbitrators seems to have been often intermingled with that of mediation, peace-making (e.g. Medieval England) or amiable composition (e.g. Medieval France, Italy and Switzerland, as France in the Modern era). Party-appointed arbitrators were sometimes expected to act in favor of their respective appointing parties, while at other times the parties wanted each and every arbitrator to act impartially. The parties do not seem to have often separated both expectations. It has been noted that arbitral tribunals composed of party-appointed arbitrators sought conciliation and an amicable settlement before proceeding to judge. This suggests a two-fold role of party-appointed arbitrators which resembles the two-tier role of party-appointed arbitrators in ancient Greece, but without the neat separation that was made in ancient Greece between the time to conciliate and the time to adjudicate. In the Nineteenth and even more so in the Twentieth Century, the clear separation between arbitration and other methods of dispute resolution (e.g. mediation or conciliation), the prevalence of the rule of law over other forms of deciding disputes (e.g. amiable composition), and the express requirement for all arbitrators –whatever the method used for their appointment– to be ‘impartial’ and ‘independent’, show the tendency to reinforce the judicial role of arbitrators. This trend has been particularly far-reaching with regard to party-appointed arbitrators, whose impartiality has been a pervasive concern for legal minds since at least the Seventeenth Century.
CHAPTER 3.  THE RIGHT TO MAKE A UNILATERAL APPOINTMENT

3-1 One of the main strengths of arbitration is the freedom of the parties to choose the persons who will decide the dispute. This freedom is indeed a condition upon which the confidence in arbitration rests. By virtue of this freedom, the parties can jointly choose the arbitrators or rather agree on a system by which the arbitrators will be appointed. The right of each party to unilaterally appoint one of the members of an arbitral tribunal is one of the many possible expressions of that freedom.

3.1. STRONG PRESENCE IN ARBITRATION PRACTICE

3-2 Most arbitration rules and laws provide for the right of each party to appoint one of the members of the arbitral tribunal, either by default when the parties have not agreed on the number of arbitrators or by default when there must be a three-member tribunal (by decision of the parties or by decision of a third person) and the parties have not agreed to any method for the appointment of arbitrators. By way of exception, a few rules provide that if the parties have not agreed to unilateral nominations, all the members of the arbitral tribunal may (e.g. LCIA) or, at the written request of any party, shall (e.g. AAA) be chosen by the arbitral institution. Under most systems, parties who wish a multiple-member tribunal without unilaterally nominated members must expressly agree so.

1 Lalive, Le choix de l’arbitre, p. 353.
2 See, e.g.: UNCITRAL Arbitration Rules (2010), arts. 7.1 and 9.1; CRCICA Arbitration Rules (2011), arts. 7.1 and 9.1; Belgian Judicial Code (as amended in 1998), arts. 1681.3 and 1682; German Code of Civil Procedure (as amended in 1997), secs. 1034.1 and 1035.3; Swedish Arbitration Act (1999), secs. 12 and 13; Japanese Arbitration Law (2003), arts. 16.2 and 17.2; Peruvian Arbitration Act (2008), arts. 19 and 23.b.
4 LCIA Arbitration Rules (1998), art. 5.4 and 5.5; AAA International Arbitration Rules (2009), art. 6.3. See also, in line with the AAA’s solution, section 5 of the US Federal Arbitration Act.
The scheme of a three-member tribunal with two party-appointed arbitrators appears to be the preferred one among international arbitration end-users. At the ICC, for instance, the ratio between the cases in which the parties had agreed on a sole arbitrator and the cases where the parties had agreed on three arbitrators was 1.93 as average for the overall period of the last decade of the last century (1991-2000); in other words, 14 cases of sole arbitrator for every 27 cases of three arbitrators. Furthermore, when considering all the cases involving one or three arbitrators during the same period, ‘all’ not only meaning the cases in which the parties had agreed on either of these two options (by a contractual provision or by a subsequent agreement) but also the cases in which the parties did not reach an agreement and the decision was thus made by the Court, the ratio was 1.21, or 14 cases of sole arbitrator for every 17 cases of three arbitrators, this showing the general preference of the Court for a single arbitrator when the parties do not agree otherwise and yet, still, the prevalence of the three-member tribunal scheme. Presumably, although the ICC statistical reports do not allow confirmation of this, the vast majority of three-member tribunals included two party-appointed arbitrators—now putting aside the fact, of little significance for present purposes, that the formal appointment of any arbitrator is made by the ICC Court.

Many arbitration end-users, if not most of them, are attached to the practice of unilateral nominations. According to the “2012 International Arbitration Survey” conducted by the School of International Arbitration (Queen Mary, University of London), sponsored by White & Case and devoted to “Current and Preferred Practices in the Arbitral Process”, 71% of in-house counsel considered unilateral party appointments as the preferred method of selecting co-arbitrators in a three-member tribunal.

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5 Figures calculated on the basis of data included in the ICC International Court of Arbitration statistical reports for the years 1991-2000, available in Volume 1 of the ICC International Court of Arbitration Bulletin of the years 1992-2001, respectively.

6 Arbitral institutions like the ICC International Court of Arbitration and the LCIA state in their rules that the parties may ‘nominate’ arbitrators but the ‘appointment’ of any arbitrator, including the party-nominated ones, is only made by the institution. In the vast majority of cases, the ‘appointment’ by the institution confirms the previous choice of the parties or, as the case may be, of one of them.
The reasons for this attachment may be numerous, and more so if dishonest parties are also considered. Leaving the reasons of dishonest parties aside (all of which may be summarised by ‘to try to win my case by all means, either allowed or not’), unilateral appointments grant each party the possibility of appointing someone with the combination of qualities that, in the eyes of that party, must be present in the arbitral tribunal. For once and only in the arbitral proceedings, the purely subjective view of each party leads. Each party may consider an endless list of factors, e.g.: education, experience of the individual in a given sector, personal trust in the individual’s honesty, arbitral experience of the individual as counsel or as arbitrator, efficiency of the individual in managing time and costs, knowledge by the individual of the rules applicable to the merits of the dispute, field work expertise, professional stand of the person, knowledge by the individual of the appointor’s business sector, ability of the individual to process materials of any nature (e.g. economic, legal, technical), academic background of the individual, cultural background of the individual, place of residence of the individual, communication skills of the individual, language skills of the individual, etcetera. Then each party can decide which of those factors are important in the case at hand, hopefully with the advice of its counsel\(^7\), and look for an individual who meets them all or, at least, who meets those considered by the party to be the most important.

One of the factors that virtually all parties are likely to consider at the time of making a unilateral nomination is to what extent the candidate may be a good choice for its case\(^8\). At this juncture, each party is selfish but should not be blamed for it. It is only natural for each party to choose someone who is believed to be closer or less hostile to the appointor’s case than other possible candidates. As Hunter and Paulsson note:

> Naturally, when the arbitration agreement calls for party-appointed arbitrators, the parties will wish to choose persons who are in a very general sense likely (in their view) to be sympathetic to their respective cases. No one would expect a government which has undertaken an act of nationalisation to nominate as its

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arbitrator a banker with a life-long career history of defending the inviolability of foreign investments. This is obvious, and it is perfectly proper.\(^9\)

3-7 In many cases, less extreme than the example chosen by Hunter and Paulsson, the importance for each party to assess who may be ‘good for its case’ should not be overstated. The party may be interested in reading what the candidate has previously published in order to speculate about some likely hostility (at worst) or understanding (at best) towards its forthcoming submissions of fact or law. Other than something like this, it does not seem to make sense to spend much time with the mental gambling.

3-8 The possibility for each party to assess who may be better (closer or less hostile) to its position in the dispute raises some concerns when pre-appointment interviews between unilateral appointors and prospective appointees take place. These concerns, along with my view that it would be preferable for those interviews to be held only if the rules governing the arbitration expressly allow them, are discussed elsewhere\(^10\).

3-9 Whatever the combination of factors that drives each party’s choice, unilateral nominations allow each party to directly manage the risk of a bad arbitral award and also to feel some reassurance that the dispute will be settled through a fair process, these two things often paving the way for an award that the losing party voluntarily complies with. Unilateral nominations, as observed by Voser and Gola, “may make the parties feel more comfortable and increase both their confidence in the arbitral tribunal and the likelihood that they will accept the award”\(^11\).

3.2. LIMITS

3-10 The right of each party to make a unilateral nomination, when it exists, has certain limits: the qualifications agreed to by the parties (3.2.1), the principle of equality of


\(^10\) See chapter 5, section 5.3.

the parties in the constitution of the arbitral tribunal (3.2.2) and the impartiality and independence of the arbitrator (3.2.3)\textsuperscript{12}.

3.2.1. QUALIFICATIONS AGREED TO BY THE PARTIES

A) Meaning and importance

3-11 Parties are free to establish in their arbitration agreement that party-appointed (as non-party-appointed) arbitrators must have certain qualifications; in terms, for instance, of education, experience, expertise, cultural background or language skills. It is not very frequent that they do so, save for the requirement (usually present in the arbitration rules agreed to by the parties) that the presiding arbitrator must be of a different nationality to that of the parties.

3-12 When the parties have determined the qualifications required of the arbitrators in their arbitration agreement, such qualifications are important. Some arbitration rules and laws provide for the lack of qualifications agreed to by the parties as one of the grounds for challenge of arbitrators\textsuperscript{13}. The removal of an arbitrator due to a lack of qualifications appears equally possible when no express reference to a lack of qualifications is made in the grounds for challenge\textsuperscript{14} and when the procedure for removal is not expressly called a ‘challenge’\textsuperscript{15}. Besides, under article V.1(d) of the New York Convention, the recognition and enforcement of the award may be refused when the composition of the arbitral tribunal is not in accordance with the agreement of the parties.

\textsuperscript{12} Two other limits are also in place in most jurisdictions: the arbitrator must be a natural person and must meet certain (and sometimes different) conditions in order to have legal capacity. Furthermore, in some jurisdictions, individuals of certain professions (e.g. members of the judiciary) are not allowed to act as arbitrators.


\textsuperscript{14} See, e.g., ICC Arbitration Rules, art. 14, “lack of impartiality or independence, or otherwise”.

\textsuperscript{15} See, e.g., English Arbitration Act (1996), sec. 24.1.b.
B) Restriction of the unilateral choice to a list drawn up by a third person

As part of their freedom to decide what qualifications the arbitrators must have, the parties may agree that the arbitrators should be appointed from a given list.

The advisability of restricting the unilateral choice of each party to a list of arbitrators drawn up by a third person is debatable\(^\text{16}\). Salah Al Hejailan considers that such a restriction is a suitable solution in light of the pressure that parties often exert on party-appointed arbitrators for them to defend the former’s interests in the arbitration\(^\text{17}\). He articulates this pressure on party-appointed arbitrators as follows:

Practice has shown that the appointing party often selects its arbitrator without the aid of any arbitral body. According to Eastern usage and practice, such a party would often embark on explaining its case to the arbitrator with a view to convincing the said arbitrator to adopt and defend its viewpoint. In most cases, the appointed arbitrator will listen to this viewpoint, and this may lead the appointing party into believing that the arbitrator is in full concurrence with the views and conclusions reached by that party. However, this may not be the case, and you may well appreciate the frustration to which an arbitrator may be subject.\(^\text{18}\)

Likewise, Paulsson suggests that one of the ways to reduce moral hazards in international arbitration may be to restrict the choice of each party to a pre-existing list of qualified arbitrators\(^\text{19}\).

On the downside, lists drafted by a third person, even if tailor-made to the case, may easily not grasp all of the factors that each party deems important in an arbitrator. Probably the only lists that are really useful to all practitioners, as Lalivé notes, are


\(^{18}\) Ibid., p. 53.

\(^{19}\) Paulsson, *Moral Hazard in International Dispute Resolution*, p. 11.
oral lists, and black as often as white. Lists drawn up by third persons may also run against the goal of allowing all parties to enter international arbitration with an equal sense of confidence in the neutrality of the system. The parties with no acquaintances on the list would probably find it more difficult to choose someone they trust.

C) Discrimination of eligible arbitrators on sensitive grounds

The freedom of the parties to determine the qualifications that the arbitrators must possess is, in principle, not restricted by regulations, common in civilised countries, that are aimed at protecting citizens from discrimination on grounds such as race, sex, religion, age, disability or nationality. No one can claim, against the parties to an arbitration agreement, a purported right to be eligible for appointment as an arbitrator in terms of equality with others, on any basis. Notwithstanding the above, it is rare, at least in international arbitration, for parties to set forth arbitrator qualifications in the arbitration agreement on any of those grounds (save for the frequent restriction as to the nationality of the presiding arbitrator).

The UK Supreme Court in Jivraj v. Hashwani confirmed the lawfulness of an arbitration agreement that was discriminatory on the grounds of religion. The case had its origin in an arbitration agreement (of 1981) which required the three arbitrators to be respected members of the Ismaili community. By the time the arbitration started (in 2008), the claimant in the arbitration appointed Mr A.C. as an arbitrator despite the latter not being a member of the Ismaili community. The claimant reasoned that it did not regard itself to be bound by the provision that the arbitrators should be members of the Ismaili community because such a requirement “would now amount to religious discrimination which would violate the Human Rights Act 1998 (HRA) and therefore must be regarded as void.” The respondent initiated proceedings before the Commercial Court seeking a declaration that the appointment of Mr A.C. was invalid because he was not a member of the Ismaili community, while the claimant filed an application before the national court seeking

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22 Ibid., para 4.
the appointment of Mr A.C. as sole arbitrator pursuant to the English Arbitration Act\textsuperscript{23}.

3-19 The judge found in favour of the respondent in the arbitration on the main disputed issues. On the one hand, the judge held that the term requiring arbitrators to be members of the Ismaili community did not constitute unlawful discrimination on any of the three grounds invoked by the claimant in the arbitration – the ‘UK Employment Equality (Religion or Belief) Regulations 2003’ (2003 Regulations), the HRA and public policy at common law – and, specifically, that arbitrators were not “employed” within the meaning of the Regulations. On the other, the judge held that, even if the appointment of arbitrators fell within the scope of the Regulations, the characteristics of the Ismaili community made the term requiring arbitrators to be members of that community a “genuine occupational requirement”, i.e. a discrimination that was allowed under the Regulations\textsuperscript{24}.

3-20 The Court of Appeal reversed the judge’s decision on the principal points. It held that arbitrators fell within the 2003 Regulations and that being a member of the Ismaili community was not “a genuine occupational requirement” under the Regulations, to conclude that the term requiring arbitrators to be members of the Ismaili community constituted unlawful discrimination on religious grounds\textsuperscript{25}.

3-21 The Supreme Court reversed the Court of Appeal’s decision. Lord Clarke (with whom the majority agreed) found that an arbitrator is not an ‘employee’ under the 2003 Regulations but “[h]e is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services”\textsuperscript{26}. Lord Clarke concluded that the 2003 Regulations did not render the arbitration agreement invalid because those Regulations are not applicable to the selection, engagement or appointment of arbitrators\textsuperscript{27}.

\textsuperscript{23} Ibid., para 5.
\textsuperscript{24} Ibid., para 14.
\textsuperscript{25} Ibid., para 16.
\textsuperscript{26} Ibid., para 40.
\textsuperscript{27} Ibid., paras 19-50.
This main conclusion of the judgment (that the arbitration agreement falls outside the scope of the Regulations), as Lord Clarke notes, made it unnecessary to determine whether the arbitration agreement, if within the scope of the Regulations, would be exempt from sanction because of the discrimination being a “genuine occupational requirement”. Nonetheless, Lord Clarke also considered this second hypothesis and found that the conclusion would be the same (the arbitration agreement is not invalid) because, if the Regulations applied, the discrimination would be a “genuine occupational requirement”\(^\text{28}\).

Arbitration end-users and practitioners have good reason to be relieved by the UK Supreme Court decision in Jivraj v. Hashwani. The restraint on party autonomy in arbitration that was drawn from the Court of Appeal’s decision had raised many eyebrows around the world. Parties are free to agree that the arbitrators must belong, or must not belong, to any group\(^\text{29}\). The only limit to this freedom should be public policy in arbitration, which is not necessarily public policy in any other sense.

Still, the judgment of the UK Supreme Court in Jivraj v. Hashwani should not lead to think that the principle of non-discrimination on the grounds of religion (and, for that matter, on grounds such as race, sex, age, disability or nationality) does not apply to the selection, engagement or appointment of arbitrators in any case. In the case considered by the Supreme Court (an arbitration agreement in which the parties had provided for a discrimination of arbitrators on religious grounds), the Court found that “the 2003 Regulations are not applicable to the selection, engagement or appointment of arbitrators”\(^\text{30}\). This means that the parties, in their arbitration agreement, are free to discriminate arbitrators on the grounds of religion (as, I believe, they are free to discriminate arbitrators on grounds such as race, sex, age, disability and nationality). However, that does not mean that a third person whose functions include the selection or appointment of arbitrators may apply on his own

\(^{28}\) Ibid., paras 51-71. It was concluded (para 70): “The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence”.

\(^{29}\) The Belgian Judicial Code makes it particularly clear when it provides, in article 1692.1, that the parties may in the arbitration agreement exclude certain categories of persons from being arbitrators.

\(^{30}\) Jivraj v. Hashwani, UK Supreme Court, 27 July 2011, para 50.
motion a policy of discrimination based on the systematic choice or exclusion of a given religion (or, for the matter, race, sex, age, disability or nationality). The third person, it would seem, cannot do that (at least in Europe), regardless of whether the 2003 Regulations—if the third person were in the UK—do apply to him (as perhaps could be the case31) or do not (as the UK Supreme Court’s reasoning32 and broad wording of its main finding33 appear to suggest).

3.2.2. PRINCIPLE OF EQUALITY OF THE PARTIES IN THE CONSTITUTION OF THE TRIBUNAL

The principle of equality is a universal limit to the freedom of the parties with regard to the appointment of arbitrators34.

A) Meaning and importance

The principle of equality or equal treatment of the parties in the constitution of the arbitral tribunal means that the parties must have the possibility of participating in the constitution of the arbitral tribunal on equal terms35. It is considered as part of the broader principle of equality of the parties, which in turn is part of transnational procedural public policy36.

The general consequence of this principle is that parties may jointly choose a sole or presiding arbitrator but none of the parties can make that choice alone. As far as party-appointed arbitrators are concerned, the principle requires that parties each have the possibility of making a unilateral appointment.

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31 Ibid., para 45: “Here [...] the Court is considering the relationship between the parties to the arbitration on the one hand and the arbitrator or arbitrators on the other”.
32 Ibid., para 40: “He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services”.
33 Ibid., para 50: “I agree with the judge that the 2003 Regulations are not applicable to the selection, engagement or appointment of arbitrators”.
34 Lalive, Le choix de l’arbitre, p. 356.
The equality of the parties in terms of the possibility of each making a unilateral appointment does not mean that the arbitral tribunal must effectively end up with as many party-appointed arbitrators as parties. If one party does not make the unilateral appointment, it is commonplace in arbitration rules and laws for a third person to appoint that arbitrator in lieu of the defaulting party while respecting the right of the other party to make a unilateral appointment.

A few national systems, pioneered by the English system, provide for an exceptional sanction for failure by a party to make a unilateral appointment by allowing the other party to appoint the arbitrator unilaterally appointed by it as sole arbitrator. This is an oddity in international arbitration but, it is only fair to add, one that has traditionally not been seen as a problem in countries where it does not exist. There is no difficulty in accepting the general validity of this exceptional sanction when a sole arbitrator must obviously be impartial, and less so when the English system further secures that the party who fails to make the unilateral appointment may still have an opportunity to avoid the sanction. Nonetheless, the appointment of a co-arbitrator by a third person, when one of the parties fails to make a unilateral

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37 English Arbitration Act (1996), sec. 17. This provision is not mandatory (sec. 4.1 and Schedule 1 of the Act) so the parties may agree to the contrary; for example, by submitting to arbitration rules that grant an arbitral institution the power to appoint an arbitrator if one party fails to make the appointment. Provisions that are similar to section 17 can be found in the English legal system since at least 1845. See chapter 2, section 2.3.A, para 2-22.

38 René David, “Rapport sur l’arbitrage conventionnel en droit privé”, Annex B, “La clause compromissoire et la jurisprudence franco-belge”, UNIDROIT, Études III, S.d.N. 1932, p. 10, footnote 10, reporting a Belgian court judgment of 1927 which found that an arbitral award rendered by a sole arbitrator appointed by one the disputing parties (according to English law) was not against public policy. In Spain, a judgment of the Supreme Court in 1912 upheld the validity of an arbitration agreement that provided for an arbitral tribunal of three arbitrators (two appointed by the parties, one each, and the third by the two co-arbitrators) and allowed each party to unilaterally appoint the two co-arbitrators if the other party failed to make an appointment (Antonio Hernández-Gil Álvarez Cienfuegos, in Comentario a la Ley de Arbitraje, A. de Martín and S. Hierro (coords.), Marcial Pons, 2006, p. 25, footnote 13).


39 English Arbitration Act, secs. 1(a) and 24(1)(a).

40 Pursuant to section 17 of the English Arbitration Act, the party in default must be given notice in writing by the other party that the latter proposes to appoint the arbitrator it has appointed as sole arbitrator; and, once this notice is served, the party in default has seven days to make the appointment and notify the other party that it has done so.
appointment, is a preferable standard in international arbitration. The arbitration rules of the London Court of International Arbitration do not provide for this sanction.

3-30 Equal possibility to make a unilateral nomination does not mean that all parties must make the unilateral appointments at the same time. Most arbitration rules, including those of some of the major arbitral institutions, provide for mechanisms to set up tribunals which provide for the unilateral nomination by the claimant prior to that of the respondent, thus allowing the respondent to know who the claimant has chosen before it making its own unilateral appointment.

3-31 Some national laws state that arbitration agreements that give one of the parties a privileged position in the appointment of the arbitrators are not valid 41. Other national laws provide for the possibility of overcoming the problem by having the national court appoint the arbitrators in deviation from the arbitration agreement. This is the case, for instance, in Germany42 and the Netherlands43, where a request for corrective measures may be filed before the state court if the arbitration agreement grants one of the parties a privileged position in the appointment of the arbitrators. In other countries, corrective measures by state courts also appear to be possible, albeit less clearly44.

B) Particular problems in tribunals with party-appointed arbitrators

3-32 There are many possible situations in which the principle of equality of the parties may be at risk because of the privileged position of one of the parties in the

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41 See, e.g.: Belgian Judicial Code, art. 1678.1: “An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators”.

42 German ZPO (1997), sec. 1034(2), first alinea: “If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure”.

43 Netherlands Arbitration Act (1986), art. 1028, first alinea: “If the arbitration agreement gives one of the parties a privileged position with regard to the appointment of the arbitrator or arbitrators, the other party may, despite the method of appointment laid down in that agreement, request the President of the District Court within one month after the commencement of the arbitration to appoint the arbitrator or arbitrators”.

44 See, e.g., Spanish Arbitration Act (2003), art. 15.3.
constitution of the arbitral tribunal. Some of these situations, related to unilateral appointments, are discussed below.

**B.1. Multiparty cases**

The protection of the principle of equality may require the suppression of unilateral appointments in multiparty cases. This principle gained international acceptance after the decision of the French *Cour de cassation* in the *Dutco* case. Three companies, BKMI, Siemens and Dutco, had signed a contract that included an arbitration agreement providing for three arbitrators appointed in accordance with the ICC Rules (the 1975 rules at the time). Dutco started an arbitration against BKMI and Siemens and unilaterally nominated one arbitrator. The ICC Court invited BKMI and Siemens to jointly nominate an arbitrator, in accordance with the arbitration rules. BKMI and Siemens objected to the joint nomination on the grounds that they had different interests. They nominated an arbitrator under protest. The ICC appointed the presiding arbitrator. The arbitral tribunal rejected the objection by BKMI and Siemens, and so did the Paris Court of Appeal when BKMI and Siemens claimed the nullification of the arbitral award on the grounds that they had not been able to participate in the constitution of the arbitral tribunal on equal terms with Dutco. The French Supreme Court upheld BKMI and Siemens’ claim and annulled the decision of the Paris Court of Appeal. In a short reasoning, the *Cour de Cassation* argued that the principle of equal treatment of the parties in the appointment of the arbitrators is part of public policy and that, therefore, this principle can only be waived after the dispute has arisen.

Since the decision of the French *Cour de Cassation* in the *Dutco* case, most rules and laws have provided for a possible compulsory exclusion of unilateral nominations in arbitrations with more than two parties. Today the general rule is that if there is a

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By way of exception, e.g., HKIAC Administered Arbitration Rules (2008), art. 8.2.c: “[W]here one or more parties or groups of parties fail to designate an arbitrator in multiparty proceedings within the time period set by the HKIAC Secretariat, the HKIAC Council shall appoint the arbitrator in question and the presiding arbitrator. Prior to doing so, the HKIAC Secretariat shall give any party or group of
group of claimants or respondents and the members of that group do not agree on the appointment of an arbitrator, all the members of the tribunal are appointed by the institution or the state court.

This waiver in advance by the parties of their respective right to make unilateral nominations is perfectly acceptable. In this respect, there is no such thing as an overriding right of each party to make a unilateral appointment every time the arbitration agreement provides for unilateral appointments. If the parties wish to configure the right of each of them to make a unilateral nomination as an essential component of their arbitration agreement, without which the arbitration cannot take place, they should specifically state so.

Two main questions remain open for discussion after the Dutco case. Firstly, is it mandatory to apply the post-Dutco general rule that the entire tribunal must be appointed by a third person when the multiple claimants or respondents do not make a joint unilateral appointment? Secondly, is it necessary, in order to apply the above-mentioned post-Dutco general rule, that there are diverging interests between the multiple claimants or respondents who are required to make a unilateral appointment jointly?

With regard to the first question, there are arbitration rules that appear to make it mandatory to exclude unilateral nominations whenever the multiple claimants or respondents fail to make a joint appointment. Other rules seem to give the arbitral parties which has duly appointed an arbitrator the opportunity within a specified time to elect in writing whether to withdraw such appointment and allow the HKIAC Council to appoint all three arbitrators. Failing such election within the specified time, the appointment shall be deemed not to have been withdrawn”.


48 See, e.g.: UNCITRAL Arbitration Rules (2010), art. 10.3; DIS Arbitration Rules (1998), sec. 13.2 (only if the respondents fail to make a joint appointment); LCIA Arbitration Rules (1998), art. 8.1; AAA International Arbitration Rules (2009), art. 6.5; CPR Rules for Non-Administered Arbitration of International Disputes (2007), rule 5.4; SCC Arbitration Rules (2010), art. 13.4; WIPO Arbitration Rules (2002), art. 18 (only if the respondents fail to make a joint appointment); CRCICA Arbitration Rules (2011), art. 10.3; SIAC Arbitration Rules (2013), art. 9.1.
institution the discretionary power to appoint or not appoint the entire arbitral tribunal in light of the circumstances of each particular case\textsuperscript{49}. This second solution appears to be preferable, for example when the multiple claimants or respondents do not make a unilateral nomination because one of them is partly owned by the other party, or because one of them refuses to participate in the arbitration and does not object to a joint appointment made by its fellow co-claimants or co-respondents \textsuperscript{50}.

The second question is whether the application of the \textit{post-Dutco} general rule requires determining whether there are diverging interests between the multiple claimants or respondents who are required to make a unilateral appointment jointly\textsuperscript{51}. Nowadays, most arbitration rules and laws do not provide for any need to ascertain the existence of conflicting interests, the absence of a joint appointment –and sometimes, at most, the request by one of the parties– it being enough for the appointment of all the arbitrators by a third person. By way of exception, for instance, the Portuguese Arbitration Act provides for the appointment of the entire arbitral tribunal by the state court only if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute\textsuperscript{52}.

\textbf{Joinder of an additional party}. Special considerations may be made in arbitrations that become multiparty because of the joinder of an additional party. In such cases, the principle of equality in the appointment of arbitrators may be at risk if the original parties can make unilateral appointments and the additional party cannot.

Certain arbitration rules seek to overcome this risk. The ICC Arbitration Rules, for instance, do not allow the joinder of an additional party \textit{after} the confirmation or appointment of any arbitrator unless all parties, including the additional party,

\textsuperscript{49} See, \textit{e.g.}: ICC Arbitration Rules (2012), art. 12.8; Swiss Rules of International Arbitration (2012), art. 8.5.\textsuperscript{50}

\textsuperscript{50} For an account of some ICC cases in which these situations took place, Nadia Darwazeh and Krista Zeman, “Joint Nominations in Multiparty Arbitration: The Exercise of the ICC Court’s Discretionary Power to Appoint the Entire Arbitral Tribunal Post-Dutco”, ICC Bull., Vol. 23, No. 1, 2012, pp. 29-35.\textsuperscript{51}

\textsuperscript{51} For an account of different approaches taken by French and Swiss state courts in this regard, Éric Loquin, “À la recherche du principe de l’égalité des parties dans le droit de l’arbitrage”, Gazette du Palais, June 29\textsuperscript{th}-July 1\textsuperscript{st} 2008, p. 11.\textsuperscript{52}

\textsuperscript{52} Portuguese Arbitration Act (2012), art. 11.3.
otherwise agree. In LCIA arbitration, the arbitral tribunal may allow the joinder if the additional party and the applicant party consent to it in writing. When the additional party joins the arbitration but cannot participate in the constitution of the arbitral tribunal, these provisions protect the principle of equality by granting the additional party full power to decide whether it wants to participate in the arbitration.

But what if the request for joinder is made before the appointment of arbitrators has commenced?

This question does not seem problematic if the joinder of the additional party is not objected to by any of the original parties. In such a case, the additional party may make a unilateral nomination jointly with one of the original parties (either the claimant or the respondent) and, should that joint unilateral nomination be impossible, the normal rule in multiparty cases will apply: none of the parties will make a unilateral nomination because all the arbitrators will be appointed by a third person.

If one of the original parties objects to the joinder, but the additional party agrees to make a unilateral nomination jointly with the other original party, the situation does not seem particularly problematic either. Both the objecting party, on the one hand, and the other original party and the additional party, on the other, will have the opportunity to make a unilateral nomination.

The delicate situation arises if one of the original parties objects to the joinder and the additional party cannot make a joint unilateral nomination with any of the original parties. How should the arbitral tribunal be constituted when the arbitration agreement provides for a three-member tribunal with two party-appointed arbitrators? Will the general rule in multiparty situations apply (i.e. will the original parties be deprived of their right to make each a unilateral nomination) even though the arbitrators may reject the joinder once they are later appointed?

53 ICC Arbitration Rules, art. 7(1).
54 LCIA Arbitration Rules, art. 22.1(h).
The answer to this question is yes under the ICC Arbitration Rules, if the ICC Court allows the arbitration to proceed according to article 6(4)(i). Under article 12(8) of the ICC Arbitration Rules, the ICC Court may appoint the three arbitrators if the additional party does not make a unilateral nomination jointly with any of the original parties and all the parties are unable to agree to a method for the constitution of the arbitral tribunal.

This approach certainly protects the equality of all parties in the appointment of arbitrators, but its consequences are questionable if the ICC Court’s *prima facie* assessment leads the Court to allow the arbitration to proceed with the additional party and yet, eventually, the arbitral tribunal decides to reject the joinder. This scenario may be unlikely but appears to be less unlikely under the 2012 ICC Arbitration Rules than under the former ones of 199855.

We could consider, for example, an arbitration with two original parties where: (i) each party initially has the right to make a unilateral nomination; (ii) one of the parties requests the joinder of Z before any arbitrator is confirmed or appointed; (iii) the other party objects the joinder; (iv) the ICC Court allows the arbitration to proceed with Z pursuant to article 6(4)(i); (v) Z does not make a unilateral nomination jointly with the claimant or the respondent; (vi) the original parties and Z are unable to agree to a method for the constitution of the arbitral tribunal; (vii) the ICC Court appoints the three arbitrators under article 12(8); (viii) the party who objects to the joinder also objects to being deprived of its right to make a unilateral nomination; and (ix) the arbitral tribunal, once constituted, renders a partial award deciding, pursuant to article 6(5), that it does not have jurisdiction over Z. In this situation, the ICC Arbitration Rules appear to leave no room for any of the original parties (most likely the one who successfully objected to the joinder) to request the constitution of a new arbitral tribunal with party-nominated members. A request that could perhaps be reasonable under the circumstances.

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B.2. Other situations

3-48 The principle of equality of the parties in the constitution of the arbitral tribunal may be at risk when all the arbitrators must be chosen from a particular organisation or professional association to which only one of the parties belongs. Some national courts have considered such an agreement to be invalid\(^56\).

3-49 **Consolidation of arbitral proceedings.** The privileged position of one of the parties in the constitution of the arbitral tribunal may not initially exist. Certain arbitration rules and laws provide for mechanisms of consolidation of different arbitrations that include the possibility that the consolidation may take place even if one of the parties objects and even if the consolidation forces some arbitrators to step down\(^57\). The principle of equality may be at risk if the consolidation allows *de facto* one of the parties to choose, between different combinations of arbitrators, which one it prefers for certain disputes.

3-50 We may consider, for example, the following scenario, based on a real case\(^58\): (i) A starts an arbitration (Arbitration 1) against B and unilaterally nominates W as arbitrator; (ii) B nominates X as arbitrator in Arbitration 1; (iii) B starts another arbitration (Arbitration 2) against A under the same arbitration agreement, but relating to a dispute that is different to the one submitted in Arbitration 1, and nominates Y as arbitrator; (iv) A nominates Z as arbitrator in Arbitration 2; and (v) B requests the consolidation of both arbitrations in Arbitration 1. Without the need to investigate the real reasons behind B’s decision to request the consolidation then, and not before, there should be little doubt that A could reasonably object to the consolidation on the grounds that what B may actually be seeking, through the

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57 See, e.g.: Swiss Rules of International Arbitration (2012), art. 4.1; ICC Arbitration Rules (2011), art. 10; Netherlands Arbitration Act (1986), art. 1046 (limited to arbitrations in the Netherlands); Hong Kong Arbitration Ordinance (2011), Schedule 2, section 2 (opt-in provision –the parties may provide expressly that it applies– save for some domestic arbitrations where it automatically applies).

58 Unpublished.
consolidation, is to move the dispute submitted in Arbitration 2 to Arbitration 1 after knowing the identity of the two party-appointed arbitrators in both cases. In other words, to choose, from the two combinations of party-appointed arbitrators (W-X and Y-Z), the one which it prefers for the dispute originally submitted in Arbitration 2. It is further worth noting that A could not even make a claim for consolidation in the opposite sense (consolidation of both arbitrations in Arbitration 2) in terms of equality with B given that Arbitration 2 was later in time. Arbitral institutions and national courts should consider scenarios like this with utmost caution and, in general, only allow the consolidation if none of the parties objects.

C) Is it waivable?

Can the parties agree that one of them may have a privileged position at the time of making the unilateral appointment?

This waiver seems to be possible. However, for the sake of protecting the arbitral award, it is safe to consider that the waiver should be made or confirmed in the arbitration proceedings. The French Cour de cassation, in the Dutco case, held that the principle of equal treatment of the parties in the appointment of arbitrators is part of public policy and can therefore only be waived after the dispute has arisen. In countries such as Germany or the Netherlands, the party who is placed at a

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59 In the real case upon which this example is based, the situation was even worse: B requested the consolidation after a third person had appointed different presiding arbitrators in both (ad hoc) arbitrations, i.e. when both arbitral tribunals were fully constituted. By seeking the consolidation of both cases in Arbitration 1, B was actually –intentionally or not– choosing the arbitral tribunal in Arbitration 1, over the tribunal in Arbitration 2, to hear the dispute originally submitted in Arbitration 2. Despite A’s objection to the consolidation, the arbitral tribunal in Arbitration 1 rendered a partial award declaring its jurisdiction in the dispute originally submitted in Arbitration 2 and, hence, agreeing de facto with the consolidation. Whether the fact that the amount in dispute in Arbitration 2 was more than a thousand times that of Arbitration 1 had any influence on the partial award rendered by the arbitral tribunal in Arbitration 1 is unknown. A sought to set aside the arbitral award for, among other grounds, breach of the principle of equality in the appointment of arbitrators. The parties reached an out-of-court settlement before the national court made a decision.

60 The ICC Arbitration Rules seem to be well aware of this risk by providing in article 10 that: “In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed”. This provision is in the right direction to avoid abusive requests for consolidation, but one would expect the ICC Court to also consider the fact of different arbitrators having been nominated (not only confirmed or appointed) as a relevant circumstance.

disadvantage by the arbitration agreement may –or may not, at its discretion– request the national court to eliminate the privileged position of the other party. In countries where there is no specific provision in the national law as to the consequences of an arbitration agreement giving one of the parties a privileged position in the constitution of the arbitral tribunal, as is also the case in most arbitration rules, the non-objection to the arbitration by the party who is placed at a disadvantage should probably amount to a valid waiver in most situations by virtue of the principle of procedural good faith. The exception would be those cases in which the privileged position of one of the parties in the appointment of the arbitrators leads to the constitution of an arbitral tribunal that does not offer a minimum appearance of being able to render an impartial judgment.

3.2.3. IMPARTIALITY AND INDEPENDENCE

A) Meaning and importance

3-53 A limit to the right of unilaterally appointing an arbitrator is that he must be impartial and independent. Historically, the practice of party-appointed arbitrators that were presumed to be biased towards the appointing party has existed in many jurisdictions and was particularly common in domestic U.S. arbitration, where it is being progressively abandoned. Nowadays, biased party-appointed arbitrators are not presumed. Virtually all arbitration rules and laws require all arbitrators to be impartial and independent.

3-54 From the parties’ perspective, the impartiality and independence of all arbitrators requires each of them to appoint someone who, as far as it may know or guess, will be willing and able to act without favouritism or bias towards any of the disputing parties. The impartiality and independence of arbitrators also require, in practice, a minimum visible distance between unilateral appointors and appointees, usually consisting in the absence of certain links (relations, connections or dealings) that are deemed unacceptable.

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63 On the notion of an impartial and independent arbitrator, see chapter 4, section 4.1.2.
The requirement of impartiality and independence should be seriously considered by the parties when making a unilateral appointment. Parties are advised to focus on qualities that can be useful in the arbitration rather than letting their choice be driven by reasons of friendship or social relations. All parties should also be aware that their expectations on how ‘good’ the party-appointed arbitrator is ‘for their case’ are irrelevant to determine what party-appointed arbitrators must do in the arbitration. As Veeder notes: “Inevitably commercial parties frequently appoint arbitrators they know, trust and like – but none are entitled to regard themselves as "tame" arbitrators or "non-neutral" arbitrators inclined to favour their appointing party.”

B) Is it waivable in party-appointed arbitrators?

Is the duty of impartiality and independence waivable in party-appointed arbitrators? Arbitration rules and laws normally provide for the duty of impartiality and independence without adding, as far as party-appointed arbitrators are concerned, the typical formula (‘unless otherwise agreed by the parties’) that is often used to indicate what is waivable. Nonetheless, most of the authors who have directly or indirectly addressed the issue consider that the parties can agree to have biased party-appointed arbitrators in the arbitral tribunal, although the vast majority of such authors consider such an agreement generally unadvisable. Well-known codes of ethics and guidelines also acknowledge the practice of biased party-appointed arbitrators.

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64 Lalive, Le choix de l’arbitre, p. 360-361.
65 As discussed below, not even a special role of the party-appointed arbitrator towards the appointing party’s case should be presumed. See chapter 5, section 5.2.
arbitrators but make clear their preference for impartial and independent party-appointed arbitrators.\textsuperscript{68}

Some authors find obstacles to admitting the practice of biased party-appointed arbitrators. Bernini notes that party autonomy allows for biased party-appointed arbitrators but he considers that those arbitrators should in no circumstances become mere agents of their respective appointing parties or tolerate being turned into their servants. Otherwise, he adds, “one would fall outside the realms of arbitration, as traditionally known”\textsuperscript{69}. Henry suggests that parties can agree to «arbitres-avocats» only after the dispute has arisen because the arbitrator’s duty of independence is part of public policy. He nevertheless rejects the whole idea of «avocat» or «partisan» arbitrator on the grounds of the arbitrator’s duty of independence. In his view, the parties cannot waive the independence of arbitrators without simultaneously excluding the institution of arbitration\textsuperscript{70}. Clay considers that the expression “his arbitrator” (referring to unilateral appointors and appointees) is an oxymoron and advocates for the ban of the practice of “non-neutral” party-appointed arbitrators\textsuperscript{71}. He seems to suggest that all arbitrators should be impartial and independent because they can judge\textsuperscript{72}. Clay and Henry further concur in criticising the Paris Court of Appeal decision in 3R v. Phénix Richelieu (a case arising from a domestic arbitration

\textsuperscript{68} The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) promotes the impartiality and independence of all arbitrators but allow“non-neutral” party-appointed arbitrators as long as the parties agree so (Note on Neutrality and Canon IX). The IBA Guidelines also promote the impartiality and independence of all arbitrators and simply state that “[t]hese Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws” (Part I, General Standard 5).


The Swiss Federal Tribunal has similarly noted that the idea that a party-appointed arbitrator may just be the advocate of the appointing party on the arbitral tribunal must be absolutely rejected, “sous peine de mettre en péril l’institution de l’arbitrage comme telle”. \textit{Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA) and Union Cycliste Internationale (UCI)}, ATF 29 October 2010, para 3.3.1.

\textsuperscript{70} Henry, \textit{Le devoir d’independence de l’arbitre}, para 506.

\textsuperscript{71} Clay, \textit{L’arbitre}, paras 354-355.


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in which there were biased party-appointed arbitrators) on the grounds, among others, that the national court had not directly sanctioned the presence of two biased arbitrators. For Jarrosson, it is impossible to admit that party-appointed arbitrators may be a hybrid of a judge and an advocate of the appointing party. He adds: “Les mots ont un sens, l’arbitre est un juge, même s’il n’est pas que cela, et l’indépendance est de l’essence même de la fonction d’arbitre”.

The controversy is not as much as it would seem at first glance. The vast majority of authors, admitting or rejecting the possibility for the parties to agree to have biased party-appointed arbitrators on the arbitral tribunal, agree on two ideas: that biased party-appointed arbitrators are generally unadvisable and that party-appointed arbitrators who are mere representatives or advocates of the appointing party do not make any sense. The real issue lies in the suggestion, by some of those authors, that biased party-appointed arbitrators are not really arbitrators or should not be allowed.

To reject biased party-appointed arbitrators on grounds of a purported incompatibility between a willingness to act without bias and the office of arbitrator reveals, I respectfully submit, an ill-conceived purism. It is an excessive extension of the idea –widely accepted in international arbitration that arbitrators perform a judicial or jurisdictional function. Jarrosson and, less clearly, Henry and Clay, seem to apply a syllogism to party-appointed arbitrators (a judicial function requires impartiality and independence, and arbitrators perform a judicial function, hence arbitrators must be impartial and independent) which is only true for ‘arbitrators’ in the generic sense of the term (arbitral bodies). That syllogism, when applied to party-appointed arbitrators, leads indeed to a theoretical trap: if party-appointed arbitrators

73 Clay, L’arbitre, para 353; Henry, Le devoir d’indépendence de l’arbitre, para 496.


must be impartial and independent because the independence and impartiality are the essential requirements to perform a judicial function, then what do two biased party-appointed arbitrators do when they render an arbitral award (unanimously with the presiding arbitrator or by a majority against the dissenting opinion of the presiding arbitrator)?

Seemingly, the only answer to this question that would be consistent with the view that party-appointed arbitrators cannot be biased would be that the award they render (at least if the presiding arbitrator dissents) is not really an arbitral award. One then wonders whether such a stand would not be fully contradicted by the parties’ agreement that an arbitral award rendered with the concurring opinions of two biased party-appointed arbitrators is intended, as any other arbitral award, to be a final and binding decision that can be enforced. Even if the presiding arbitrator dissented from the award, it would still be an arbitral award. And the New York Convention, which is about recognition and enforcement of foreign arbitral awards, does not seem to prevent parties from agreeing to have biased party-appointed arbitrators on a tribunal. Indeed, to my knowledge, no national court has ever refused the enforcement of an arbitral award on the mere grounds that an agreement by the parties to dispense party-appointed arbitrators of the duty of impartiality and independence is contrary to article V.2 (public policy) of the New York Convention.

The parties’ freedom to agree to have biased party-appointed arbitrators in an arbitral tribunal should be naturally recognised, unadvisable though this agreement may generally be. In some cases, the impartiality and independence of party-appointed arbitrators may not be fit for purpose. These are cases where the parties do not want impartial and independent party-appointed arbitrators because they do not want party-appointed arbitrators to act without bias but, rather, to support their respective appointing parties. This support obviously entails bias but does not necessarily mean that these party-appointed arbitrators are mere representatives or advocates of their respective appointing parties. The idea of them being mere representatives or advocates does indeed not make any sense.

Biased party-appointed arbitrators may make sense, at least for some parties, when the latter do not hire counsels (rare nowadays) or, if there are counsels, when the
party-appointed arbitrators can do something for the appointing party that counsels cannot do and that, for the parties, is important. Some parties may consider that counsels and biased party-appointed arbitrators can conform a two-tier process of clarifying and refining the opposed positions, the latter in a clearer or more dispassionate way, in order to put the presiding arbitrator in a better position to rightly make up his mind. Other parties may consider that a two-tier process of advocacy is a good way to ensure that the presiding arbitrator does not get lost somewhere along the way during the decision-making process—a Socratic method for the presiding arbitrator to challenge his thoughts against those of the parties’ representatives until the very last second before his decision. Other parties may not want party-appointed arbitrators to be under the duty of impartiality and independence because there are not clear rules to apply to the substance of the dispute and they want to have representatives in the tribunal that is going to create those rules (this is probably the reason why biased party-appointed arbitrators are less rare in cases where the arbitral tribunal must decide ex aequo et bono or as amiable compositeur than in cases where the arbitral tribunal must decide according to rules of law, and also probably the reason why party-appointed arbitrators were not required to take an oath or a solemn declaration to act impartially in many arbitrations about boundaries in the Nineteenth Century). Other parties may want the party-appointed arbitrators to be representatives for conciliation purposes. Still other parties may wish to agree to have biased party-appointed arbitrators on the tribunal because they want representatives to act as watchdogs of the impartiality of the third arbitrator at all times76. And so on.

Whatever the ‘bias’ side may be, biased party-appointed arbitrators are arbitrators (and not mere representatives, advocates, mediators, conciliators or anything else) because they are empowered by the parties to render an arbitral award with another member or the other members of the arbitral tribunal without necessarily having to vote for the appointing party. These party-appointed arbitrators defend to one or another extent the interests of the appointing party (in this respect certainly

resembling an advocate) but are fully or partly entitled to vote against the appointing party without any need of the latter’s permission if they deem it appropriate (in this respect certainly not resembling an advocate). They have traditionally had their own place in arbitration and they should keep it.

Biased party-appointed arbitrators are strange characters, whose beauty may be difficult to appreciate, but who may serve the purpose of what the parties in some cases may want to put or try to put a final and binding end to a dispute. Positions of only seeing traditional judges in all arbitrators seem exaggerated. Biased party-appointed arbitrators cannot be ugly ducklings when, as happens in the tale, they are actually not ducklings. It fully applies to them the idea once evoked by Mustill in a different context: “To the persons involved in a dispute which is being submitted to arbitration it is the efficacy of the mechanisms, not the purity of the doctrines, which matter”78. The key with these party-appointed arbitrators is that they must be openly agreed upon by the parties79. And the question with these arbitrators is not whether

77 Historically, party-appointed arbitrators appear to have often been expected to assume the two-fold ambivalent role of representing the appointing party while being fully or partly entitled to find against the appointing party. Very few historical examples suggest that the only thing that party-appointed arbitrators could do was either follow the instructions of the appointing party or step down. Perhaps this could have been the case in some of the arbitrations relating to boundaries in the Nineteenth Century, in which the party-appointed arbitrators were not required (unlike many arbitrations in other types of disputes) to take an oath or make a solemn declaration to act impartially. See chapter 2, section 2.3.B.

See also “The Use of Tripartite Boards in Labor, Commercial, and International Arbitration”, Note by Bernard Gold and Helmut F. Furth, Harv. L. Rev., 68, 1954-1955, p. 318-319 (commercial arbitration), noting that party-appointed arbitrators were expected to support their respective appointing parties’ cases but that they did not automatically dissent from an adverse decision: “In principle, at least, businessmen acknowledge that their appointees should vote independently of the interests of the party appointing them”; and p. 337 (international public arbitration): “As a rule, the national commissioner will consider himself bound to vote for his government in addition to supporting its position at the executive session only when the dispute involves matters of fundamental national policy or raises issues not governed by well-established principles of international law”.

78 Michael Mustill, Keynote Speech in International Arbitration in a Changing World, ICCA series No. 6 (Bahrain 1993), Albert Jan van den Berg (general ed.) with the cooperation of the T.M.C. Asser Instituut, Kluwer Law and Taxation Publishers, 1994, p. 22.

79 The situation is different and delicate when the rules governing the arbitration provide for the impartiality and independence of all arbitrators but the parties, without openly waiving the impartiality and independence of party-appointed arbitrators, appear to consent de facto to having biased party-appointed arbitrators on the tribunal. Depending on the circumstances of each particular case, this situation may be the consequence of a genuine agreement between the parties or, rather, something that the parties or some of them did not want but opted to bear. In the latter circumstances, it may be difficult to blame such parties for bearing what they do not want. The dilemma for those parties is not an easy one. If they challenge the party-appointed arbitrators, the challenge may disrupt the arbitral proceedings (most probably in favour of those who did not respect the fair play from the outset) and,
they are impartial and independent (it does not really matter) but whether they can, despite their bias or thanks to it, be useful to definitely settle the dispute.

Yet, it must be stressed again, biased party-appointed arbitrators are generally unadvisable. The uncertainty about their status, a historically pervasive problem, is likely to end up causing confusion and deception\(^\text{80}\). Besides, biased party-appointed arbitrators, in some circumstances, may give rise to serious doubts as to their real capability to reach any decision against the appointing party for fear of the consequences upon their own fortunes\(^\text{81}\). For good reasons, there is nowadays a

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\(^{80}\) See chapter 2, sections 2.3 and 2.4. See also “The Use of Tripartite Boards in Labor, Commercial, and International Arbitration”, Note by Bernard Gold and Helmut F. Furth, Harv. L. Rev., Vol. 68, 1954-1955, p. 331, noting, in the context of international public arbitration, that “the difficulties of party-appointed tribunals lay to a much larger extent in the national commissioner’s uncertainty as to his proper role”.

\(^{81}\) This difficulty was observed in 1929 by Ralston in interstate arbitration (see chapter 2, section 2.4.1, footnote 94) and may equally arise (although probably less frequently) in other types of arbitration.
prevailing view that impartial and independent party-appointed arbitrators are the best standard in international arbitration. But it is important not to mistake what is best as a standard for what should be allowed—a perverse effect of the generally useful assimilation of arbitrators to public judges.

3.3. IS IT WORTH KEEPING UNILATERAL NOMINATIONS BY DEFAULT IN INTERNATIONAL ARBITRATION?

Arnold commented in 1997 that party-appointed arbitrators are “chronically not impartial” and suggested that unilateral nominations ought to be “expunged from the global institution of arbitration” as a default provision in arbitration rules, irrespective of whether party-appointed arbitrators are or are not under the duty of impartiality and independence.

According to Smit, the suppression of party-appointed arbitrators would be a good means of doing away with arbitral decisions that are actually not decisions under the law but rather undue compromises:

Many cases are not simply black or white, and the flexibility that arbitration affords may lead to solutions that constitute acceptable compromises. But the pie-cutting approach may produce less desirable results when one side is clearly in the wrong and the sanction imposed in arbitration is significantly less severe than the one it deserves under the law. Unfortunately, most arbitration laws and institutional rules provide for, or permit, party-appointed arbitrators. A most persuasive argument can be made for a modification of these rules requiring all arbitrators to be appointed by the institution or a specially created appointment authority that properly investigates the qualifications of candidates before making the appointment. Until this is done, arbitration will continue to differ substantially from adjudication by independent judges.

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82 On this issue, see chapter 4, sections 4.1.1 and 4.2.


More recently, Paulsson suggested that unilateral nominations should be forbidden, or at least rigorously policed\textsuperscript{85}. Paulsson envisions the suppression of unilateral nominations as a worthwhile way to remove moral hazards in the process of international adjudication. He notes that “many persons serving as arbitrators seem to have no compunction about quietly assisting "their" party” and “apparently view the modern international consensus that all arbitrators do own a duty to maintain an equal distance to both sides as little more than pretty words, as though sophisticates in reality conduct themselves in accordance with a different sub rosa operational code”. He also gives some examples of cases where unilaterally-nominated tribunal members who were under the obligation to be impartial yet seem to have actually been biased in favour of the party who had appointed them\textsuperscript{86}. Paulsson believes that the reasons typically invoked for explaining the parties’ attachment to the practice of unilateral appointments are ill-conceived and notes, as far as cultural differences are concerned, that “the real answers lie in ensuring that the arbitration process is inclusive, so that no one is "a foreigner," and in enhancing the confidence both sides have in the institutions charged with the essential task of ultimately appointing truly neutral and able arbitrators”. He praises arbitrators who are chosen jointly by the parties or appointed by a neutral institution as “invested with an equal measure of confidence and an equal claim to moral authority”, to conclude that “any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body”.

Paulsson also suggests some measures to police the practice of unilateral appointments while it remains in place. He acknowledges that the suppression of this


\textsuperscript{86} The Alaskan Boundary case (submitted by a treaty of 1903 to a six-member tribunal), an international arbitration involving private parties and conducted under the LCIA Rules (unpublished) and the particularly unedifying \textit{Loewen} case in the field of investment arbitration.
practice is not a realistic option in the short term. The unilaterally-nominated arbitrator, he notes, “is the product of realism, doubtless indispensable in a complex world of inter-communal transactions, as a way of making arbitration acceptable – though in a manner which immediately dilutes its purity”\textsuperscript{87}. One way of “reducing contamination” that he suggests is to restrict the choice of each party to arbitrators with a different nationality to such party. Another way, which he deems more effective if properly conceived, would be to restrict the choice of each party to a pre-existing list of qualified arbitrators. He also mentions, among other practices that some institutions have applied, the picturesque one of not telling each nominee who appointed him\textsuperscript{88}.

The arguments put forward by these authors for doing away with unilateral appointments are unpersuasive. It is easier to agree with Bond’s remark that the best is the enemy of the good and with Lalive’s view that the progress of international arbitration does not need the appointment of all the members of the arbitral tribunal by a third\textsuperscript{89}. It is doubtful that the illness is so severe and widespread as to require such a radical cure. Most importantly, no matter if the illness is severe or widespread, the alternative to unilateral nominations is worse as a standard in a system of justice, arbitration, where final decisions which are wrong can nevertheless, virtually always, be enforced.

\textbf{Is the illness severe and widespread?} Paulsson, Smit and Arnold suggest that many party-appointed arbitrators are not really impartial, and they are certainly not alone in this observation. Many authors have noted that party-appointed arbitrators often are

\textsuperscript{87} Paulsson, \textit{Moral Hazard in International Dispute Resolution}, p. 9.

\textsuperscript{88} Ibid., pp. 11-12.

\textsuperscript{89} Stephen Bond, “The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration”, in \textit{The Arbitral Process and the Independence of Arbitrators}, ICC Publ. No. 472, 1991, p. 15, warning against the radical measure of having all arbitrators appointed directly by an arbitral institution without the participation of the parties in order to attempt to ensure the complete independence of every arbitrator, recalling the saying that the best is the enemy of the good.

Lalive once deemed the appointment of all the members of the arbitral tribunal by a third person as a possible progress for arbitration (“Problèmes relatifs à l’Arbitrage International Commercial”, R.C.A.D.I., 1967, p. 682), but he was of the opposite view over two decades later (\textit{Sur l’impartialité de l’arbitre international en Suisse}, p. 65): “[L]’on ne ferait guère avancer la «cause» de l’arbitrage international en préconisant, comme le font certains «activistes», la désignation de l’intégralité des membres d’un tribunal par une institution”.

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or look biased. Yet, it is unclear whether this illness is actually severe and widespread. Some authors note that “[m]ost party-appointed arbitrators act properly and in good faith”\(^90\).

3-72 Not all biased-looking party-appointed arbitrators pose an actual moral hazard. On some occasions, they are just impartial arbitrators whose views are closer to the appointing party’s views than to those of the other party and who, for some reason (e.g. a clumsy behaviour in the arbitrator or too sensitive eyes in the observer), look biased. Paulsson mentions the fact that 95% of dissenting opinions are written by the arbitrator appointed by the losing party, but he does not fail to acknowledge that behind part of that percentage there may not be a failure of ethics but just an arbitrator who sees certain propositions of law or circumstances of fact in the same way as the party who appointed him\(^91\). On other occasions, biased-looking party-appointed arbitrators show at the outset of the arbitration an innocent partiality, perhaps based on cultural closeness with the appointing party or on wishful thinking that the party who made the good decision of appointing them also has a good case,

\(^90\) Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, para 4.141.


but this innocent partiality progressively disappears as the case unfolds through the
submissions and evidence of the parties.\(^{92}\)

Figures do not suggest that the illness is particularly severe or widespread. The
findings of the empirical study explained in chapter 6 suggest that problems of bias
in party-appointed arbitrators are not significantly more or worse than problems of
bias in non-party-appointed arbitrators. On the one hand, party-appointed arbitrators
are challenged less than proportionally, as sole arbitrators, and in contrast with the
more than proportional challenges against presiding arbitrators. In relative terms,
presiding arbitrators are the most challenged. In tribunals with party-nominated
arbitrators, 59.2% of challenges were against a party-appointed arbitrator (versus a
theoretical 66.6% proportional rate of challenge) and 40.8% of challenges were
against a presiding arbitrator (versus a theoretical 33.3% proportional rate of
challenge)\(^{93}\). On the other hand, looking at the outcome of challenges, the amount of
accepted challenges against party-nominated arbitrators (9.4%) is approximately
twice as much as that of presiding arbitrators (5.3%) and three times as much as that
of sole arbitrators (3.2%), but the challenges in which the arbitrator resigns and his
resignation is accepted by the Court are relatively few in party-nominated arbitrators
(4.5%), nearly twice as much in presiding arbitrators (8.2%) and nearly three times
as much in sole arbitrators (11.8%)\(^{94}\). The higher rate of accepted challenges in
party-appointed arbitrators may be partly explained by the fact that each party
naturally tends to appoint someone it knows (with whom it has links) so party-
appointed arbitrators are normally nearer the red line than presiding and sole
arbitrators. Besides, we do not know how many presiding and sole arbitrators that
resigned after being challenged would have been allowed to hold office if the
resignation had not taken place.

\(^{92}\) Niel Pearson, “Nationalité et attaches de l’arbitre”, in Qualification de l’arbitre international -
les débats, la présence d’un Président neutre détourne les deux arbitres nommés par les parties de
manifester leur parti pris, même s’ils commencent par montrer quelle naturelle et innocente partialité.
Et un tribunal arbitral de trois personnes tend à devenir plus neutre qu’autre chose au fur et à mesure
qu’il agit, à supposer du moins que le Président neutre soit une personne de caractère pourvue d’une
bonne dose de persuasion”.

\(^{93}\) See chapter 6, section 6.3.1, obs. to Fig. 2.

\(^{94}\) See chapter 6, section 6.3.1, obs. to Fig. 9.
As far as the enforcement of the arbitral award is concerned, the illness does not seem to be significantly worrying either. Under the New York Convention, a party may resist enforcement on the grounds of a breach of the duty of impartiality and independence of an arbitrator, either through art. V(1)(d) (irregularity in the composition of the arbitral tribunal or arbitral procedure) or art. V(2)(b) (public policy). Very few arbitral awards have been refused enforcement on any of these two grounds, regardless of the method of appointment of the arbitrator. Ground V(1)(d) has led to a refusal of enforcement in only a few cases. As to ground V(2)(b), which is generally accepted to encompass the lack of impartiality or independence of an arbitrator, it has also led to very few refusals of enforcement. Van den Berg noted in 1991 that in none of the 330 court decisions from 23 contracting states reported in the Yearbook of Commercial Arbitration up to such date, had a Court refused enforcement on account of a lack of impartiality or independence of an arbitrator. Rare examples are found later.

The alternative is not better as a standard. Perhaps the illness is severe or widespread, although not always visible. We must take Paulsson’s diagnosis as accurate when he states “[t]he troubling reality is that the extreme cases remain unknown, because improper behaviour is shrouded in urbane subterfuge and hypocrisy.” And it must certainly be acknowledged, as far as the empirical study carried out for this research is concerned, that challenges do not show all the problems. Challenges may just be, as Kaufmann-Kohler once said, the tip of the

95 Albert Jan van den Berg, “Why are some awards not enforceable?”, in New Horizons in International Commercial Arbitration and Beyond, ICCA series No. 12 (Beijing 2004), Albert Jan van den Berg (general ed.) with the assistance of the International Bureau of the PCA, Kluwer Law International, 2005, p. 302: “Although ground [V.1.]d has given rise to extensive comments in scholarly writings, in only a few cases it has led to a refusal of enforcement”.


97 One is these rare examples is the case Excelsior Film TV srl v. UGC-PH, Cass., 24 March 1998, Rev. Arb. 1999, No. 2, pp. 255-256, with note by Fouchard in pp. 257-259. Excerpt of the case also available in Y.C.A., Albert Jan van den Berg (ed.), Vol. XXIVa, 1999, pp. 643-644. In this case, the French Supreme Court upheld the Paris Court of Appeal’s refusal of enforcement of an arbitral award on the grounds of disloyalty on the part of one of the party-appointed arbitrators that created an imbalance between the parties amounting to a violation of due process and public policy.

98 Paulsson, Moral Hazard in International Dispute Resolution, p. 6.
iceberg. After all, most practitioners with some experience have witnessed, at one or another point in their career, party-appointed arbitrators who show little respect for their duty of impartiality and independence. So let us assume, for the moment, that the illness is severe or widespread. Supporters of suppressing unilateral nominations suggest that the alternative (tribunals without unilaterally-nominated members) is better. But is it?

Probably not, at least for the parties. Multiple-member tribunals without unilaterally nominated members could likely contribute to having a more relaxed atmosphere in the arbitration. The ethical concerns about unilateral nominations would no longer trouble anyone. More responsibility would lie upon the neutral appointors’ shoulders, but some arbitral institutions would already be well able to assume it. However, the parties would still face the risk of a bad award, this time without the consolation of having been able, each of them, to manage such risk by directly appointing one of the members of the arbitral tribunal.

Supporters of suppressing unilateral nominations of arbitrators under-estimate the importance of each party being able to directly manage the risk of a bad award. Neutral appointors cannot guarantee that the award will not be a bad award. At best, they can just reduce the likelihood of such an occurrence. Serious appointors may appoint serious arbitrators, but serious arbitrators can get it wrong. Probably bad awards with party-appointed arbitrators are more than bad awards without party-appointed arbitrators, but the latter certainly do exist. How many could they be? What percentage of the awards rendered by arbitral bodies without unilaterally-appointed members are bad awards? 5%, 10%, 15%, more than 15%, less than 5%? Shall we say around 12%, the percentage over many years of US federal district


101 A good award is an award which is right and can be enforced. ‘Right’ means right on the merits, the materialization in each particular case that justice is done. A bad award is one that is wrong in its decision on the merits or is not enforceable (at least in some places). For present purposes, I will consider ‘bad awards’ to simply be those that are wrong on the merits; or, to put it differently, those which would have been reversed if an appeal on the merits had been available.
courts’ civil decisions which are reversed by federal appeals courts?\textsuperscript{102} No data is available to answer this question and practitioners, each with his own experience, are likely to have different views on what the closest answer might be. All the same, it matters little what the exact percentage of bad awards without party-appointed arbitrators might be. What does matter is that such percentage is over 0\% and that arbitration is ‘one shot’: “Errors of judgment, whether of fact or of law, are not in themselves grounds on which the award can be set aside or refused enforcement”\textsuperscript{103}. So, eventually, it all boils down to a simple question when the parties do not reach the ideal of jointly choosing all the members of the arbitral tribunal. If the risk of a bad arbitral award is unavoidable and the parties will virtually never be able to do anything against a bad award, is it better to let the parties put up with that risk with party-appointed arbitrators or without them? In my view, the first way is much preferable as a standard –of which the parties, of course, may opt out if they wish. Bearing in mind that justice is also in the eye of the beholder, the right of each party to appoint one of the members of the tribunal, despite its evils, is worth keeping in arbitration. To appease multiple-member tribunals by forbidding unilateral nominations, that is to say, by removing the associated ethical tensions, may harm arbitration in the long run –like the Faraday paradox in electrochemistry: diluted nitric acid corrodes steel while concentrated nitric acid does not.

\textsuperscript{3-78} Furthermore, it is hard to concur with Paulsson’s view that the unavoidable possibility for each party to ‘calculate’ what the arbitrator it appoints will do runs against the “fundamental premise of arbitration” of “mutual confidence in arbitrators”\textsuperscript{104}. Why mutual confidence in arbitrators is a fundamental premise of arbitration eludes me, at least if by ‘mutual confidence’ is meant equal confidence of the parties in each and every member of an arbitral tribunal. Moreover, there is nothing wrong –probably quite the opposite– with each party selfishly wishing to feel that the appointment it makes is a good decision for it\textsuperscript{105}. This is perhaps what


\textsuperscript{103} Fouchard, Gaillard and Goldman, \textit{International Commercial Arbitration}, para 1603.

\textsuperscript{104} Paulsson, \textit{Moral Hazard in International Dispute Resolution}, p. 6.

\textsuperscript{105} M. Scott Donahey, “The Independence and Neutrality of Arbitrators”, J. Int. Arb., Vol. 9, No. 4, 1992, p. 39: “In international arbitrations, the party-appointed arbitrator, who has often been selected
Hunter was thinking when he said his famous phrase that “when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias”\textsuperscript{106}. Most parties and counsel in international arbitration devote some time to speculating as to what candidate to be unilaterally nominated will be better (closer or less hostile) to the appointing party’s position in the dispute. This mental gambling causes no harm to the arbitral proceedings if it is just that. Perhaps some arbitration end-users are attached to the practice of unilateral appointments because they see in that mental gambling a tool to increase their chances of winning the case, as though their choice could influence the outcome of the arbitration more than that of the other party. I rather suspect that, for most arbitration end-users, such attachment is not due to their expectation to be smarter than their counter-parties but to their wish to keep some direct control in the constitution of an arbitral tribunal that may ultimately get it right. This is probably why most arbitration end-users who decide to have their dispute settled by a multiple-member tribunal do not opt out of the practice of unilateral nominations\textsuperscript{107}; and also probably why projects which are not very far from the system envisioned as better by Paulsson, international tribunals because of his perceived predisposition to the party and its legal position, is expected to maintain his independence and impartiality. That this paradox works well in practice is one of the strenghts of international commercial arbitration”.

\textsuperscript{106} Martin Hunter, “Ethics of the International Arbitrator”, Arb., Vol. 53, No. 4, Nov. 1987, p. 223. This author later clarified his above-mentioned phrase as follows: “At first sight, this may seem shocking, but by "predisposition" I do not mean, of course, that I want the arbitrator to vote automatically for my client. Quite to the contrary, I am simply looking for someone who is likely, in very general terms, to be sympathetic to the position my client has to defend - someone who is likely to be genuinely persuaded by my argument. For example, in representing a government who has nationalised an oil company, I am not likely to choose an investment banker from a capitalist country with many years of experience of battling for investors in less-developed countries, or someone who has published a series of articles showing that he has a conservative viewpoint on the interpretation of the phrase "prompt, adequate and effective" compensation” (Hunter’s comments in The Arbitral Process and the Independence of Arbitrators, ICC Publ. No. 472, 1991, p. 25).

\textsuperscript{107} According to the “2012 International Arbitration Survey” conducted by the School of International Arbitration (Queen Mary, University of London), sponsored by White & Case and devoted to “Current and Preferred Practices in the Arbitral Process”, 76% of the respondents to the survey considered unilateral party appointments as the preferred method of selecting co-arbitrators in a three-member tribunal (per category of respondents, the percentage was 71% of in-house counsel, 83% of private practitioners and 66% of arbitrators).
for commercial matters where private disputants cannot make unilateral nominations, have not progressed in the past.

CONCLUSIONS

The following summary conclusions can be drawn from the foregoing:

Widespread recognition and use.-- Most arbitration rules and laws recognise the right of each party to make a unilateral nomination as a standard for the constitution of three-member arbitral tribunals. Many parties are attached to the practice of unilateral nominations. They provide each party with the possibility to appoint someone with the combination of qualities that, in the eyes of such party, must be present in the arbitral tribunal. When making a unilateral nomination, parties are also likely to consider, along with the candidate’s qualities, to what extent the candidate may be a good choice for their case. At this juncture, each party is selfish but should not be blamed for it. It is only natural for each party to choose someone who is believed to be closer or less hostile to the appointor’s case than other possible candidates. In any case, unilateral nominations allow each party to directly manage the risk of a bad arbitral award and also to feel some reassurance that the dispute will be settled through a fair process, these two things often paving the way for an award that the losing party voluntarily complies with.

The right of each party to make a unilateral nomination, when it exists, has certain limits: the qualifications of the arbitrators agreed to by the parties, the principle of equality of the parties in the constitution of the arbitral tribunal and the impartiality and independence of arbitrators.

In 1924, the Hungarian branch of the International Law Association (ILA) presented a project for the creation of a Permanent International Court in Civil Matters, competent for litigious civil matters between a private individual and a foreign state or between private individuals with their domicile in different states. In 1934, the ILA French branch, appreciating the Hungarian idea but considering that progressive steps should be taken to attain it, presented a project of Bilateral Convention to create an International Tribunal in Private Law, competent for litigious civil and commercial matters between a private individual of one of the contracting states and the other contracting state or between private individuals of both states. The tribunal would be comprised of three members, two national judges nominated by the respective contracting states and a presiding arbitrator of a third nationality agreed to by the contracting states. Both projects were eventually abandoned.
Qualifications agreed to by the parties.— The parties are free to set forth in their arbitration agreement that party-appointed arbitrators (as non-party-appointed arbitrators) must have certain qualifications. The parties may agree, for instance, that all the arbitrators must be appointed from a given list. To restrict the unilateral choice of each party to a list of arbitrators that is drawn up by a third person is generally unadvisable. Lists drafted by third persons, even if tailor-made to the case, may easily fail to grasp all the factors that each party deems important in an arbitrator.

The freedom of the parties to provide in their arbitration agreement that party-appointed arbitrators (as non-party-appointed arbitrators) must have certain qualifications is, in principle, not restricted by regulations, common in civilised countries, that are aimed at protecting citizens from discrimination on grounds such as race, sex, religion, age, disability or nationality. No one can claim, against the parties to an arbitration agreement, a purported right to be eligible for appointment as an arbitrator in terms of equality with others, on any basis. This does not mean that a third person whose functions include the selection or appointment of arbitrators may apply on his own motion a discrimination policy based on the systematic choice or exclusion of a given race, sex, religion, age, disability or nationality. The third person, it would seem, cannot do that.

Equality of the parties in the constitution of arbitral tribunals.— The principle of equality or equal treatment of the parties in the constitution of the arbitral tribunal basically means that the parties must have the same possibility of appointing the arbitrators. This principle does not require the arbitral tribunal to effectively end up having as many party-appointed arbitrators as parties, nor does it mean that all parties must make their unilateral appointments at the same time.

Multiparty arbitrations and certain scenarios of consolidation and joinder may create a risk to the principle of equality of the parties in the constitution of arbitral tribunals with party-appointed members.

An agreement of the parties whereby one of them may have a privileged position when making a unilateral appointment seems to be possible if it is made or confirmed in the arbitration proceedings, once the dispute has arisen.
Impartiality and independence.– From the parties’ perspective, the impartiality and independence of all arbitrators requires each party to appoint someone who, as far as it may know or guess, will be willing and able to act without favouritism or bias towards any of the disputing parties.

Parties can waive the impartiality and independence of party-appointed arbitrators in the sense that they can allow the party-appointed arbitrators to act with favouritism or bias towards their respective appointing parties. The parties who want biased party-appointed arbitrators should openly agree so. Biased party-appointed arbitrators only make sense if they are, despite their bias, fully or partly entitled to vote against the appointing party without any need for the latter’s permission if they deem it appropriate. Generally, biased party-appointed arbitrators are unadvisable. The uncertainty about their status, a historically pervasive problem, is likely to end up causing confusion and deception. Besides, biased party-appointed arbitrators, in some circumstances, may give rise to serious doubts as to their real capability to make any determination against the appointing party.

It is not worth suppressing unilateral nominations.– Unilateral nominations are worth keeping in international arbitration as the standard system for the constitution of three-member tribunals, despite the ever-present associated ethical risks.
CHAPTER 4. THE STANDARD OF IMPARTIALITY AND INDEPENDENCE

4-1 One of the most obvious and fundamental values of a system of justice is the capability of the deciding body to consider the contested positions and ultimately make a decision without favouritism or bias towards any of the disputing parties. In other words, the capability of the deciding body to be impartial or, if so preferred, independent, objective or neutral. This capability logically implies the existence of an individual duty to be impartial on the part of unipersonal bodies. However, the capability of multiple-member tribunals to be impartial lies in a balance which does not necessarily require the duty of each and every member of the tribunal to be impartial, not even of some of them. The key to this balance normally lies in the absence of advantages of one party over the others with respect to the appointment, the duties and the powers of each member of the tribunal. For example, in a case with A and B as the disputing parties and a three-member tribunal comprised of X, Y and Z, the parties may perceive that the balance of impartiality is achieved – and may therefore be able to trust that the system of justice is such a thing – in, amongst other possible types, the following six types of tribunal:

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>Appointed by A</th>
<th>Appointed by B</th>
<th>Neutrally appointed</th>
<th>Under the duty of impartiality</th>
<th>Power to decide alone if there is no majority</th>
</tr>
</thead>
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<td>Y</td>
<td>Z</td>
<td>X, Y, Z</td>
<td>Z</td>
</tr>
<tr>
<td>2</td>
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<td>Y</td>
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</tr>
<tr>
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</tr>
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<td>none</td>
<td>X, Y, Z</td>
<td>X, Y, Z</td>
<td>none</td>
</tr>
</tbody>
</table>

4-2 These preliminary remarks are not just made for the always useful sake of reminding of elementary things as a starting point to any reflection, but also to avoid confusion.

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1 For instance, even-numbered tribunals in which half of the members are appointed by each party and none is obliged to be impartial. The inherent limitation – and perhaps drawback under the circumstances – of this type of tribunal is that it may not be able to render a decision.
It is important not to mistake the impartiality of a deciding body, which is naturally obvious, with the impartiality of the unilaterally-nominated members of a tribunal, which is not naturally obvious. The obligation for a tribunal to be impartial is an essential requirement of justice which is probably in everyone’s mind and is recognised as a human right. In contrast, the obligation for party-appointed members of a tribunal to be impartial is a choice made by those who can make it in the system of justice at stake. In arbitration, first and foremost, a joint choice by the disputing parties.

This chapter deals with the standard of impartiality and independence of arbitrators. Firstly, it reviews the virtually universal principle that all arbitrators, whatever the method followed for their appointment, must be impartial and independent (4.1.1). Secondly, it presents some reflections on what an impartial and independent arbitrator is (4.1.2). Last section of this chapter is devoted to the question of whether it is worth requiring by default the standard of impartiality and independence from party-appointed arbitrators in international arbitration (4.2).

4.1. THE PRINCIPLE OF IMPARTIALITY AND INDEPENDENCE

4.1.1. A STANDARD FOR ALL ARBITRATORS IN INTERNATIONAL ARBITRATION

The UNCITRAL Arbitration Rules and the UNCITRAL Model Law, since their first versions, established the duty of impartiality and independence of all arbitrators, regardless of the method followed for their appointment. They did so in an indirect

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2 Universal Declaration of Human Rights, United Nations, 1948, art. 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950, art. 6 (“Right to a fair trial”), paragraph 1, first sentence: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”; American Convention on Human Rights (“Pact of San José, Costa Rica”), 1969, art. 8 (“Right to a fair trial”), paragraph 1: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”; African Charter on Human and Peoples’ Rights, art. 7.1(d): “Every individual shall have the right to have his cause heard. This comprises: […] The right to be tried within a reasonable time by an impartial court or tribunal”.

101
two-fold way. On the one hand, they provided for the right of any disputing party to challenge an arbitrator “if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence”\(^3\). On the other hand, they protected the parties’ right of challenge by imposing on every arbitrator a continuing duty of disclosing to the parties “any circumstances likely to give rise to justifiable doubts as to his impartiality or independence”\(^4\). Ever since, most arbitration rules\(^5\) and national laws\(^6\) have adopted this formula (impartiality and independence through a right to


challenge and a duty of disclosure) with equal or similar wordings. Most rules and some statutes have also included a direct provision for such duty\(^7\).

Neither is any distinction made between party-appointed and non-party-appointed arbitrators in the arbitration rules and laws which prefer not to make joint use of the terms of impartiality and independence. For instance, the Swiss Federal Private International Law Act allows the challenge of an arbitrator “if circumstances exist which give rise to justifiable doubts as to his independence” (no mention of ‘impartiality’)\(^8\). Under the English Arbitration Act, in contrast, a party may apply to remove an arbitrator on the grounds that “circumstances exist that give rise to justifiable doubts as to his impartiality” (no mention of ‘independence’)\(^9\). The notion of ‘impartiality’ is also the only one used by the Swedish Arbitration Act when it states that “[a]n arbitrator shall be impartial” and “[i]f a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality”\(^10\). Under Latvian law, an arbitrator may be removed if facts exist that cause well-founded doubt as to the arbitrator’s “objectivity

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and independence”. In the United States, the Federal Arbitration Act provides that an award may be vacated if “there was evident partiality or corruption in the arbitrators, or either of them”, the impartiality and independence of all arbitrators being the standard in international arbitration. In investment arbitration, the ICSID Convention requires all arbitrators, whether or not appointed by a party, and whether or not appointed from the panel of arbitrators of the arbitral institution, to be persons “who may be relied upon to exercise independent judgment”. In sports arbitration, all CAS arbitrators are required to be independent.

The impartiality and independence of both party-appointed and non-party appointed arbitrators are also required by most guidelines concerning arbitrator conduct. The International Bar Association (IBA) Rules of Ethics for International Arbitrators set forth the principle that arbitrators “shall be and shall remain free from bias”, emphasising the qualities of “impartiality and independence” as “the criteria for assessing questions relating to bias”. The IBA Guidelines on Conflicts of Interest in International Arbitration provide that “[e]very arbitrator shall be impartial and independent of the parties” and consider this duty as a “fundamental principle in international arbitration”. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, where the term “neutral” is used equivalently to “independent and impartial”, specifically states that in three-member tribunals with two party-appointed arbitrators “all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator”, further noting that

12 US Federal Arbitration Act, sec. 10(a)(2).
14 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965, arts. 14(1) and 40(2). The French version of the Convention also uses the notion of independence (“garantie d’indépendance”) while the Spanish version uses the notion of impartiality instead (“imparcialidad de juicio”). The three languages are deemed official.
15 CAS Code (2010), Procedural Rules 33 and 34.
16 IBA Rules of Ethics for International Arbitrators (1987), Rule 1, Fundamental principle.
17 IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 by the Council of the International Bar Association, Part I(1), General Principle and Explanation to General Standard 1. These Guidelines further note that the IBA Rules of Ethics (1987) remain in effect in relation to subjects that are not discussed in the Guidelines.
“[t]his expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects” 18.

4.1.2. AN IMPARTIAL AND INDEPENDENT ARBITRATOR

The terms ‘impartial’ and ‘independent’ are commonly used, either separate or jointly, to convey the ability of an arbitrator to act without favouritism or bias toward any of the disputing parties. An impartial and/or independent arbitrator, at this general level of thought, would match what may have always been understood by the concept of an impartial and/or independent judge.

In more technical legal contexts, the notions of ‘impartiality’ and ‘independence’ are often differentiated, in both the worlds of judiciary and arbitration. In the judiciary, independence has traditionally been associated with a situation of freedom and impartiality with a behaviour without bias, the former (independence) being a means to protect the existence of the latter (impartiality). Brown notes that “judges are independent if there is no external source of control or influence which prevents them from acting in an autonomous fashion; and they fulfil their role with impartiality if there is no bias in the disposal of the case” 19. The idea that a judge must be independent so as to have unfettered freedom to decide cases impartially is deeply rooted in the history of the judiciary, where the case for the independence of judges appears in its origins and for long thereafter as a means of protecting them against interference from others 20. The independence of judges as a protective shelter of their capability to act impartially is today an international standard, reflected for instance in the United Nations “Basic Principles on the Independence of the

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18 Code of Ethics for Arbitrators in Commercial Disputes approved by the American Bar Association (ABA) House of Delegates and by the Executive Committee of the Board of Directors of the American Arbitration Association (AAA) in 2004, Canon IX(A) and Note on Neutrality.


Judiciary”21 and in the Recommendation by the Council of Europe on “Independence, efficiency and role of judges”22. Judicial independence is also perceived to be one of the reasons that justify judges being granted a high degree of immunity or, changing the perspective on the phenomenon, for restricting the right of recipients of justice to claim judges’ accountability23. Yet, as Russell notes, the fundamental purpose or rationale of judicial independence is to endow judges with an appearance that inspires the trust of those same recipients:

We want judges to enjoy a high degree of autonomy so that, when disputes arise about our legal rights and duties to one another and in relation to public authorities and these disputes cannot be settled informally, we can submit them for resolution to judges whose autonomy or independence gives us reasons to

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1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.


“In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary”.


believe they will resolve the issues fairly, according to their understanding of the law, and not out of fear of recrimination or hope of reward.\textsuperscript{24}

4.9 In international arbitration it has often been pointed out that there is difficulty in drawing a single comprehensive distinction between the notions of impartiality and independence\textsuperscript{25}. The meaning of ‘impartiality and independence’ has usually been approached from the perspective of trying to seek the specific weight of each of the two terms under the basic –and, strictly speaking, right– premise that they are not synonyms; and therefore under the premise that to use both terms jointly, as the UNCITRAL did, may mean something different than using just one of them.

4.10 Among the several theoretical approaches that have been put forward regarding the distinction between impartiality and independence in arbitration, two may be deemed traditional: the ‘subjective/objective’ approach and the ‘subject-matter/parties’ approach.

4.11 The ‘subjective/objective’ approach associates impartiality with the state of mind of the arbitrator and his conduct in the reference, and independence with the arbitrator’s external links, namely with the parties. Bucher and Tschanz note that “[i]mpartiality is an attitude or state of mind, while independence refers to an objective situation, i.e. the absence of circumstances external to the case and which might influence an arbitrator’s judgment”\textsuperscript{26}. In similar terms, Fouchard, Gaillard and Goldman explain the difference between the two notions as follows:

Independence is a situation of fact or law, capable of objective verification. Impartiality, on the other hand, is more a mental state, which will necessarily be subjective. Impartiality is of course the essential quality required of a judge. However, as it is rarely possible to provide direct proof of impartiality, the


arbitrators should at least be required to be independent, which is easier to prove and which, in principle, guarantees the arbitrators' freedom of judgment. Whereas the bias of arbitrators will very rarely be revealed by their conduct, links of dependence with one of the parties—even though they will not necessarily lead the arbitrator to be biased—will provide a sufficient basis on which to consider that they do not satisfy the conditions required of a judge.27

4-12 Under the ‘subject-matter/parties’ approach, impartiality is considered to be the absence of prejudice with regard to the subject-matter of the dispute and the unbiased behaviour of the arbitrator in the reference, whereas independence is deemed to be related to the absence of certain relationships between the arbitrator and the parties. Hunter notes that “[i]n my mind, independence relates really to the relationship between the arbitrator and the parties; impartiality relates primarily to the relationship between the arbitrator and the subject-matter of the dispute”28. The IBA Code of Ethics took the same view:

The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.29

4-13 The ‘subjective/objective’ and ‘subject-matter/parties’ approaches to the distinction between the notions of impartiality and independence are not exclusive of each other and may rather be seen as complementary views of the same landscape. Lew, Mistelis and Kröll differentiate the notions of impartiality and independence with a combination of both approaches:

Impartiality requires that an arbitrator neither favours one party nor is predisposed as to the question in dispute. In so far as this is a state of mind it is a fairly abstract and subjective standard which is hard to prove. […] Independence requires that there should be no such actual or past dependant relationship between the parties and the arbitrators which may or at least appear to affect the arbitrator’s freedom

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of judgment. While impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done.\textsuperscript{30}

The ‘subjective/objective’ and ‘subject-matter/parties’ approaches both offer benefits and drawbacks. On the positive side, the former suggests the fundamental idea that an impartial and independent arbitrator is not (or cannot generally be accepted to be) just an individual who professes to be unbiased and who acts seemingly without bias. An appearance of lack of bias must also be ascertainable by a third person on the basis of external elements rather than the –normally impossible to ascertain– actual state of mind of the arbitrator\textsuperscript{31}. Another value of the ‘subjective/objective’ approach relates to the role of party autonomy in arbitration as far as the impartiality and independence of arbitrators are concerned. Party autonomy allows parties to agree that a person with links to one of them, or to all of them, may act as an arbitrator. By constraining the actual bias to a subjective dimension and the appearance of bias to an objective dimension, the ‘subjective/objective’ approach also points at the fundamental idea that parties in arbitration may have a say, if they wish, in what ‘an impartial and independent arbitrator’ means from the appearance perspective. This is certainly germane to arbitration when compared to the judiciary. By virtue of party autonomy, the parties in a particular case may shape as they wish the external requirements that an arbitrator must meet in order for him to be recognised as free of bias; or, and often easier for them, the external circumstances that are deemed to compromise the ability of an arbitrator to act without bias and therefore justify him not being appointed or being removed. In other words, now making use of the terminology normally used under the ‘subjective/objective’ approach, the independence of different arbitrators may vary even though all of them are impartial\textsuperscript{32}.


\textsuperscript{32} Ibid., pp. 94 and 99. See also Murray L. Smith, “Impartiality of the Party-Appointed Arbitrator”, \textit{Arb. Int.}, Vol. 6, No. 4, 1990, p. 323: “[I]t is necessary to make some distinction between independence and impartiality because in practice it is common for parties to waive the independence
However, the ‘subjective/objective’ approach to the distinction between impartiality and independence also has drawbacks. The main drawback is that the distinction itself is too artificial, seemingly more the result of linguistic convenience to explain a duality of terms (‘impartiality and independence’) than of a natural construction of the terms ‘impartiality’ and ‘independence’ or, most importantly, of a real need to use both terms. On the one hand, the two words are not needed to ascertain the twofold (subjective-objective) dimension of problems of bias. If the normal meaning of the terms ‘impartiality’ and ‘independence’ is considered, both express the absence of something: partiality in the former case and dependence in the latter. Either of these terms may be seen to comprise an inner-mind (subjective) and outer-mind (objective) quality aimed at giving comfort on the same question of whether the arbitrator will be able to act, or is acting, without bias. Not surprisingly, the notion of independence is sometimes construed as comprising that of impartiality whilst other times, conversely, the latter is construed as comprising the former. The ‘subjective/objective’ approach is séduisante but unpersuasive in light of the varied terminological choices made in practice. Even in the world of the judiciary, where the ‘subjective/objective’ approach deepens its roots, the notion of independence is often seen as difficult to dissociate from that of impartiality when the latter is considered from an objective perspective. Moreover, to constrain the behaviour of an arbitrator to a subjective dimension neglects the importance that such behaviour may have in assessing whether the appearance of lack of bias is sufficiently protected. On the other hand, two words are not needed to remind us that party autonomy allows parties to agree on an arbitrator’s links or conduct that must not exist in order for him to be recognised as unbiased.

rule where there has been disclosure of some connection with one of the parties. This does not mean that the party waives the impartiality rule”.

33 See, e.g., Henry, Le devoir d’indépendence de l’arbitre, p. 152: “[L’]arbitre doit être indépendent, c’est-à-dire, neutre, impartial et objectif”.

34 See, e.g., “Grounds for Refusal of Enforcement - Public Policy – Lack of Impartiality of Arbitrator”, Albert Jan van den Berg (ed.), Y.C.A., Vol. XXI. 1996, p. 506: “The arbitrator’s impartiality is also a fundamental requirement for every arbitration. This condition requires that the arbitrator have no personal interest in the case and is independent vis-à-vis the parties”.

35 Lalive, Sur l’impartialité de l’arbitre international en Suisse, p. 60.

A second drawback of the ‘subjective/objective’ approach lies in the consequences that are sometimes drawn. Under the premise that the quality of impartiality cannot be verified except for rare situations of actual bias shown by the arbitrator’s behaviour, this approach has occasionally led to the peculiar outcome of not requiring the impartiality from persons who are obliged to have such a quality. The ICC Arbitration Rules, before their revision of 2012, epitomised this situation. This was not satisfactory, also bearing in mind that counsel in arbitration proceedings may also feel subject to a certainly different but equally called, and sometimes similarly freedom-based formulated, duty of independence.

The ‘subject-matter/parties’ approach also has upsides and downsides. It indicates the origin of the main types of problems of bias in practice: on the one hand, under the notion of ‘impartiality’, the links of the arbitrator with the subject-matter of the dispute (problems of prejudgement) and the behaviour of the arbitrator in the

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37 The ICC Arbitration Rules of 1998, recently superseeded by a new version of these Rules, required every arbitrator to “be and remain independent of the parties involved in the arbitration” (art. 7.1) and provided that an arbitrator could be challenged “for an alleged lack of independence or otherwise” (art. 11.1). They did not require every arbitrator to be impartial but only the arbitral tribunal to act impartially (art. 15.2). For an explanation of this situation, Derains and Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed., pp. 118-119:

While the main purpose of Article 7(1) is to secure the appointment of impartial arbitrators, the drafters of the ICC Rules have preferred to express the relevant requirement in terms of independence because independence is a more objective notion. Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind, which it may be impossible for anyone but the arbitrator to check or to know when the arbitrator is being appointed. It is therefore easier for the Court to determine, when confirming or appointing an arbitrator, whether that person is independent than to assess the extent of his or her impartiality (…) The absence of an express reference to impartiality in Article 7(1) should not be construed as meaning that an arbitrator's partiality is to be tolerated.

See also Stephen Bond, “The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration”, in *The Arbitral Process and the Independence of Arbitrators*, ICC Publ. No. 472, 1991, p. 11, explaining more in detail the reasons why the suggestion to include the concept of “impartiality” in the ICC Arbitration Rules of 1998 was not accepted. According to this author, one of those reasons was related, as Derains and Schwartz note, to the “independence” being a more objective concept. Bond also mentions two other reasons: that the suggestion to include the concept of “impartiality” was made late in the revision process and that no one offered a satisfactory definition of “impartiality”.

38 See, e.g., Recommendation Rec(2000)21 of the Council of Europe, about Freedom of Exercise of the Profession of Lawyer, when referring in its preliminary considerations to “the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason”.

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reference (problems of misconduct\(^{39}\)); and on the other hand, under the notion of ‘independence’, the links of the arbitrator with persons interested in the outcome of the arbitration (problems of affection—or animosity—and problems of money). It also facilitates an appreciation of the fact that certain potential problems of bias (e.g. a personal or professional relationship between the arbitrator and one of the parties [independence], or an arbitrator having shown a premature opinion on the merits of the dispute [impartiality]) are less complex than others (e.g. an arbitrator appointed by the same party in several arbitrations on similar disputes arising out of the same contract [independence and impartiality], or an arbitrator who is a member of the same law firm as the legal advisor of a third which was involved in the commercial project related to the contract and who has an interest in the outcome of the arbitration [independence and impartiality]). However, the suggestion that the impartiality is not related to the parties but rather to the subject-matter of the dispute is counter-intuitive given that ‘impartiality’ and ‘parties’ belong to the same linguistic family. Furthermore, the ‘subject-matter/parties’ approach is not enough to explain the reality. There are circumstances which may pose a problem of bias and yet do not fit into any of the categories that this approach suggests, because they are neither links with persons interested in the outcome, nor links with the subject-matter of the dispute, nor a behaviour of the arbitrator in the reference. For instance, relationships that the arbitrator may have with his fellow co-arbitrators or with the arbitral institution. The ‘subject-matter/parties’ approach eventually seems to be, like the ‘subjective/objective’ one, too artificial.

4-18 The ‘subjective/objective’ and ‘subject-matter/parties’ approaches to the distinction between the notions of impartiality and independence have proved useful in arbitration at many levels (e.g. teaching, scholar, legal practice) in facilitating the debate about problems of bias. Nonetheless, neither of them provides a satisfactory distinction between the notions of impartiality and independence. Fortunately enough though, this does not attract any serious concern from practitioners, scholars, arbitral institutions or national courts, let alone arbitration end-users, because a distinction between the meanings of impartiality and independence in arbitration, after all, is not

\(^{39}\) The term ‘misconduct’ is here used in a broad sense, encompassing any wrongdoing by the arbitrator in the reference, either intentional or not.
really necessary. Some authors indeed reject the distinction or note that it has been
given undue importance. It is further doubtful whether the ‘impartial and
independent’ duality was originally brought to arbitration with any interest in the
terminological distinction at all, or rather, which seems more likely, with no other
consideration than the sole interest in making arbitrators mirror judges. The search
for a single conceptual distinction between the meanings of impartiality and
independence in arbitration is of limited interest and carries the risk of ending up lost
in translation and fighting false problems.

The foregoing still holds true despite the fact that some arbitration laws, after the
UNCITRAL choice of making joint use of the terms ‘impartiality’ and
‘independence’, continue using only one of them and not the other. This is the case,
for instance, as mentioned earlier, of the Swiss Private International Law Act
(‘independence’), the English Arbitration Act (‘impartiality’) and the Swedish
Arbitration Act (‘impartiality’). English legislators used the notion of ‘impartiality’
not because the ‘independence’ (seen as the absence of certain relationships between
the arbitrator and the parties) was not important, but rather because it was considered
unnecessary to provide for the independence requirement given that a doubt as to a
lack of independence would only matter if it amounted to a doubt as to a lack of

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41 From a historical perspective, the joint use of the notions of ‘impartiality’ and ‘independence’ in
arbitration is relatively new. Pre-Twentieth-Century arbitration agreements normally use the term
‘impartiality’ only. The first joint use of the notions of ‘impartiality’ and ‘independence’ in the field
of international arbitration may be traced back to the early 1930s, when René David noted that the
arbitrator should be able to be challenged when there are circumstances that give rise to doubts as to
his impartiality or independence (René David, “Rapport sur l’arbitrage conventionnel en droit privé -
Étude de droit comparé”, UNIDROIT, Études III, S.d.N. 1932, pp. 70-71). The notions of
‘impartiality’ and ‘independence’ were further jointly resorted to in several legal instruments which
were drafted under the auspices of UNIDROIT and the United Nations during the 1940s, 1950s and
1960s. The interest in making arbitrators mirror judges is particularly visible in the European
Convention providing a Uniform Law on Arbitration, opened for signature by the member States of
the Council of Europe on 20 January 1966, Explanatory Report, paras 47 and 64:

The rules adopted are in no way intended to establish a system whereby an arbitrator appointed by
one party should be regarded as that party's representative. Article 6 provides only for the right of
appointment, and it goes without saying that the arbitrators, however appointed, must perform their
duties in the same way as judges, i.e. with independence and impartiality.

Since [...] the Committee of Experts considered that arbitrators must have the impartiality and
independence of judges, they thought it best to define the grounds for challenging arbitrators purely
and simply by reference to the grounds for challenging judges laid down in municipal law.
42 See section 4.1.1 above, para 4-5.
impartiality\textsuperscript{43}. In Sweden, the term ‘impartial’ is deemed to include the concept of ‘independence’ in the sense used in the UNCITRAL Model Law \textsuperscript{44}. In the Swiss case, even though there are different doctrinal positions on the matter, the Federal Tribunal has made it clear that the omission of the term ‘impartiality’ does not allow any arbitrator to act with bias\textsuperscript{45}. Overall, there is no fundamental difference between systems that have made different terminological choices\textsuperscript{46}.

Whatever the choice of words may be (‘impartiality and independence’, ‘impartiality’ or ‘independence’), an impartial and/or independent arbitrator may be defined as the sum of three elements: an unbiased mind (A), an unbiased behaviour in the reference (B) and something else (whatever else the arbitrator may be required to meet in order to be recognised as impartial and/or independent in each case), usually consisting of a minimum distance from the dispute (persons and subject-matter) or, in other words, the absence of certain links which are deemed to be unacceptable (C). Reasonable doubts that an arbitrator lacks any of these three elements may justify his removal.

A) An unbiased mind

An unbiased mind is the first component of an impartial and independent arbitrator. It would seem to be also the most obvious and the one less exposed to changes at different times and places. It consists of an internal willingness and self-awareness of capability to act without favouritism or bias toward any of the disputing parties. To act without bias, in turn, amounts to the arbitrator acting on the sole basis of his own understanding of what is the right decision according to the submissions of the parties, the facts and the rules (procedural or substantive, as each case may be) that he must apply. An unbiased mind in an arbitrator, as far as the willingness and self-


\textsuperscript{45} Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA) and Union Cycliste Internationale (UCI), ATF 29 October 2010, para 3.3.1.

\textsuperscript{46} Poudret and Besson, \textit{Comparative Law of International Arbitration}, 2\textsuperscript{nd} ed., para 417.
awareness of capability to act without bias are concerned, is not different from an unbiased mind in a judge.^

To have an unbiased mind does not mean ceasing to be human. Any arbitrator (like any judge) may naturally be unable to refrain from having different feelings for each party for whatever reason; for instance, out of any of the many in-built likes and dislikes that every human being carries at any given time of life as a result of the combined effect of genetic heritage, cultural background and what he has so far decided to do with his freedom, or simply out of the knowledge of one party prior to the arbitration proceedings. Moreover, there are factors that may influence the judgment of an unbiased mind and make that judgment different from another reached by another unbiased mind. For instance, education and professional experience. Even gender has been suggested as a factor that may introduce different perspectives and experiences to inform a judgment. After all, it is only natural that different arbitrators may think about the same problem differently even if all of them are bound to apply the same rules. A hypothetical case may be imagined in which the same parties and counsel present their respective submissions and evidence in the same manner but separately to ten different impartial and independent arbitrators, all of whom are bound to decide the dispute according to the same procedural and substantive rules. It is likely that the arbitral procedure would not be conducted identically in the ten cases and, more importantly, the ten awards would probably not all reach identical conclusions. Assuming that the ten arbitrators were all good arbitrators, the ten awards could well all be good awards, notwithstanding the fact that each of the disputing parties would probably rank its satisfaction with them differently. This explains the ever-present degree of unpredictability stemming from differences in the ways different people think, which may be seen as the role of luck.

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47 "Independence, efficiency and role of judges", Recommendation No. R (94) 12 adopted by the Committee of Ministers of the Council of Europe on 13 October 1994, Principle I(2)(d): “Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law”.

48 Suggested by Brenda Hale, who in 2004 became the first female Law Lord in the United Kingdom after six hundred years of male exclusivity among the members of the House of Lords’ appellate committee. She yet further remarked that “the great majority of judgments I have written or spoken could just as easily have been written or spoken by a man”. Quoted from Erika Rackley, “Difference in the House of Lords”, Social & Legal Studies, 2006, p. 168.
in judicial outcomes and which has evoked in others the idea that absolute impartiality is a myth. Yet, the particular feelings and personal factors of an arbitrator are compatible with an unbiased mind as long as he is satisfied that none of such feelings and factors prevents him from acting without favouritism or bias toward any of the disputing parties.

Arbitrators are increasingly required in practice to somehow make their unbiased state of mind explicit by means of an express statement when they enter office. The concerned arbitrator is the one who can better—if not the only one who can really—answer the question of whether his mind is an unbiased one; and once this question is answered in the affirmative, there is little that a party who distrusts the arbitrator can do. This, coupled with human fallibility (one of the few realities that appear to enjoy universal consensus) and the fact that there is also little that a party can do against what it may consider to be an unjust award, makes it important for arbitrators to take the assessment about having an unbiased mind seriously. A careful look at oneself is necessary, not at the person that the arbitrator would like to be but at the person he is. If an arbitrator under the duty of impartiality and independence has any


50 Clay, L’arbitre, paras 337-341 (“Le mythe de l’indépendance absolue”), noting at page 289: “Même la volonté la plus absolue d’être indépendant ne permettrait pas à celui qui juge de dépasser, ce qu’un auteur a appelé, les “démons de sa propre subjectivité””, quoting this last expression from R. Koering-Joulin, “Le juge impartial”. See also Russell, footnote 24 above, p. 10: “We realists know that judges come to their work with predispositions based on their pre-judicial experience and affiliations, and that these predispositions are not easily shed even if they are disciplined by new orientations after their appointment”.

51 See, e.g.: ICC Statement of Acceptance, Availability, Impartiality and Independence; SCC Statement of Impartiality and Independence; WIPO Statement of Acceptance and Declaration of Impartiality and Independence.

52 The unbiased mind of an arbitrator is usually presumed as long as it is not voluntarily denied by the concerned individual or otherwise contradicted by his behaviour in each particular case. This presumption also applies to judges. See, e.g.: Le Compte, Van Leuven and De Meyere v. Belgium, ECHR Judgment 23 June 1981, No. A43, para 58; Morel v. France, ECHR Judgment 6 June 2000, No. 34130/96, para 41.

The presumption of the arbitrator’s unbiased mind virtually always makes the mere subjective doubts of one party about the unbiased state of mind of the arbitrator perfectly irrelevant to making the arbitrator step down. The only exception that may arise in arbitration, although rare in practice, is when those mere subjective doubts are shared by all of the other parties. It is then the arbitrator’s willingness and self-awareness of ability to act without bias that is perfectly irrelevant—virtually always, he will not be able to do anything against a joint decision by the parties to do without his services.
reservations or doubts about his willingness and ability to find the rights and obligations of each and every disputing party, if he does not initially consider equally possible the radically opposed hypothesis of finding 100% or 0% in favour of either party, he should not accept the office. Party-appointed arbitrators, in particular, need to be sure that their willingness and self-awareness of capability to act without bias are not undermined whatsoever by the natural feeling of thankfulness that they may have towards the appointing party for the intangible and tangible satisfactions that, because of the unilateral choice of that party, will reach them (most arbitrators like to be appointed and nowadays virtually all of them receive fees for their services).

Having an unbiased mind partly consists in the courage to dislike and, particularly in party-appointed arbitrators, the absence of any wish to be appointed again by the same party. Any doubt by the arbitrator about his unbiased mind should lead him to step down.

The notion of an unbiased mind, albeit obvious, is also somewhat elusive. As mentioned above, there is no difficulty in accepting that two unbiased minds may think differently about the same matter. For instance, a method of calculation of damages which is disputed by the contending parties may be deemed convincing by one arbitrator and unconvincing by another without the difference entailing any reprehensible bias in either, but rather a legitimate difference of understanding of how certain facts may be deemed to be proved or how a legal provision on the admissible scope of damages may be construed. Indeed, more often than not, it is good that such differences exist. One of the advantages of multiple-member tribunals is that, by allowing differences to emerge and be confronted, a tribunal may be more likely to ultimately get it right. However, the elusive issue of whether an arbitrator can truly be impartial is a different question. Amongst those who doubt it, Jennifer Kirby, “With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated”, J. Int. Arb., Vol. 26, No. 3, 2009, pp. 337-355. For a different view: André Faurès, “Pourquoi choisir trois arbitres au lieu d’un seul?”, in Les arbitres internationaux, Société de législation comparée, 2005, p. 82, noting that a sole arbitrator may not be the best option in cases which are complex in law or in facts; Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, para 4.27.


54 IBA Guidelines, General Standard 2(a): “An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent”.

55 Whether the advantages of three-member tribunals outweigh their disadvantages is a different question. Amongst those who doubt it, Jennifer Kirby, “With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated”, J. Int. Arb., Vol. 26, No. 3, 2009, pp. 337-355. For a different view: André Faurès, “Pourquoi choisir trois arbitres au lieu d’un seul?”, in Les arbitres internationaux, Société de législation comparée, 2005, p. 82, noting that a sole arbitrator may not be the best option in cases which are complex in law or in facts; Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, para 4.27.
arbitrator’s position on a given matter may be more or less favourable to one of the disputing parties because of the influence of factors of which the arbitrator is unaware remains unresolved. May such a thing as an unconscious or implicit bias exist in arbitrators who are nevertheless determined to act without bias? The question of whether an unconscious bias may exist in decision-making is relatively unexplored in arbitration literature, probably for a good reason (too difficult to undertake for all practical purposes), although it has received an affirmative answer in many other fields of knowledge. Yet, an attentive look at international arbitration shows that the possibility of implicit bias in party-appointed arbitrators, far from being disregarded, is at the heart of certain provisions that are common ground in virtually all arbitration rules and laws, such as the provision that a sole or third presiding arbitrator should be of a nationality different from those of the parties, the provision that unilateral appointments may only exist if they are available to all the disputing parties, or the provision that a party-appointed arbitrator cannot make procedural decisions or, for that matter, reach an arbitral award on his own.

B) An unbiased behaviour

The second component of an impartial and independent arbitrator is an unbiased behaviour in the reference: the arbitrator must act without favouritism towards any of the disputing parties. Arbitration rules and laws rarely make an express provision for this duty on the part of each individual arbitrator, probably because it is only deemed as an inherent part of the duty of impartiality and independence. What most rules and laws expressly provide for is the arbitral tribunal’s obligation to conduct the procedure impartially, allowing all of the parties to have a reasonable opportunity to present their case.

If it is clear at a theoretical level that a biased behaviour in an arbitrator may give rise to justifiable doubts as to his impartiality or independence, it is less clear what

noting that “in a process where there is no effective appeal process on the merits in most cases, the risk of an error of law or fact by a three-member tribunal is far lower than that of a sole arbitrator with no colleagues to correct or debate an inadvertent mistake or misunderstanding”.

By way of exception see, e.g., Brazilian Arbitration Act (1996), art. 13, sixth para.: “In performing his duty, the arbitrator shall behave in an impartial, independent, competent, diligent and discreet manner”.

118
specific actions or omissions by an arbitrator during the arbitral proceedings should lead to appreciate the existence of such justifiable doubts. Yet, certain conducts can be identified. For instance, a biased behaviour may clearly be concluded when the arbitrator acts as an advocate or a representative of one of the parties or when he advises a party on the merits or outcome of the dispute\textsuperscript{57}.

Unilateral communications with one of the disputing parties in relation to the case are also normally deemed as a bias-related misconduct. An impartial and independent arbitrator is expected not to have this type of communications, even prior to his appointment\textsuperscript{58}. By way of exception, two types of unilateral communication between a party-appointed arbitrator and his respective appointing party are generally considered acceptable: pre-appointment interviews and post-appointment discussions about the choice of the presiding arbitrator. In these instances, a party-appointed arbitrator may be informed by the party about the general nature of the case and may inform the party about his qualifications, availability and independence, or likewise discuss with such party the prospective candidates for the office of presiding arbitrator. Yet, in the course of these unilateral

\textsuperscript{57} See, e.g.: LCIA Arbitration Rules 1998, art. 5.2: “All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute”; Hungarian Arbitration Act (1994), sec. 11: “The arbitrators are independent and impartial, they are not the representatives of the parties. In the course of their action they may not receive any instruction and they are obliged to full secrecy with regard to circumstances they have become aware of when fulfilling their responsibilities, even after the termination of the proceedings. In case of an institutional arbitral tribunal they shall make a written statement thereon on the occasion of their election (appointment)”; Bolivian Law of Arbitration and Conciliation (1997), art. 15.1: “The arbitrators shall not represent the interests of either of the parties and shall perform their duties with absolute impartiality and independence”; CIETAC Arbitration Rules (2005), art. 19: “An arbitrator shall not represent either party and shall remain independent of the parties and treat them equally”.

\textsuperscript{58} See, e.g.: CRCICA Arbitration Rules (2011), art. 11.3: “The arbitrator shall avoid ex parte communications with any party regarding the arbitration. If any such communication is made, the arbitrator shall inform the other parties and arbitrators of its substance”; NAI Arbitration Rules (2010), art. 10: “[...] He may not, prior to his appointment, disclose his opinion on the case to one of the parties. 2. In the course of the proceedings an arbitrator shall not have any contacts with a party concerning matters regarding the proceedings unless he has obtained prior consent of the other parties and, if the tribunal consists of more than one arbitrator, of the coarbitrators”.
communications, the prospective or already appointed arbitrator must not discuss the merits of the dispute nor disclose to the party any preliminary opinion.

Some important arbitration rules have not yet taken a stand in this regard and some party-appointed arbitrators prefer to avoid these unilateral communications because they do not deem them justified or do not feel at ease with them, particularly when there is no record of their contents. One may hardly deny that subtle words in conversations and also even non-verbal communication in meetings may in some cases make the line between what is appropriate and what is not very thin.

An arbitrator may also engage in biased behaviour when he breaches his ongoing obligation to timely disclose any circumstance that may give rise to justifiable doubts as to his impartiality or independence. This misconduct would initially seem easier to prove by an aggrieved party than the above-mentioned examples (to act as an advocate or to unilaterally discuss the case with one party) and, yet, it is probably the one more in need of further clarification. There is certainly a general perception in international arbitration that an arbitrator must not disclose all or virtually all

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60 For instance, the LCIA and the ICC. The 2012 ICC Arbitration Rules remain silent about any acceptable unilateral communications between appointors and appointees. An express stand would have been preferable, particularly when members of the ICC senior staff have noted that some unilateral communications are normal or appropriate. See, in this respect, Ahmed S. El-Kosheri (Vice-Chairman of the ICC International Court of Arbitration at the time) and Karim Y. Youssef, “The Independence of International Arbitrators: An Arbitrator’s Perspective”, in The independence of the arbitrator, ICC Special Bull., 2007, p. 52.

61 On the advisability of rethinking the presumption of these purportedly acceptable unilateral oral communications between appointors and appointees, see chapter 5, section 5.3.
circumstances that ‘connect’ him in any way to a party. However, it is unclear what circumstances arbitrators must disclose or, put differently, what undisclosed circumstances constitute a breach of the arbitrator’s duty of disclosure. The IBA Guidelines require arbitrators or prospective arbitrators to disclose the facts or circumstances “that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality and independence”; and they also provide some specific examples of circumstances that should normally be disclosed, consideration ultimately being due to the facts of the case. These Guidelines are further adamant in suggesting that disclosure is not an admission of a conflict of interest nor does it demonstrate sufficient doubts to disqualify an arbitrator. Instead, the Guidelines note that the purpose of disclosure is for an arbitrator who considers himself to be impartial and independent despite the disclosed facts, and therefore capable of performing his duties as such, “to allow the parties to judge whether or not they agree with the evaluation of the arbitrator and, if they wish, to explore the situation further.”

The difference between the circumstances that must be disclosed and the circumstances (presumably fewer) that constitute a conflict of interest is explained in the Guidelines by having recourse to a subjective-objective distinction: the arbitrator must apply a subjective test when fulfilling his duty of disclosure (General Standard 3, “in the eyes of the parties”) whereas the decision-maker on a challenge of the arbitrator must apply an objective test (General Standard 2, “reasonable third person having knowledge of the relevant facts”). Overall, this regime deserves the credit of shedding some light on the sensitive areas of disclosure and conflicts of interest, and

62 A relatively recent failure confirms this perception. At the beginning of 2008, a subcommittee of the Dispute Resolution Section’s Arbitration Committee of the American Bar Association (ABA) proposed a draft of Best Practices for Meeting Disclosure Requirements. This draft was followed by other drafts, all of them proposing a very broad scope of disclosure on the part of prospective arbitrators. The draft received strong criticism from many, not only from outside the United States but also from members of the ABA itself, namely from the Working Group of the ABA Section of International Law. Eventually, the Section Council of the ABA Dispute Resolution Section refused to approve the draft in April of 2009. It appears that the reason for this refusal was that the draft was seriously overbroad. The ABA further stressed that such draft did not represent its official position.

63 IBA Guidelines on Conflicts of Interest in International Arbitration (2004), General Standard 3(a) and Red and Orange lists. The general duty of the arbitrator to make the assessment of what he must disclose having regard to the “eyes of the parties” was imported from art. 7(2) of the ICC Arbitration Rules of 1988 –art. 11(2) of the 2012 ICC Arbitration Rules.

64 Ibid., Explanation to General Standard 3(b). Otherwise, this General Standard adds, the arbitrator would have declined the nomination or appointment at the outset, or he would have resigned.

65 Ibid., Explanation to General Standard 3(a).
also appears to be contributing –if only, on some occasions, by reaction– to paving the way towards harmonization of international standards. However, the subjective-objective conundrum that the IBA Guidelines leave us with raises problems of their own. The question of what an arbitrator must disclose to avoid breaching his duty remains, for practical purposes, exposed to some degree of uncertainty.

Secondly, there is also uncertainty as to what happens when there is a breach of the duty of disclosure. May such a breach be in itself a reason for disqualifying an arbitrator? The IBA Rules of Ethics of 1987 gave an affirmative answer to this question: “Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.” The more recent IBA Guidelines, which supersede the IBA Rules of Ethics in the matters dealt with by the former, do not contain that statement and indeed seem to have adopted a different point of view. They still appear to admit that a failure to disclose may lead to the disqualification of an arbitrator, but place emphasis on making it clear that it may not. When commenting on the practical application of the Orange List (“non-exhaustive enumeration of specific situations which, depending on the facts of a given case, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence” –i.e. the situations which are likely to pose more doubts when assessing whether they must be disclosed or whether they constitute a conflict of interest), the IBA Guidelines consider that the arbitrator’s non-disclosure “should not result automatically in either non-appointment, later


disqualification or a successful challenge to the award”. They go on to note: “In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so”\(^{70}\).

This shift from where the IBA stood in its Rules of Ethics may have been caused by the interest of the drafters of the IBA Guidelines in deterring reluctant parties from abusing the process\(^{71}\). Yet, the IBA Guidelines’ approach and, more particularly, the remark that “non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so”, leaves room for breaches of the duty of disclosure without consequence or remedy –a disappointment that most arbitration end-users do not deserve. The reputation of international arbitration is likely to be undermined if a reasonable third person, with knowledge of the relevant facts, concludes that an arbitrator should have disclosed a given circumstance that the arbitrator did not disclose, and yet the aggrieved party obtains no more satisfaction than the mere declaration of the arbitrator’s wrong-doing.

A remedy for the failure to disclose is necessary. It should be strong enough to preserve the reputation of the system and to deter arbitrators from non-disclosing ‘orange’ situations, but also consonant with the fact that the question of whether a specific given circumstance should be disclosed may sometimes admit sharp differences of opinion. A balanced solution may be to accept that a failure to disclose a circumstance which \textit{expressly} appears on a list agreed to by the parties (which could be the sum of the IBA Red and Orange Lists as they currently are or as they may be expanded) should generally lead to the disqualification of the arbitrator or to the challenge of the award being upheld, the only exception being when the behaviour of the complaining party made it unreasonable. This solution may seem harsh, particularly when what is at stake is the disqualification of the arbitrator at a

\(^{70}\) Ibid., paras 4-5. See also Emmanuel Gaillard, Note – Cass. (2e Ch. Civile), 6 décembre 2001; Cour d’appel de Paris (1re Ch. G), 2 avril 2003; Cour d’appel de Paris (1re Ch. C), 16 may 2002, Rev. Arb., 2003, No. 4, pp. 1241-1242, stressing the need to neatly distinguish between circumstances that must be disclosed and grounds for challenge. This author was one of the members of the Working Group that was appointed by the IBA Committee on Arbitration and ADR to prepare the IBA Guidelines.

\(^{71}\) IBA Guidelines on Conflicts of Interest in International Arbitration (2004), Introduction, para 1.
late stage of the proceedings or the nullification of an arbitral award. Yet, it seems consistent with the principle, also present in the IBA Guidelines, that the arbitrator is supposed to resolve all doubts as to whether he should disclose certain facts or circumstances in favour of disclosure. If there is a non-exhaustive list of circumstances that must be disclosed, arbitrators cannot misjudge what is doubtful to be disclosed at least as far as the specific circumstances set forth on such list are concerned.

Along with the disqualification of the arbitrator or the nullification of the arbitral award, or only as a stand-alone remedy if the former is no longer available or is deemed inappropriate in a particular case, the failure to disclose the circumstances on the Orange List (let alone on the Red List) should normally have an impact on the arbitrator’s fees. Penalising the failure to disclose through the arbitrator’s fees was, for example, decided by the Vienna International Arbitration Centre (VIAC) in one case. After a challenge against an arbitrator was accepted, the Secretary General of the VIAC decided not to pay any fees to such arbitrator on the grounds of his failure to disclose the facts which had led to the challenge, the arbitrator then filing a claim against the Austrian Federal Economic Chamber, of which VIAC forms part, claiming the unpaid fees. The Austrian Supreme Court eventually upheld the decision of the arbitral institution not to pay fees to the arbitrator who had been successfully challenged on the grounds of facts that he had not disclosed. This solution seems reasonable. Parties should not be the only ones to be incentivised to behave well and penalties through fees are likely to be more effective incentives for arbitrators to carefully perform their duty of disclosure than the possibility – theoretically better for its compensatory logic but less real in practice – for the aggrieved party to claim liability from the arbitrator.

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72 Ibid., General Standard 3(c).
C) A minimum distance, or the absence of unacceptable links

As stated above, an impartial and independent arbitrator, as well as an impartial and independent judge, must be willing and self-satisfied of being able to consider the contested positions and ultimately make a decision (or participate in the decision-making process in multiple-member tribunals) without favouritism towards any of the parties. And he must also retain an unbiased behaviour in the reference. But these first two elements (mind and behaviour), essential though they may be, are generally not enough to recognise an impartial and independent arbitrator as such. There is an extended belief that it is also necessary to ascertain a visible minimum distance between the arbitrator, on the one hand, and any person who may have an interest in the outcome of the dispute (parties, counsel and sometimes third parties) and the subject matter of the dispute, on the other. This minimum distance consists of the absence of certain links (ties, relationships, connections or dealings, either past or present, direct or indirect) which are deemed unacceptable.

The unacceptable links of an arbitrator are external, so-called objective links, in the sense that their existence can be verified without any need to speculate about the arbitrator’s actual state of mind or about the meaning of his conduct in the reference. The mere existence of these links does not question the arbitrator’s integrity. They may lead to an arbitrator being prevented from acting or being removed from office even though he is generally seen as having an international reputation and recognised ability. The rationale of requiring an impartial and independent arbitrator to be free of certain links to the dispute is not that these links necessarily prevent the arbitrator from acting without bias, but rather an interest in giving the disputing parties enough reasons to believe, from the very first moment of the arbitrator’s nomination, that he will not consciously or unconsciously act with bias.

The question of what are the unacceptable links in arbitration cannot be answered by having recourse to a closed list of circumstances. For years, national laws sought to define the unacceptable links in arbitration by making it equal to those that apply to judges. This was the case during most of the Twentieth Century, when most national
laws provided that arbitrators could be challenged on the same grounds as judges. These grounds typically include a personal interest in the dispute, certain blood relations, a notorious friendship or enmity, previous knowledge or involvement in the matter and a situation of subordination. However, there has been an evolution—or perhaps just a move back to the basics—towards considering that the mere assimilation of arbitrators to judges, as far as grounds for challenge are concerned, is not suited or adequate to arbitration and, more particularly, to international arbitration. The fact that links between arbitrators and parties are naturally likely to be more in practice than those between judges and parties (especially when the parties themselves choose the arbitrators instead of delegating the choice to a third person), along with the power of the parties to agree in each case which links are acceptable and which are not, make it preferable to use the general formula that an arbitrator can be challenged if there are circumstances which give rise to justifiable doubts about his impartiality or independence. Nowadays, there are few national laws that define the grounds to challenge arbitrators by making full or partial reference to the grounds for challenging judges.

Notwithstanding the above, the unacceptable links in an impartial and independent arbitrator, when the parties have not agreed otherwise, usually—and logically—resemble in part the unacceptable links applying to judges. The Red List of the IBA


77. See, e.g.: Honduras Conciliation and Arbitration Law (2000), first section (domestic arbitration), art. 44 para 1 and art. 49 para 1; Brazilian Arbitration Act (1996), art. 14.
Guidelines illustrates this resemblance. This List provides a non-exhaustive enumeration of specific situations which, in principle (consideration ultimately being due to the facts of the case), give rise to justifiable doubts as to an arbitrator’s impartiality and independence in the eyes of a reasonable and informed third person. The two broad categories of circumstances that are covered in the Red List are substantially similar to the grounds upon which judges may be challenged in most countries: (i) close personal relationships or financially significant professional relationships with a disputing party or with an affiliate to one of the disputing parties, with a counsel or with a third party that has an interest in the outcome of the dispute; and (ii) prior legal advice or expert opinion on the dispute to a party, or previous involvement of the arbitrator in the case.

The IBA Guidelines also illustrate, this time through its Orange List, why it is not adequate to mirror the grounds of challenge of arbitrators with those of judges. The Orange List is a non-exhaustive enumeration of specific situations which are unlikely to affect judges and which may or may not disqualify an arbitrator (may or may not give rise to justifiable doubts as to the arbitrator’s impartiality and independence in the eyes of a reasonable and informed third person), depending on the circumstances of each particular case. The arbitrator has a duty to disclose the circumstances set forth in the Orange List, as well as those on the Red List.

Some national laws follow a similar approach by providing for specific examples of unacceptable links (which resemble, to a large extent, those applied to the judiciary) and, at the same time, provide for the general formula that an arbitrator may be challenged if there are other circumstances which give rise to justifiable doubts about his impartiality or independence:

- [China] In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator: (1) the arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) the arbitrator has a personal interest in the case; (3) the arbitrator has another relationship with a party or his agent in the case which may affect the impartiality
of the arbitration; or (4) the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.\textsuperscript{78}

- [Lithuania] An arbitrator may be challenged only if the following circumstances exist that give rise to justifiable doubts as to his impartiality or independence: 1) an arbitrator is officially or otherwise dependent on one of the parties; 2) is a relative of one of the parties; 3) is directly or indirectly concerned with the outcome of the case in favour of one of the parties; 4) participated in pre-arbitral mediation proceedings; 5) there are other circumstances that give rise to justifiable doubts as to his impartiality.\textsuperscript{79}

- [Sweden] An arbitrator shall be impartial. If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist: 1. where the arbitrator or a person closely associated to him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute; 2. where the arbitrator or a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect benefit or detriment worth attention as a result of the outcome of the dispute; 3. where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or 4. where the arbitrator has received or demanded compensation in breach of section 39, second paragraph.\textsuperscript{80}

4-40 Other systems provide for more stringent conditions by providing for additional unacceptable links. For instance, the NAI Arbitration Rules provide that an arbitrator may not have a close or professional relationship with a co-arbitrator\textsuperscript{81}. By way of a second example, the Code of Sports-related Arbitration (CAS regulations) included in 2009, as the most significant amendment, the prohibition for CAS arbitrators and mediators to also act as counsel before the CAS. The Court of Arbitration for Sport explained that “[t]his prohibition of the double-hat arbitrator/counsel role was

\textsuperscript{78} Chinese Arbitration Law (1994), art. 34.
\textsuperscript{79} Lithuanian Law on Commercial Arbitration (1996), art. 15.2.
\textsuperscript{80} Swedish Arbitration Act (1999), sec. 8. Pursuant to section 39, second paragraph: “An agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void. Where one of the parties has provided the entire security, such party may, however, solely consent to the realisation of the security by the arbitrators in order to cover the compensation for work expended.”
\textsuperscript{81} NAI Arbitration Rules (2010), art. 10.
decided in order to limit the risk of conflicts of interest and to reduce the number of petitions for challenge during arbitrations.”

4.2. IS IT WORTH REQUIRING THIS STANDARD BY DEFAULT FROM PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL ARBITRATION?

It has sometimes been suggested that party-appointed arbitrators in international arbitration should not be required to be impartial and independent. Such was the initial stand of the UNIDROIT commission chaired by René David in its ‘Draft of a Uniform Law on Arbitration in Respect of International Relations of Private Law’. The 1954 draft provided that an arbitrator could be challenged “if any circumstances exist capable of casting doubt on his impartiality or independence”, but also that these grounds for challenge did not apply to party-appointed arbitrators. The rationale behind this exclusion was that party-appointed arbitrators should not be open to being challenged for lack of impartiality or independence when the practice often showed that they had not such qualities:

The draft does not admit this cause for challenge in respect of all the arbitrators. The only arbitrator who may be so challenged is the arbitrator designated by agreement between the parties, by the court, by the other arbitrators, or by a third person.

On the other hand, the arbitrator nominated by one of the parties may not be challenged because of some doubt with regard to his impartiality, except in the case where such arbitrator has become the president of the arbitral tribunal. The distinction thus admitted in the draft constitutes in theory a big change having regard to certain existing legal systems; but it did not seem desirable to the members of the Committee to confine themselves to a theoretical point of view and it was not possible to ignore the unsatisfactory practice, according to which arbitrators nominated by the parties too often tend to conduct themselves as advocates for the parties which have nominated them, the only really judicial function being then, in truth, reserved for the third arbitrator.

82 Court of Arbitration for Sport, Press Release of 1 October 2009.
84 Ibid., Explanatory Report, p. 43.
Later, UNIDROIT changed its view. In its ‘Draft Uniform Law on Arbitration in Respect of International Relations of Private Law’ of 1957, which was prepared with the participation of the Council of Europe, the grounds for challenge based on doubts about the impartiality of the arbitrator applied to all arbitrators, no matter how appointed. Two decades later, during the preparation of the UNCITRAL Arbitration Rules, those who considered that imposing the obligation of impartiality and independence on party-appointed arbitrators was impractical and unrealistic remained a minority.\(^{85}\)

Lauterpacht commented in the early nineties, in the context of arbitration involving states, that the principal disadvantage of the widely used system of international tribunals including party-nominated members was “the dilution that it entails of the concept of judicial impartiality and integrity”, often resulting in the assumption by party nominees of the role of representatives of the respective nominating parties on the tribunal. When considering possible solutions to this situation, and after deeming it unlikely that states would approve of the abolition of the party-nominees system, he suggested to overcome at least the underlying hypocrisy of the situation by relieving party nominees from taking the oath of acting impartiality as “functionally unnecessary and probably more honoured in the breach than in the observance”.\(^{86}\)

Others have come out in favour of not imposing the duty of impartiality on party-appointed arbitrators not only for it being more coherent with what party-appointed arbitrators often do in practice, but also considering it to be genuinely preferable. In the late eighties, Coulson praised the ‘non-neutral party-appointed arbitrators’ approach taken by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes of 1977 over the ‘all impartial’ approach taken by the IBA Rules of Ethics of 1987. He deemed it a ‘fiction’ that party-appointed arbitrators are totally impartial in practice and was sceptical about a worldwide consensus that party-appointed arbitrators in international arbitration should be impartial. He also considered that party-appointed arbitrators who are predisposed towards their respective appointing

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85 See chapter 2, section 2.4.2.B.
parties offered other advantages. For instance, he noted that non-neutral party-appointed arbitrators under the AAA/ABA Code of Ethics were free to discuss possible settlements with their respective appointing parties unless otherwise agreed by the parties. This practice, in Coulson’s view, could produce advantageous settlements that the IBA Rules of Ethics, under which party-appointed arbitrators were forbidden to discuss the case with their respective appointing parties, would on the contrary inhibit.

Dispensing party-appointed arbitrators from the duty of impartiality and independence could have some advantages. It would certainly allow avoidance of the hypocrisy of situations in which the unilaterally-nominated arbitrators are actually advocates in disguise. Arguably, it could also contribute to a smoother arbitration process and facilitate the enforcement of the arbitral award. By not requiring party-appointed arbitrators to be impartial and independent, challenges against party-appointed arbitrators would not take place. There would be no way for parties to resist the enforcement of an arbitral award on the grounds that a party-appointed arbitrator was biased. And decision-makers on problems of bias, at any stage, would be relieved from the sometimes distressing task of testing the impartiality and independence of unilaterally-appointed arbitrators.

However, the fact that the rules governing the arbitration did not expressly require party-appointed arbitrators to be impartial and independent would carry the major drawback of spreading a high degree of uncertainty in the arbitral process. What would silence mean? And if it meant that party-appointed arbitrators are expected to be biased, what is a biased arbitrator?

What would silence mean? Party-appointed arbitrators who are not expressly required to be impartial and independent may be puzzled, along with all the other participants in the arbitration, about what they are supposed to do. Some could see in the silence a form of tacit authorisation for party-appointed arbitrators to act with bias in favour of their respective appointing parties (closer to Coulson). Others could

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see silence simply a way to protect the arbitral process and the arbitral award by preventing parties from complaining about bias in party-appointed arbitrators, but without renouncing the moral aspiration of impartiality (closer to David and Lauterpacht). This could lead to oddly unbalanced situations where the party-appointed arbitrators could be performing different roles while both of them, ironically, would be convinced they are doing their duty.

What is a biased arbitrator? Parties and arbitrators in a given case may have a common understanding that the absence of the requirement of impartiality and independence in party-appointed arbitrators implies that they are expected to be biased. In such case, everyone would probably also share the idea that to be biased means to act in favour of the appointing party. But how? By way of assuming the mission to advocate in favour of the appointing party on the basis of what the latter presented in the arbitration, without assisting the party in preparing its case? Also advising the appointing party? Maybe assisting the party by participating in meetings with witnesses or experts? Possibly further accepting instructions from the appointing party? Perhaps even disclosing deliberations amongst the arbitrators to the appointing party or, more mildly, advising the appointing party to engage or not in settlement discussions with the other party? Would there be any limit beyond which a fair partiality would turn into an unfair partiality? Biased party-appointed arbitrators could again find themselves puzzled about what they are required to do.

To look for an international common understanding of what a biased arbitrator can do is much more difficult than seeking an international common understanding of what an impartial and independent arbitrator can do. Lessons can be learnt from the “non-neutral” arbitrators allowed by the AAA/ABA Code of Ethics of 1977 and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes of 2004, probably the most famous attempts to establish a status for biased party-appointed arbitrators. This status was set by first establishing the obligations of “neutral” (either non-party-
appointed or party-appointed) arbitrators and then indicating which of those obligations are applicable to “non-neutral” party-appointed arbitrators.\textsuperscript{88}

4-50  \textit{AAA/ABA Code of Ethics of 1977}. The differences in “non-neutral” party-appointed arbitrators were essentially the following: their narrower duty of disclosure, their freedom to enter relationships or acquire interests with a party even if they were likely to affect the arbitrator’s impartiality or reasonably create the appearance of partiality or bias, the lack of challenge against them for lack of impartiality and the broader unilateral communications with the appointing party. Two additional differences were established in relation to the notion of “predisposition” toward the party who appointed them: the first one related to the arbitrator’s obligation to uphold the integrity and fairness of the arbitration process, and the second one related to the arbitrator’s obligation in the decision-making process.

4-51  As to the arbitrator’s obligation to uphold the integrity and fairness of the arbitration process, Canon I provided, among other things, that an arbitrator “must observe high standards of conduct so that the integrity and fairness of the process will be preserved” and that “[a]rbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest”. Canon VII provided that “non-neutral” party-appointed arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject only to two different provisions: they could be predisposed towards the party who appointed them\textsuperscript{89} and they were not obliged to avoid entering relationships or acquiring interests with a party that were likely to affect impartiality or which might reasonably create the appearance of partiality or bias\textsuperscript{90}.

\textsuperscript{88} In the 1977 Code, Canons I-VI set the obligations of “neutral” arbitrators and Canon VII determined what obligations of Canons I-VI applied to party-appointed arbitrators. In the 2004 Code, Canons I-IX and Canon X, respectively, did the same.

\textsuperscript{89} Canon VII(A)(1): “Nonneutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, nonneutral arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators”.

\textsuperscript{90} Canon VII(A)(2).
As to the arbitrator’s obligation in the decision-making process, Canon V provided, among other things, that an arbitrator “should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision”\(^{91}\). According to Canon VII: “Nonneutral party-appointed arbitrators should observe all of the obligations of Canon V concerning making decisions, subject only to the following provision [...] Nonneutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them”.

**AAA/ABA Code of Ethics of 2004.** The status of biased party-appointed arbitrators remained very similar to that established in the Code of 1977. The most remarkable difference in the obligations of “non-neutral” arbitrators is that they had to disclose the same facts as “neutral” arbitrators\(^{92}\). The Code also reversed the presumption of “non-neutrality” of party-appointed arbitrators, bringing the US system into line with international standards\(^{93}\). The presumption of the “non-neutrality” of party-appointed arbitrators in the United States did not operate in international arbitration since long before\(^{94}\).

The status of biased party-appointed arbitrators in either of the two AAA/ABA Codes of Ethics is likely to leave a reader puzzled with at least two questions. Firstly, it is not entirely clear how an arbitrator may observe high standards of conduct in order to preserve the integrity and fairness of the process, and conduct himself in a way that is fair to all parties, if at the same time he may be “predisposed toward the party” who appointed him. Secondly, it is even less clear how an arbitrator may make decisions in a just, independent and deliberate manner if, at the same time, he

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\(^{91}\) AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, 1977, Canon V(B).

\(^{92}\) AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon X(B)(1): “Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist”.


\(^{94}\) Murray L. Smith, “Impartiality of the Party-Appointed Arbitrator”, Arb. Int., Vol. 6, No. 4, 1990, p. 322: “[t]here is accordingly no room for debate that a party-appointed arbitrator may be partisan in an international arbitration absent party authorization”.

134
is allowed to be “predisposed toward deciding in favor of the party” who appointed him. The answer this time seems as difficult as putting a round peg into a square hole.

4-55 Perhaps not surprisingly, the “non-neutral” party-appointed arbitrator has been criticized by American authors as “something of an embarrassment”\(^95\) and a system leading “to all kinds of mischief, including overly contentious proceedings, gamesmanship, additional expense and delay”\(^96\). There has also been confusion and disagreement amongst US courts and practitioners about the role of “non-neutral” and “neutral” party-appointed arbitrators\(^97\).

4-56 If biased party-appointed arbitrators are problematic in domestic systems, where more rules, values and expectations are shared, they are likely to be more problematic in the international context, where parties and arbitrators do not have a common cultural background that may allow all of them to have a similar understanding of what a fair partiality is. It may not be surprising that when the drafters of the UNCITRAL Arbitration Rules discussed the question of whether or not the impartiality and independence should be required from party-appointed arbitrators, those who considered that the answer to such question should be affirmative –as it eventually was– contended that the institution of arbitration would gain greater respect if the arbitrators acted with independence and impartiality; that the obligation was in accordance with the arbitration law of many countries, it would be widely acceptable and it would not conflict with the applicable law governing the arbitration; and that the parties, eventually, were free to waive this requirement by agreement\(^98\).


\(^98\) See chapter 2, section 2.4.2.B.
These reasons keep their value today, although perhaps now not so much as out of a need to protect the recognition and respect of arbitration by nations. International commercial arbitration being more and more detached from any national system, the key reason for imposing the duty of impartiality and independence upon party-appointed arbitrators is not a purported (and actually inexistent) absolute need for party-appointed arbitrators to have such duty, but the crucial need to show that international arbitration is a fair system of dispute resolution. The uncertainty about what a fair biased party-appointed arbitrator may be is too high. Biased arbitrators in international arbitration are likely to jeopardize the trust in the process. The international arbitration community is not willing, for good reasons, to embark on the task of establishing an international standard of what a fair partiality may be. Fouchard noted in 1995, speaking of arbitrators in general, that “[l]e statut de l’arbitre international doit tendre naturellement a l’universalité”. This is particularly desirable in party-appointed arbitrators when the parties have not reached any specific agreement on what the former are expected to do. The best way to achieve an international common understanding of the rights and obligations of party-appointed arbitrators is to require them to be impartial and independent by default.

CONCLUSIONS

The requirement of impartiality and independence from all arbitrators, no matter how appointed, is nowadays present in most arbitration rules and laws around the world. The idea that this requirement is the best standard in international arbitration is generally accepted.


An impartial and independent arbitrator.— An impartial and independent arbitrator may be defined as an arbitrator willing and self-aware of being able to act without bias, who behaves in the reference without bias and who is recognised as impartial and independent. This third requirement usually entails a minimum distance from the parties and the subject-matter of the dispute; or, in other words, the absence of certain links that are deemed unacceptable.

Is it worth keeping the standard of impartiality and independence of all arbitrators by default in international arbitration?— Yes. The standard of impartiality and independence of all arbitrators is the best way to ensure that international arbitration is a system of dispute resolution that is equally fair to all.
CHAPTER 5. PROBLEMS OF BIAS IN PARTY-APPOINTED ARBITRATORS

5-1 A problem about the impartiality and independence of an arbitrator is, essentially, a problem of trust by one of the parties in the willingness or in the ability of the arbitrator to act without bias. It will be generally referred to hereinafter as ‘a problem of bias’. Such a problem usually arises in the arbitral proceedings under the form of a challenge of the arbitrator\(^1\). The other party may put an end to the problem by agreeing to the arbitrator’s removal, irrespective of whether the former agrees or disagrees with the reasons of distrust invoked by the complaining party. The problem may also be solved if the arbitrator resigns and the other party does not object to the resignation. Otherwise, every time the other party and the arbitrator object to the latter being removed, the problem becomes a dispute –another one– between the parties.

5-2 Decision-makers resolving problems of bias (normally arbitral institutions, \textit{ad hoc} authorities or national courts) may face several typical difficulties when applying, in each particular case, the international standard that an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. One of these difficulties is that the first two elements of an impartial and independent arbitrator, an unbiased mind and an unbiased behaviour in the reference, are often of little help to decide. Complaints that the arbitrator may be mentally biased or may be behaving with bias in the arbitration, when followed by the arbitrator denying any bias and objecting to be removed, can leave the decision-maker troubled in a sea of opposed subjectivities, particularly if there are no reasons to doubt the complaining party’s integrity nor that of the arbitrator. Similarly troubled as would be someone required to decide which person is right between one that says ‘I love you’ to another that replies ‘no, you don’t’ when both of them are thought to honestly mean what they say. In order to overcome this difficulty,

\(^1\) In some systems (e.g. ICC arbitration) the problem may also arise before the formal appointment of the arbitrator in the form of an objection to his confirmation.
decision-makers often rely, perhaps too much, in the absence of reasons to put into doubt the arbitrator’s personal integrity.

A second difficulty has to do with the minimum distance from the dispute that the arbitrator must have (the links of the arbitrator that must not exist) in order for the decision-maker to be satisfied that the appearance of impartiality and independence on the part of the arbitrator is positively achieved. There are many different links of the arbitrator that may come to mind; with the parties, their counsel, the subject-matter of the dispute, a third person with an interest in the outcome of the arbitration, or any other person directly or indirectly connected to the arbitration. Some of these links, namely those that normally justify the challenge of a judge, may in most cases be deemed enough to disqualify the arbitrator as long as the parties have not agreed otherwise. However, when it comes to many other links, the question of whether they may normally be deemed to give rise to ‘justifiable doubts’ as to the arbitrator’s lack of bias is still, in terms of a transnational common understanding, an unsettled question. It is even doubtful whether certain links may be generally classified in one way or another given the critical importance of the context in each particular case.

A third difficulty for the decision-maker may lie in how to deal with the complaining party’s allegation that the arbitrator breached his ongoing obligation to timely disclose any circumstance that may give rise to justifiable doubts as to his impartiality or independence. What circumstances must be disclosed by the arbitrator and what must or can the decision-maker do in the presence of a failure to disclose? Again unsettled questions, especially the second one.

The foregoing difficulties in assessing and deciding problems of bias affect both party-appointed and non-party-appointed arbitrators. One may then wonder what is the point of discussing problems of bias in party-appointed arbitrators. Yet, such a discussion is of interest for several reasons. From a theoretical perspective, the appearance of lack of bias in party-appointed arbitrators is weaker than in sole and

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2 General Standard 2(c) of the IBA Guidelines states: “Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision”.

139
presiding arbitrators by hypothesis, and often also as a consequence of other factors apart from the unilateral appointment itself (5.1). Two of these factors, the presumption of a special role of party-appointed arbitrators (5.2) and the presumption of some acceptable unilateral communications between appointors and appointees (5.3), pose certain difficulties. It is also of interest to address the repeat appointments of the same arbitrator by the same party or counsel, as it is unclear when this link may be deemed acceptable or unacceptable (5.4). Lastly, it is of interest to address the question of whether a different standard of impartiality and independence in party-appointed and non-party-appointed arbitrators may make sense (5.5).

5.1. THE WEAKER APPEARANCE OF LACK OF BIAS

5-6 Party-appointed arbitrators often carry with them a deficit of trust in the eyes of the parties who do not appoint them. This deficit is compensated only in some cases, for example when each party trusts the arbitrator appointed by the other party because of prior knowledge. Suggestions that the system of three-member arbitral tribunals with two impartial and independent party-appointed members requires or is based on an equal trust of the parties in all the arbitrators are naive. The system in most cases works on a balance of deficits of trust derived from two basic principles that virtually most rules and laws recognise: each party will have the possibility to unilaterally appoint one arbitrator and none of the party-appointed arbitrators will be empowered to decide anything alone.

5.1.1. BY HYPOTHESIS

5-7 From a theoretical point of view, an impartial and independent party-appointed arbitrator is somehow a paradox: someone who must act without any favouritism towards either party but who is chosen by one party. It often troubles those that hear of it for the first time. If one tries to explain to a layman who is in total ignorance of arbitral matters the concept of arbitration and the existence of arbitral tribunals comprised of three impartial and independent arbitrators, two of whom are appointed by the parties, one each, and the third by the two party-appointed arbitrators or by a neutral person, the layman often asks, with a look of concern, a funny grimace or a combination of both: ‘Well, and those two persons appointed by the parties, are they
really impartial and independent arbitrators?’ And the subsequent reply ‘yes’, whatever the reasons accompanying it, rarely leaves the layman with the Shakespearean ‘sweet silent thoughts’ of those who in the end feel satisfied. For some reason, there seems to be a spontaneous feeling amongst many that the mere fact of allowing each of the disputing parties to unilaterally choose an arbitrator makes it more difficult to understand the impartiality and independence of the latter.

This feeling is hardly surprising. It stems from the instinctive consideration that the right to unilaterally choose an impartial and independent individual, when in the hands of a dishonest party, may be used to appoint a dishonest arbitrator who concealingly takes on the mission of favouring the appointing party; and when in the hands of an honest party, may be used to appoint an honest arbitrator who, as far as the former may second-guess, might reach a decision more favourable to the appointing party than those that other prospective candidates to be appointed might reach. Either way, even in the ideal best-case scenario of two honest parties and two honest party-appointed arbitrators where each of them is satisfied with the honesty of the other three, each party can naturally expect that the other party will unilaterally choose an arbitrator that it thinks is a good choice for its case and, therefore (as arbitration, like litigation, is normally a zero-sum game: what is gained by one party is lost by the other one), a bad choice for the former’s one.

It is only natural to expect each party to have, in principle, more doubts about the lack of bias of the arbitrator appointed by the other party than about the lack of bias of the presiding arbitrator, for the simple reason that each party has accepted to have, by definition, one less objective reason to believe in the lack of bias of the arbitrator appointed by the other party: a neutral appointor. Indeed, a party-appointed arbitrator is not merely a member of a tribunal who is chosen by someone who is not neutral, but a member of a tribunal who is appointed by someone who cannot

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4 As is the case, for instance, of appointors that generally represent the interests of groups to which one of the disputing parties belongs or is closer. The European Court of Human Rights (ECHR) has
possibly be further from being neutral: one of the disputing parties. Any observer is confronted with the hard fact that impartial and independent party-appointed arbitrators do not have, in terms of minimum distance from the parties, a quality of ‘impartiality and independence’ equal to that of sole or presiding arbitrators, because the unilateral appointment by one of the disputing parties is in itself a link that is acceptable in the former and unacceptable in the latter. The appearance of lack of bias in party-appointed arbitrators is weaker than in neutrally-appointed arbitrators by hypothesis.

5.1.2. THROUGH THE INFLUENCE OF OTHER FACTORS

Other factors may make the appearance of lack of bias in party-appointed arbitrators still weaker in practice. One of them relates to the particular ethical concerns that the benefits from unilateral appointments may cause. The tangible and intangible gains that the average person usually obtains nowadays when appointed as an arbitrator (fees and personal satisfaction) are the result, in the case of unilateral appointments, of a choice by just one of the parties. Each party may legitimately wonder if the arbitrator appointed by the other party, whom it may not even know, will be unwilling or unable, perhaps even unconsciously, to not remunerate howsoever the sense of professional achievement that the appointment as an arbitrator procures him with bias in favour of the appointing party. Moreover, given that the arbitrator’s confronted on several occasions tribunals where some of their members are nominated by non-neutral appointors notwithstanding the obligation of all the members of the tribunal to act impartially. In Langborger v. Sweden (Judgment 22 June 1989) there was a four-member Housing and Tenancy Court of which two members were nominated by non-neutral appointors (one lay assessor nominated by an owners’ association and another lay assessor nominated by a tenants’ association), the other two members being professional judges. In Ab Kurt Kellermann v. Sweden (Judgment 26 January 2005) there was a seven-member Labour Court of which four members were nominated by non-neutral appointors (two lay assessors nominated by employers’ associations and two lay assessors nominated by employees’ associations), two members were professional judges and one a lay assessor with special knowledge of the labour market but who “did not represent any employers’ or employees’ interests” (para 26 – this lousy use of the notion of representation, whereby one might think that the lay assessors nominated by non-neutral appointors represent the respective disputing parties, is rightly criticised in the concurring opinion of Judge Martens in Langborger v. Sweden as being inconsistent with the obligation of such lay assessors to act impartially). In both cases, the ECHR suggested that tribunals with some of their members nominated by non-neutral appointors are acceptable as long as there is a balance of interests in the tribunal’s composition. The nomination of some members of the tribunal by non-neutral appointors was indeed not even an issue in either of the two cases.
mind is inextricable, there is no general solution that could appease a party’s doubts or suspicions in this regard.

5-11 A second factor that makes the appearance of lack of bias in party-appointed arbitrators different from that in non-party-appointed arbitrators is the difference in cultural proximity—namely nationality—that most arbitration rules and laws allow. Presiding arbitrators are usually required to have a different nationality from those of the parties. This different nationality of the presiding arbitrator reinforces his appearance of impartiality and independence. As Lalive notes:

[T]he question is not whether, in actual fact, such an arbitrator is more independent or more impartial because of his “neutral nationality” – a fact which is impossible to ascertain (subject of course to the usual rules relating to challenge of arbitrators). The question is whether he will thus be thought of or seen as more impartial by the parties, i.e. whether he will (rightly or wrongly) inspire more confidence because of his “neutral” nationality. This would seem to be a situation where reference can be made, at least by analogy, to the well-known English phrase “it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

5-12 A third factor that may influence a different appearance of impartiality and independence is the different degree of tolerance that parties sometimes show in practice as to what links of party-appointed and non-party-appointed arbitrators are unacceptable. In some cases, the parties make unilateral nominations of individuals who have links (with each of them, with third persons or with the subject-matter of the dispute) that could pose a conflict of interests; and yet none of the parties, being aware of the links of the other party’s appointee, raises any objection. Arbitral institutions rarely curtail party autonomy in such cases.

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5 Some take a step further than the mere nationality. For example, article 1173(2) of the Polish Code of Civil Procedure (as amended in 2005) obliges national courts to take into consideration, when appointing a sole arbitrator or a presiding arbitrator, the need to appoint a person who is not connected with any of the states where the parties have their residence or seat. On the arbitrator’s nationality and its possible varying degrees, Ilhyung Lee, “Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)”, Fordham Int. L. J., Vol. 31, 2008, pp. 603-633.

A fourth factor that may weaken the appearance of impartiality and independence of party-appointed arbitrators is the questionable presumption that they can do certain things that the presiding arbitrator cannot.

5.2. THE QUESTIONABLE PRESUMPTION OF A SPECIAL ROLE

A special role of party-appointed arbitrators which is deemed compatible with their impartiality and independence is nowadays accepted by many authors. It is usually formulated in terms of a specific behaviour that each party-appointed arbitrator may deploy in relation to the case of the party who appointed him. Arbitration rules and laws are silent about it. Promoters of such a special role normally justify it by suggesting that it is implicitly accepted by the parties and good for the arbitration process. Lowenfeld notes that a party-appointed arbitrator must give confidence to the party who appointed him in that he will carefully consider its case, and must also serve as a cultural translator:

While the same legal and ethical duties in principle apply equally to party appointed arbitrators, it is nevertheless recognized that they have a special role to perform. In particular, the party appointed arbitrator must give confidence to the party who appointed him, in that he will listen carefully to that party’s presentation and will study any supporting documents with care. In this way, the two party appointed arbitrators attempt to offer, if not ensure a fair hearing and sound decision where all evidence and arguments are considered. Second, the arbitrator serves as a translator, not of language only, but rather of legal and business culture between lawyers from different countries”

Blackaby and Partasides, sharing the vision of Redfern and Hunter, suggest that party-appointed arbitrators should be able to ensure that the case presented by the party who appointed them is properly understood by all members of the arbitral tribunal:

An arbitrator nominated by a party will be able to make sure that the case of the appointing party is properly understood by the arbitral tribunal. In particular, such an arbitrator should be able to ensure that any misunderstandings that may arise during the deliberations of the arbitral tribunal (for instance, because of

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differences of legal practice, culture, or language) are resolved before they lead to injustice. It may appear to be difficult in practice, but it is quite possible for an arbitrator to fulfil a useful role in representing the interests of due process of the party who nominated him or her without stepping outside the bounds of independence and impartiality.8

In the same vein, Bishop and Reed, De Fina and Werner9. Quoting the first ones:

It is also generally recognized that the party-appointed arbitrators may ‘serve’ the appointing party in the limited sense –consistent with deciding the case impartially – of ensuring that the presiding arbitrator selected will not be iminical to the party’s case, ensuring that the party’s case is understood and carefully considered by the panel, ‘translating’ the party’s legal and cultural system (and occasionally the language) for the benefit and understanding of the other arbitrators, and ensuring that the procedure adopted by the panel will not unfairly disadvantage the appointing party.10

Similarly, Lowenfeld notes that one role that is proper for a party-appointed arbitrator is to see that the case for the party that appointed him is adequately heard11.

For Lew, Mistelis and Kröll, “[b]y working as a cultural interpreter the party appointed arbitrator can and should help to ensure that the arguments [of the party that appointed him] will be properly appreciated and considered during the tribunal’s deliberations”12.

The presumption of a special role in party-appointed arbitrators may be deemed reasonable, albeit unnecessary, when such a role is envisaged as that of just a cultural

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10 The authors added: “It might be questioned whether the last point should be listed since it is the duty of all arbitrators to ensure that the procedure used does not unfairly prejudice either party” (Bishop and Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Arbitration*, p. 405 and footnote 56).


translator. When the party-appointed arbitrators share a common cultural background with their respective appointing parties, as is often the case, each party-appointed arbitrator is probably the member of the tribunal who is exposed to fewer risks of a cultural misunderstanding affecting the party who appointed him; and in such capacity, if the risk of such a misunderstanding ever arises and he can clarify it, he must help the other members of the tribunal to get out of the dark. Attentively considered, a party-appointed arbitrator who is in a position to perform this special role when necessary must do so because, otherwise, he would be acting with bias. Hence, it would not be necessary to call this cultural assistance a special role, all the more so when such cultural assistance should take place regardless of whether it goes for or against the appointing party’s case. Nonetheless, the express acknowledgement of this special role may have the advantage of allowing party-appointed arbitrators to perform it, when the cultural clarifications run in favour of the appointing party’s case, without being concerned about raising suspicion of bias in the eyes of the other members of the tribunal.

5-20 However, the presumption of a special role of party-appointed arbitrators which goes beyond a mere cultural translation, such as that of paying particular attention to the appointing party’s case in some respect, faces two serious difficulties.

5-21 The first difficulty has to do with a risk of unbalance. Given that the rules governing the arbitration normally do not provide for any such thing as a duty of each party-appointed arbitrator to inspire particular confidence or pay particular attention to the appointing party’s case, it may occur that one party-appointed arbitrator works on the assumption that he has such a special role to perform whereas the other party-appointed arbitrator works as if his role were the same as the presiding arbitrator.

5-22 The risk of unbalance may not disappear even if the parties agree to the special role of party-appointed arbitrators, because they could still see what specific behaviour such special role allows differently. Arbitral proceedings in which the standard that all arbitrators must be impartial and independent applies while, at the same time, some unwritten sort of behavioural difference between the party-appointed arbitrators and the presiding arbitrator is consented to, are exposed to the risk of forfeiting their ability to serve as fair dispute resolution systems due to the
potentially divergent approaches of parties, counsel, party-appointed arbitrators, presiding arbitrators, arbitral institutions and state courts on the understanding of what an impartial party-appointed arbitrator, when discharging his duty, may or may not be entitled to do differently from the presiding arbitrator. As Lew, Mistelis and Kröll note:

There is a tension between ensuring that a party’s case is properly understood and appreciated by the co-arbitrators and the requirement to stay independent and impartial. The slightest appearance of impropriety may destroy the confidence of the other members of the tribunal.13

The second serious difficulty in the special role of party-appointed arbitrators that goes beyond mere cultural translation is related to its rationale. Why should an impartial and independent party-appointed arbitrator be presumed to have a duty to pay particular attention to the appointing party’s case? It seems natural, even needless to say, that a party making an unilateral appointment does so, at the very least, because it feels reassured that the appointee will be able to understand its case. Likewise, it may be hardly surprising that such party does not feel from the outset the same reassurance with the other two members of the tribunal, on whose appointments it could have limited influence (in the case of the presiding arbitrator) or no influence at all (in the case of the arbitrator chosen by the other party). More often than not, the different level of reassurance that each party may feel as to the ability of the different members of the tribunal to understand its case is simply due to the fact that, by the time of the appointment of the arbitrators, the party has sufficient knowledge of the arbitrator it appoints and does not know or knows little about the other two arbitrators.

Yet, there is no justification to turn a basic reassurance that each party is likely to seek when making a unilateral nomination into a presumption of a special duty of care on the part of each party-appointed arbitrator with regard to the case of the party that appointed him. To accept such presumption is to accept that each party may benefit from the fact that the arbitrator it appoints does his job better than the arbitrator appointed by the other party. If each party-appointed arbitrator pays

particular attention to the proper understanding by the other arbitrators of the case of the party who appointed him, the smarter or more hard-working a party-appointed arbitrator, as compared to the other party-appointed arbitrator (and I am now only thinking about honest arbitrators), the better the position of the party who appointed that arbitrator might be in comparison to the other party. This, which—ironically enough—is also what often happens with counsel, cannot be generally good in an arbitration process where the governing rules require all arbitrators to be impartial and independent and do not distinguish arbitrator’s roles dependant on the arbitrator’s method of appointment.

The problem with presuming a special duty of care from each party-appointed arbitrator with regard to the case of the party that appointed him is not that such a role amounts to advocacy. None of the authors who accept such a special duty of

14 With a different view, David Branson, “American Party-Appointed Arbitrators – Not The Three Monkeys”, U. Dayton L. Rev., Vol. 30, No. 1, p. 46. This author notes that the special role of party-appointed arbitrators is sometimes formulated in the field of international arbitration not only in terms of paying particular attention to the appointing party’s case, but also in terms of being ‘sympathetic’ to the appointing party. This observation leads him to wonder whether the ‘sympathetic’ reference in international arbitration does not really amount to advocacy inasmuch as such term is used as encompassing some special action of the party-appointed arbitrator in relation to the appointing party’s case. Also, Alan Scott Rau, “The Culture of American Arbitration and the Lessons of ADR”, Tex. Int. L. J., Vol. 40, 2004-2005, pp. 459-461, noting the tension between “an official rhetoric of independence” and “a tolerated latent sympathy”, and warning against the ambiguities of the system of impartial and independent party-appointed arbitrators.

These views seem a bit overstated. The formulation of ‘being sympathetic’ has normally been used in the context of unilateral nominations in international arbitration to express how the appointing party pictures in its mind the arbitrator whom it appoints, not how that arbitrator actually sees the former’s case. Indeed, it is not entirely clear how an arbitrator may be sympathetic in the second sense if he must not discuss the case with the appointing party and thus should not know the case–unless, of course, the arbitrator and the appointing party breach the fair play during the appointment process. See, e.g., Martin Hunter and Jan Paulsson, “A Code of Ethics for Arbitrators in International. Commercial Arbitration?”, Int. Bus. Law., Vol. 13, Issue 4, April 1985, p. 153: “Naturally, when the arbitration agreement calls for party-appointed arbitrators, the parties will wish to choose persons who are in a very general sense likely (in their view) to be sympathetic to their respective cases. No one would expect a government which has undertaken an act of nationalisation to nominate as its arbitrator a banker with a life-long career history of defending the inviolability of foreign investments. This is obvious, and it is perfectly proper”. See also Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, paras 4.69 and 4.74, rejecting any unilateral discussion on the merits between party-appointed arbitrators and their respective appointing parties but also considering good policy “to appoint a person who may, by reason of culture or background, be broadly in sympathy with the case theory to be put forward (eg someone who is known to favour a strict literal interpretation of contracts rather than look to the true intention of the parties), but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law”.

Branson and Rau are yet undoubtedly right in their suggestion that the term ‘sympathetic’ is dangerous in the context of unilateral nominations in international arbitration. Formulations such as that of Bond in 1991 whereby “the wisest choice for any party is a co-arbitrator who is sympathetic to
care suggests in the slightest that party-appointed arbitrators may be allowed to favour their respective appointing parties by giving support for or recommendation of their respective causes. Some of those authors are particularly adamant in making it clear\textsuperscript{15}. The problem is more subtle. An impartial and independent party-appointed arbitrator who believes that he must perform the special role of making sure that the other members of the tribunal properly understand the case of the party who appointed him may reasonably wish to firstly make sure that he thoroughly understands that case; and, given that a day has twenty-four hours for everyone, this may easily lead him to devote more time and attention to the ‘case’ of the party who appointed him than to the other party’s one. Whilst both party-appointed arbitrators may be genuinely impartial and see such a special role just as an allocation of tasks within the arbitral tribunal, the differences between the two party-appointed arbitrators may introduce a bias in the arbitral process, a kind of consequential bias, in the form of an advantage for the party who chooses the most diligent or zealous arbitrator. A special role which carries such risk, I believe, should not be presumed. Unless otherwise agreed by the parties, impartial and independent party-appointed arbitrators must attempt to give equal confidence to all parties in that they will carefully listen to and study their case, and they must make sure – no doubt, each as far as he can– that both parties’ cases are properly understood by all the members of the arbitral tribunal.

The difficulty with a special duty of care on the part of each party-appointed arbitrator with regard to the case of the party that appointed him is not an absolute difficulty. As said earlier, the difficulty lies in the presumption of such duty. The parties who wish to endure the above-mentioned risk of consequential bias in the arbitral process may well agree, in a particular case, that the party-appointed

\textsuperscript{15} Bishop and Reed, \textit{Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Arbitration}, p. 405: “[I]t bears repeated emphasis that party-appointed and presiding arbitrators alike are expected to maintain an impartial demeanour and to decide the case in favour of the party with the better factual and legal position”.
arbitrators (ideally after they have already been appointed) will assume a special duty of care towards their respective appointing parties. And one may even concede that, in practice, the cultural factor could often make such an agreement more efficient in its outcome than one which required each party-appointed arbitrator to assume that duty with respect to the case of the party who did not appoint him. Besides, an agreement by the parties on such special role could be helpful in certain cases, for instance when the complexity of the dispute or the size of the file, coupled with the procedural timetable, made it unlikely for each and every arbitrator to be able to look thoroughly enough into all the aspects of each party’s case.

5-27 It is doubtful whether the presumption of a special role of party-appointed arbitrators is rendering a good service to international arbitration. Apart from the difficulties pointed out above, that special role may be sending a wrong message to or being misunderstood by some arbitration end-users and arbitrators, and perhaps also making life easier for concealed partisan arbitrators. It seems fair to add that the risk of confusion about the role of party-appointed arbitrators is not only due to certain formulations of their so-called special role. Some legislators also foster such risk, unconsciously, by requiring all arbitrators to be impartial and independent, whatever the method used for their appointment, and then allowing national judges to act as arbitrators only if they are non-party-appointed.16

5.3. THE QUESTIONABLE PRESUMPTION OF ACCEPTABLE UNILATERAL COMMUNICATIONS

5-28 According to conventional wisdom, two types of unilateral oral communications between appointors and appointees are acceptable as long as they respect certain

16 See, e.g.: English Arbitration Act (1996), sec. 93(1): “A judge of the Commercial Court or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement”; Croatian Law on Arbitration (2001), art. 10.2: “Judges of Croatian courts may only be appointed as presiding arbitrators or as sole arbitrators”. See also Philippe Fouchard, “L’arbitrage judiciaire”, in Études Pierre Bellet, 1991, pp. 176-177, noting that judges should only accept to perform arbitral functions as sole or presiding arbitrators. This author later adopted a more flexible view on this matter, admitting that judges could be party-appointed arbitrators in some circumstances (Philippe Fouchard, “La compatibilité des fonctions de magistrat et d'arbitre, ou la fin d'une mauvaise querelle”, Rev. Arb. 1994, No. 4, p. 663-664). See also, in favour of judges preferably acting as non-party-appointed arbitrators, Pierre Bellet, “Le juge-arbitre”, Rev. Arb. 1980, No. 2, p. 402. With a different view, in favour of not allowing judges to act as arbitrators, Clay, L’arbitre, paras 496-513.
limits: pre-appointment interviews and post-appointment discussions about the choice of the presiding arbitrator. This is not exempt from controversy but supporters of the conventional wisdom seem to be in a majority.

Some arbitration rules, in line with conventional wisdom, have expressly allowed unilateral pre-appointment communications without any restriction as to their form (thus admitting that such communications may take place in an interview) but with restrictions as to the scope of the discussion. For instance, the AAA International Arbitration Rules provide as follows:

No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator 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 in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

Similarly, as far as pre-appointment interviews are concerned, the WIPO Arbitration Rules allow ex parte pre-appointment communications “to discuss the candidate's qualifications, availability or independence in relation to the parties” and the CPR Rules for Non-Administered Arbitration of International Disputes (2007) provides that “a party may advise a candidate for appointment as its party-appointed arbitrator

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19 AAA International Arbitration Rules (2009), art. 7.2.

of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties"\(^{21}\).

Conventional wisdom, however, promotes pre-appointment interviews and post-appointment discussions about the choice of the presiding arbitrator regardless of whether the rules governing the arbitration expressly allow them. It has been said, for example, that pre-appointment interviews are in principle not objectionable if they are not carried out in a secretive way and the scope of the discussion is appropriately restricted\(^{22}\). On other occasions, the interviews have been presented as general standards that appear to represent a consensus among international arbitration specialists\(^{23}\), something that the IBA Guidelines seem to endorse\(^{24}\) and others do not\(^{25}\). An “unwritten rule” allowing unilateral communications with regard to the choice of the presiding arbitrator has also been evoked\(^{26}\). Conventional wisdom’s logic is that pre-appointment interviews and post-appointment discussions about the choice of the presiding arbitrator may take place even if the rules governing the arbitration are silent about them\(^{27}\). Only if those communications were against an express provision by the parties would they be inappropriate.

This approach is questionable. There is probably an international consensus that parties may send an e-mail to prospective appointees in order to check possible

\(^{21}\) CPR Rules for Non-Administered Arbitration of International Disputes (2007), art. 7.4.

\(^{22}\) Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, para 4.69.


\(^{24}\) IBA Guidelines, Green List, 4.5.1: “The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the case”.


\(^{25}\) Chartered Institute of Arbitrators “Practice Guideline: The Interviewing of Prospective Arbitrators”, Introduction, para 2: “[I]t is common practice, in some jurisdictions but not in others, that the appointor interviews a list of prospective PAAs [party-appointed arbitrators] prior to making the appointment”.


\(^{27}\) As is the case, for instance, of the ICC Arbitration Rules (2012).
conflicts of interests, the candidate’s availability and the candidate’s experience in a
given sector. These are basic checks aimed at ensuring the candidate’s capability to
act as arbitrator, and the written form can give best assurance of propriety. However,
ex parte pre-appointment interviews go a step further, as do post-appointment
discussions (in interviews or by any other verbal means) on the choice of the
presiding arbitrator. These case-related unilateral verbal communications side with
one particular preconception of what is unnecessary to protect the appearance of lack
of bias in an arbitrator, when the opposite preconception (those interviews and
discussions may affect the appearance of lack of bias in an arbitrator and hence must
not be held unless they have been expressly allowed by the parties) is equally
legitimate and probably more appropriate by default in international arbitration. Not
that long ago, David considered pre-appointment discussions between one of the
parties and a potential arbitrator difficult to reconcile with the requirement of full
impartiality.28

Supporters of pre-appointment interviews are adamant in stressing that any
discussion between the interviewer and interviewee about the merits of the case is
completely unacceptable. Indeed, not only on the merits but also on any procedural
aspect of the case. The purpose of pre-appointment interviews is, rather, to check for
possible conflicts of interest and the candidate’s availability and qualifications.
Perhaps because the first two checks (conflicts of interest and availability) seem
particularly feasible without the need for interview, justifications of interviews
often invoke the appointor’s interest in checking the candidate’s qualifications in a
broad sense: not just by reading a CV or enquiring in writing for more detail about
the candidate’s experience, but by ‘seeing the man or woman’ who is being
considered for appointment. It has been noted, for instance, that CVs, websites and

29 Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, para
4.69: “[T]here should be no probing of the prospective arbitrator's views on the merits of the case, nor
should party representatives take the opportunity to test their forthcoming submissions of fact and
law”.
30 It is enough for an e-mail informing the candidate of: (i) the parties’ and, if they are already known,
their counsel’s identities; (ii) the type of arbitration (e.g. under such and such rules); (iii) the general
sector of the dispute (e.g. telecommunications); and (iv) an estimation of the amount in dispute (some
senior arbitrators outright refuse appointments below a certain amount).
word-of-mouth recommendations might not necessarily give a “complete picture of the appointee”\(^\text{31}\), that lawyers or clients may want to have a first-hand look at the candidate in order to establish some basis for confidence\(^\text{32}\); and that interviewers may question the candidate on his experience in the relevant field and his qualifications for the case at hand, as well as taking the opportunity to assess his physical and mental health\(^\text{33}\).

Post-appointment discussions on the choice of the presiding arbitrator presumably imply the exchange of views between each party and the arbitrator that it has unilaterally appointed about the suitable qualifications of the chair-person. Certain authors have also suggested that each party, in such discussions, could exercise a power of veto over specific candidates that it does not like\(^\text{34}\); or, if not a veto, at least a sort of input that the party-appointed arbitrator could reasonably be expected to bear in mind\(^\text{35}\).

All these justifications may lead sensible parties to agree that pre-appointment interviews, post-appointment discussions about the choice of the presiding arbitrator, or both, may take place. Nonetheless, other sensible parties may think that the benefits of those unilateral verbal discussions do not outweigh their drawbacks.

A first drawback has to do with the boundaries of what is appropriate in verbal conversations, which are blurry. Consider, for example, unilateral pre-appointment interviews. Everyone may agree with the proposition that the interviewer should not take the opportunity to test his forthcoming submissions of fact and law\(^\text{36}\), but it is


\(^\text{33}\) Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, para 4.69.

\(^\text{34}\) Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, p. 87, noting the “unwritten rule”, if the arbitration agreement provides that the two party-appointed arbitrators will choose the presiding arbitrator, the candidates being considered be cleared by the party-appointed arbitrators with counsel for the respective appointing parties.


\(^\text{36}\) Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, para 4.69.
nearly impossible to avoid the fact that an interviewer finds indirect ways, which may be difficult to judge from an ethical prospective (some of which may even be found unexpectedly), to reach an equivalent result\textsuperscript{37}. For instance, an interviewer enquires about the experience of the prospective arbitrator in energy cases, the candidate replies that he has acted as arbitrator in four energy cases, and the interviewer asks whether he could expand or be more specific. It is easy to imagine drifts of the conversation in which the interviewee would unconsciously give the interviewer elements for the latter to fine-tune second-guessing about what the former would do in the arbitration. Neither a careful drafting of the scope and limits of the discussion\textsuperscript{38} nor even having all possible questions predetermined\textsuperscript{39} may avoid it. Pre-appointment interviews may end up allowing the appointing party to get a sense of the prospective appointee’s position on some substantive or procedural aspect of the case, similarly to their having always allowed appointors of biased arbitrators to make sure that they appointed someone who was, in principle, close to the position that they were going to defend in the arbitration.

\textsuperscript{5-37} Another drawback, equally serious, is a possible unbalance. It is doubtful that the acceptable unilateral communications, as they are currently formulated by the conventional wisdom, are equally favourable to all parties. Why should a party be allowed to unilaterally interview an individual in order to decide whether the latter is the best option to appoint as arbitrator in a particular case, or a party be allowed to unilaterally discuss with the arbitrator whom it appoints about the best choice for the presiding arbitrator in the case, and another party not be allowed to unilaterally communicate with the arbitrator whom it appoints for a different purpose related to the case (for instance, in order to be satisfied that the arbitrator fully understands its claims), if in all cases all agree that the party and the arbitrator must respect certain limits? Does the current formulation of the unilateral communications that are


\textsuperscript{38} See, e.g., Chartered Institute of Arbitrators “Practice Guideline: The Interviewing of Prospective Arbitrators”, Guidelines 9 and 11.

\textsuperscript{39} Gerald Aksen, “The Constitution of Arbitral Tribunals: Proper Bounds for Communications between Counsel and Party Arbitrators”, 14th Colloquium ICC-ICSID-AAA, Nov. 1997 (unpublished). He also suggests limits to the duration of the interview (maximum 30 minutes) and to the persons allowed to be present at the interview (party, party’s counsel and an assistant).
acceptable not run in favour of parties with better access to counsel or other service providers who are trained in interviewing juror candidates in order to ‘rank their bias’ (parties who are more present in some parts of the world) and, also, in disfavour of parties less acquainted with the technicalities of international arbitration or with less access to experienced arbitrators (parties who are more present in some –different– parts of the world)?

It is further worth noting that many of the supporters of these unilateral communications are also supporters of a special role of party-appointed arbitrators consisting in each of them making sure that the case of the appointing party is properly understood by the arbitral tribunal. Others around the world also think that party-appointed arbitrators have a special role to perform, in other terms. In Arab countries, for instance, a party-appointed arbitrator is, if not strictly speaking an advocate or representative of the appointing party, at least “une sort d’intermédiaire, de trait-d’union ou de « médiateur »” between the appointing party and the presiding arbitrator. It is dangerous to privilege one particular vision of special but acceptable conducts of party-appointed arbitrators towards their respective appointing parties, over other visions, when the explanation of the required qualities of a party-appointed arbitrator in terms of impartiality and independence reflects in itself, as Lalive notes, a certain “philosophy of arbitration” or “cultural conception” that is not universally shared. Those whose visions are neglected may not understand the reason very well.

Unilateral discussions on the choice of the presiding arbitrator should also be rejected, unless the parties have agreed to them, even if such discussions are just aimed at avoiding the party-appointed arbitrators choosing as presiding arbitrator a persona non grata to one of the parties. One would be inclined to agree with the

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42 Ibid.
suggestion by Lew, Mistelis and Kröll that it does not seem to make sense for the party-appointed arbitrators to choose a chair person in whom one of the parties does not have confidence\textsuperscript{43}, if only for psychological reasons. However, the parties’ selfishness does not end (or at least cannot be presumed to end) when they make the unilateral nominations\textsuperscript{44}. Thus, in most cases, it will probably be impossible for the party-appointed arbitrator to know if the input he receives from one party is only intended to exclude someone who, in that party’s view, is not as good for its case as other possible candidates. The only satisfactory solution, in my view, is indeed in line with what Lew, Mistelis and Kröll recommend: that the party-appointed arbitrators jointly request the parties to inform them of the chairperson profile they consider to be suitable\textsuperscript{45}. In order to avoid any appearance that the party-appointed arbitrators may be facilitating the appointing party’s selfishness, while at the same time ensuring that the party-appointed arbitrators do not appoint someone who is not wanted by one of the parties, the following steps could be followed: (i) the party-appointed arbitrators, in the light of the information received from the parties, would try to reach an agreement on one or more possible candidates; (ii) if they do not reach an agreement, the presiding arbitrator would be appointed by a third person; (iii) if they reach an agreement, they would submit the name or names to the parties; and (iv) if the parties do not agree on one of those candidates, the presiding arbitrator would be appointed by a third person (with the names proposed by the party-appointed arbitrators excluded).

All in all, should ex parte pre-appointment interviews and post-appointment discussions about the choice of the presiding arbitrator be presumed acceptable in international arbitration? This question should perhaps be revisited. In my view, when the parties have not expressly agreed to pre-appointment interviews and post-appointment discussions on the choice of the presiding arbitrator, it is preferable that


\textsuperscript{44} Christopher R. Seppälä, “Obtaining the right international arbitral tribunal: a practitioner’s view”, Int. Cons. L. R., Vol. 25, Part 2, April 2008, p. 200: “A party’s goal should be the appointment of an arbitral tribunal, a majority (at least) of whose members, while being independent and impartial as regards the parties (as required by the relevant arbitration rules and law), will at the same time be well disposed towards, or sympathetic to, or at the very least receptive to, that party’s position”.

The general acceptance of these interviews and verbal discussions in international arbitration cannot be taken for granted. When all the members of the arbitral tribunal are under the duty of impartiality and independence, some parties may reasonably think that ex parte pre-appointment interviews and post-appointment discussions on the choice of the presiding arbitrator weaken the appearance of lack of bias in the arbitrator. Conventional wisdom promotes a double yardstick\(^{46}\) for measuring the appearance of lack of bias in party-appointed and non-party-appointed arbitrators that should not be presumed. Besides, to refrain from engaging in such interviews or discussions may also contribute to avoiding ambiguity as to the role of impartial and independent party-appointed arbitrators in international arbitration\(^{47}\). And if those interviews or discussions take place, for whatever reason other than an express provision by the parties, at least the party holding them should let the other party know of their existence\(^{48}\). Transparency would also be gained if such interviews or discussions were recorded or put in detailed file note to be disclosed to the other party to the dispute\(^{49}\).

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\(^{46}\) See, e.g., Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, para 4.71, noting that presiding arbitrators are only supposed to meet with one of the parties if the other party is present.

\(^{47}\) Ambiguities such as those introduced by Hunter and Paulsson when discussing the choice of the presiding arbitrator by the party-appointed arbitrators should be avoided. Martin Hunter and Jan Paulsson, “A Code of Ethics for Arbitrators in International Commercial Arbitration?”, *Int. Bus. Law.*, Vol. 13, Issue 4, April 1985, p. 154: “In this context, the requirement of independence and impartiality has been distinguished from ‘neutrality’. One example of a permissible lack of neutrality in a party-nominated arbitrator is where the two arbitrators nominated by the parties have the express duty, under the arbitration agreement, to attempt to agree on the third arbitrator, who will normally be chairman of the tribunal. In such a case, to put it no higher than a negative obligation, it would seem to be perfectly proper for a party-nominated arbitrator to do his best to ensure that he does not assent to the appointment of a third arbitrator who would be likely to hold general views which would be adverse to the position of the party who nominated him”. Party-appointed arbitrators who are under the duty of impartiality and independence do not have any responsibility towards the appointing party that they do not have towards the non-appointing party.

\(^{48}\) In this respect, the IBA Guidelines’ general recommendation, in point 4.5.1 of their Green List, not to disclose certain unilateral communications, possibly interviews, with disregard of what the rules governing the arbitration expressly allow, is deeply questionable. For further criticism on point 4.5.1, based on the confusion that it creates, V. V. Veeder, “L’indépendance et l’impartialité de l’arbitre dans l’arbitrage international”, in *Médiation et Arbitrage, Alternative dispute resolution, Alternative à la justice ou justice alternative?*, Perspectives comparatives, Loïc Cadet (dir.), Thomas Clay and Emmanuel Jeuland, LexisNexis, Litec, 2005, p. 234, para 325.

\(^{49}\) See, e.g., Chartered Institute of Arbitrators “Practice Guideline: The Interviewing of Prospective Arbitrators”, Guideline 7.
5.4. REPEAT APPOINTMENTS

5-41 By ‘repeat appointments’ it is normally meant the situation where a party or one of its affiliates unilaterally appoints the same arbitrator in different arbitrations; and also, given that many parties leave that choice to their counsel, the situation in which a counsel unilaterally appoints the same arbitrator in different arbitrations. In a broader sense, repeat appointments may also comprise the situation where a third person nominates the same arbitrator in related cases and also when an arbitrator who has formally been jointly appointed by the parties has repeatedly been chosen by one of them and accepted by the others. In this section, the term ‘repeat appointments’ is used in its more common narrow sense of unilateral repeat appointments unless otherwise indicated.

5-42 Repeat appointments exemplify well the permanent tension that exists in the system of impartial and independent party-appointed arbitrators between the right of each party to choose the ‘impartial and independent’ person it wants and the right of each party to challenge an arbitrator when there are circumstances that give rise to justifiable doubts about his lack of bias. On the one hand, a party or counsel may have good reasons to appoint an individual whom it trusts several times as an arbitrator, precisely because of that trust. Total trust is a scarce commodity. Knowledge of personal qualities and professional experience or expertise of an individual may make the party or counsel confident, to an extent that it may not reach with other candidates, that justice will likely be done. On the other hand, the party opposed to the one who made the repeat appointment may be concerned about the real motives behind the repetition, particularly if that party has the perception that, in the arbitration world, friends always appoint one another. Could such arbitrator be what a witty and very fine lawyer once defined on humour note as a ‘truly independent arbitrator’: an arbitrator who will always agree with the position of the appointing party independently of the case?

5-43 Repeat appointments are also a typical example of links which are in the grey area of conflicts of interest in arbitration: links which it is difficult to say, in the abstract,

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whether they should normally disqualify an arbitrator or not. It is generally accepted that the mere existence of repeat appointments should not, in principle, be enough to disqualify an arbitrator; but it is also generally accepted that the arbitrator repeatedly appointed by the same party may, by the mere fact of the repeat appointments, lose his independence. The question then arises as to what facts in a particular case may be relevant to decide whether the repeat appointments do or do not pose a conflict of interest (A). A second question arises as to the questionable decision of the IBA Guidelines to set quantitative limits on the repeat appointments that arbitrators must disclose (B).

5.4.1. FACTORS TO DECIDE WHETHER THERE IS CONFLICT OF INTEREST OR NOT

1) Number of repeat appointments. Prior appointments by one party may cast justifiable doubts on the independence of an arbitrator if there is a pattern of regular appointments by that particular party.

A high number of repeat appointments may justify the presumption of a conflict of interests on the consideration that what the repeat appointments actually unveil is an outright clear reason for disqualification; for instance, a close personal relationship or a significant professional relationship between the appointor and the appointee. Making use of the IBA Guidelines’ colour code, the higher the number of repeat appointments, the more likely the orange circumstance of repeat appointments starts resembling the red circumstance of an arbitrator having a significant commercial relationship with one of the parties or even the more serious red circumstance of the arbitrator having a significant — albeit indirect — financial interest in one of the parties. The French Supreme Court has appreciated the existence of a conflict of

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52 Emmanuel Gaillard, Note – Cass. (2e Ch. Civile), 6 décembre 2001; Cour d’appel de Paris (1re Ch. G), 2 avril 2003; Cour d’appel de Paris (1re Ch. C), 16 may 2002, Rev. Arb., 2003, No. 4, p. 1245.


54 The IBA Guidelines include in its Waivable Red List the situation (2.3.6) where “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of
interests based on a high number of repeat appointments by reasoning that there is a
flow of business between repeat appointors and appointees. These cases usually
involved repeat appointments in their broader sense (the repeat arbitrator was a sole
arbitrator formally jointly appointed by the parties in the arbitration agreement but
actually chosen by one of the parties and accepted by the other). In X v. Prodim/Logidis, the French Supreme Court annulled a decision of the Douai Court of
Appeal of 18 June 2009 that had rejected to set aside an arbitral award rendered by a
sole arbitrator who had not disclosed that he had been appointed thirty-four other
times by companies of the same group of one of the parties. In the similar case
Somoclest v. DV, the French Supreme Court annulled a decision of the Versailles
Court of Appeal of 14 May 2009 that had rejected to set aside an arbitral award
rendered by a sole arbitrator who had not disclosed that he had been appointed fifty-one times by companies belonging to the same group of one of the parties. In both
cases, which were decided by the French Supreme Court on the same date, it was
reasoned that: “le caractère systématique de la désignation d’une personne donnée
par les sociétés d’un même groupe, sa fréquence et sa régularité sur une longue
période, dans des contrats comparables, ont créé les conditions d’un courant
daﬀaires entre cette personne et les sociétés du groupe parties à la procédure de
sorte que l’arbitre était tenu de révéler l’intégralité de cette situation à l’autre partie à
l’effet de la mettre en mesure d’exercer son droit de récusation”.

In Serf v. DV, where one of the parties was common to Somoclest v. DV, the Court of
Appeal of Paris set aside an arbitral award because of the fifty-one appointments of
the same arbitrator by the group of companies to which one party belonged.

one of the parties”, and in its Non-Waivable Red List the situation (1.3) where “[t]he arbitrator has a
significant financial interest in one of the parties”.


3, pp. 709-713. On the doubts that the behaviour of the challenging party in this case raises (it did not
challenge the arbitrator despite knowing of eight out of the fifty-one repeat appointments), Marc
Henry, “Pluralité de désignation et devoir d’indépendance et d’impartialité de l’arbitre, note sous Paris,
In similar cases, where there are no, strictly speaking, unilateral repeat appointments, it may sometimes be useful to assess the facts prior to the signing of the arbitration agreement. In STPIF v. Ballestero, the Paris Court of Appeal decided to appoint an expert to determine the number of repeat appointments of a sole arbitrator and also whether the party who had not suggested including the arbitrator in the arbitration agreement could have included other names of arbitrators during the contractual negotiations.\(^{58}\)

There is no clear threshold of the number of repeat appointments that should normally justify the disqualification of the arbitrator. Slaouï mentions two similar cases with different outcomes. In the first case, an arbitration under the aegis of the Stockholm Chamber of Commerce, the SCC Institute upheld the challenge of a party-appointed arbitrator who had been appointed eight times by the same party and six times by companies of that party’s group within a period of two years. In the second case, an ad hoc arbitration, the arbitral tribunal and later a national court rejected the challenge of a party-appointed arbitrator who had been appointed ten times in nearly ten years.\(^{59}\) In a third case, Korsnäs v AB Fortum, a national court dismissed a party’s application to set aside an arbitral award on the grounds of the appointment of the same arbitrator by the same law firm in three other cases during the last three years.\(^{60}\) In the Frémarc case, however, the French Supreme Court annulled a decision by the Paris Court of Appeal to dismiss an application to set aside an arbitral award. The application was based on the repeat appointment of a party-appointed arbitrator in three other cases.\(^{61}\)

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For another study on the issue, examining recent ICSID, LCIA and ICC cases, Maria C. Rivera-Lupu and Beverly Timmins, “Repeat appointment of arbitrators by the same party or counsel: a brief survey of institutional approaches and decisions”, Spain Arb. Rev., No. 15, 2012, pp. 103-118.


2) **Personal or professional relationships and financial gain.** When the number of repeat appointments is not high and the parties disagree as to whether the arbitrator should be allowed to hold office, it may be necessary to look in more detail at other links between the appointor and the appointee, namely their personal or professional relationships and the arbitrator’s income associated to them. Consideration may be given to the principle set by the Swiss Federal Tribunal that professional links between arbitrators and counsels are acceptable unless there is a close and permanent professional relationship, or when a non negligible part of the arbitrator’s income stems from the relationship.\(^{62}\)

3) **Related cases.** A circumstance which must be considered is whether the repeat appointments take place in related arbitrations. In this scenario, the party making the repeat appointments may have additional good reasons for its decision to choose the same person in different cases, namely an interest in avoiding inconsistent decisions.\(^{63}\) However, the fact that the cases are related also raises two additional concerns, even if there is only one prior appointment of the same arbitrator by the same party. The first of these additional concerns is that the arbitrator’s lack of bias may be affected by some prejudgement, while the second one is that there may be an unbalance of information amongst arbitrators and amongst parties.

*Prejudgement.* In lay terms, an arbitrator is said to be prejudged if his judgement is reached before the evidence is available. This may be due to varied reasons, for instance, strong animosity towards one of the disputing parties, prior involvement of the arbitrator in the case or prior views of the arbitrator related to the subject-matter of the arbitration (in the form of doctrinal opinions or positions adopted by the arbitrator in related cases). The notion of prejudgement in arbitration is normally used in a narrower sense, only in relation to the links between the arbitrator and the subject-matter of the dispute (either because of a prior involvement of the arbitrator in the case or of prior views of the arbitrator). The risk of prejudgement, it is worth


\(^{63}\) Other parties may not appoint the same arbitrator in two related cases, for instance because they deem that each of the cases needs a different experience or expertise in the arbitrator, or just because they wish to diversify the risks.
noting, may exist with or without repeat appointments, and may affect both party-appointed and non-party-appointed arbitrators.

5-52 An arbitrator is not automatically prevented from ruling on a matter that is related to other proceedings in which he previously acted as arbitrator. There is prejudgement if the arbitrator’s position in one case determines or logically has consequences on his position in another case. It should also be assessed when the repeat appointments in the related cases took place. An automatic presumption of an arbitrator’s prejudgement to decide an issue in case ‘B’ because he has already decided that issue in case ‘A’ seems excessive. When the repeat arbitrator has received all the appointments prior to him having adopted any position in any of the related cases, he should not be deemed as prejudged in one case just because the other arbitral proceedings run faster. Otherwise we would have to accept the idea, which so much neglects the reality that related arbitral proceedings do not often progress at the same speed, that repeat arbitrators in related cases can only seek to protect the interest of avoiding inconsistent decisions if they decide all the cases on the same date.

5-53 Gaillard suggests a broader notion of prejudgement. When considering the question of whether parallel repeat appointments of an arbitrator in related cases may in themselves be grounds for challenge, he notes that the appointing authority of a presiding arbitrator may legitimately doubt between the concern for avoiding inconsistent decisions and the concern for giving each party an equal opportunity of

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65 Many arbitration rules and laws do not provide for a mechanism that may allow both arbitrations to end simultaneously.
convincing an independent arbitral tribunal without the consequences of another party having presented the case, well or not, without its presence. He appears to accept the existence, at least in some cases, of a right of any party in any of the related cases to present its case before a virgin presiding mind. He does not suggest how the appointing authority should solve the dilemma between both the above-mentioned concerns when the repeat arbitrator is a party-appointed arbitrator, but he praises the ICC for having adopted the policy of only appointing a repeat presiding arbitrator in parallel related cases if all the parties concerned agree.\(^{66}\)

5-54 *Unbalanced information.* In the context of repeat appointments in related cases, it has been noted that the independence of the arbitrator (including his possible prejudgement) is only a part of the problem, the other part being that the arbitrator, by sitting in related cases, may have factual or legal information that his fellow arbitrators do not have. This additional information would pose a risk of unbalance in the form of an advantage of the repeat arbitrator vis-a-vis his colleagues in the arbitral tribunal.\(^{67}\) Reymond sees in this risk a reason for avoiding repeat appointments in related cases.\(^{68}\) Other authors yet consider that such risk should not be overstated because the repeat arbitrator can either refrain from using the additional information or submit it to contradictory debate.\(^{69}\)

5-55 Reasons based on unbalanced information do not only relate to the arbitrators, but also to the disputing parties. Whitesell notes, with regard to the ICC practice, that when an arbitrator is proposed in a related matter, consideration is given to the proposed arbitrator’s access to information if the parties, counsel or the other

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\(^{66}\) Emmanuel Gaillard, Note – Cass. (2e Ch. Civile), 6 décembre 2001; Cour d’appel de Paris (1re Ch. G), 2 avril 2003; Cour d’appel de Paris (1re Ch. C), 16 may 2002, Rev. Arb., 2003, No. 4, pp. 1246-1247.


\(^{68}\) Reymond, footnote 64 above, p. 12.

arbitrators involved are not the same in the related cases. Thus, a balance of information also appears to be at risk, not by the fact that one of the members of an arbitral tribunal may have more information on an issue to be decided than the other members (all the arbitrators in the related cases could even be the same), but by the fact that one of the parties (not involved in all the related cases and without a counsel involved in all the related cases) may not have all the information that the repeat arbitrator acquires on the issue whilst the other party does (involved in all the related cases or with a counsel involved in all the related cases).

The ICC’s attention to the two-fold balance of information, between arbitrators and between parties, does not seem to apply to presiding arbitrators only. The Court, praised by Gaillard for having adopted a policy of only appointing a repeat presiding arbitrator in parallel related cases if all the parties concerned agree, also appears to be sensitive to reasons of balance when there is an initial objection against the appointment of a repeat party-nominated arbitrator. Derains and Schwartz note that the Court, in the event of an objection by a party, “has refused to confirm the appointment of a common arbitrator for multiple, connected arbitrations raising identical issues and where the parties are not the same.” Some specific examples may be taken from the ICC practice. For instance, in four ICC arbitrations between the grantor of a license and four different concessionaires, the former, who had the same claims in the four cases, nominated the same arbitrator. The Court confirmed the arbitrator in only one of the cases. In another example, a claimant challenged the respondent-nominated arbitrator after the latter had been nominated by the same party in a related case. The Court rejected the challenge but also decided not to confirm the arbitrator in the other case. In another –and particularly illustrative double– example, there were two different arbitrations in which the respondent objected the confirmation of the claimant-nominated arbitrator, who had been nominated by the same party in two other related cases. The Court, in the same year, decided not to confirm the repeat arbitrator in the arbitration where the parties to the

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related cases were not all the same, but confirmed the arbitrator in the other arbitration, where the related cases involved the same parties.\textsuperscript{72}

\textsuperscript{5-57} It is less clear how sensitive the ICC Court is to reasons based on unbalanced information when dealing with challenges of party-appointed arbitrators repeatedly appointed in related cases. Out of the eleven challenges of this type that were filed in ICC arbitrations between 1992 and 2009, reasons of unbalanced information seem to underlie in seven: five challenges rejected by the Court where the challenging party was a party in all the related cases, one challenge rejected by the Court where the parties to the related cases were not the same but coupled with the Court’s decision not to confirm the arbitrator in the related case (this challenge is also referred to in the previous paragraph) and one challenge accepted by the Court where the challenging party was not a party in all the related cases (in this case, the respondent, a distributor, challenged the claimant-nominated arbitrator on the grounds that he had been appointed by the claimant in another arbitration involving a similar contract against another distributor with whom the challenging party had identical interests). Yet, the other four challenges (two of which may be deemed for present purposes as one as they were against the same arbitrator and based on his involvement in the same prior related cases) were rejected by the Court despite the challenging party not being a party in the related cases.\textsuperscript{73} This means that, of the five actual challenges in which the parties in the related cases were different, reasons based on unbalanced information could have had a decisive effect in the outcome of two, but seemingly not in that of the other three. In this regard, it is worth recalling Derains and Schwartz’s remark that “[t]he Court considers all such cases in the light of their own circumstances and has not adopted any rigid practices concerning the acceptability of appointing the same arbitrator in related arbitrations”.\textsuperscript{74}

\textsuperscript{5-58} Grounds of unbalanced information should not be taken too far. The decision to allow or not allow the same arbitrator to deal with similar issues in related cases should try to be objective in the consideration of the two legitimate interests that are

\textsuperscript{72} Fieldwork carried out for this research.

\textsuperscript{73} Idem.

\textsuperscript{74} Derains and Schwartz, \textit{A Guide to the ICC Rules of Arbitration}, 2\textsuperscript{nd} ed., p. 130.
normally at stake: the interest to avoid prejudgement by the arbitrator and the interest to avoid inconsistent decisions. The interest of a party that is involved in all the related cases to avoid inconsistent decisions may deserve less protection than the interest of a party involved in only one of the related cases to have a presiding or sole arbitrator who may not first consider or decide on a similar issue in another related case. After all, sole arbitrators and often presiding arbitrators (if there is no majority) have the power to decide alone. But that interest to avoid inconsistent decisions still deserves protection. A systematic disqualification of repeat party-appointed arbitrators in related cases only because of the objection of one party to any of those cases seems excessive.

4) Failure to disclose. It is generally accepted that repeat appointments must be disclosed, although there is controversy on whether it must be all of them. The ICC Court has normally expected repeat appointments to be disclosed, without setting any restriction. Henry is in favour of full disclosure of repeat appointments by the same party, but seemingly not by the same counsel. The IBA Guidelines puts quantitative limits (in terms of number and time) on the repeat appointments, either by the same party or counsel, that should normally be disclosed. Clay considers that the IBA Guidelines’ quantitative limit in terms of time (3 years) is too short and should be extended. There is also a strange suggestion that none of the repeat appointments should be disclosed in an isolated recommendation not to disclose the previous participation as an arbitrator in other arbitrations in which one of the parties has been involved. In my opinion, full disclosure of the number of repeat appointments, either by the same party or by the same counsel, is the most appropriate thing to do.

75 Derains and Schwartz, A Guide to the ICC Rules of Arbitration, 2nd ed., pp. 128-129. See also Whitesell, footnote 70 above, p. 10, suggesting that an arbitrator acting in a related matter should disclose it when the parties, counsel and arbitrators involved in the related cases are not the same.


77 IBA Guidelines, Orange List, 3.1.3 and 3.3.7.


79 Recommendations on the Independence and Impartiality of the Arbitrators by the Spanish Club of Arbitration (CEA), approved on 23 October 2008 and available in English at
The mere failure to disclose, regardless of the severity of the undisclosed circumstances, should not justify the disqualification of the arbitrator. Nonetheless, the failure to disclose repeat appointments should be a factor, to be weighed together with the other circumstances of the case, in order to decide whether the arbitrator should be disqualified or not. It may even be a decisive factor if the decision-maker, after considering all the other circumstances, has doubts as to what to do. Probably not by chance, an allegation of failure to disclose by the complaining party often appears, in the context of repeat appointments, as a common denominator in the cases where national courts have upheld the complaining party’s claim. Moreover, it is generally worth noting that a failure to disclose had been alleged by the challenging party in nearly one out of every two challenges (48.6%) that were accepted by the ICC Court during the period 1992-2009.

5) Small pool of arbitrators. Repeat appointments in its broader sense (affecting party-appointed or non-party-appointed arbitrators) may be justified in some cases by the existence of a small pool of prospective arbitrators with the experience or

http://www.clubarbitraje.com/files/docs/recomendacion_independencia_arbitral_eng.pdf (last visited in May 2013), section 14 (“Examples of Circumstances that need not be disclosed”).

80 See section 5.4.2 below.

81 Emmanuel Gaillard, Note – Cass. (2e Ch. Civile), 6 décembre 2001; Cour d’appel de Paris (1re Ch. G), 2 avril 2003; Cour d’appel de Paris (1re Ch. C), 16 may 2002, Rev. Arb., 2003, No. 4, p. 1241, commenting on the Frémarc case. In Frémarc v. ITM, Frémarc (franchisee—formerly Fretal) sought the nullification of an arbitral award on the grounds that the arbitrator who had been appointed by ITM (franchisor) had already adopted a position in several other arbitrations on issues that he had to decide in the case, had received substantial fees from the repeat appointments and had failed to disclose the repeat appointments. In its decision of 1999, the Paris Court of Appeal noted that there had been a regrettable failure of disclosure by the arbitrator but rejected to nullify the award by reasoning that such failure was not enough to call into question the arbitrator’s independence or impartiality. Frémarc then appealed to the French Supreme Court. By ruling dated 6 December 2001, the Supreme Court annulled the judgment of the Paris Court of Appeal on the grounds of contradictory reasoning. The Supreme Court did not express whether the failure of disclosure had any weight in its decision.


84 Fieldwork carried out for this research. See chapter 6, section 6.3.2, obs. to Figure 11.
expertise required of the arbitrator. A national court appreciated the specialisation of the law firm of an arbitrator who had been appointed by the same party ten times in ten years to reject his challenge in an ad hoc case. In a different case, however, the arguments relating to the specialisation and expertise of the arbitrator did not prevent the SCC Institute from upholding a challenge of a party-appointed arbitrator who had been appointed over ten times by companies of the same group during a period of two years.

Repeat appointments may also be justified, when affecting party-appointed arbitrators only, by the existence of a small pool of prospective arbitrators with the cultural proximity to the appointing party (namely same nationality) that the rules governing the arbitration normally allow. In *Mytilineos v. APSEA*, the claimant sought the nullification of the arbitral award on the grounds of reasonable doubts about the impartiality and independence of the claimant-nominated arbitrator because he had failed to disclose that he had sat as an arbitrator in four other cases where the respondent was involved, in some of which the arbitrator had been appointed by that respondent. The Paris Court of Appeal rejected the challenge by stating, among other things: “Que s’agissant par ailleurs de juger des litiges du commerce international, il est parfaitement compréhensible qu’une partie roumaine s’adresse à un arbitre roumain expérimenté comme M. B. dans le contexte d’un pays en voie de transition où les compétences professionnelles de ce type soient nécessairement limitées.” On other occasions, the existence of a small pool of prospective arbitrators has not been enough to justify the repeat appointments in light of other circumstances of the case. In 2008, the ICC Court decided not to confirm a claimant-nominated arbitrator who had been involved as an arbitrator in five previous cases in which the claimant had been a party. Out of those five cases, the arbitrator had been nominated by the

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87 Ibid., p. 111.

claimant in three and had been nominated as presiding arbitrator by the co-arbitrators in the other two. Fry and Greenberg note that “[t]he Court took account of factors such as the existence of only a small pool of experienced arbitrators in the claimant’s country but also the fact that the arbitrator was sitting as arbitrator in a pending dispute involving the claimant”89.

6) **Arbitrator’s position in the other cases.** On some occasions, an arbitrator whose impartiality is disputed because of repeat appointments contends that his position in the other arbitrations, not in favour of the appointing party, gives evidence of his lack of bias. This happened in the *Mytilineos* case, where a claim for the nullification of the arbitral award was eventually rejected. The national court’s reasoning in this case did not yet seem to attach importance to the arbitrator’s position in the other arbitrations90. On other occasions, the arbitrator’s position in the other cases has been argued by the complaining party in the opposite sense. In the *CBC Banque* case, the Court of First Instance of Brussels accepted a challenge of a party-appointed arbitrator who had been unilaterally appointed by other parties opposed to the challenging party in at least eleven prior similar arbitrations, all of which had resulted in the challenging party losing its case91. Overall, an argument as to the arbitrator’s position in other cases should always be considered with caution, if only because of the confidentiality issues that it may raise.

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89 Jason Fry and Simon Greenberg, “The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases”, ICC Bull. Vol. 20, No. 2, 2009, p. 20. The fact that the arbitrator concerned had been nominated by the claimant is not expressly indicated by Fry and Greenberg but was confirmed when carrying out the fieldwork of this research.

90 Société Mytilineos Holdings v. The Authority for Privatization and State Equity Administration, Paris CA (1st Civ. Ch.), 17 February 2005, Rev. Arb. 2005, No. 3, p. 717, quoting the arbitrator’s statement that in two out of the three already concluded arbitral proceedings in which he and the other party had been involved (including the arbitration from which this case arose), the arbitral tribunal had decided against that party in two and the parties reached a settlement agreement in the third.

5.4.2. THE QUESTIONABLE APPROACH TAKEN BY THE IBA GUIDELINES

5-64 The IBA Guidelines on Conflicts of Interest in International Arbitration include repeat appointments on its Orange List. This List is a non-exhaustive enumeration of specific situations which: (i) in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator’s impartiality or independence (hence the arbitrator’s duty to disclose them); but (ii) in the eyes of a reasonable third person with knowledge of the relevant facts in each particular case, may or may not be a conflict of interests (may or may not justify the disqualification of the arbitrator).\(^\text{92}\)

5-65 According to the IBA Guidelines, not all repeat appointments are orange but only those that reach a certain number and take place within a given period of time counted backwards from the moment of the assessment. The Guidelines also take into account whether the appointor is a party or counsel. Orange List 3.1.3 refers to the situation where “[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties”, while point 3.3.7 of the same List includes the case where “[th]e arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm”. The repeat appointments that do not reach these thresholds of number and time are green: the arbitrator is not required to disclose them.

5-66 The two-fold limits that points 3.1.3 and 3.3.7 set (number and time of past appointments) do not distinguish between repeat appointments in unrelated or related cases. Nonetheless, the IBA Guidelines suggest, elsewhere, that repeat appointments in related cases should be treated differently: no limit as to the number of past appointments (only one could trigger the arbitrator’s duty of disclosure) and a three-year time limit aimed at determining whether the past case is still open, not when the past appointments took place. This different treatment may be drawn from Orange List 3.1.5, which refers to the situation where “[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related

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\(^{92}\) IBA Guidelines, Part II, Practical Application, paras 3-4.
issue involving one of the parties or an affiliate of one of the parties”. It may be noticed that repeat appointments are not mentioned in point 3.1.5 but clearly fall under it. The underlying concern in point 3.1.5 is the possible prejudgement of the arbitrator who participates in related cases; a concern which may affect both party-appointed and non-party-appointed arbitrators, with or without repeat appointments.

Beyond the different treatment of repeat appointments in unrelated and related cases, the above-mentioned points 3.1.3, 3.3.7 and 3.1.5 of the IBA Guidelines’ Orange List may be spreading an understanding that repeat appointments must be disclosed only in certain circumstances. No doubt, the Guidelines clearly warn about their relative value and the need to take into account the circumstances of each particular case, and also make it clear that in the case of doubt the arbitrator should disclose, thus suggesting that full disclosure of the number of repeat appointments may sometimes be the appropriate thing to do. They even pick the specific example of repeat appointments to underline the relative value of the quantitative limits they use. Yet, the fact remains that objective limits to the disclosure of repeat appointments appear in the IBA Guidelines by default, conveying the idea that non-disclosure of repeat appointments that are just a few or are distant in time (in unrelated cases), or that took place in cases distant in time (in related cases), is the normal thing that arbitrators should do.

The IBA Guidelines explain the limits to the duty of disclosure. The drafters of the Guidelines noted that they had accepted a subjective approach to what should be disclosed, in line with their recognition that the parties have an interest in being fully informed of all the circumstances that may be relevant in their view, but that the subjective test for disclosure should not be applied without limitations. According to the Working Group, “there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely

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93 IBA Guidelines, Part II, Practical Application, para 7: “For example, the three-year period in Orange List 3.1 may be too long in some circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case”.

94 Ibid., Part. I, Explanation to General Standard 3(a).
subjective test of ‘the eyes of the parties’”\(^95\). The Working Group was also of the view that excessive disclosures may unnecessarily undermine the parties’ confidence in the process\(^96\). As to the time limits, much debated during the drafting of the Guidelines, the IBA Guidelines added that they “are appropriate and provide guidance where none exists now”\(^97\) while the Background Information on the IBA Guidelines noted that the Working Group “decided to retain the three-year limits in order to indicate that some potential conflicts would recede with the passage of time”\(^98\).

5.69 Within this logic, the IBA Guidelines: (i) treat some repeat appointments (those outside the limits in number and time that they set) as green situations\(^99\); (ii) explain the green situations as those that “should never lead to disqualification under the objective test”\(^100\); and (iii) explain the objective test for disqualification as the test, “from a reasonable third person’s point of view having knowledge of the relevant facts”, of whether there are facts or circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence\(^101\).

5.70 This approach does not seem satisfactory. By recommending not to disclose certain repeat appointments, the IBA Guidelines are not only sending decision-makers the message that those appointments should normally not disqualify an arbitrator (admittedly a good general guideline\(^102\)) but also –and here lies the rub– encouraging

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\(^95\) Ibid., Part II, Practical Application, para 6.
\(^96\) Ibid., Part I, Explanation to General Standard 3(c).
\(^97\) Ibid., Part II, Practical Application, para 7.
\(^99\) IBA Guidelines, Part II, Practical Application of the General Standards, (7): “Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated”.
\(^100\) IBA Guidelines, Part I, Explanation to General Standard 3(a): “Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties’ perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required”.
\(^101\) IBA Guidelines, Explanation to General Standard 2(b) and 2(c).
\(^102\) Already followed, as a sort of indiciary evidence, by some national courts. See, e.g., Korsnäs Aktiebolag v AB Fortum Värme samägt med Stockholms stad, Svea Court of Appeals, and obs. in “The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-
arbitrators to make the real objective test on those appointments (the one carried out by a reasonable and informed third party) impossible for lack of knowledge.

5-71 All repeat appointments are repeat appointments and should be able to be seen by the parties—and eventually, if necessary, by a third decision-maker— together with the other circumstances of the case. An arbitrator should not be allowed to decide alone whether one past appointment by the same party or three past appointments by the same counsel do or do not exist for the purpose of the parties identifying potential conflicts of interest. Even if there is only one repeat appointment, parties should be informed of its existence in order to be able to make further enquiries if they deem it appropriate. For example, about the relevance of the fees associated with such past appointment or about a possible relationship between the past case and the present one.

5-72 The partial disclosure of repeat appointments that the IBA Guidelines promote can hardly run in favour of the parties’ confidence. The IBA Guidelines crop the visible repeat appointments by number and calendar, with quite a short time-limit (three years). A party can observe with concern that, with the IBA Guidelines’ limits, a counsel may appoint Mr X once every nine months plus one day and a party may appoint Mrs Y once every year and a half plus one day, both as long as they wish, without ever falling within the situations provided for, respectively, in points 3.3.7 and 3.1.3 of the Orange List. It is not entirely clear how someone who observes the non-visibility of these potentially dangerous situations is supposed to feel relieved by the considerations that the time limits “are appropriate and provide guidance where none exists now” or that “some potential conflicts would recede with the passage of time”. Besides, national courts that have ordered enquiries into the number of repeat appointments by counsel, as well as the number of appointments by the same law firm, have not followed the IBA Guidelines for the purpose of either identifying potential conflicts or constituting a basis of the possible recusal of an arbitrator.

2009”, IBA Conflicts Of Interest Subcommittee, Dispute Resolution International, Vol. 4, No. 1, May 2010, pp. 17-18. In this case, the national court took into account the criterion established in point 3.3.7 of the Orange List (“[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm”) to dismiss a party’s application to set aside an arbitral award on the grounds of the appointment of the same arbitrator by the same law firm in three other cases during the last three years.

appointments have sought to know the full number or, at least, the number during a long period of time (ten years). It is difficult to accept the IBA’s logic that repeat appointments vanish after three years, no matter the number, unless the arbitrator decides otherwise.

The IBA quantitative limits to the duty of disclosure of repeat appointments pose further drawbacks. They may easily lead to capricious results: for instance, the disclosure of two other appointments by the same party in the last three years vis-a-vis the non-disclosure of five other appointments by the same party if just one of them took place in the last three years. They also pose doubts. For example, should an arbitrator who has received four other appointments by the same party, two of which having taken place during the last three years, disclose two or four? And they are also leading some practitioners to think that repeat appointments within those limits are not a conflict of interests, as though they, or the arbitrators they appoint, always knew or otherwise could neglect all the circumstances surrounding the repeat appointments that could be potentially relevant for identifying conflicts of interests and that are beyond the bare number and date of those appointments.

Moreover, the traditional rationale for limiting the scope of disclosure does not work well with the IBA quantitative limits on the duty of disclosure of repeat appointments. It is generally accepted that what an arbitrator must disclose cannot be left to the whim of the parties’ own subjectivity. An arbitrator “cannot be expected to provide the parties with his complete and unexpurgated business biography” and “arbitrators

104 STPIF v. SB Ballestero, Paris CA (1st Civ. Ch.), 16 May 2002, Rev. Arb. 2003, No. 4, pp. 1231-1240. The Paris Court of Appeal decided to appoint an expert to determine the total number of contracts signed by one of the parties where a given individual was proposed as sole arbitrator.

105 Société Prodim v. Nigoni, Cass. (1st Civ. Ch.), 20 June 2006, Rev. Arb. 2005, No. 1, pp. 219-220, where the French Supreme Court confirmed the decision of the Paris Court of Appeal to uphold a lower national court’s request to one of the parties to disclose the number of related cases in which it had appointed the same arbitrator during the last ten years; Fremarc v. ITM Entreprises, Paris CA (1st Ch. G), 2 April 2003, Rev. Arb. 2003, No. 4, pp. 1231-1236, where the Paris Court of Appeal decided (in renvoi, after the French Supreme Court had annulled its decision not to set aside an arbitral award) to appoint an expert who should determine the number of arbitral proceedings in which one of the parties had appointed the same arbitrator during the last ten years and, out of that number, the number of related cases.

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. Just taking into account the wide range of fees that arbitrators may receive in one case, there is no justification to presume that a low number of repeat appointments is, for disclosure purposes, trivial.

Full disclosure of the number of repeat appointments is not an over-reaching disclosure in any other sense. It should not be a burdensome task for arbitrators to recall the repeat appointments that they have received, even if such appointments are distant in time, and it does not seem to be too intrusive in the lives of party-appointed arbitrators to make them reveal, in each particular case, the number of times that the same party or counsel has appointed them as arbitrators in the past. One may understand that an arbitrator does not disclose a repeat appointment because he does not know that the appointing party in the second case is an affiliate of the appointing party in the first case. It would be unreasonable to oblige arbitrators to track and identify all of the affiliates of the companies appointing them. Other than this exceptional case, though, it is hard to picture why or how full disclosure of the number of repeat appointments could be excessive.

All in all, to set quantitative limits on the duty of disclosure of repeat appointments is not a good solution. The reduction of the number of challenges based on repeat appointments by making some of those challenges impossible for lack of knowledge is questionable. It would be preferable to have the repeat appointments included in the Orange List without setting any quantitative limits, particularly bearing in mind how clearly the IBA Guidelines recall the principle that disclosure is not an admission of a conflict of interests nor automatically leads to disqualification—a principle which, it is fair to add, seemed to have less weight not very long ago.  

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107 Commonwealth Coatings Corp. v. Continental Casualty Co. et al., US Supreme Court, 18 November 1968, J. White’s concurring opinion.

108 IBA Guidelines, Part I, Explanation to General Standard 3(a) and (b).

109 It is interesting to compare, for instance, the following views of members of the ICC senior staff, separated as they are by nearly two decades. 1991: “[I]n almost each instance where a party has objected to a confirmation of a prospective arbitrator based on reservations in the Statement of Independence, the Court has refused confirmation” (Stephen Bond, “The Experience of the International Chamber of Commerce”, in The Arbitral Process and the Independence of Arbitrators, ICC Publ. No. 472, 1991, p. 13). 2009: “Potential arbitrators should not be nervous about full
Full disclosure of the number of repeat appointments might lead to more objections or challenges, but these should be filed in a timely manner and eventually might very well be rejected. When faced with an objection or challenge, arbitrators should be ready to give some more information if they do not want to resign. For instance, details of their relationship with the appointing party and the income associated. This may be a burden but is worth the effort, even if it ends up making a few more often miss out on the legitimate satisfactions of acting as an arbitrator and earning the corresponding fees.

Limits as to the number or time of repeat appointments could be satisfactory if they were not aimed at limiting the arbitrators’ duty of disclosure, but rather at giving an outright ‘yes/no’ answer at the outset of the arbitration to the question of whether repeat appointments disqualify an arbitrator. This or that specific limit could always be argued to be the most appropriate, as much as whether 120 km/h is more appropriate than 130 km/h as a speed limit. It would always be artificial to draw a line beforehand between the repeat appointments that allow arbitrators to hold office and those that do not. But whatever those limits may be, when the parties had accepted them, they could add certainty to the arbitral process by relinquishing the prospect of a challenge based on repeat appointments. Within the limits, the parties would accept repeat appointments. Over the limits, any arbitrator would automatically be disqualified. Some parties could find in such limits a good way to strike a balance between the wish of each party to unilaterally choose an arbitrator who it trusts and the right of each party to challenge an arbitrator if there are circumstances which give rise to justifiable doubts as to his impartiality or independence.

disclosure. They should have confidence in the Court’s decision on whether the disclosed fact is significant. Disclosure is likely to avoid the potential embarrassment and delays that could result if facts that have not been disclosed are subsequently uncovered. Moreover, proper disclosure protects an arbitrator by flushing out any challenges at the outset of a case. Undisclosed information may be used by a party at a later stage, when it has a different, covert reason for wanting to get rid of the arbitrator or simply cause a delay. Had the information been disclosed at the outset, the parties would only have 30 days after the appointment or confirmation to file the challenge” (Jason Fry and Simon Greenberg, “The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases”, ICC Bull. Vol. 20, No. 2, 2009, para 25).
5.5. A DIFFERENT STANDARD OF IMPARTIALITY AND INDEPENDENCE?

5-78 When all the arbitrators on an arbitral tribunal have a duty to be impartial and independent, the question arises as to whether party-appointed arbitrators may be subject to a standard of impartiality and independence which is different from that applied to the presiding arbitrator.

5-79 The first problem with this question is the question itself. What is meant by ‘a different standard’? Does it mean one less (but still) unbiased mind or unbiased behaviour of the arbitrator in the reference? Or does it amount to fewer unacceptable links in the arbitrator? These two different questions are not normally distinguished, either by those who reject a different standard¹¹⁰ or by those that have doubts about the convenience of accepting it¹¹¹. It may be useful to distinguish them to avoid the risk of reaching oversimplified answers that may obscure the theoretical analysis of the status of party-appointed arbitrators and that are also likely to be of little help for decision-makers on problems of bias to address, in practice, the question of whether their decision may vary depending on the method of appointment of the arbitrator. If the question is just the oversimplified one of whether a different standard should be admitted, the oversimplified answer should be, in my view, no (A) and yes (B).

5.5.1. ONE LESS (BUT STILL) UNBIASED MIND OR UNBIASED BEHAVIOUR?

5-80 There is a prevailing view amongst legal authors that the impartiality and independence of an arbitrator cannot change depending on whether he has been neutrally or unilaterally appointed. This view rejects any difference as to what party-appointed and non-party-appointed arbitrators must do or what their behaviour must be. It can be summarised in the words of Goldman and Holtzmann back in 1970:

¹¹⁰ See, e.g., IBA Guidelines, General Standard 5: “These Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators. These Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws”.

there is just one way to be impartial, that of a judge\textsuperscript{112}; and there is just one type of impartiality: absolute impartiality\textsuperscript{113}. According to Fouchard, Gaillard and Goldman, it is better to stick to the principle of impartiality and independence of all arbitrators in order to discourage party-appointed arbitrators from misbehaving\textsuperscript{114}. Henry notes that the arbitrator’s duty of independence must be understood in an absolute and not relative way, this meaning that such duty does not vary in intensity depending on whether the arbitrator has been nominated by one party or not: in all cases the arbitrator is deontologically bound by the same duty of independence\textsuperscript{115}. In the same vein, Clay notes that the arbitrator, regardless of whether he has been unilaterally chosen by a party or not, and regardless of whether he has links with a party or not, must always judge in full independence, and this independence “ne souffre ni variation ni tempérament: elle est monolithique”\textsuperscript{116}.

A minority of authors have nevertheless deemed it necessary to acknowledge a different impartiality and independence in party-appointed arbitrators, on several grounds.

\textit{An implied agreement as to their role of impartial representatives for conciliation purposes.} About forty years ago, Minoli expressed the view that arbitrators must be impartial no matter how they are appointed, but there are different ways to be impartial, just as there are different tasks that an arbitrator may be required to perform within an arbitral tribunal\textsuperscript{117}. In his opinion, the impartiality of party-appointed arbitrators would be different from that of the presiding arbitrator because of the parties’ different expectations about the role of party-appointed arbitrators, on the one hand, and that of the presiding arbitrator, on the other. Minoli thought that the parties’ agreement to have unilaterally-appointed arbitrators in a tribunal


\textsuperscript{113}Ibid., obs. by Howard Holtzmann, p. 235.

\textsuperscript{114}Fouchard, Gaillard and Goldman, \textit{International Commercial Arbitration}, para 1046.

\textsuperscript{115}Henry, \textit{Le devoir d’indépendence de l’arbitre}, p. 338.

\textsuperscript{116}Clay, \textit{L’arbitre}, para 343.

encompasses in most cases a common understanding that each party may expect the arbitrator appointed by it to “envisage spécialement les aspects du cas traité qui lui sont favorables” and, at the same time, accept that the arbitrator appointed by the other party will do likewise “dans le sens contraire”\textsuperscript{118}. Such behaviour by each party-appointed arbitrator would be allowed out of a common wish by the parties to empower the party-appointed arbitrators with a conciliatory role aimed at trying to put an end to the arbitration with an agreement, either between the parties or between the party-appointed arbitrators\textsuperscript{119}. Minoli’s view seems to suggest that party-appointed arbitrators could still be impartial because they would not be representatives in the normal sense of the term (people who, like advocates, must defend someone’s interests or otherwise face the risk of being fired and perhaps sued), nor even representatives who wish to defend someone’s interest for the sake of doing so but are irremovable by and unaccountable to those whom they represent, but representatives for the sole purpose of trying to reach an agreed solution.

Minoli’s vision of impartial party-appointed arbitrators representing their respective appointing parties is troubling, even if representation is only allowed for conciliation purposes. It seems impossible to represent one party and simultaneously be impartial. The specific example then suggested by this author to illustrate the existence of different degrees of impartiality, the comparison of judges and public prosecutors, does not seem particularly helpful.

What is possible, but qualitatively different from Minoli’s vision, is for party-appointed arbitrators to play both roles one after the other (representatives for conciliation purposes and later impartial adjudicators), as it was seemingly done in ancient Greece\textsuperscript{120}. This two-tier role will be addressed later\textsuperscript{121}. Suffice to now say

\textsuperscript{118} Ibid., p. 223.

\textsuperscript{119} Ibid., pp. 224-225: “[S]i les parties ont préféré cette forme d’arbitrage à celle dans laquelle tous les arbitres sont nommés de façon impartiale, cela se produit, dans la plupart des cas, parce qu’elles désirent fondamentalement que l’arbitrage, si possible, se termine par une sentence «d’accord parties» ou par un accord entre les arbitres nommés ex parte” (emphasis in the original).

\textsuperscript{120} Party-appointed arbitrators in ancient Greece were expected to represent their appointing parties when trying to reach an agreement but at some point in the procedure, when conciliation was deemed to have failed, were expected to ‘change hat’ and decide according to what they deemed just. See chapter 2, section 2.1.1.A.

\textsuperscript{121} See chapter 7, section 7.3.2.D.2.
that such a two-tier role, apart from facing clear difficulties, cannot be presumed. Nowadays, arbitrators are normally not allowed to perform any conciliatory functions unless the parties have expressly authorised them to do so.

An implied special responsibility towards the unilateral appointor. Some authors have suggested that party-appointed arbitrators may have a special responsibility towards the appointing party. According to Smit, “[a] party-appointed arbitrator cannot help but realize that counsel who selected him was motivated by the desire that his selection would contribute to the favorable result he seeks and, to some extent, the arbitrator may act upon that realization”122. Likewise, Stevenson asserts that the principle of independence of arbitrators is “somewhat negated if the parties have the option to select one of the three arbitrators since such arbitrator will feel that he has a certain responsibility to the party selecting him”123. Shani argues that unilateral nominations are often made because of the presumed dispositions of the appointees, this being likely to give rise to chronic partiality concerns. In his view, these dynamics in the appointment process, along with the potentially high material costs and adverse effects on the arbitral process that monitoring of the arbitrators’ internal dispositions might entail, would make it more appropriate to apply a less stringent standard to party-appointed adjudicators; for example, by only requiring from them a lack of serious bias and good faith124.

The idea that unilateral appointments justify or give rise to a special responsibility towards the appointing party is close to the vision, deeply embedded in US case law


124 Yuval Shani, “Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings”, Loy. L.A. Int. & Comp. L. Rev., Vol. 30, 2008, p. 488: “Since party-appointed adjudicators are often nominated because of their presumed dispositions (which render them, at least, somewhat partial), the application of stringent standards of judicial impartiality to party-appointed adjudicators may be a hopeless task. The actual dynamics of the appointment process are such that they are likely to give rise to chronic partiality concerns. Unfortunately, the ability of external bodies to monitor such «internal» dispositions – unlike external manifestations of dependence – is limited. In addition, the costs – both in terms of material costs and interference with party autonomy and level of comfort in the process – might be prohibitively high. So, arguably, the development of looser standards of impartiality for party-appointed adjudicators (e.g., lack of serious bias and good faith) would be more appropriate here too”.

182
on domestic arbitration, that unilateral appointments carry in themselves an implicit
degree of partiality\textsuperscript{125} or less impartiality\textsuperscript{126}. This idea must be firmly rejected. Party-
appointed arbitrators who are under the duty of impartiality and independence do not
have any responsibility towards the appointing party that they do not have towards
the non-appointing party. William Henry Wadsworth, a US arbitrator unilaterally
appointed by the United States in the Nineteenth Century by virtue of an arbitration
agreement which obliged all commissioners (as arbitrators in interstate arbitration
were called at the time) to be impartial, made a commendable statement in this
regard. Speaking of himself, he said:

The authority which he possesses he derives from both the United States and
Mexico, and is obliged to exercise it impartially for the benefit of both. He would
possess neither office nor authority without the consent and concurrence of both
nations, and is not more bound by the official acts or municipal regulations of the
United States than by those of Mexico. He derives his appointment to a place on
the board—a place created by the action of both governments—from the
Government of the United States, indeed, but is no more bound by this
appointment to represent the interests of the United States than those of Mexico,
and no more bound by the acts of that government than his colleague on the board,
or their umpire. He is an impartial arbiter selected by the United States, but
deriving all his powers from the United States and Mexico, nor more the officer of
the former than of the latter.\textsuperscript{127}

\begin{quote}
\textit{A more consistent solution with what parties often want or accept.} For certain
authors, a different degree of impartiality and independence would be justified by the
observation that, in practice, party-appointed arbitrators often show less impartiality
than the presiding arbitrator. This view seemed to find legal justification in the
\end{quote}

\textsuperscript{125} See, \textit{e.g.}, \textit{Astorial Medical Group and others v. Health Ins. Plan of Greater New York}, 11 N.Y.2d
128, 182 N.E.2d 85, 88 (1962): “In thus enforcing the party’s contractual right to designate an
arbiter of his own choice, we implicitly recognized the partisan character of tripartite arbitration”.

\textsuperscript{126} See, \textit{e.g.}, \textit{Merit Ins}, 714 F.2d at 679: “The parties to an arbitration choose their method of dispute
resolution, and can ask no more impartiality than inheres in the method they have chosen”.

\textsuperscript{127} “Répertoire de la jurisprudence arbitrale internationale - Repertory of International Arbitral
Jurisprudence”, vol. I (1794-1918), Vincent Coussirat-Coustère and Pierre Michel Eisemann,
of the international arbitrations to which the United States has been a party, together with appendices
containing the treaties relating to such arbitrations, and historical and legal notes on other international
 arbitrations ancient and modern, and of the domestic commissions of the United States for the
It is often contended that a party-appointed arbitrator need not have the same degree of independence and impartiality as an arbitrator appointed by a third party or by a court. The Swiss Supreme Court has so far refused to make such a distinction on the ground that every arbitrator performs the function of a judge. The Parliament, however, chose better to take into account the realities of international arbitration. The Upper House first decided to delete the ground for disqualification based on the lack of independence of an arbitrator. The Lower House, however, insisted on retaining Article 180(1)(c), but agreed to delete partiality as a ground for disqualification, thus keeping only the lack of independence. The Upper House in turn agreed to this change. [...]

[...] While partiality can still lead to disqualification to the extent that it is the result of a lack of independence, the legislature adopted a solution consistent with the realities of international arbitration and with a more extensive freedom of the parties. The legislative history of Article 180(1)(c), and the reference therein to the ‘circumstances’ of the case permit decisions about disqualification taking account of the method of appointment of the arbitrators. In many arbitral tribunals made up of three or more arbitrators, one cannot expect quite the same degree of objectivity and impartiality from each of the arbitrators. All of them must, however, by their situation vis-a-vis the parties offer sufficient guarantees as to their freedom to make up their own mind in performing their jurisdictional function. Such a realistic interpretation of Article 180(1)(c) is all the more warranted since the application of this provision will, in many cases, escape judicial review, because the parties, as provided by Article 180(3), may refer to a third party, most often an arbitration institution, any challenges of arbitrators. The suggested realistic interpretation is also consistent with the apparent intent of the Swiss Parliament to move away from a purely jurisdictional view of international arbitration. When the parties have not waived their right to judicial review, the
Swiss courts will also have to take account of the realities of international practice in order to contribute to a uniform interpretation of Article 180(1)(c)\textsuperscript{128}.

In a similar vein, Lalive noted that the Swiss legislative reform accepted a lesser degree of impartiality in party-appointed arbitrators and that this was in line with the flexible solutions that parties often wanted or accepted:

\[\text{[L]e législateur fédéral a délibérément renoncé, avec raison croyons-nous, à la formule envisagée par le Conseil national qui ajoutait à celle d’indépendance l’exigence de l’impartialité. Il a manifestement songé, ce faisant, aux arbitres dits de partie, et non pas au président du tribunal arbitral ou à l’arbitre unique, dont il va de soi que, dans la conception suisse, il doit être aussi impartial qu’indépendent; la règle est traditionnelle, et peut être reliée à l’art. 58 de la Constitution fédérale, le droit à un juge impartial étant de portée toute générale, pour l’arbitrage international comme pour l’ arbitrage interne ou le procès judiciaire. L’exigence est d’autant plus catégorique qu’une innovation de la LDIP (art. 189 al. 2) permet au président de statuer seul à défaut de majorité.}\]

La loi suisse n’exige donc pas, ou plus, de l’arbitre dit de partie la même impartialité –et le même degré d’indépendance– que pour l’arbitre neutre ou président. En accord avec la conception libérale qui caractérise l’ensemble du chapitre 12, elle laisse une large place à l’autonomie de la volonté et donc à la souplesse des solutions voulues ou admises par les parties. On aurait tout à fait tort d’en déduire, cependant, comme semblent l’avoir cru quelques praticiens étrangers, avec une singulière naïveté, que la LDIP permettrait ou favoriserait la dépendance ou la partialité de l’arbitre-partie! Ce dernier ne saurait être, on l’a dit déjà, le simple représentant de la partie qui l’a désigné et l’on peut exiger de lui à la fois qu’il soit indépendant (réellement, encore qu’à un degré sans doute moindre que le président neutre) et qu’il manifeste une suffisante impartialité.\textsuperscript{129}

By the time of the articulation of the above-mentioned views, the Swiss Federal Court had rejected the idea that the impartiality required from party appointed arbitrators could be less than that expected from the chairman\textsuperscript{130}. However, a Swiss Federal Tribunal decision of 1992, in \textit{K v. X}, was regarded as a departure from the


\textsuperscript{129} Lalive, \textit{Sur l’impartialité de l’arbitre international en Suisse}, p. 64.

previous stand to a recognition that the independence and impartiality of party-appointed arbitrators need not be examined as strictly as those of non-party-appointed arbitrators.\footnote{K \textit{v.} X, ATF 118 II 359 (1992). Fouchard, Gaillard and Goldman, \textit{International Commercial Arbitration}, para 1047.}

In \textit{K v. X}, a Hungarian company (K) and a consortium (X) entered into a contract in 1978 for the construction of an integrated corn sugar and alcohol plant in Hungary. The contract contained an arbitration agreement providing for ICC arbitration, three arbitrators and Bern as the seat of arbitration. The contract also provided that Swiss substantive law would be applied. In 1982, K initiated an arbitration against X and the latter filed a counterclaim. An arbitral tribunal comprised of arbitrators A, B and C was constituted. Arbitrator A was appointed by K, arbitrator B by X and arbitrator C was appointed as chairman. Arbitrator B resigned at the end of 1988 and was replaced, in accordance with the choice of X, by arbitrator D. Subsequent to its retirement, arbitrator B was appointed by X as its solicitor. The arbitral tribunal, in its new composition, rejected K’s claim to have all procedural stages since 25 June 1982 repeated. The final award, of 19 December 1991, rejected most of the claimant’s claims and upheld most of the respondent’s counterclaims.

K submitted before the Federal Tribunal that the arbitral tribunal had been improperly constituted, both in its original and altered form. K contended that the first arbitrator appointed by the respondent, arbitrator B, was neither independent nor impartial. K also contended that the two other arbitrators originally appointed, arbitrators A and C, particularly the presiding member, did not satisfy the requirements of independence and impartiality required of arbitrators after more than six years of intensive influence by the retired arbitrator B. The Federal Tribunal rejected K’s claim on the grounds that a reasonable impression of partiality could not be established. It noted in passing the view of some Swiss authors that the independence and impartiality of party-appointed arbitrators should not be examined with the same strictness as that of arbitrators appointed by a third person or by state courts, although it added that this issue did not need to be addressed further as it was
not relevant to the chairman of the arbitration tribunal, “whose impartiality was the primary concern of the claimant”.

In 2010, the Swiss Federal Tribunal rejected in the *Valverde* case any different behavioural standard of impartiality and independence between party-appointed and non-party-appointed arbitrators. This case had its origin in the decision taken by the Italian National Olympic Committee (CONI) in May 2009 to ban cyclist Alejandro Valverde Belmonte, found guilty of violating anti-doping regulations, from participating for two years in any competition organised by the CONI or other national sport federations on Italian soil. This decision was appealed by the cyclist before the Court of Arbitration for Sport (CAS) in June 2009. An arbitral tribunal was constituted with Mr Romano Subiotto (presiding arbitrator), Mr Juan José Pintó (appointed by the cyclist) and Mr Ulrich Haas (appointed by CONI). Shortly after the constitution of the tribunal, arbitrator Pintó resigned due to a lack of availability and was replaced by Mr Ruggero Stincardini.

In October 2009, further to CONI’s request, the CAS decided to invite two other persons to join the proceedings: the International Cycling Union (UCI) and the World Anti-Doping Agency (AMA). By the end of that month, the cyclist filed a challenge against arbitrator Haas. The challenge was based on several links between Mr Haas and the AMA, namely the former’s participation in the group of independent persons chosen by the AMA to observe how the Anti-Doping Program was applied during the Athens Olympic Games in 2004, the former’s participation in the team of experts created under the aegis of AMA to revise the World Anti-Doping Code in 2006/2007 and the former’s participation in several meetings or conferences as AMA’s representative or delegate. The CAS Secretariat rejected the challenge by decision dated 29 November 2009. The cyclist then appealed against this decision to the Swiss Federal Tribunal, which rejected the appeal without entering into the merits of the challenge by reasoning that the CAS Secretariat’s decision to reject the challenge was a decision from a private institution and, as such, could not be the subject of an appeal to the Federal Tribunal.

After the arbitral award was rendered, the cyclist filed a petition to set aside the award with the Federal Tribunal, on the grounds that the arbitral tribunal had been irregularly constituted. The appeal was based on the same facts as the previous challenge, as well as on the additional fact that Mr Haas had been recently appointed as an arbitrator by AMA in three other cases.

CONI, AMA and UCI opposed the appeal separately and on several different grounds. Importantly for present purposes, CONI contended, among other arguments, that the impartiality of party-appointed arbitrators did not need to be examined as strictly as that of presiding arbitrators.

By decision dated 29 October 2010, the Swiss Federal Tribunal rejected the appeal. The Federal Tribunal yet made it clear that it was not persuaded by CONI’s contention that the impartiality of party-appointed arbitrators did not need to be examined as strictly as that of presiding arbitrators, rejecting such contention at length. In line with the authors that reject a different standard between party-appointed and non-party-appointed arbitrators as far as their role or behaviour is concerned, the Federal Tribunal concluded that party-appointed arbitrators were subject to the same requirement of independence and impartiality as the presiding arbitrator:

It must accordingly be held that the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the chairman of the arbitral tribunal. Whilst affirming this principle, the Federal Tribunal is admittedly aware that absolute independence by all arbitrators is an ideal which will correspond to reality only rarely. Indeed whether one wishes it or not, the way of appointing the members of an arbitral tribunal creates an objective nexus, subtle as it may be, between the arbitrator and the party appointing him because the former, as opposed to a state judge, derives his power and his place only from the latter’s will. Yet this is an inherent consequence of the arbitral procedure with which one must live. It implies that an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute. Yet the so called system of the arbitre-partie must be ruled out, in which the party-appointed arbitrator would not be subject to the same requirement of independence and impartiality as the chairman of the arbitral tribunal. The idea that the arbitrator may merely be the advocate of “his” party within the arbitral tribunal must be categorically rejected, failing which the very institution of arbitration would be jeopardized. To that extent the Federal Tribunal
may adopt the following conclusion, drawn almost fifteen years ago by authoritative professors of French law in the field of international arbitration: “considering the degradation of standards sometimes seen in international arbitration and the manoeuvres to which the party-appointed arbitrator sometimes resorts, it is not sufficient to require good faith behaviour from him: it is better to hold on to the principles, hoping that in practice they will make it possible to mitigate the misbehaviour of biased arbitrators”.  

It is worth highlighting that these remarks reject any different standard between party-appointed and non-party-appointed arbitrators as far as the role or behaviour of the arbitrator in the reference is concerned, despite the arbitrator’s role or behaviour not being the grounds upon which the challenge was based. Mr Haas was challenged at an early stage of the arbitral proceedings, immediately after AMA had joined them and he had disclosed his professional links with AMA. The challenge of Mr Haas was based on these links and the disputed issue was whether such links disqualified him (i.e. were unacceptable) or not. The Swiss Federal Tribunal concluded that the links were acceptable. To note this is important in order to appreciate what the Swiss Federal Tribunal did and did not say in the Valverde case. The Federal Tribunal did not say that the method of appointment of the arbitrator was irrelevant in determining whether his links with AMA were acceptable or not. It may even be thought that the Federal Tribunal suggested the opposite when it stated that its decision “in no way precludes the appreciation which could be made as to the same arbitrator’s independence and impartiality towards AMA in the light of other circumstances not considered here”\textsuperscript{134}. The decision by the Swiss Federal Tribunal in the Valverde case therefore does not close the discussion about a different standard of impartiality and independence in party-appointed arbitrators, because such decision leaves the

\textsuperscript{133} Ibid., para 3.3.1. I express my appreciation to Charles Poncet, whose translation into English of the judgment (originally in French), for the main, has been used here. The quote at the end is the English translation of Fouchard, Gaillard and Goldman, “Traité de l’arbitrage commercial international”, Litec, 1996, para 1046, pp. 592-593. In the English version of this treatise, published in 1999, the corresponding quote reads as follows: “Given the delaying tactics sometimes adopted by party-appointed arbitrators, it is not enough to require arbitrators to act in good faith. The better solution is to adhere to the requirements of independence and impartiality, in the hope that in practice they will discourage arbitrators from being systematically one-sided” (Fouchard, Gaillard and Goldman, \textit{International Commercial Arbitration}, para 1046).

\textsuperscript{134} Ibid., para 3.4.4 \textit{in fine}. 

189
question of whether the method of appointment may influence a decision of disqualification of an arbitrator partly unanswered135.

5-98 Notwithstanding the above, the *Valverde* case and the prevailing doctrinal views on which it relies are praiseworthy in that they reject any different standard of impartiality and independence between party-appointed and non-party-appointed arbitrators as far as the arbitrator’s role and behaviour in the reference are concerned.

5-99 **Criticism of the acknowledgement of a different impartiality and independence in party-appointed arbitrators for the sake of being realistic.** The authors who accept a lesser degree of impartiality and independence in party-appointed arbitrators for the sake of being realistic are right when they say that parties often accept situations in which the impartiality of party-appointed arbitrators does not appear to be the same as that of the presiding arbitrator. However, the acceptance of a lesser degree of impartiality in party-appointed arbitrators seems unadvisable for several reasons.

5-100 Firstly, where is the line that separates ‘less impartiality’ from ‘partiality’? If the parties to an international arbitration do not approach each other to agree on specific behavioural differences between the party-appointed arbitrators and the presiding arbitrator, it seems safer for the overall fairness of the arbitral process not to accept an abstract lesser degree of impartiality and independence that may lead each party to decide on its own what those differences will be. It is important to note that each individual is likely to have a personal view, different from that of others, on which behavioural differences between party-appointed and non-party-appointed arbitrators are compatible with the impartiality and independence of all of them.

5-101 Secondly, is a lesser degree of impartiality and independence in party-appointed arbitrators actually realistic? It is true that, more often than not, each party-appointed arbitrator sees more strengths in the appointing party’s procedural or substantive propositions than the arbitrator appointed by the other party. This phenomenon is sometimes caused by the unfortunate fact that the impartiality of party-appointed arbitrators is a fallacy because such arbitrators, despite being obliged to act

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135 The question of whether the acceptable links of an arbitrator may vary depending on the method of his appointment is addressed in section 5.5.2 below.
impartially, do not really want to act without bias. In other cases, the reason may have nothing to do with ethics but rather with the fact that the party-appointed arbitrators’ own genuine views are closer to the appointing party’s than to the other party’s. Either way, a lesser degree of impartiality and independence in party-appointed arbitrators appears to be an inaccurate description of reality.

5-102 Probably the only accurate—or at least less inaccurate—way to deem party-appointed arbitrators less impartial than the presiding arbitrator, as far as the arbitrators’ mind and behaviour in the reference are concerned, is to presume that the former are unconsciously biased (i.e. unconsciously unable to avoid favouring the appointing party for reasons that are unknown to the arbitrators themselves) while the latter is not. Whether this presumption (which also underlies the traditional argument of neutrality of international arbitration vis-a-vis national state courts) fairly represents what actually happens in most cases may be endlessly discussed—I personally think that it does not. Yet, be this as it may, the prevailing solution in international arbitration of not accepting lesser impartiality in party-appointed arbitrators is good enough for its reasonable dose of idealism and pragmatism: to presume that party-appointed arbitrators can be as impartial and independent as the presiding arbitrator (hence the same requirement for all) and, yet, to give each party-appointed arbitrator a weight in the decision-making process as if that presumption were wrong (a party-appointed arbitrator cannot decide anything alone).

5-103 Thirdly, can a lesser degree of impartiality and independence in party-appointed arbitrators be expected to bring any benefit to the arbitral process? It is unclear how things could improve to any practical extent by accepting a lesser degree of impartiality in party-appointed arbitrators. Other than the theoretical satisfaction of having captured the admittedly higher likelihood of unconscious bias in party-appointed arbitrators, such a lesser degree would not allow the most undesirable situations (party-appointed arbitrators who decide not to honour their duty to act without bias) to be done away with and could, in turn, make it more difficult—even more difficult— for decision-makers on problems of bias to remove arbitrators for biased misconduct.
When considering the duty of impartiality and independence from the perspective of the arbitrator’s mind (to be willing and self-satisfied of being able to act without favouritism towards any of the disputing parties) and the arbitrator’s behaviour in the reference (to act without favouritism towards any of the disputing parties), no degrees of such duty should be admitted. To be or not to be. To act or not to act. This approach is the one that better serves the desirable goal of achieving a transnational understanding about a core meaning of the duty of ‘impartiality and independence’ in arbitrators.

5.5.2. A STILL CLOSER MINIMUM DISTANCE?

Attention is now paid to the minimum distance (the absence of unacceptable links) that must exist between the arbitrator and the dispute (persons involved and subject-matter). Can the unacceptable links in party-appointed arbitrators be different from the unacceptable links in non-party-appointed arbitrators? This question is better tackled by differentiating whether the parties have expressly agreed to a different standard or not.

A) When the parties agree on it

Can the minimum distance between an arbitrator and the dispute (persons involved or connected and subject-matter) vary from party-appointed arbitrators to non-party-appointed arbitrators because the parties so agree? The answer to this question is clearly yes. The minimum distance is less in party-appointed arbitrators by definition (the appointment by one of the disputing parties is an unacceptable link in the presiding arbitrator) and often also because of other factors (e.g. nationality). If the parties are entitled to accept three-member tribunals where two of their members offer fewer objective reasons to trust in their impartiality and independence than the third arbitrator, the parties are also entitled to accept that those objective reasons may be still fewer. They can decide in each particular case where is their common degree of tolerance towards the appearance of impartiality and independence of unilaterally-nominated arbitrators. They may agree, for instance, that all of the circumstances

set forth in the IBA Guidelines’ Orange List will be automatically acceptable in party-appointed arbitrators but automatically unacceptable in the presiding arbitrator. This may make it easier for each party to be able to choose someone whom it trusts and, at the same time, be seen by both parties as a good way to improve the timing of the arbitration proceedings by eliminating the possibility of any challenge based on the links set forth in that List. No doubt, at the cost of each party having many fewer objective reasons to believe in the ability of the arbitrator appointed by the other party to act without bias. Nonetheless, as a matter of fact it is not rare in practice to see some milder sort of trade-off when party-appointed arbitrators disclose certain links with their respective appointing parties and none of the latter complain. What is evident is that the shorter the distance, the more heavily the system relies on the personal integrity of the arbitrator and thus, in the event of a problem, the more incapable any decision-maker will be to rely on anything different from the always presumed unbiased arbitrator’s mind.

How much can the minimum distance in party-appointed arbitrators be shortened? Is there any limit? Can parties agree to have an arbitral tribunal with party-appointed members who have the duty to act impartially but have links with their respective appointing parties that cause a strong appearance of bias? In absolute terms, the answers to these questions seem to be, respectively, as much as they wish, no and yes. There is no link, to my knowledge, that necessarily prevents an arbitrator (or for the matter, anyone) from honouring his duty. Even the principle that someone cannot be a judge in his own cause, in arbitration, is not as fundamental as the principle that the parties are free to jointly decide who they trust.

5-107

principe de l’impartialité a deux aspects: méfiance et confiance. L’essentiel est en réalité une impression d’impartialité et c’est en fait aux parties de prendre la décision; c’est à elles qu’il convient de dire: nous connaissons les liens qui existent, mais nous sommes cependant d’accord pour la nomination de cet arbitre”.

137 As well as there being no absence of links that guarantees that the arbitrator will honour his duty to act impartially. The fullest absence of links only guarantees that the arbitrator, if he decides to act partially, will do so just out of freedom.


193
Nonetheless, the approach to these questions changes when the primary goal of posing them is less theoretical. The IBA Guidelines, aimed at helping decision-makers on disclosure, objections and challenges of arbitrators in adopting more uniform standards\textsuperscript{139}, consider that some circumstances (identity or certain strong links between a party and the arbitrator) cannot be waived by the parties\textsuperscript{140}. This may be objected to in absolute terms but, with the Guidelines’ main purpose in mind, seems reasonable. It is quite understandable, for instance, that an arbitral institution rejects an arbitrator who is accepted by the parties but who has strong links with one of them on the grounds that such an arbitrator would hardly be recognised as impartial and independent by national courts around the world. Arbitral institutions have a legitimate interest, sometimes even formulated in terms of an obligation, to try to make the award enforceable\textsuperscript{141}. Besides, their credit is at stake. On another level of ideas, a limit on the distance that can be shortened in impartial and independent party-appointed arbitrators makes sense as a means for arbitral institutions to protect such arbitrators. Party-appointed arbitrators should ideally be able to perform their functions without the need to resist strong temptations of profit or overcome strong fears of retaliation – something that in the latter case, under extreme circumstances, only heroes may be able to do. Parties requiring extreme solutions, with the risks that they entail (namely for the enforcement of the award), may always resort to an ad hoc arbitration.

**B) When the parties have not agreed on it**

Can the unacceptable links in party-appointed arbitrators be different from the unacceptable links in non-party-appointed arbitrators when the parties, as is almost always the case, have not agreed anything in this regard? This is probably the question with the most practical interest for decision-makers on problems of bias. When a person is called upon to resolve a disagreement between the parties on the admissibility of a given link between an arbitrator and one of the parties, and these

\textsuperscript{139} IBA Guidelines, Introduction, paras 2-3. The IBA Guidelines are primarily aimed at assisting arbitrators, arbitral institutions and state courts in their consideration of issues of conflicts of interest, not at helping parties to draft their arbitration agreements.

\textsuperscript{140} IBA Guidelines, Non-Waivable Red list.

\textsuperscript{141} See, e.g., ICC Arbitration Rules (2012), art. 41.
have not agreed to any differences between the acceptable links in party-appointed and non-party appointed arbitrators beyond the self-evident (biased versus unbiased appointor) and the frequent (same versus different nationality), could that person consider that the disputed link is unacceptable because (solely or among other reasons) the arbitrator is a sole or presiding arbitrator? Or could that person consider that the disputed link is acceptable because (solely or among other reasons) the arbitrator is party-appointed?

There are sensible reasons to answer no to these questions. Firstly, the test is a single one and on an individual: the view of a reasonable and informed third party on whether the circumstances give rise to justifiable doubts about the impartiality and independence of the arbitrator. There is no apparent justification for considering that the application of the same test under the same circumstances, except for the method of appointment of the arbitrator, may lead to different results because of such method. The parties’ agreement whereby each of them is allowed to choose one arbitrator may naturally explain the existence of certain links between unilateral appointors and appointees, but this does not mean that the threshold that separates acceptable from unacceptable links should change from some arbitrators to others. Secondly, a different standard of impartiality and independence, even if limited to a different acceptance or non-acceptance of certain links in the arbitrator, might lead some people to think that party-appointed arbitrators’ deontological obligations are different from those of presiding arbitrators or, if not different, at least subject to a more lenient test. The interest in not sending messages that may cause confusion makes it advisable not to admit any differences. And thirdly, as a matter of fact, arbitral institutions and national courts do not seem to recognise that the method of appointment of an arbitrator may have a weight or influence in deciding whether he must be disqualified or not.

Nevertheless, it would seem that there are more sensible reasons to answer affirmatively the question of whether the unacceptable links in party-appointed arbitrators may be different from the unacceptable links in non-party-appointed arbitrators when the parties have not expressly agreed upon anything in this regard. The interests at stake are different. In the case of sole and presiding arbitrators, the requirement of a visible minimum distance between the arbitrator and the dispute
does not only serve to inspire confidence in the impartiality and independence of the individual, but also to inspire confidence in the capability of the arbitral tribunal (beyond the individual observation of the arbitrator) to render a fair decision. There is an interest in reinforcing the appearance of lack of bias in the presiding arbitrator to a degree that does not make as much sense in party-appointed arbitrators, neither of whom can ever make an arbitral decision alone. Furthermore, when considering the unacceptable links in party-appointed arbitrators, a balance must be struck between the interest in protecting the right of each party to choose someone it trusts and the principle of equality of the parties in the appointment of arbitrators, on the one hand, and the interest in protecting the right of each party to have reasons to believe that the person chosen by the other party will be able to act without bias, on the other. A balanced protection of these interests can justify a compromise that would not find justification in the case of a presiding arbitrator.

Some authors have suggested, more or less openly, that the decision on whether a link is unacceptable or not may be influenced by the method of appointment of the arbitrator. Lalive notes that whilst full independence is not the decisive factor driving parties’ unilateral nominations, parties want full independence in sole and presiding arbitrators. Lalive, Poudret and Besson note that the rules of challenge apply to all arbitrators, no matter how they are appointed, but that the method of appointment of the arbitrator may be taken into account. For Lew, Mistelis and Kröll, a professional link between an appointor and an appointee may be justified by the existence of a small pool of arbitrators in the cultural milieu of the appointing party, notwithstanding a different standard of presiding arbitrators. Blackaby and Partasides observe that prospective party-appointed arbitrators who are faced with an objection should normally decline the appointment if they consider the objection to be without merit and the appointing party rejects the objection, while the presiding arbitrator is supposed to follow the same course of action but “is probably under a

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greater duty to examine carefully the grounds for objection before deciding whether
or not to proceed with the case” 145. Tschanz notes that “[l]a confiance qui doit exister
dans l’arbitre unique ou le président est plus absolue que celle applicable au «co-
arbitre» nommé par une partie” 146. Hunter uses the example of an arbitrator who had
written a general thesis on compensation in nationalisation cases to suggest that,
while there would be no objection to him acting as party-nominated arbitrator in a
nationalisation case, the parties would be likely to disagree to his appointment as a
presiding arbitrator 147. Fouchard, Gaillard and Goldman criticise a decision by the
Paris Tribunal of First Instance to appoint a presiding arbitrator of the same
nationality as that of one of the parties, stating that the national court “should have
taken such nationality into account as a factual matter, the appearance of neutrality
being as important in international arbitration as neutrality itself” 148.

5-113 A possible different threshold of unacceptable links is also suggested, albeit not
expressly stated, in some decisions. Certain cases may be considered wherein
allegedly unacceptable links in party-appointed arbitrators were nevertheless
eventually deemed acceptable, e.g.: Qatar v. Creighton 149 (the party-appointed
arbitrator had been appointed by the same party in another arbitration where a similar
issue had already been decided in favour of the appointing party); SBRA v.
Devoluy Vacances 150 (the party-appointed arbitrator had made an expert accounting
expert upon the appointing party’s request before the arbitration started, and the
dispute in the arbitration related to an accounting matter); Inex Film and Inter

145 Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, para 4.138.
April 1985, Rev. Arb. 1986, with note by Jarrosson. Henry notes that this case is an example “du
temperament porté par la Cour de Cassation au principe de l’appréciation objective de l’indépendance
de l’arbitre”, which –he adds– does not affect the controversy about “le caractère absolu ou non du
devoir d’indépendance de l’arbitre” (Henry, Le devoir d’indépendence de l’arbitre, para 493). I agree
with this remark but disagree with the same author’s conclusion that: “Le fait que cette décision ait
concerné un arbitre désigné par une partie doit par conséquent être considéré comme indifférent, la
Cour de Cassation n’ayant à l’évidence pas souhaité axer sa décision sur la question de l’arbitre-
Export v. Universal Pictures (the party-appointed arbitrator was an employee of the parent company of the appointing party)\textsuperscript{151}; I SA v. V. (the party-appointed arbitrator was a partner of the lawyer who represented a third party company against a company of the same group as the challenging party)\textsuperscript{152}; Hitachi Ltd. SMS Schloemann (the party-appointed arbitrator had received clients from referrals from counsel for the appointing party)\textsuperscript{153}; X. v. Y. (the party-appointed arbitrator was counsel for the party opposed to the challenging party in four previous or concomitant arbitrations with related legal issues)\textsuperscript{154}; Gemanco v. SAEPA and SIAPE (the party-appointed arbitrator was a past member of the board of directors of the parent company of one of the companies that appointed him)\textsuperscript{155}; Valverde v. CONI, AMA and UCI (the party-appointed arbitrator had rendered professional services to a party to the arbitration whose position in the dispute was aligned with that of the appointing party)\textsuperscript{156}, X. v. Y (the party-appointed arbitrator had been appointed as an arbitrator by the appointing party in four other cases that essentially concerned the same matter)\textsuperscript{157}. Or the examples, in investment arbitration, given by Eureka BV v.

\textsuperscript{151} Sociétés Inex Film et Inter Export v. Société Universal Pictures, Paris CA, 16 March 1978, Rev. Arb. 1978, pp. 501 et seq. See Henry, Le devoir d’indépendence de l’arbitre, para 494, noting that the method of appointment of the arbitrator was not the reason why the Paris Court of Appeal decided as it did. In my view, however, the fact that the concerned arbitrator was a party-appointed arbitrator was in this case decisive. Since 1955, the ICC Arbitration Rules empowered the presiding arbitrator to make the award alone if a majority was not reached.


\textsuperscript{153} Hitachi Ltd. SMS Schloemann, ATF 30 June 1994, ASA Bull. 1997. The Swiss Federal Tribunal noted that a lawyer who also acts as arbitrator should be able to distinguish between his different functions. See also Pierre-Yves Tschanz, “Indépendance des arbitres en droit suisse”, Rev. Arb., 2000, pp. 530-531.

\textsuperscript{154} Schiedsverfahrenszeitschrift 2003, 191, Hambourg CA, and obs. by Peter F. Schlosser, “L’impartialité et l’indépendance de l’arbitre en droit allemand”, in L'impartialité du juge et de l'arbitre: Etude de droit comparé, Jacques van Compernolle and Giuseppe Tarzia (dir.), Bruylant, Bruxelles, 2006, p. 306. This author notes that should the arbitrator have been a sole or presiding arbitrator, it would be unthinkable that he would have been allowed to keep office.

\textsuperscript{155} Gemanco v. SAEPA and SIAPE, Paris CA (1\textsuperscript{er} Ch. suppl.), 2 June 1989, Rev. Arb. 1991, No. 1, pp. 87 et seq.

\textsuperscript{156} Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA) and Union Cycliste Internationale (UCI), ATF 29 October 2010.

Republic of Poland (the party-appointed arbitrator had professional relationships with a law firm that was acting as counsel for the party opposed to the challenging party in a different arbitration with a similar dispute)\(^{158}\) and by *Suez and InterAguas v. Argentine* (the arbitrator appointed by the investor had been appointed by another investor in a case originally arising out of the same privatisation undertaken by the challenging state, which ended with an award in favour of the investor)\(^{159}\). Multiple circumstances were considered in these cases and it cannot be suggested that the method of appointment of the arbitrator had a decisive influence upon any of them. Yet, one may reasonably think that in some or all of these cases the decision could have been the opposite should the arbitrator affected by the link have been a presiding arbitrator or a sole arbitrator. The state court made it particularly clear in one of them when it pointed out that the parties’ guarantees were not reduced by the particular composition of the arbitral tribunal, as this included a presiding arbitrator appointed by a well-known arbitral institution\(^ {160}\).

In other cases, conversely, allegedly unacceptable links in presiding arbitrators were eventually deemed unacceptable by the state court: *KFTCIC v. Icori Estero* (the presiding arbitrator and the counsel of one of the parties were members of the same Chambers in London)\(^{161}\); *Ligier and Diffusia v. Alfa Lancia* (the sole arbitrator had in the past been the lawyer for an important witness in the arbitration)\(^{162}\); *X v. Y* (the presiding arbitrator had acted as counsel for a party opposed to the challenging party

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\(^{159}\) *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007.


\(^{161}\) *KFTCIC v. Icori Estero*, Paris CA (1st Ch. suppl.), 28 June 1991, and obs. by Pierre Bellet noting that the fact that the arbitrator was a presiding arbitrator explained the severity, Rev. Arb. 1992, No. 4, p. 579.

\(^{162}\) *Société Ligier et Société Diffusia v. Société Alfa Lancia Industriale*, ATF, Rev. Arb. 1989, pp. 505 et seq. Tschanz observes that the relative severity of this decision may probably be explained by the fact that the arbitrator was a sole arbitrator and not a party-appointed one (Pierre-Yves Tschanz, “Indépendance des arbitres en droit suisse”, Rev. Arb., 2000, p. 531).
in a different case)\textsuperscript{163}. Again, multiple circumstances were considered in these cases and it cannot be suggested that the method of appointment of the arbitrator had decisive weight. However, then again, it is reasonable to think that in all or some of these cases the decision could have been the opposite if the concerned arbitrator had this time been a party-appointed one.

A difference between the acceptable links in party-appointed and non-party appointed arbitrators, when such difference has not been agreed upon by the parties, may be justified in some cases either to reinforce the appearance of lack of bias in the presiding arbitrator or to maintain unilateral nominations as a way for each party to appoint someone whom it trusts, or to achieve both goals. However, in order to avoid any confusion, decisions that admit such a difference, and especially those that admit it when rejecting a claim of lack of impartiality and independence in a party-appointed arbitrator, should make it perfectly clear that the difference only pertains to the arbitrator’s links and does not entail nor allow any different behaviour in the reference whatsoever between the party-appointed arbitrators and the presiding arbitrator.

\textbf{CONCLUSIONS}

The following conclusions may be drawn from the above:

\textit{Problems of bias in party-appointed arbitrators.--} From a theoretical perspective, problems of bias in party-appointed arbitrators have particular features. By hypothesis, the appearance of lack of bias in party-appointed arbitrators is weaker than that of sole and presiding arbitrators. Such appearance is often still weaker as a consequence of other factors apart from the unilateral appointment itself.

\textsuperscript{163} X v. Y, ATF 6 October 2008, available with digest by Georg von Segesser in ITA reports at kluwerarbitration.com. The Federal Tribunal noted that a lawyer who acts as arbitrator should be able to distinguish between his functions, but it upheld the claim on the grounds that the relevant criterion is whether a judge may be considered biased from an objective point of view and that, as a matter of experience, a party often passes its negative feelings towards its opponent to its counsel, so many parties consider not only the counterparty as their opponent but also its counsel. It is interesting to contrast this decision with the one in the \textit{Hitachi} case, footnote 153 above.
Presumption of a special role.— The presumption of a special role of party-appointed arbitrators in international arbitration should be rejected.

Presumption of acceptable unilateral communications.— The presumption of acceptable unilateral communications between an arbitrator and the party who appointed him should be rejected.

Repeat appointments.— In order to determine whether repeat appointments of the same arbitrator by the same party or counsel is an acceptable or unacceptable link, the following factors may be considered: the number of repeat appointments; the personal or professional relationship between the appointor and the appointee, along with the income associated with that relationship; the relation or not between the cases; the failure of disclosure or not; the existence or not of a small pool of arbitrators; and the arbitrator’s position in the other cases.

The IBA Guidelines’ decision to set quantitative limits on the duty of disclosure of repeat appointments is not a good solution. It would be preferable to have the repeat appointments included in the Orange List without setting any quantitative limits.

A different standard of impartiality and independence in party-appointed and non-party-appointed arbitrators?

No different willingness, self-awareness of capability and behaviour in the reference.— In cases where party-appointed arbitrators are under the duty of impartiality and independence, no different degree of this duty whatsoever should be accepted between party-appointed and non-party-appointed arbitrators as far as the arbitrator’s mind and conduct in the arbitration are concerned.

Different unacceptable links by party agreement.— Parties are free to make the fewer unacceptable links in party-appointed arbitrators (a biased appointor and normally also the same nationality are only unacceptable in presiding arbitrators) still fewer. They can decide in each particular case where their common degree of tolerance towards the appearance of impartiality and independence of unilaterally-nominated arbitrators lies. Yet, this freedom may be reasonably expected to be limited by arbitral institutions in extreme cases.
Different unacceptable links in the absence of party agreement. A difference between the acceptable links in party-appointed and non-party appointed arbitrators, when such difference has not been agreed to by the parties, may be justified in some cases in order to reinforce the appearance of lack of bias in the presiding arbitrator, maintain unilateral nominations as a way for each party to appoint someone it trusts, or both.
CHAPTER 6. PROBLEMS OF BIAS: A COMPARATIVE EMPIRICAL VIEW

6-1 What are the problems of impartiality and independence of party-appointed arbitrators in practice and how are they compared to those of non-party-appointed arbitrators? An empirical study has been carried out at the ICC International Court of Arbitration to attempt to provide an answer to these two questions.

6.1. SCOPE AND LIMITATIONS

6-2 The scope of this study covers the challenges of arbitrators in the ICC practice during the period 1992-2009. This scope shows two limitations of the study. The first is that ‘problems’ are put down to ‘challenges’ despite the clear fact that not all the problems affecting the impartiality and independence of arbitrators give rise to challenges. This study does not cover, for instance, the problems of objections to the confirmation of arbitrators in ICC practice. The second limitation of the study is that it is limited to one arbitral institution. This limitation is compensated to some extent by two facts. Firstly, the ICC is the arbitral institution with the largest historically aggregated caseload of international arbitrations in the world. Secondly, the study covers a period of time that may be deemed significant (18 years, from 1992 to 2009) and is not based on a sample of cases of challenges but on all the challenges filed in ICC arbitrations during the period (518 challenges). Whilst it is certainly a limitation that only challenges in ICC arbitrations are considered, it may be fair to say that the reviewed challenges are qualitatively and quantitatively sufficient to provide a sense of the reality of problems of impartiality and independence of arbitrators in international practice and, most importantly for present purposes, to perform a comparative test depending on the method of appointment of the arbitrator.
There are several works concerning the ICC practice relating to challenges of arbitrators\(^1\). The main point of originality in this empirical study is its comparative approach, taking into account the type of arbitrator. Party-nominated arbitrators, presiding arbitrators and sole arbitrators are compared. Co-arbitrators who are not unilaterally appointed by one party have not been distinguished as a group for the comparative analysis. Their presence in the ICC practice is so meager that there is not enough data to be able to draw any meaningful conclusions.

This comparative empirical study will attempt to answer seven basic questions:

1. How often are party-nominated arbitrators challenged? Is the frequency of challenges against them different from that of challenges against presiding arbitrators and sole arbitrators?

2. Which party files the challenge? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

3. What grounds are invoked by the challenging party? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

4. At what time during the arbitral proceedings are party-nominated arbitrators challenged? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?


5. What is the outcome of challenges against party-nominated arbitrators? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

6. How are the outcomes of the challenges related to the grounds invoked by the challenging party and to the time of the challenge? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

7. Is anything changing over the years?

A final remark on the scope of this study is in order. The study does not speculate about the reasons that actually led to the acceptance or rejection of the challenge at the Plenary Session of the International Court of Arbitration (the contents of which are confidential), nor does it speculate about the reasons given in the reports that the members of the Court had available (also confidential) which could have had more influence on the acceptance or rejection of the challenge at the Plenary Session\(^2\). Rather, the study is aimed at presenting compared data and correlations between challenging parties, challenged arbitrators, grounds invoked by challenging parties, the time of challenges and their outcome. Whether any of these comparisons and correlations suggests any ideas on the Court’s policy in relation to challenges is up to the reader. Notwithstanding the above, when the empirical observations of the study can be explained by remarks that have already been made in arbitration literature on the Court’s policy in relation to challenges, it will be noted.

6.2. METHODOLOGY

The following five parameters have been identified in each challenge: (A) challenged arbitrator, (B) challenging party, (C) grounds invoked by the challenging party, (D) time of the challenge, and (E) outcome.

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\(^2\) Challenges at the ICC are normally decided at a Plenary Session of the Court, which is held monthly. Members of the Court at such session have a report prepared by the Secretariat (without a recommendation as to the outcome) and a report prepared by one of the members of the Court (with a recommendation as to the outcome). During the Plenary Session, Court members engage in an open debate about the challenge and, occasionally, a vote is taken. Fry and Greenberg, footnote 1 above, pp. 23-24 and 31.
A) **Challenged arbitrator.** Cases were classified into one of the following five categories: ‘CNA’ (claimant-nominated arbitrator), ‘RNA’ (respondent-nominated arbitrator), ‘Pres’ (presiding arbitrator), ‘SA’ (sole arbitrator) or ‘Other’ (co-arbitrator not unilaterally nominated by one party).

B) **Challenging party.** Cases were classified into one of the following three categories: ‘Claimant’, ‘Respondent’ and ‘All’. Cases with multiple claimants (or respondents) in which the challenge was filed by some of the claimants (or respondents) have not been differentiated from those in which the challenge was filed by all of the claimants (or respondents).

C) **Grounds invoked by the challenging party.** Ten categories of cases have been individually differentiated: five main categories (‘M’, misconduct in the proceedings; ‘LP’, links with persons; ‘PSM’, prejudgement of the subject-matter of the dispute; ‘CB’, cultural bias; and ‘LQ’, lack of qualifications), four hybrid categories (‘M+LP’, ‘M+PSM’, ‘LP+PSM’ and ‘CB+LQ’) and a last category of ‘Others’. The criterion for individually differentiating a hybrid category was a representativeness of at least 1% of the total number of challenges (518). Hybrid categories that represent less than 1% of the total number of cases have been grouped in the category ‘Others’.

Explanation of each of the categories individually differentiated:

‘M’ (misconduct). Cases in which the challenging party complains about an improper or unfair behaviour by the arbitrator in the arbitral proceedings, virtually always accompanied by an allegation of bias of the arbitrator in favour of the other party. The term ‘misconduct’ is here used in a broad sense, encompassing any wrongdoing by the arbitrator in the reference, either intentional or not.

Even though an allegation of the arbitrator’s failure to disclose is, strictly speaking, an allegation of misconduct, such an allegation has not been considered as misconduct (‘M’) for the purposes of classification of the grounds invoked by the challenging party. Consideration has been given to the peculiar fact that the allegation of an arbitrator’s failure to disclose is always coupled to circumstances falling under any of the ten categories that have been considered (‘M’, ‘M+LP’, ‘M+PSM’, ‘LP’, ‘LP+PSM’, ‘PSM’, ‘CB’, ‘CB+LQ’, ‘LQ’ and ‘Others’) as such an
allegation always needs –by hypothesis– another allegation that some other circumstance (which allegedly should have been disclosed) existed. It has also been taken into account that an allegation of failure to disclose, perhaps precisely because of its special nature, is not always understood today as ‘misconduct’ of an arbitrator in plain language. It has therefore been deemed preferable, for the sake of clarity, to look at the failure to disclose separately.

6-13 ‘LP’ (links with persons). Cases in which the challenge is based on the existence of a personal or professional relationship or connection between the arbitrator, on the one hand, and someone with an interest in the outcome of the dispute (party, counsel or third party), on the other.

6-14 ‘PSM’ (links with the subject-matter of the dispute). Challenges based on an allegation of prejudgement in the arbitrator. The challenging party alleges that the arbitrator has shown positions or opinions that are related to the subject-matter of the dispute and may prevent him from addressing the issues in dispute with an open mind.

6-15 ‘CB’ (cultural bias). Cases in which the challenge is based on cultural proximity (or, less often, cultural animosity) between the arbitrator and someone with an interest in the outcome of the dispute –namely the parties and their counsels. These cases are different from those included in category ‘LP’ (links with persons) in that the latter comprise specific connections between specific persons whilst the former only refer to general cultural (e.g. national, educational or geographical) links. These cases also differ from those included in category ‘PSM’ (prejudgement of the subject-matter of the dispute) in that the former do not include any allegation that the arbitrator has already shown prejudgement through any specific action.

6-16 ‘LQ’ (lack of qualifications). Cases in which the challenge is based on an allegation that the arbitrator lacks the necessary qualifications, including both education or training (legal, technical, linguistic) and professional experience. In virtually all these

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3 This category includes, among others, the challenges based on repeat appointments in unrelated cases.
cases, the challenging party does not make any complaint about the arbitrator’s impartiality or independence.

6-17 ‘M+LP’. Hybrid cases in which ‘M’ and ‘LP’ are alleged.

6-18 ‘M+PSM’. Hybrid cases in which ‘M’ and ‘PSM’ are alleged.

6-19 ‘LP+PSM’. Hybrid cases in which ‘LP’ and ‘PSM’ are alleged.

6-20 ‘CB+LQ’. Hybrid cases in which ‘CB’ and ‘LQ’ are alleged.

6-21 ‘Others’. Two types of cases have been included in this category. Firstly, cases belonging to hybrid categories (combinations of ‘M’, ‘LP’, ‘PSM’, ‘CB’ and ‘LQ’) which have not been individually differentiated because none of them represents at least 1% of the total number of challenges (in other words, none of them includes more than five cases). Secondly, cases which do not fit well into any non-hybrid (‘M’, ‘LP’, ‘PSM’, ‘CB’ or ‘LQ’) or hybrid category. Cases of the second type include cases in which the challenge is based on relationships of the challenged arbitrator with other arbitrators or with the arbitral institution, on health conditions or other physical factors that allegedly prevent the arbitrator from performing his functions and on the incompatibility of the challenged arbitrator with the arbitration agreement.

6-22 D) Time of the challenge. Cases were placed in one of the following two categories: ‘ToR’ (challenge filed before or shortly after the signature of the Terms of Reference) and ‘Later’ (challenge filed after the Terms of Reference and usually after some further procedural activity).

6-23 E) Challenge outcome. Cases were classified in one of the following four categories: ‘Accepted’ (challenge accepted by the Court), ‘Rejected’ (challenge rejected by the Court), ‘Resigned’ (resignation of the arbitrator accepted by the Court) and ‘Other’ (e.g. joint request by the parties to remove the challenged arbitrator).

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4 This category includes, among others, the challenges based on repeat appointments in related cases.
6.3. FINDINGS

Most of the findings are shown in a four-picture format: ‘Total’ (all challenges considered – including the very few against co-arbitrators not unilaterally nominated), ‘PNA’ (only challenges against party-nominated arbitrators considered), ‘Pres’ (only challenges against presiding arbitrators considered) and ‘SA’ (only challenges against sole arbitrators considered).

6.3.1. CHALLENGES

Challenged arbitrator. In absolute terms, challenges against party-nominated arbitrators (‘PNA’) are more than those against presiding arbitrators (‘Pres’) and sole arbitrators (‘SA’). During the surveyed period 245 party-nominated arbitrators were challenged\(^3\), representing 47.3% of the total number of challenges, while presiding arbitrators and sole arbitrators respectively received 171 (33%) and 93 (18%) challenges. There were 9 challenges (1.7%) against co-arbitrators not unilaterally appointed by one party (neutrally-nominated co-arbitrators, ‘NNCA’).

![Figure 1. Challenges of arbitrators 1992-2009](image)

\(^3\) Challenges against claimant-nominated arbitrators (117) are slightly fewer than those against respondent-nominated arbitrators (128).
In relative terms, not enough information is available to establish whether the number of challenges for each type of arbitrator is more than proportional, proportional or less than proportional to the number of arbitrators of that type in the ICC practice. Nevertheless, a rough comparison of the relative frequency of challenges to each type of arbitrator (‘PNA’, ‘Pres’, ‘SA’ and ‘NNCA’) may be suggested by assuming— as a rule of thumb, certainly inaccurate but perhaps not very inaccurate— that out of every 100 arbitrations under the aegis of the ICC during the period considered (1992-2009), 50 corresponded to three-member tribunals with party-nominated arbitrators, 48 to sole arbitrators and 2 to three-member tribunals with neutrally-appointed co-arbitrators. Under this assumption, the proportional rate of challenge (PRC) for each type of arbitrator would be 49% (PNA), 25.5% (Pres), 23.5% (SA) and 2% (NNCA)

A more accurate finding is reached if the analysis is run only on tribunals with party-nominated arbitrators. In this case, only two types of arbitrators can be compared (‘PNA’ and ‘Pres*’) but the proportional rate of challenge (PRC) for each type is known: 66.6% (PNA) and 33.3% (Pres*). Of the 171 challenges against presiding arbitrators (Pres), 169 were challenges to presiding arbitrators in tribunals with party-nominated arbitrators (Pres*). When the analysis is only run on the latter 169 cases, the actual percentage of challenges (APC) for each type of arbitrator is 59.2% (PNA) and 40.8% (Pres*)

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6 50 arbitral tribunals with party-nominated arbitrators amount to 100 party-nominated arbitrators and 50 presiding arbitrators. 2 arbitral tribunals with neutrally-appointed co-arbitrators amount to 4 neutrally-appointed co-arbitrators and 2 presiding arbitrators. Arbitrators on arbitral tribunals (156) added to sole arbitrators (48) amount to 204. PRC (‘PNA’) = 100/204 = 49%. PRC (‘Pres’) = 52/204 = 25.5%. PRC (‘SA’) = 48/204 = 23.5%. PRC (‘NNCA’) = 4/204 = 2%.

7 Pres*: presiding arbitrators in tribunals with party-appointed arbitrators.

8 245 (challenges against party-nominated arbitrators) and 169 (challenges against presiding arbitrators in tribunals with party-nominated members) amounts to 414. The actual percentage of challenges (‘PNA’) = 245/414 = 59.2%. Actual percentage of challenges (‘Pres’) = 169/414 = 40.8%.
are challenged less than proportionally whereas presiding arbitrators are challenged more than proportionally.

6-28 Party-nominated arbitrators are thus challenged in relative terms less frequently than presiding arbitrators in tribunals with party-nominated members. This finding contradicts certain perceptions that challenges against presiding arbitrators are rare⁹.

6-29 **Challenging party.** Claimant-nominated arbitrators and, to a lesser extent, presiding arbitrators and sole arbitrators are more often challenged by the respondent. In contrast, respondent-nominated arbitrators are more often challenged by the claimant. The major differences, as shown in Figure 3, can be observed in party-nominated arbitrators. 85.5% of challenges against claimant-nominated arbitrators are filed by the respondent, while 66.4% of challenges against respondent-nominated arbitrators are filed by the claimant.

This inverse-symmetry appearance in party-nominated arbitrators, perhaps hardly surprising, is still sharper if we exclude from the analysis all the cases in which the challenge is against the three members of the tribunal. The analysis on challenges excluding those against the entire arbitral tribunal reveals, as shown in Figure 4, that 93.1% of challenges against claimant-nominated arbitrators were filed by the respondent whereas 88% of challenges against respondent-nominated arbitrators were filed by the claimant. It is also worth noting that when challenges against the entire tribunal are excluded, challenges against presiding arbitrators filed by claimants and respondents were very similar in number.
Grounds invoked by the challenging party. Figure 5 shows the grounds invoked by the challenging party considering the total number of challenges (518 cases), the challenges against party-nominated arbitrators (245 cases), the challenges against presiding arbitrators (171 cases) and the challenges against sole arbitrators (93 cases). The ten above-mentioned categories of grounds are considered.

Three main observations from Figure 5 can be made. Firstly, for the three types of arbitrators considered, the ground of misconduct (M) is the one on which challenges are more frequently based: 39.2% in party-nominated arbitrators, 41.5% in presiding arbitrators and 35.5% in sole arbitrators (these percentages increase to 47%, 49.1% and 42%, respectively, if challenges partly based on misconduct –M+LP and

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10 The nine challenges against neutrally-appointed co-arbitrators are included.

11 ‘M’ (misconduct), ‘M+LP’ (misconduct and links with persons), ‘M+PSM’ (misconduct and prejudgement of the subject-matter), ‘LP’ (links with persons), ‘LP+PSM’ (links with persons and prejudgement of the subject-matter), ‘PSM’ (prejudgement of the subject-matter), ‘CB’ (cultural bias), ‘CB+LQ’ (cultural bias and lack of qualifications), ‘LQ’ (lack of qualifications) and ‘Others’.
M+PSM – are also considered). Also for the three types of arbitrators, the second
ground most frequently invoked by the challenging party is links with persons (LP):
32.2% in party-nominated arbitrators, 24% in presiding arbitrators and 19.4% in sole
arbitrators (these percentages increase to 42.4%, 29.3% and 21.6%, respectively, if
challenges partly based on links with persons –M+LP and LP+PSM – are also
considered). It may be noted that the relative weight of LP varies more than that of M
from one type of arbitrator to another: while approximately one third of challenges
against party-nominated arbitrators are based on links with persons (32.2%), that
proportion falls to around a fourth in presiding arbitrators (24%) and to around a fifth
in sole arbitrators (19.4%).

The second observation from Figure 5 relates to the different relative weight of
grounds related to cultural bias and lack of qualifications (CB, CB+LQ and LQ).
While these grounds amount to an aggregate percentage of 2.4% in party-nominated
arbitrators, the percentage rises to 11.1% in presiding arbitrators and to 24.8% in sole
arbitrators. It may be noted that the relative weight of challenges based solely on lack
of qualifications (LQ) is particularly high in sole arbitrators.

Thirdly, the ground of prejudgement (PSM) has a relative weight of 5.7% in party-
nominated arbitrators, 7% in presiding arbitrators and 3.2% in sole arbitrators (these
percentages increase to 14.7%, 11.7% and 9.7%, respectively, if challenges partly
based on prejudgement –M+PSM and LP+PSM – are also considered).

A fourth remark regarding Figure 5 may be made by providing some additional
information that the Figure does not show. Cases of the category ‘Others’ which do
not include any allegation of bias represent 2.4% of challenges against party-
nominated arbitrators, 1.7% of challenges against presiding arbitrators and 2.1% of
challenges against sole arbitrators 12. Given that challenges based on a lack of
qualifications (LQ) do not include allegations of bias either, challenges related to
bias represent 96% of challenges against party-nominated arbitrators, 96.5% of

12 PNA: 6/245 = 2.4%; Pres: 3/171 = 1.7%; SA: 2/93 = 2.1%.
challenges against presiding arbitrators and 87.1% of challenges against sole arbitrators.\(^\text{13}\)

6-36 **Failure to disclose.** Failure to disclose is invoked in 13.7% of challenges. As shown in Figure 6, this ground is significantly more present in challenges against party-nominated arbitrators (17.1% of cases) than in those against presiding arbitrators and sole arbitrators (11.7% and 7.5% of cases respectively).

![Figure 6](image_url)

**Figure 6. Challenges in which failure to disclose is and is not alleged**

6-37 Figure 7 shows the grounds invoked together with a failure to disclose. Links with persons (LP) prevails for all types of arbitrators: 64.3% in party-nominated arbitrators, 55% in presiding arbitrators and 42.9% in sole arbitrators (85.7%, 75% and 57.2%, respectively, if challenges partly based on links with persons –M+LP and LP+PSM– are also considered).

\(^\text{13}\) PNA: 2.4% (‘Others’ without allegation of bias) + 1.6% (LQ) = 4%; Pres: 1.7% (‘Others’ without allegation of bias) + 1.8% (LQ) = 3.5%; SA: 2.1% (‘Others’ without allegation of bias) + 10.8% (LQ) = 12.9%.
Time of the challenge. Around 40% of all challenges were filed before or shortly after the signing of the Terms of Reference, while 60% were filed at a later stage. Challenges against party-nominated arbitrators and presiding arbitrators were more often filed at a later stage (62.9% and 66.1%, respectively). In contrast, more than half of the challenges against sole arbitrators (53.8%) were filed before or shortly after the Terms of Reference.
This difference in sole arbitrators seems to be mainly due to them being challenged on CB (cultural bias) and LQ (lack of qualifications) grounds significantly more often than party-nominated arbitrators and presiding arbitrators, and to the fact that challenges on CB and LQ grounds are normally early challenges. Of the 25 challenges in total (including PNA, Pres and SA) that were based on cultural bias, 22 (88%) were filed before or shortly after the Terms of Reference. In the case of lack of qualifications, of the 18 challenges in total, 17 (94.4%) were early challenges.

**Challenge outcome.** The vast majority of challenges were rejected by the Court, irrespective of the type of arbitrator (84.5% PNA, 86% Pres, 84.9% SA), as shown in Figure 9.

![Figure 9. Challenge outcome](image)

Figure 9 also shows that challenges against party-nominated arbitrators were more often accepted by the Court (9.4%) than challenges against presiding arbitrators and sole arbitrators (5.3% and 3.2% respectively). In contrast, the challenged arbitrator resigned and the resignation was accepted by the Court in a small proportion of challenges against party-appointed arbitrators (4.5%) compared to those against
presiding arbitrators (8.2%) and sole arbitrators (11.8%)\textsuperscript{14}. In four challenges against party-nominated arbitrators (1.6% PNA) and one against the presiding arbitrator (0.6% Pres), the Court did not examine the challenge because it decided to replace the arbitrator on its own motion or following a joint request from the parties.

It is uncertain whether the Court would have accepted or rejected the challenge in the cases in which the challenged arbitrator resigned if such resignation had not taken place, or how the Court would have decided the challenge had it not decided instead to follow a different procedure of replacement. What is certain is that the proportion of arbitrators who leave the arbitration because of a challenge, either because the challenge is accepted by the Court, because the Court has decided by the same time to replace the arbitrator, or because the challenged arbitrator tendered his resignation and it was accepted by the Court, is quite similar for the three types of arbitrators (15.5% PNA, 14.1% Pres, 15% SA). Without judging the appropriateness of resignations (sometimes obvious needs, sometimes noble reactions to spurious challenges, sometimes anything but noble, sometimes doubtful), it is a fact that the challenging party obtains satisfaction (removal of the challenged arbitrator) in a similar proportion in the three cases.

6.3.2. ACCEPTED CHALLENGES

Figure 10 shows, in absolute figures, the challenges that were accepted by the ICC Court grouped according to the grounds invoked by the challenging party, without differentiating those in which a failure to disclose was also invoked.

\textsuperscript{14} Tenders of resignation are normally but not always accepted by the ICC Court. Fry and Greenberg, footnote 1 above, p. 28.
Figure 10. Accepted challenges grouped according to the grounds invoked by the challenging party (not differentiating failure to disclose)

6-44 The first observation with regard to Figure 10 is that most accepted challenges correspond to cases in which the challenging party had invoked links with persons (LP): 30 out of 37 cases (81.1%) in all accepted challenges, 21 out of 23 cases (91.3%) in accepted challenges against party-nominated arbitrators, 6 out of 9 cases (66.6%) in accepted challenges against presiding arbitrators, and 2 out of 3 cases (66.6%) in accepted challenges against sole arbitrators.

6-45 The second observation relating to Figure 10 has to do with a remarkable absence. Misconduct (M) is the ground which is more often invoked by the challenging party irrespective of the type of arbitrator; and, along with the 202 challenges based on misconduct alone, there were 38 other challenges based on misconduct and something else—links with persons (M+LP, 19 cases) or prejudgement of the subject-

15 See Figure 5 above. Challenges based on misconduct represent 39% of total challenges (LP: 27%), 39.2% of challenges against party-nominated arbitrators (LP: 32.2%), 41.5% of challenges against presiding arbitrators (LP: 24%) and 35.5% of challenges against sole arbitrators (LP: 19.4%). As pointed out earlier, the number of neutrally-appointed co-arbitrators in ICC challenges (and seemingly in ICC practice as well) is so meager that it has not been included in the comparative analysis.
matter of the dispute (M+PSM, 19 cases). The three grounds related to misconduct (M, M+LP and M+PSM) represent in the aggregate 46.9% of challenges against party-nominated arbitrators, 49.1% of challenges against presiding arbitrators and 41.9% of challenges against sole arbitrators. And yet, surprisingly or not, not a single challenge totally or partially based on misconduct was upheld by the Court in the period considered.

This finding may be partly explained by the fact that the Court is generally reluctant to uphold challenges on the basis of an allegation of misconduct and has rarely upheld challenges based on procedural decisions issued by the arbitrators, except when the arbitrator’s conduct is “so manifestly improper as to raise concerns over due process”.

Figure 11 again shows the challenges that were accepted by the ICC Court grouped according to the grounds invoked by the challenging party, but this time — unlike in Figure 10— differentiating the challenges in which a failure to disclose was invoked (‘F’) from those others where it was not (‘N’). Of the 37 challenges that were accepted by the Court, the challenging party had invoked a failure to disclose in 18 (48.6%). Accepted challenges in which a failure to disclose had been invoked by the challenging party represented 52.2% of accepted challenges in party-nominated arbitrators (12 out of 23 cases), 44.4% in presiding arbitrators (4 out of 9 cases) and 33.3% in sole arbitrators (1 out of 3 cases). One of the challenges accepted by the ICC Court in which a failure to disclose was invoked was a challenge against a neutrally appointed co-arbitrator.

The challenging party mostly made the allegation of failure to disclose (16 cases) in relation to links with persons (LP): 11 cases in party-nominated arbitrators, 4 cases in presiding arbitrators and 1 case in sole arbitrators. Allegations of failure to disclose in accepted challenges were further found in relation to alleged links with persons and prejudgement of the subject-matter of the dispute (LP+PSM, 1 case, PNA) and

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16 Fry and Greenberg, footnote 1 above, para 86. These authors comment on a case where one of the parties challenged the presiding arbitrator on the grounds that the some of the arbitrator’s decisions had created a more favourable situation for the other party. After being informed of the challenge, the presiding arbitrator “amended the procedural directions to rectify the perceived inequality in the treatment of the parties”. The challenge was rejected by the ICC Court (ibid, para 84).
to an alleged prejudgement of the subject-matter of the dispute (PSM, 1 case, neutrally-appointed co-arbitrator).

It is worth noting, with respect to all types of arbitrators, how frequently the allegation of failure to disclose is present in accepted challenges in comparison to the other allegations put forward by the challenging party. The allegation of links with persons (alone or with the allegation of prejudgement of the subject-matter) was made in 89.2% of the accepted challenges, followed by the allegation of failure to disclose (present in 48.6% of accepted challenges), prejudgement of the subject-matter (present, alone or with the allegation of links with persons, in 13.5% of accepted challenges), cultural bias and lack of qualifications (each present in 2.7% of the accepted challenges). Of the 71 challenges in which an allegation of failure to disclose was made, 18 (25.35%) were accepted.
Figure 12 shows a yet more detailed breakdown of the challenges that were accepted by the ICC Court. These challenges are grouped according to the grounds invoked by the challenging party, but this time differentiating not only the challenges in which a failure to disclose was invoked (‘F’) from those others where it was not (‘N’), but also the challenges that were filed before or shortly after the signing of the Terms of Reference (‘ToR’) from those others that had been filed after the Terms of Reference and usually after some further procedural activity (‘Later’).

Two findings shown in Figure 12 may be highlighted. Firstly, most of the challenges that were accepted by the ICC Court were filed before or shortly after the Terms of Reference: 78.4% (Total), 73.9% (PNA), 88.9% (Pres) and 66.6% (SA). Secondly, in the case of party-appointed arbitrators, the accepted challenges that were filed before or shortly after the Terms of Reference were approximately three times as many as the accepted challenges filed at a later stage, regardless of whether a failure to disclose had been invoked or not.
6.3.3. IS ANYTHING CHANGING OVER THE YEARS?

Until now, the analysis has referred to the 18-year period between 1992 and 2009. Now the same analysis, albeit more narrow, will be performed to look separately and comparatively at each of the two 9-year periods: 1992-2000 and 2001-2009.

**Challenged arbitrator.** The number of challenges in the period 2001-2009 (335) represents an increase in absolute terms of 83% with respect to the number of challenges in the period 1992-2000 (183). This increase is quite uneven from one type of arbitrator to another. Challenges against party-nominated arbitrators increased by 57.9% (95 in 1992-2000 and 150 in 2001-2009), those against presiding arbitrators by 122.6% (53 and 118) and those against sole arbitrators by 65.7% (35 and 58). In relative terms, comparing the proportion of challenges for each type of arbitrator in both periods, challenges against party-nominated arbitrators and sole arbitrators decreased while challenges against presiding arbitrators increased, as shown in Figure 13.

![Figure 13. Challenges of arbitrators: 1992-2000 and 2001-2009](image)

Challenges against neutral-appointed co-arbitrators (9) are only present in the period 2001-2009.
Running the comparative analysis of party-nominated arbitrators (PNA) and presiding arbitrators in tribunals with party-nominated members (Pres*), this time for each of the two 9-year periods considered, the actual percentage of challenges (APC) for each type of arbitrator is 64.2% (PNA) and 35.8% (Pres*) in the period 1992-2000\(^{18}\) and 56.4% (PNA) and 43.6% (Pres*) in 2001-2009\(^{19}\). The comparison between APC and PRC\(^{20}\) shows that, in both periods of time, party-nominated arbitrators were challenged less than proportionally while presiding arbitrators in tribunals with party-nominated members were challenged more than proportionally. This difference is sharper in the period 2001-2009 as shown in Figure 14.

![Figure 14. PRC v. APC in tribunals with party-nominated arbitrators, 1992-2000 and 2001-2009](image)

**Challenging party.** The biggest differences from one period of time to another appear, as shown in Figure 15, in party-nominated arbitrators. These differences,

\(^{18}\) 1992-2000: 95 (challenges against party-nominated arbitrators) and 53 (challenges against presiding arbitrators in tribunals with party-nominated members) is 148. APC (PNA) = 95/148 = 64.2%. APC (Pres*) = 53/148 = 35.8%.

\(^{19}\) 2001-2009: 150 (challenges against party-nominated arbitrators) and 116 (challenges against presiding arbitrators in tribunals with party-nominated members) is 266. APC (PNA) = 150/266 = 56.4%. APC (Pres*) = 116/266 = 43.6%.

\(^{20}\) The proportional rate of challenge (PRC) is 66.6% in ‘PNA’ and 33.3% in ‘Pres*’.

224
however, are not in the same direction. While the proportion of challenges filed by respondents against claimant-nominated arbitrators increases in the second period, the proportion of challenges filed by claimants against respondent-nominated arbitrators decreases.

Figure 15. Who challenges who (1992-2000 and 2001-2009)

Figure 16 illustrates the same analysis but excluding all the cases in which the challenge is against the entire arbitral tribunal.

Figure 16. Who challenges who (excluding challenges against the entire arbitral tribunal), 1992-2000 and 2001-2009
As shown in Figure 16, the prevalence of challenges of party-nominated arbitrators by non-appointing parties is in a very similar proportion in the two periods considered. By contrast, challenges by claimants of presiding and sole arbitrators are relatively higher in the period 2001-2009 than in the period 1992-2000.

**Grounds invoked by the challenging party.** Figure 17 shows the grounds invoked by the challenging party for the periods 1992-2000 and 2001-2009.

![Figure 17. Grounds invoked by the challenging party, 1992-2000 and 2001-2009](image)

Two observations on Figure 17. Firstly, links with persons (LP) and misconduct (M) are the grounds that were most frequently invoked in both periods, the former being the most frequent one in 1992-2000 and the latter the most frequent one in 2001-2009. Both in absolute (number of cases) and relative terms (proportion of cases in which it is alleged), challenges based on misconduct are increasing over the years.
Secondly, grounds related to cultural bias and lack of qualifications (CB, CB+LQ and LQ) lose relative weight over the years in the case of presiding arbitrators and, less significantly, in party-nominated arbitrators. In the case of sole arbitrators, however, grounds solely or partly based on cultural bias (CB and CB+LQ) lose relative weight over the years, whereas the ground of lack of qualifications (LQ) increases in relative terms in the period 2001-2009.

Failure to disclose. Failure to disclose was more frequently alleged during the period 2001-2009 in challenges against party-appointed arbitrators and sole arbitrators, whereas it was less frequently alleged in challenges against presiding arbitrators.

![Figure 18. Challenges in which failure to disclose is and is not alleged, 1992-2000 and 2001-2009](image)

Figure 19 shows, for each of the two periods of time considered, the grounds that are invoked together with a failure to disclose. It is worth noting, for all types of arbitrators, the significant increase in the relative weight of challenges based on misconduct and links with persons (M+LP). It is also worth noting, for party-appointed and presiding arbitrators, the significant increase in the relative weight of challenges based on links with persons and prejudgement of the subject-matter of the dispute (LP+PSM). Challenges against party-nominated arbitrators that were based on LP+PSM decreased over time (see Figure 17) but increased if only those that were coupled with an allegation of failure to disclose are considered (see Figure 19).
6-63 **Time of the challenge.** For all types of arbitrators, challenges filed before or shortly after the signing of the Terms of Reference decrease in relative terms from one period to another. This decrease is particularly sharp in sole arbitrators.
**Challenge outcome.** Figure 21 shows the outcome of the challenges for both periods considered. In both periods, and for all types of arbitrators, the vast majority of challenges were rejected by the Court.

![Challenge outcome chart](image)

**Figure 21. Challenge outcome**

It may be noted, from Figure 21, that the challenges accepted by the Court lose relative weight in the period 2001-2009 as far as party-nominated arbitrators and presiding arbitrators are concerned, whereas such challenges gain relative weight in the same period when they affect sole arbitrators. In addition, resignations accepted by the Court lose relative weight in the period 2001-2009 as far as party-nominated arbitrators and sole arbitrators are concerned, while such resignations gain relative weight in the same period when they affect a presiding arbitrator.
CONCLUSIONS

6-66 The seven basic questions that the comparative empirical study of this research sought to answer, along with a summary of the findings, are shown below:

6-67 First.— How often are party-nominated arbitrators challenged? Is the frequency of challenges against them different from that of challenges against presiding arbitrators and sole arbitrators?

6-68 In absolute terms, party-nominated arbitrators are the most challenged (47.3% of all challenges), followed by presiding arbitrators (33%) and sole arbitrators (18%). In relative terms, presiding arbitrators are the most challenged—actually the only type of arbitrator that is more than proportionally challenged. With respect to challenges against arbitrators who form part of tribunals with party-nominated members, 59.2% were against a party-appointed arbitrator (versus a theoretical 66.6% proportional rate of challenge) whereas 40.8% were against a presiding arbitrator (versus a theoretical 33.3% proportional rate of challenge).

6-69 Second.— Which party files the challenge? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

6-70 Claimant-nominated arbitrators are more often challenged by the respondent (85.5%) while respondent-nominated arbitrators are more often challenged by the claimant (66.4%). This phenomenon is sharper when challenges against the entire tribunal are excluded. In this case, 93.1% of challenges against claimant-nominated arbitrators were filed by the respondent whereas 88% of challenges against respondent-nominated arbitrators were filed by the claimant. Challenges against presiding arbitrators and sole arbitrators are more often filed by the respondent (57.3% and 65.6%, respectively) than the claimant (42.1% and 33.3%, respectively). When challenges against all the members of a tribunal are excluded, challenges against presiding arbitrators were filed in similar proportion by respondents (50.8%) and claimants (48.4%).

6-71 Third.— What grounds are invoked by the challenging party? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?
Firstly, for the three types of arbitrators: (i) the ground of misconduct (M) is that upon which challenges are most frequently based: 39.2% in party-nominated arbitrators, 41.5% in presiding arbitrators and 35.5% in sole arbitrators (47%, 49.1% and 42%, respectively, if challenges partly based on misconduct –M+LP and M+PSM– are also considered); and (ii) the second ground most frequently invoked by the challenging party is links with persons (LP): 32.2% in party-nominated arbitrators, 24% in presiding arbitrators and 19.4% in sole arbitrators (42.4%, 29.3% and 21.6%, respectively, if challenges partly based on links with persons –M+LP and LP+PSM– are also considered). Secondly, grounds related to cultural bias and lack of qualifications (CB, CB+LQ and LQ) amount to an aggregate percentage of 2.4% in party-nominated arbitrators, 11.1% in presiding arbitrators and 24.8% in sole arbitrators. Thirdly, the ground of prejudgement (PSM) has a relative weight of 5.7% in party-nominated arbitrators, 7% in presiding arbitrators and 3.2% in sole arbitrators (14.7%, 11.7% and 9.7%, respectively, if challenges partly based on prejudgement –M+PSM and LP+PSM– are also considered). And fourthly, challenges which include an allegation of bias represent 96% of challenges against party-nominated arbitrators, 96.5% of challenges against presiding arbitrators and 87.1% of challenges against sole arbitrators.

Failure to disclose is invoked in 13.7% of all challenges. This ground is significantly more present in challenges against party-nominated arbitrators (17.1%) than in those against presiding arbitrators (11.7%) and sole arbitrators (7.5%). For all types of arbitrators, links with persons (LP) is the ground that is most frequently invoked coupled with a failure to disclose: 64.3% in party-nominated arbitrators, 55% in presiding arbitrators and 42.9% in sole arbitrators (85.7%, 75% and 57.2%, respectively, if challenges partly based on links with persons –M+LP and LP+PSM– are also considered).

Fourth.— At what time during the arbitral proceedings are party-nominated arbitrators challenged? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

Around 40% of all challenges were filed before or shortly after the signing of the Terms of Reference and 60% at a later stage. Challenges against party-nominated
arbitrators and presiding arbitrators were more often filed at a later stage (62.9% and 66.1%, respectively), while only 46.2% of the challenges against sole arbitrators were filed at a later stage.

6-76 *Fifth.*—What is the outcome of challenges against party-nominated arbitrators? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

6-77 The proportion of challenges against party-nominated arbitrators that were accepted (9.4%) is approximately twice as much as that of presiding arbitrators (5.3%) and three times as much as that of sole arbitrators (3.2%). In contrast, the proportion of challenges against party-nominated arbitrators in which the arbitrator resigns and his resignation is accepted by the Court (4.5%) is nearly half of presiding arbitrators (8.2%) and nearly three times less than in sole arbitrators (11.8%).

6-78 *Sixth.*—How is the outcome of the challenges related to the grounds invoked by the challenging party and to the time of the challenge? Is there any remarkable difference between party-nominated arbitrators, presiding arbitrators and sole arbitrators?

6-79 The majority of accepted challenges, particularly in party-nominated arbitrators, correspond to cases in which the challenging party invoked links with persons (LP): 91.3% in party-nominated arbitrators, 66.6% in presiding arbitrators and 66.6% in sole arbitrators. The second ground most frequently present in accepted challenges is the failure to disclose. Accepted challenges in which a failure to disclose was invoked by the challenging party represent 52.2% of accepted challenges in party-nominated arbitrators (12 out of 23 cases), 44.4% in presiding arbitrators (4 out of 9 cases) and 33.3% in sole arbitrators (1 out of 3 cases).

6-80 On the other hand, there is a remarkable absence of accepted challenges in cases in which the challenging party invoked misconduct (excluding failure to disclose). None of the 240 challenges that were solely (M) or partly (M+LP and M+PSM) based on misconduct was upheld by the ICC Court in the period considered.
Most of the challenges that were accepted by the ICC Court, whatever the grounds for challenge invoked by the challenging party, were filed before or shortly after the Terms of Reference.

Seventh.— Is anything changing over the years (period 1992-2000 v. period 2001-2009)?

In absolute terms, challenges against party-nominated arbitrators increased by 57.9% (95→150), those against presiding arbitrators by 122.6% (53→118) and those against sole arbitrators by 65.7% (35→58). In relative terms, presiding arbitrators are in both periods of time the only arbitrators challenged more than proportionally. Looking at the number of challenges of each type of arbitrator in relation to the total number of challenges in each period, challenges against party-nominated arbitrators and sole arbitrators decreased (51.9%→44.8% and 19.1%→17.3%, respectively) whereas challenges against presiding arbitrators increased (29%→35.2%).

Links with persons (LP) was the ground most frequently invoked in the period 1992-2000 whereas misconduct (M) was that most frequently invoked in the period 2001-2009. Grounds related to cultural bias and lack of qualifications (CB, CB+LQ and LQ) lose relative weight in the second period in the case of presiding arbitrators and, less significantly, in party-nominated arbitrators. In the case of sole arbitrators, grounds solely or partly based on cultural bias (CB and CB+LQ) lose relative weight in the second period but the ground of lack of qualifications (LQ) gains relative weight in the second period.

Failure to disclose was more frequently alleged during the period 2001-2009 in challenges against party-appointed arbitrators and sole arbitrators, whilst less frequently alleged in challenges against presiding arbitrators. For all types of arbitrators, there was a significant increase in the relative weight of challenges based on misconduct and links with persons (M+LP) together with an allegation of failure to disclose. For party-appointed and presiding arbitrators, challenges based on prejudgement of the subject-matter of the dispute (PSM) and on prejudgement of the subject-matter of the dispute and links with persons (LP+PSM), when both include an allegation of failure to disclose, gain in the aggregate significant relative weight in the second period.
For all types of arbitrators, challenges filed before or shortly after the signing of the Terms of Reference decrease in relative terms from one period to another. This decrease is particularly sharp regarding sole arbitrators.

Challenges that are accepted by the ICC Court lost relative weight in the period 2001-2009 as far as party-nominated arbitrators and presiding arbitrators are concerned, whereas such challenges gained relative weight in the same period when they affected sole arbitrators. Furthermore, resignations accepted by the Court lost relative weight in the period 2001-2009 as far as party-nominated arbitrators and sole arbitrators are concerned, while such resignations gained relative weight in the same period when they affected a presiding arbitrator.
CHAPTER 7. CONCLUSIONS AND SUGGESTIONS FOR THE FUTURE

7.1. THE PAST

7-1 How did we get here? Were there party-appointed arbitrators in different historical periods and, if so, in what form of tribunal? What was the system of decision-making in tribunals with party-appointed arbitrators? What was the role of party-appointed arbitrators?

7-2 Party-appointed arbitrators have always been with us, at all times and places, except for the unclear situation in ancient Rome. Their presence is found in all types of arbitrations (between private parties, states or both) and all types of arbitral tribunals (even or odd numbered). Even-numbered tribunals were more common in ancient times. Since the Middle Ages, the presence of an odd (parity-breaking) non-party-appointed arbitrator has been more frequent. The number of arbitrators unilaterally appointed by each party varies from certain historical examples to others (from 1 up to 12). Since the beginning of the Modern era to date, one arbitrator appointed by each party and an odd arbitrator is most common in multiple-member arbitral tribunals. Probably to the surprise of our ancestors, some systems nowadays forbid even-numbered arbitral tribunals.

7-3 The weight of each party-appointed arbitrator in the decision-making process has progressively decreased throughout History. Arbitral tribunals that could only render unanimous decisions, mainly found in ancient Greece, became rare in later times. The role of the odd arbitrator has evolved from intervening in the decision-making process only when it was necessary to break a deadlock (more frequent in the past) to intervening in the decision-making process from the start (more frequent nowadays). Furthermore, the power of the odd arbitrator to render the arbitral award alone if no majority is reached, despite not being the UNCITRAL solution, is more and more accepted in arbitration rules and laws.

7-4 The role of arbitrators has evolved throughout History and, with it, the role of party-appointed arbitrators. In ancient Greece, all arbitrators had the two-tier role of mediating between the parties and, if mediation failed, to adjudicate the dispute.
Party-appointed arbitrators were expected to support their respective appointing parties while trying to mediate between them but, if mediation failed, they had to take an oath to act impartially and decide the dispute according to what they deemed just. From the Middle Ages, this dual role of conciliation and adjudication remained, although without the neat separation that existed in ancient Greece between the time to conciliate and the time to adjudicate. The role of party-appointed arbitrators turned more ambivalent, consisting in supporting the appointing party and, at the same time, adjudicating the dispute. Party-appointed arbitrators still appear to have almost always been entitled, at least to some extent, to sacrifice positions of the appointing party without any need for the latter’s permission (very few historical examples suggest that the only thing party-appointed arbitrators could do was either to follow the instructions of the appointing party or to step down). The ambivalent role of party-appointed arbitrators was probably rejected by the parties in some cases. In the Nineteenth and Twentieth Centuries, many examples are found of party-appointed arbitrators who were expressly required to take an oath or a make a solemn declaration that they would act impartially. Nevertheless, it is unclear in some of these cases whether or not the parties still expected a certain degree of support from the party-appointed arbitrator.

7-5 It seems safe to think that the two-tier role of party-appointed arbitrators in ancient Greece (representatives of the appointing parties for mediation purposes and, from a given point in time, only impartial adjudicators) and the two-fold ambivalent role of party-appointed arbitrators in later times (representatives of the appointing parties and adjudicators fully or partly entitled to find against the appointing party) must have worked well in many cases. One may expect arbitration users to use systems they think are worth using.

7-6 Nonetheless, historical sources show that, from the Seventeenth Century onwards, there was criticism in Europe and the United States of party-appointed arbitrators who acted rather as advocates than judges, both in arbitration between private parties and in interstate arbitration. These sources also show the difficulty sometimes for party-appointed arbitrators in interstate arbitration (and probably in other types of arbitration) to act in any way against the interests of the appointing party, either because of their national prejudices or their fear of the consequences for their own
fortunes, thus often resulting in them not being capable to make any impartial decisions.

7.7 The Nineteenth and Twentieth Centuries witness efforts to separate arbitration from other forms of dispute resolution (e.g., mediation and conciliation) and to make the rule of law prevail in arbitration over other forms of adjudicating disputes (e.g., ‘peace-making’ and amiable composition). In the Twentieth Century, the express requirement for all arbitrators to be impartial and independent comes onto the scene and, with it, a new vision of what party-appointed arbitrators should do.

7.8 Nowadays, an impartial and independent arbitrator may be defined as the sum of three elements: an unbiased mind (he must be willing and self-aware of being able to act without favouritism or bias towards any of the disputing parties), an unbiased behaviour in the reference (he must act without favouritism or bias towards any of the disputing parties) and a minimum distance from the dispute (persons and subject-matter) or, in other words, an absence of certain links (relations, connections or dealings) which are deemed to be unacceptable.

7.9 It is futile, if not outright wrong, to compare different historical periods through the prism of modern ‘impartiality and independence’. Insofar as party-appointed arbitrators have almost always been allowed to impose their views on those of the appointing party, at least to some extent, it could be said that party-appointed arbitrators have almost always been expected to be ‘impartial and independent’, at least to some extent. However, insofar as party-appointed arbitrators have often been expected to support the appointing party, to some extent, it could be said that they have often not been expected to be ‘impartial and independent’, to some extent.

7.10 The question of whether party-appointed arbitrators have historically been required to be ‘impartial and independent’, as may be observed, is ill-conceived. The requirements that any arbitrator must nowadays normally meet when appointed for him to be recognised as impartial and independent (willingness to act without bias and absence of certain links with certain persons and the subject-matter of the dispute) are more than those required from an arbitrator in ancient Greece, when mediation failed, for him to be recognised as impartial (willingness to act without bias, by oath, whatever the usual close links of family or friendship between
unilateral appointors and appointees). And those requirements are also more than the requirements applying to party-appointed arbitrators who, as of the Middle Ages, had strong links with the appointing party and were expected to perform the ambivalent role of supporting the appointing party and, at the same time, adjudicating the dispute with full or partial freedom to find against such party. Furthermore, differences between historical periods are exacerbated by the fact that arbitrators often performed conciliatory and adjudicatory functions in the past, whereas nowadays, inasmuch as any conciliatory function requires the arbitrator to become involved to some extent in the subject-matter of the dispute, conciliatory functions in arbitrators raise a discussion (how to reconcile the office of arbitrator with him assuming conciliatory functions) which did not appear to be a concern in the past.

7.2. THE PRESENT

7.2.1. HOW IS THE RIGHT TO MAKE UNILATERAL NOMINATIONS CURRENTLY CONFIGURED?

A) Meaning and importance of this right

The right of the parties to each make a unilateral appointment of an arbitrator is one of the many possible expressions of the freedom of the parties to decide who will decide the dispute.

Many parties are attached to the practice of unilateral nominations. These provide each party with the possibility of appointing someone with the combination of qualities that, in the eyes of such party, must be present on the arbitral tribunal. When making a unilateral nomination, parties are also likely to consider, along with the candidate’s qualities, to what extent the candidate may be a good choice for its case. At this juncture, each party is selfish but should not be blamed for it. It is only natural for each party to choose someone who is believed to be closer or less hostile to the appointor’s case than other possible candidates. In any event, unilateral nominations allow each party to directly manage the risk of a bad arbitral award and also to feel some reassurance that the dispute will be settled through a fair process, these two things often paving the way for an award that the losing party voluntarily complies with.
B) Limits

The right of each party to make a unilateral nomination, when it exists, has certain limits: the qualifications of the arbitrators that have been agreed upon by the parties, the principle of equality of the parties in the constitution of the arbitral tribunal and the impartiality and independence of the arbitrator.

Qualifications. The parties are free to require in their arbitration agreement that party-appointed arbitrators (as non-party-appointed arbitrators) must have certain qualifications.

The parties may agree that all the arbitrators must be appointed from a given list. To restrict the unilateral choice of each party to a list of arbitrators drawn up by a third person is generally unadvisable. Lists drafted by third persons, even if tailor-made to the case, may easily fail to take into account all the factors that each party deems important in an arbitrator.

The freedom of the parties to provide in their arbitration agreement that party-appointed arbitrators (as well as non-party-appointed arbitrators) must have certain qualifications is, in principle, not restricted by regulations –common in civilised countries– that are aimed at protecting citizens from discrimination on grounds such as race, sex, religion, age, disability or nationality. No one can claim, against the parties to an arbitration agreement, a purported right to be eligible for appointment as an arbitrator in terms of equality with others, on any basis. This does not mean that a third person whose functions include the selection or appointment of arbitrators may apply, on his own motion, a discrimination policy based on the systematic choice or exclusion of a given race, sex, religion, age, disability or nationality. The third person, it would seem, cannot do that.

Equality of the parties in the constitution of arbitral tribunals. The principle of equality or equal treatment of the parties in the constitution of the arbitral tribunal means that the parties must have the possibility of participating in the constitution of the arbitral tribunal on equal terms. This principle does not mean that the arbitral tribunal will effectively end up having as many party-appointed arbitrators as parties, nor does it mean that all parties must make a unilateral appointment at the same time.
Multiparty arbitrations and certain scenarios of consolidation and joinder may pose a risk to the principle of equality of the parties in the constitution of arbitral tribunals with party-appointed members.

An agreement of the parties whereby one of them has a privileged position at the time of making a unilateral appointment seems to be possible as long as it is made or confirmed in the arbitration proceedings, once the dispute has arisen.

*Impartiality and independence.* Nowadays, the standard of impartiality and independence of all arbitrators is common place in international arbitration. Unless otherwise agreed by the parties, two-tier or two-fold roles of party-appointed arbitrators that allow them to support the appointing party at any time or to any extent (even if only for conciliation purposes) are not permitted.

From the parties’ perspective, the impartiality and independence of all arbitrators requires each party to appoint someone who, as far as it may know or guess, will be willing and able to act without favouritism or bias towards any of the disputing parties.

Parties can waive the impartiality and independence of party-appointed arbitrators, in the sense that they can allow the party-appointed arbitrators to act with favouritism or bias towards their respective appointing parties. The parties who want biased party-appointed arbitrators should openly agree to them. Biased party-appointed arbitrators may only make sense if, despite their bias, they are fully or partly entitled to vote against the appointing party without any need for the latter’s permission.

Generally, biased party-appointed arbitrators are unadvisable. The uncertainty about their status, a historically pervasive problem, is likely to end up causing confusion and deception. In addition, biased party-appointed arbitrators, in some circumstances, may give rise to serious doubts as to their real capability to reach a decision against the interests of the appointing party.
7.2.2. HOW DO UNILATERAL NOMINATIONS COEXIST WITH THE MODERN CONFIGURATION OF THE DUTY OF ALL ARBITRATORS TO BE IMPARTIAL AND INDEPENDENT?

A) Specific theoretical problems.

7-24 Arbitral tribunals with party-appointed arbitrators pose theoretical problems of their own kind that are not encountered in tribunals without party-appointed members. By hypothesis, the appearance of lack of bias in party-appointed arbitrators is weaker than that of sole and presiding arbitrators. Each party accepts to have one less objective reason to believe in the lack of bias of the arbitrator appointed by the other party: a neutral appointor.

7-25 Other factors may make the appearance of lack of bias in party-appointed arbitrators still weaker in practice: (i) the particular ethical concerns that the benefits from unilateral nominations normally cause; (ii) the usual requirement that the presiding arbitrator must have a different nationality from those of the parties; (iii) the different degree of tolerance that parties sometimes show as to what links of party-appointed and non-party-appointed arbitrators are unacceptable; and (iv) the presumption that party-appointed arbitrators can do certain things that the presiding arbitrator cannot.

B) What are the problems of impartiality and independence of party-appointed arbitrators in practice and how do they compare to those of non-party-appointed arbitrators?

7-26 In the light of the findings of the empirical study shown in chapter six, challenges of party-appointed arbitrators and non-party-appointed arbitrators follow common as well as different patterns. The main patterns are:

- **Common patterns.** [1] For the three types of arbitrators considered (party-appointed arbitrators, presiding arbitrators and sole arbitrators), the ground of misconduct is the one on which challenges are most frequently based, followed by links with persons. [2] About 40% of challenges of party-nominated arbitrators and presiding arbitrators were filed before or shortly after the signing of the Terms of Reference. That percentage rises to about 55% in challenges of sole arbitrators. [3] Most accepted challenges, for the three types of arbitrators, correspond to cases in which the challenging party had invoked links with
persons. The second most frequent ground invoked by the challenging party in accepted challenges, again for the three types of arbitrators, is the failure to disclose. [4] For the three types of arbitrators, there is a remarkable absence of accepted challenges in cases in which the challenging party had invoked misconduct (excluding failure to disclose). None of the 240 challenges that were solely or partly based on misconduct during the period considered (1992-2009) was accepted.

- **Different patterns.** [1] Claimant-nominated arbitrators are most commonly challenged by the respondent (85.5%) whereas respondent-nominated arbitrators are usually challenged by claimants (66.4%). This phenomenon is sharper when challenges against the entire tribunal are excluded (93.1% and 88%, respectively). Challenges against presiding and sole arbitrators are more often filed by the respondent, at a lower proportion. If challenges against all of the members of a tribunal are excluded, challenges against presiding arbitrators are filed in a similar proportion by respondents (50.8%) and claimants (48.4%). [2] Grounds for challenge relating to cultural bias and lack of qualifications, in all, appear in very few challenges of party-nominated arbitrators (2.4%), in a tenth of the challenges of presiding arbitrators (11.1%) and in a fourth of the challenges of sole arbitrators (24.8%). [3] Failure to disclose is significantly more present in challenges of party-nominated arbitrators (17.1%) than in those of presiding arbitrators (11.7%) and sole arbitrators (7.5%).

**C) Do arbitral tribunals with party-appointed arbitrators give rise in practice to more problems than those without party-appointed members?**

7-27 In the light of the findings of the empirical study shown in chapter six, and acknowledging the limitation of the study that only challenges of arbitrators are considered, it appears that problems of bias in party-appointed arbitrators are not significantly more or worse than problems of bias in non-party-appointed arbitrators:

- Party-appointed arbitrators are challenged less than proportionally, as are sole arbitrators and in contrast to the more than proportional challenges against presiding arbitrators. In relative terms, presiding arbitrators are the most challenged. In tribunals with party-nominated arbitrators, 59.2% of challenges
were against a party-appointed arbitrator (versus a theoretical 66.6% proportional rate of challenge) and 40.8% of challenges were against a presiding arbitrator (versus a theoretical 33.3% proportional rate of challenge).

Looking at the outcome of challenges, the rate of accepted challenges against party-nominated arbitrators (9.4%) is approximately twice that of presiding arbitrators (5.3%) and three times that of sole arbitrators (3.2%). However, the challenges in which the arbitrator resigned and the resignation was accepted by the Court were relatively few in party-nominated arbitrators (4.5%), nearly twice as high in presiding arbitrators (8.2%) and nearly three times as high in sole arbitrators (11.8%). The higher rate of accepted challenges of party-appointed arbitrators may be partly explained by the fact that each party naturally tends to appoint someone whom it knows (with whom it has links), party-appointed arbitrators therefore normally being closer the red line than presiding and sole arbitrators. Besides, we do not know how many of the presiding and sole arbitrators that resigned after being challenged would have been allowed to hold office if the resignation had not taken place.

D) Repeat appointments

In order to determine whether repeat appointments of the same arbitrator by the same party or counsel is an acceptable or unacceptable link, the following factors may be considered: the number of repeat appointments; the personal or professional relationship between the appointor and the appointee, along with the income associated with that relationship; whether the cases are related or not; failure to disclose; the existence or not of a small pool of arbitrators; and the arbitrator’s position in the other cases.

The IBA Guidelines’ decision to set quantitative limits on the duty of disclosure of repeat appointments is not a good solution. It would be preferable to have the repeat appointments included on the Orange List without setting any quantitative limits.
E) Does a different standard of impartiality and independence for party-appointed arbitrators make any sense?

7-30 No different degree of the duty of impartiality and independence whatsoever should be accepted between party-appointed and non-party-appointed arbitrators as far as the arbitrator’s sense of mission and conduct in the arbitration (including the pre-appointment phase) are concerned. Expectations of parties that may actually be of none or only some of them should not contribute to the conception of anything that impartial and independent party-appointed arbitrators can do but the presiding arbitrator cannot. Presumed double yard-sticks are dangerous, especially when, as one may expect in any dispute resolution system that brings people from different parts of the world together, the chances are that there will actually be as many different double yard-sticks as disputing parties.

7-31 Notwithstanding the above, a different standard makes sense if ‘different standard’ means that the method of appointment of the arbitrator may influence the decision as to what links in the arbitrator are and are not acceptable. A different standard in this limited sense (a difference as to the unacceptable links of the arbitrator) should naturally be acknowledged. When a person is called upon to resolve a disagreement between the parties as to the admissibility of a given link between an arbitrator and one of the parties, and the parties have not agreed upon any difference between the acceptable links in party-appointed and non-party appointed arbitrators beyond the self-evident difference (biased versus unbiased appointor) and the frequent difference (same versus different nationality), can that person consider that the disputed link is unacceptable because (solely or among other reasons) the arbitrator is a sole or presiding arbitrator? Or can that person consider that the disputed link is acceptable because (solely or among other reasons) the arbitrator is a party-appointed arbitrator? I believe that the answer to these questions, in some circumstances, should be yes. A difference between the acceptable links in party-appointed and non-party appointed arbitrators, when such a difference has not been agreed upon by the parties, may be justified in some cases in order to reinforce the appearance of lack of bias in the presiding arbitrator, maintain unilateral nominations as a way for each party to appoint someone it trusts, or both.
Despite the standard that all arbitrators must be impartial and independent, nowadays there is no consensus on whether the role of party-appointed arbitrators is exactly the same as that of presiding and sole arbitrators. Arbitration rules and laws do not provide for a different role of the arbitrator depending on the method followed for his appointment. However, historical reminiscences that each party-appointed arbitrator is supposed to be allowed to do something special in relation to the appointing party still remain, even though the rules governing the arbitration do not state so. Something special that presiding arbitrators are not supposed to do and that, still, many authors presume to be compatible with the duty of arbitrators to be impartial and independent. In this respect, many authors consider that party-appointed arbitrators may engage in unilateral interviews or discussions with a prospective appointor in order for the latter to consider the appointment, as they may also engage in unilateral discussions with the appointor about the choice of the presiding arbitrator, provided in all cases that the unilateral communications respect certain limits. Some of those authors, and others, also consider that party-appointed arbitrators may perform the special role of acting as cultural translators between the appointor and the arbitral tribunal and of ensuring that the appointor’s case is properly understood by the other members of the tribunal.

In my opinion, based on the considerations included in sections 5.2 and 5.3 of chapter five, it is preferable not to presume that party-appointed arbitrators can do things that the presiding arbitrator cannot, specially if those things consist of certain conducts in relation to the appointing party. I think that the presumption of a special role of party-appointed arbitrators and of certain acceptable unilateral verbal communications between appointors and appointees should be rejected. These presumptions introduce ambiguities in the arbitration and carry the risk of causing confusion and unbalance in the arbitral process, either in the form of an advantage for the party who chooses the most diligent or zealous arbitrator or in the form of an
advantage for the party who has access to people who are trained in interviewing other people in order to ‘rank their bias’.

7-34 The role or mission of party-appointed arbitrators, what they must do to earn their fees, should always, unless otherwise agreed by the parties, be exactly the same as that of the presiding arbitrator\(^1\). This goes in favour of the desirable goal of making international arbitration a truly neutral dispute resolution system.

7.3. LOOKING AHEAD

7.3.1. IT IS WORTH KEEPING THE SYSTEM OF ‘IMPARTIAL AND INDEPENDENT PARTY-APPOINTED ARBITRATORS’ AS THE DEFAULT METHOD TO CONSTITUTE MULTIPLE-MEMBER TRIBUNALS IN INTERNATIONAL ARBITRATION

7-35 Some authors, a distinguished minority, have noted that the system of impartial and independent party-appointed arbitrators is not worth keeping in international arbitration, at least as a standard or default solution for the constitution of three-member tribunals. Their views can be grouped in two different lines of thinking. For some, it would be preferable to do away with the requirement of impartiality and independence in party-appointed arbitrators (Lauterpacht, Coulson). For others, it would be better to do away with unilateral nominations (Arnold, Smit, Paulsson). Both extremes are, in my view, unpersuasive. In my opinion, based on the considerations included in section 3.3 of chapter three and section 4.2 of chapter four, the system of impartial and independent party-appointed arbitrators is worth keeping as the default standard in three-member tribunals.

A) It is not worth getting rid of the ‘party-appointed’

7-36 Despite the ever-present associated ethical risks and the ugly situations that sometimes are seen, most of which are without any real remedy to the frustration of honest witnesses, unilateral nominations allow each party to directly manage the risk of a bad arbitral award. This is important because the parties will virtually never be

\(^1\) Notwithstanding the fact, irrelevant in this respect, that the presiding arbitrator may in some cases be allowed to issue procedural orders and even render the arbitral award alone.
able to do anything against a bad award. Unilateral nominations may be a ‘human foible’, as an eminent judge once said, but judges and non-party-appointed arbitrators are also human and can get things wrong. And when they do, there is hardly anything that aggrieved parties can do about it.

By exercising their power to make a unilateral appointment, many parties also seek to feel some reassurance that, whatever the outcome of the arbitration may be, the dispute will be settled through a fair process. What the party-appointed arbitrator thinks that a fair process requires may well not match the appointing party’s expectation, but the latter at least has the opportunity to choose someone who is believed to meet this expectation.

B) It is not worth getting rid of the ‘impartial and independent’

The standard of impartiality and independence of all arbitrators, including the party-appointed arbitrators, is the best way of ensuring that international arbitration is a system of dispute resolution that is equally fair to all.

7.3.2. ROOM FOR IMPROVEMENT OF THE SYSTEM OF ‘IMPARTIAL AND INDEPENDENT PARTY-APPOINTED ARBITRATORS’

What can be done to improve the system of impartial and independent party-appointed arbitrators, if anything? Some ideas on this are tentatively shown below. Yet, it is good to note, from the outset, that the ideal three-member tribunal is that in which all the members have been jointly chosen by the disputing parties. It is worth encouraging the parties to try to jointly choose all the members of the arbitral tribunal, as does, for example, the Norwegian Arbitration Act.

Probably most ways of improving the system of impartial and independent party-appointed arbitrators pass by increasing the trust of each party in the arbitrator appointed by the other party. This may be achieved by several means:

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2 Norwegian Arbitration Act 2004, section 13, second para.: “The parties shall as far as possible appoint the arbitrators jointly”.

3 Only those I consider worth taking are addressed. For instance, the rule of not informing party-appointed arbitrators of which party made the unilateral appointment, praised by some practitioners, is
A) Removal of ambiguities as to their role

On the basis of the considerations included in sections 5.2 and 5.3 of chapter five, and following the conclusion set forth in paragraph 7-33 above, probably the best way to improve the system of impartial and independent party-appointed arbitrators is to remove ambiguities as to the role of these arbitrators by rejecting both the presumption of any acceptable special role of party-appointed arbitrators and the presumption of any acceptable unilateral verbal communications between them and their respective appointors.

B) More transparency with full disclosure of repeat appointments

On the basis of the considerations included in section 5.4.2 of chapter 5, party-appointed arbitrators should disclose all repeat appointments at the outset of the arbitration. The IBA Guidelines’ decision to set quantitative limits on the duty of disclosure of repeat appointments is not a good solution. It would be preferable to have the repeat appointments included in the Orange List without setting any quantitative limits.

C) Better arbitral education or training of party-appointed arbitrators

According to the empirical study of the ICC practice presented in chapter 6, misconduct (excluding failure to disclose) is the ground most frequently invoked in challenges, virtually always along with an allegation of bias, and yet not a single challenge totally or partially based on misconduct was upheld throughout the entire period of study (eighteen years). This conclusion affects all types of arbitrators, not only party-appointed ones. It may be attempted to explain this 0% acceptance rate by considering that many challenges based on misconduct are abusive and that, in any case, it is very difficult for decision-makers to determine actual misconduct, except

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4 Challenges totally or partially based on misconduct (excluding failure to disclose) represent 47% of challenges against party-nominated arbitrators, 49.1% of challenges against presiding arbitrators and 42% of challenges against sole arbitrators. See chapter 6, section 6.3.1, obs. to Fig. 5.

5 Not a single challenge totally or partially based on misconduct (excluding failure to disclose) was accepted by the ICC Court in the period 1992-2009. See chapter 6, section 6.3.2, obs. to Fig. 10. It may be noted, in contrast, that failure to disclose was alleged by the challenging party in almost half of the challenges (48.6%) accepted by the ICC Court during that period (ibid., obs. to Fig. 11).
in extremely rare cases. Nevertheless, a 0% acceptance rate in all challenges totally or partially based on misconduct over eighteen years (240 challenges) deserves some reflection. Zero is a peculiar figure. Perhaps we should draw the conclusion that the system cannot effectively deal with problems of misconduct, as it seems to be virtually impossible for a party to make a successful case of justifiable doubts as to the impartiality and independence of an arbitrator on the grounds of misconduct of the arbitrator in the reference 6.

What can be done? Ideally, to make biased misconduct more objective, possibly with a set of rules of conduct, in order to facilitate the ability of decision-makers to detect and sanction such misconduct7. It would be desirable for the behaviour of the arbitrator to not so often remain in an immeasurable dimension. Yet, to solve the problems of biased misconduct with codes of conduct may not be the right thing to do in practice8. The worst biased misconducts, those that are not inadvertent mistakes by the arbitrator, are usually the less visible ones. As Nariman notes, “[t]he real trouble about telling Judges (and for the matter, arbitrators) how to behave is that the reputable ones do not require the advice, the disreputable ones do not care to read it”9. In addition, rules of conduct, inasmuch as they should be drafted in terms that would admit different interpretations, could be used by some to disrupt the arbitration and thereby end up backfiring against their own purpose.


8 See, e.g.: V. V. Veeder, “Is there any need for a code of ethics for international commercial arbitrators?”, in Les arbitres internationaux, José Rosell (coord.), Centre Français de Droit Comparé, Société de Législation Comparé, 2005, p. 192, expressing his opposition to enlarging the arbitration rules with an extensive code of ethical conduct to be enforced by arbitrators and arbitral institutions; Stephen Bond, “The Experience of the International Chamber of Commerce”, in The Arbitral Process and the Independence of Arbitrators, ICC Publ. No. 472, 1991, p. 15, warning against mandatory and binding codes of ethics and, more generally, against “radical” measures to try to ensure the complete independence of every arbitrator.

A more modest way to reduce complaints of biased misconduct against arbitrators, and perhaps more particularly those against party-appointed arbitrators, is to improve their arbitral education or training. This may be easier to achieve in institutional arbitration; by means, for example, of an informal invitation to arbitrators to contact the secretariat of the institution with any doubts relating to their expected conduct in the reference. A brief guide to the elementary do’s and don’ts in arbitral proceedings, drafted after the consultation of different jurisdictions and legal cultures, would also be of assistance.

A particularly delicate situation arises when the biased misconduct of a party-appointed arbitrator is only visible to the other members of the tribunal. Arbitration rules and laws normally do not provide for a challenge of arbitrators by other arbitrators, nor do they address the issue of misconduct in camera in any other way. It is unclear what an arbitrator is supposed to do if he believes that another member of the arbitral tribunal is not acting impartially. The best course of action is probably for the arbitrator to informally raise the issue within the tribunal. Diplomacy skills may make it easier, especially if he does not exclude the possibility that the perception of misconduct may be due to a misunderstanding. Some arbitrators rather opt to compensate with bias towards the other party, a peculiar form of legitimate defence or exceptio non adimpleti contractus. However, this course of action is generally rejected. The arbitrator should stick to his obligation to act impartially on the grounds that a biased arbitrator cancels himself out in the eyes of the presiding arbitrator. The most delicate situation is obviously that in which one of the party-

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appointed arbitrators believes that the other two arbitrators are not acting impartially. In these circumstances, it is probably still worth raising the issue within the tribunal. If not resolved by the arbitrators to the satisfaction of them all, each will have to think twice about what to do. In institutional arbitration, an informal consultation to the institution would probably be in order.

D) Other possible ways of improvement

Other possible ways of improving the system may be to let each party have a limited say in the unilateral appointment by the other party and, when appropriate, to expressly agree on a special role of the party-appointed arbitrators.

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14 Some authors have also suggested that in the extreme case of the presiding arbitrator showing deliberate and actual bias towards one of the parties, “a proper course for the arbitrator appointed by the other party in the hope that the dependance or partiality of the arbitrator will turn him into a ‘lame duck’, without influence in the presiding arbitrator; Marc Blessing,’s comments in The Arbitral Process and the Independence of Arbitrators, ICC Publ. No. 472, 1991, p. 131, noting that one party may often decide not to challenge the arbitrator appointed by the other party in the hope that the dependance or partiality of the arbitrator will turn him into a ‘lame duck’, without influence in the presiding arbitrator; Martin Hunter and Jan Paulsson, “A Code of Ethics for Arbitrators in International Commercial Arbitration?”, Int. Bus. Law., Vol. 13, Issue 4, April 1985, pp. 158-159).

I agree that this may be a reasonable course of action, but not only by the arbitrator nominated by the party against whom the bias is directed, but also by the arbitrator nominated by the party in favour of whom the bias runs.


Before one can exercise remedies against the “obstructive arbitrator” he must first of all be identified. We have observed that there is an extreme reluctance on behalf of most chairmen and co-arbitrators to identify, put on warning and if necessary seek the assistance of the International Chamber of Commerce (ICC) Court in regard to such persons.

In many instances a strong chairman can no doubt handle the situation himself. However, it is the wise chairman who also alerts the ICC Secretariat to the situation so that the two can either work together to resolve the difficulty or at least the ICC can monitor the situation so as to take action quickly should it go beyond the abilities of the chairman to handle.
D.1. To let the non-appointing party have some limited say in the appointment

Another way of increasing the trust of each party in the arbitrator appointed by the other party may be to let the non-appointing party have some limited say in the appointment. This may be done, for instance, by each party being able to choose which individual will be appointed as an arbitrator amongst several candidates unilaterally chosen by the other party. Guatemala and Honduras reached such an agreement in a treaty in 1845: “[E]ach of the states shall propose three persons and of these the other shall select one”\textsuperscript{16}. A system like this appears to be more efficient than one in which each party is allowed to veto the candidates presented by the other party. Mechanisms of veto may give rise to gamesmanship and, ultimately, hamper the arbitral process\textsuperscript{17}.

D.2. To expressly agree on a special role

For some parties, those who believe that party-appointed arbitrators should not have the same role as the presiding arbitrator, the best way to improve the system may be to expressly agree on a special role of the party-appointed arbitrators. Such parties have several available options:

- They can fully depart from the system of impartial and independent party-appointed arbitrators and agree instead to have biased party-appointed arbitrators. This is generally unadvisable, firstly because of the uncertainty about what biased party-appointed arbitrators may do. If the parties in a particular case want biased party-appointed arbitrators on the arbitral tribunal, they should take utmost care to make it clear what those arbitrators can do, drawing the line that separates fair and unfair partiality.

- They can agree to have impartial and independent party-appointed arbitrators that may still do something for the appointing party that is related to the arbitration


\textsuperscript{17} Blackaby, Partasides, Redfern and Hunter, Redfern and Hunter on International Arbitration, para 4.34.
and that the presiding arbitrator cannot do (e.g., to hold unilateral pre-appointment interviews, to have some type of unilateral communications with the appointing party or to pay particular attention to the appointing party’s case).

They can partly depart from the system of impartial and independent party-appointed arbitrators by agreeing to have party-appointed arbitrators who have the two-tier role of first representing their respective appointing parties with the sole purpose of exploring with each other a possible settlement and secondly, should conciliation fail, deciding the case impartially. These party-appointed arbitrators are representatives of the appointing parties for conciliation purposes and eventually (if necessary) impartial adjudicators.

Party-appointed arbitrators who are representatives of the appointing parties for conciliation purposes and eventually, if conciliation fails, impartial adjudicators, may probably only be advisable if the moment in the arbitral proceedings at which they have to change their role is openly and neatly determined.

The idea that arbitrators can perform conciliatory functions if the parties expressly authorise them to do so is more and more generally accepted nowadays. However, in its modern formulation, this idea is not normally articulated so as to also include the possibility of conciliatory functions being performed by each party-appointed arbitrator getting into the shoes of his respective appointing party. It is likely that the wish of the international arbitration community to end improper behaviour by party-appointed arbitrators has held back, for good reason, any interest in exploring

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19 One of the several suggested models to combine conciliation and arbitration consists of party-appointed arbitrators forming a ‘settlement team’, but without each of them being clearly expected to assume any representation of the appointing party for conciliation purposes. Abramson, footnote 18 above, pp. 12-13.
the potential conciliatory functions of party-appointed arbitrators consisting of them representing howsoever their respective appointing parties.

Yet, the potential benefits of party-appointed arbitrators that are representatives of the appointing parties for conciliation purposes during a limited period in the arbitral proceedings and eventually, if conciliation fails, impartial adjudicators, should not be overlooked, particularly at a time when arbitration is said to have lost some of its appeal. These benefits include those that are typical of conciliation (a faster, cheaper and perhaps substantially better end to the dispute) but also others. Firstly, the likelihood of a successful conciliation may be increased. A settlement agreement needs by hypothesis two previously opposed points of view. When the parties wish the arbitrators to perform a conciliatory role before an adjudicatory one, the assignment to each party-appointed arbitrator of the conciliatory role of exploring zones of possible agreement from the appointing party’s perspective can make conciliation more effective than if managed by the three members of the tribunal, each assuming an equal conciliatory role. Two serious party-appointed arbitrators meeting each other in order to confront two opposed positions for conciliation purposes may bring added value to the arbitration.

Secondly, these representatives for conciliation purposes and later impartial party-appointed arbitrators may contribute to the relief of ethical tension in the arbitration. A conciliatory role of party-appointed arbitrators whereby each of them represents his appointing party is consistent with the presumption—which more often than not proves correct—that each party-appointed arbitrator will find more strengths in the appointing party’s case than the other party-appointed arbitrator. By each party-appointed arbitrator assuming the role of exploring the limits of what an acceptable solution for the appointing party may be, the parties could achieve a more accurate match between what they expect from party-appointed arbitrators and what they


21 Pierre Bellet, “Des arbitres neutres et non neutres”, in Études de droit international en l’honneur de Pierre Lalive, Christian Dominici, Robert Patry and Claude Reymond (eds.), Helbing & Lichtenhahn, 1993, p. 408, suggesting that biased party-appointed arbitrators may particularly serve the needs of disputing parties who wish to submit their dispute to arbitration but also wish that the arbitration may end with a settlement.
ultimately get. Party-appointed arbitrators would not be worried about their bias towards the appointing party when exploring zones of possible agreement with each other and, thanks to that, they would probably feel relieved from any sense of owing anything to the appointing party after conciliation attempts had failed. And the presiding arbitrator, whether or not a witness of the party-appointed arbitrators’ conciliatory efforts, could perhaps be more confident that they would come and sit with him, if conciliation fails, to simply perform an adjudicatory role according to the rules applicable to the merits of the dispute. History shows that we have moved from systems in which the parties expected party-appointed arbitrators to firstly try to persuade each other to the present system, in which many parties just expect the arbitrator they unilaterally appoint to persuade the presiding arbitrator. One may have opposed feelings about this evolution and wonder whether a time in the arbitral proceedings for party-appointed arbitrators to confront their views with each other, an arbitral feature as old as nowadays neglected, may perhaps help to raise the sense of ethics in international arbitration.

The critical question with these party-appointed arbitrators is, of course, to what extent they may perform the second role (to participate in the decision-making process acting impartially) in a satisfactory fashion, despite their willingness or self-awareness of their capability to act without bias having possibly been undermined by the performance of their first conciliatory role. Any person who assumes the role of settlement facilitator and later that of adjudicator faces inevitable risks, and these risks invariably increase if the first of those two roles encompasses the representation of one of the parties. It would be naive to presume that most party-appointed arbitrators could perform the two-tier biased-unbiased role satisfactorily in practice. The English system of arbitrator-advocates, for what it is worth as an example of pragmatism, is based on the quite opposite idea that party-appointed arbitrators who

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22 A study on the factors behind the choice of co-arbitrators shows that the seventh most important factor (acknowledged by 47% of the respondents) was the likelihood that the co-arbitrator will be able to influence the presiding arbitrator. “2010 International Arbitration Survey: Choices in International Arbitration”, School of International Arbitration, Queen Mary, University of London, p. 26.

try and fail to reach an agreement had better change their role to that of advocates of
the parties. The parties will have to decide, in each particular case, what balance of benefits and
risks they wish to have.

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APPENDIX TO CHAPTER 6

Abbreviations:  APC actual percentage of challenges  
CB cultural bias  
CB+LQ cultural bias and lack of qualifications  
CNA claimant-nominated arbitrator  
F cases in which failure to disclose was invoked  
Later challenges filed significantly later than the Terms of Reference  
LP links with persons  
LP+PSM links with persons and prejudgment of the subject-matter  
LQ lack of qualifications  
M misconduct  
M+LP misconduct and links with persons  
M+PSM misconduct and prejudgment of the subject-matter  
N cases in which failure to disclose was not invoked  
NNCA neutrally-nominated co-arbitrator  
PNA party-nominated arbitrator  
PRC proportional rate of challenge  
Pres presiding arbitrator  
Pres* presiding arbitrator in a tribunal with party-nominated members  
PSM prejudgment of the subject-matter of the dispute  
RNA respondent-nominated arbitrator  
SA sole arbitrator  
ToR challenges filed before or shortly after the Terms of Reference

Figure 1. Challenges of arbitrators 1992-2009

<table>
<thead>
<tr>
<th></th>
<th>Challenges 1992-2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>PNA</td>
<td>245</td>
</tr>
<tr>
<td>Pres</td>
<td>171</td>
</tr>
<tr>
<td>SA</td>
<td>93</td>
</tr>
<tr>
<td>NNCA</td>
<td>9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>518</strong></td>
</tr>
</tbody>
</table>

257
Figure 2. PRC v. APC in tribunals with party-nominated arbitrators

<table>
<thead>
<tr>
<th></th>
<th>PRC</th>
<th>APC</th>
</tr>
</thead>
<tbody>
<tr>
<td>PNA</td>
<td>66.6%</td>
<td>59.2%</td>
</tr>
<tr>
<td>Pres*</td>
<td>33.3%</td>
<td>40.8%</td>
</tr>
</tbody>
</table>

Figure 3. Who challenges who (*)

<table>
<thead>
<tr>
<th>Challenging party</th>
<th>CNA cases</th>
<th>CNA proportion</th>
<th>RNA cases</th>
<th>RNA proportion</th>
<th>Pres cases</th>
<th>Pres proportion</th>
<th>SA cases</th>
<th>SA proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimant</td>
<td>17</td>
<td>14.5%</td>
<td>85</td>
<td>66.4%</td>
<td>72</td>
<td>42.1%</td>
<td>31</td>
<td>33.3%</td>
</tr>
<tr>
<td>Respondent</td>
<td>100</td>
<td>85.5%</td>
<td>42</td>
<td>32.8%</td>
<td>98</td>
<td>57.3%</td>
<td>61</td>
<td>65.6%</td>
</tr>
<tr>
<td>All</td>
<td>117</td>
<td>100%</td>
<td>128</td>
<td>100%</td>
<td>171</td>
<td>100%</td>
<td>93</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) Only challenges of claimant-nominated arbitrators (‘CNA’), respondent-nominated arbitrators (‘RNA’), presiding arbitrators (‘Pres’) and sole arbitrators (‘SA’) are considered. Challenges of neutral-nominated co-arbitrators (9) are not considered.

Figure 4. Who challenges who (excluding challenges against the entire arbitral tribunal) (*) (**) 

<table>
<thead>
<tr>
<th>Challenging party</th>
<th>CNA cases</th>
<th>CNA proportion</th>
<th>RNA cases</th>
<th>RNA proportion</th>
<th>Pres cases</th>
<th>Pres proportion</th>
<th>SA cases</th>
<th>SA proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimant</td>
<td>5</td>
<td>6.9%</td>
<td>73</td>
<td>88.0%</td>
<td>60</td>
<td>48.4%</td>
<td>31</td>
<td>33.3%</td>
</tr>
<tr>
<td>Respondent</td>
<td>67</td>
<td>93.1%</td>
<td>9</td>
<td>10.8%</td>
<td>63</td>
<td>50.8%</td>
<td>61</td>
<td>65.6%</td>
</tr>
<tr>
<td>All</td>
<td>72</td>
<td>100%</td>
<td>83</td>
<td>100%</td>
<td>124</td>
<td>100%</td>
<td>93</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) Only challenges of claimant-nominated arbitrators (‘CNA’), respondent-nominated arbitrators (‘RNA’), presiding arbitrators (‘Pres’) and sole arbitrators (‘SA’) are considered. Challenges of neutral-nominated co-arbitrators (9) are not considered.

(**) The three members of the arbitral tribunal were jointly challenged 47 times. Out of them, 45 times the arbitral tribunal had party-nominated members (45×3=135 challenges) while 2 times the co-arbitrators had not been unilaterally nominated by the parties (2×3=6 challenges). This is the reason why the total of cases in categories ‘CNA’ and ‘RNA’ in Fig. 4 (72 and 83 respectively) is in each case 45 below the total of cases in categories ‘CNA’ and ‘RNA’ in Fig. 3 (117 and 128 respectively) while the total of cases in category ‘Pres’ in Fig. 4 (124) is 47 (45+2) below the total of cases in category ‘Pres’ in Fig. 3 (171).
**Figure 5. Grounds invoked by the challenging party (*)**

<table>
<thead>
<tr>
<th></th>
<th>Total cases</th>
<th>proportion</th>
<th>PNA cases</th>
<th>proportion</th>
<th>Pres cases</th>
<th>proportion</th>
<th>SA cases</th>
<th>proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>202</td>
<td>39.0%</td>
<td>96</td>
<td>39.2%</td>
<td>71</td>
<td>41.5%</td>
<td>33</td>
<td>35.5%</td>
</tr>
<tr>
<td>M+LP</td>
<td>19</td>
<td>3.7%</td>
<td>11</td>
<td>4.5%</td>
<td>7</td>
<td>4.1%</td>
<td>1</td>
<td>1.1%</td>
</tr>
<tr>
<td>M+PSM</td>
<td>19</td>
<td>3.7%</td>
<td>8</td>
<td>3.3%</td>
<td>6</td>
<td>3.5%</td>
<td>5</td>
<td>5.4%</td>
</tr>
<tr>
<td>LP</td>
<td>140</td>
<td>27.0%</td>
<td>79</td>
<td>32.2%</td>
<td>41</td>
<td>24.0%</td>
<td>18</td>
<td>19.4%</td>
</tr>
<tr>
<td>LP+PSM</td>
<td>17</td>
<td>3.3%</td>
<td>14</td>
<td>5.7%</td>
<td>2</td>
<td>1.2%</td>
<td>1</td>
<td>1.1%</td>
</tr>
<tr>
<td>PSM</td>
<td>32</td>
<td>6.2%</td>
<td>14</td>
<td>5.7%</td>
<td>12</td>
<td>7.0%</td>
<td>3</td>
<td>3.2%</td>
</tr>
<tr>
<td>CB</td>
<td>25</td>
<td>4.8%</td>
<td>2</td>
<td>0.8%</td>
<td>12</td>
<td>7.0%</td>
<td>11</td>
<td>11.8%</td>
</tr>
<tr>
<td>CB+LQ</td>
<td>6</td>
<td>1.2%</td>
<td>0</td>
<td>0.0%</td>
<td>4</td>
<td>2.3%</td>
<td>2</td>
<td>2.2%</td>
</tr>
<tr>
<td>LQ</td>
<td>18</td>
<td>3.5%</td>
<td>4</td>
<td>1.6%</td>
<td>3</td>
<td>1.8%</td>
<td>10</td>
<td>10.8%</td>
</tr>
<tr>
<td>Others</td>
<td>40</td>
<td>7.7%</td>
<td>17</td>
<td>6.9%</td>
<td>13</td>
<td>7.6%</td>
<td>9</td>
<td>9.7%</td>
</tr>
<tr>
<td></td>
<td>518</td>
<td>100%</td>
<td>245</td>
<td>100%</td>
<td>171</td>
<td>100%</td>
<td>93</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) ‘Total’ includes 9 challenges of neutral-nominated co-arbitrators (2 M, 2 LP, 3 PSM, 1 LQ and 1 Others).

**Figure 6. Challenges in which failure to disclose is and is not alleged (*)**

<table>
<thead>
<tr>
<th></th>
<th>Total cases</th>
<th>proportion</th>
<th>PNA cases</th>
<th>proportion</th>
<th>Pres cases</th>
<th>proportion</th>
<th>SA cases</th>
<th>proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alleged</td>
<td>71</td>
<td>13.7%</td>
<td>42</td>
<td>17.1%</td>
<td>20</td>
<td>11.7%</td>
<td>7</td>
<td>7.5%</td>
</tr>
<tr>
<td>Not alleged</td>
<td>447</td>
<td>86.3%</td>
<td>203</td>
<td>82.9%</td>
<td>151</td>
<td>88.3%</td>
<td>86</td>
<td>92.5%</td>
</tr>
<tr>
<td></td>
<td>518</td>
<td>100%</td>
<td>245</td>
<td>100%</td>
<td>171</td>
<td>100%</td>
<td>93</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) ‘Total’ includes 9 challenges of neutral-nominated co-arbitrators (2 Alleged, 7 Not alleged).
Figure 7. Grounds with which failure to disclose is invoked (*)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>cases</td>
<td>proportion</td>
<td>cases</td>
<td>proportion</td>
</tr>
<tr>
<td>M</td>
<td>2</td>
<td>2.8%</td>
<td>2</td>
<td>4.8%</td>
</tr>
<tr>
<td>M+LP</td>
<td>8</td>
<td>11.3%</td>
<td>4</td>
<td>9.5%</td>
</tr>
<tr>
<td>M+PSM</td>
<td>0</td>
<td>0.0%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>LP</td>
<td>42</td>
<td>59.2%</td>
<td>27</td>
<td>64.3%</td>
</tr>
<tr>
<td>LP+PSM</td>
<td>6</td>
<td>8.5%</td>
<td>5</td>
<td>11.9%</td>
</tr>
<tr>
<td>PSM</td>
<td>3</td>
<td>4.2%</td>
<td>1</td>
<td>2.4%</td>
</tr>
<tr>
<td>CB</td>
<td>4</td>
<td>5.6%</td>
<td>1</td>
<td>2.4%</td>
</tr>
<tr>
<td>CB+LQ</td>
<td>0</td>
<td>0.0%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>LQ</td>
<td>1</td>
<td>1.4%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Others</td>
<td>5</td>
<td>7.0%</td>
<td>2</td>
<td>4.8%</td>
</tr>
<tr>
<td></td>
<td>71</td>
<td>100%</td>
<td>42</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) ’Total’ includes 2 challenges of neutral-nominated co-arbitrators (1 LP and 1 PSM).

Figure 8. Time of the challenge (*)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>cases</td>
<td>proportion</td>
<td>cases</td>
<td>proportion</td>
</tr>
<tr>
<td>ToR</td>
<td>206</td>
<td>39.8%</td>
<td>91</td>
<td>37.1%</td>
</tr>
<tr>
<td>Later</td>
<td>312</td>
<td>60.2%</td>
<td>154</td>
<td>62.9%</td>
</tr>
<tr>
<td></td>
<td>518</td>
<td>100%</td>
<td>245</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) ’Total’ includes 9 challenges of neutral-nominated co-arbitrators (7 ToR and 2 Later)
Figure 9. Challenge outcome (*) (**) 

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>cases</td>
<td>proportion</td>
<td>cases</td>
<td>proportion</td>
</tr>
<tr>
<td>Resigned</td>
<td>36</td>
<td>6.9%</td>
<td>11</td>
<td>4.5%</td>
</tr>
<tr>
<td>Replaced</td>
<td>5</td>
<td>1.0%</td>
<td>4</td>
<td>1.6%</td>
</tr>
<tr>
<td>Accepted</td>
<td>37</td>
<td>7.1%</td>
<td>23</td>
<td>9.4%</td>
</tr>
<tr>
<td>Rejected</td>
<td>440</td>
<td>84.9%</td>
<td>207</td>
<td>84.5%</td>
</tr>
</tbody>
</table>

(*) 'Total' includes 9 challenges of neutral-nominated co-arbitrators (2 Accepted and 7 Rejected).

(**) 'Resigned': resignation of the arbitrator accepted by the Court - the Court does not examine the challenge. 'Replaced': Court decision to replace the arbitrator - the Court does not examine the challenge. 'Accepted': challenge accepted by the Court. 'Rejected': challenge rejected by the Court.

Figure 10. Accepted challenges grouped according to the grounds invoked by the challenging party (not differentiating failure to disclose) (*) 

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>LP</td>
<td>30</td>
<td>21</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>LP+PSM</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>PSM</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CB</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LQ</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>37</td>
<td>23</td>
<td>9</td>
<td>3</td>
</tr>
</tbody>
</table>

(*) 'Total' includes 2 challenges of neutral-nominated co-arbitrators (1 LP and 1 PSM).
Figure 11. Accepted challenges grouped according to the grounds invoked by the challenging party (differentiating failure to disclose) (*)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>F</td>
<td>N</td>
<td>F</td>
</tr>
<tr>
<td>LP</td>
<td>14</td>
<td>16</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>LP+PSM</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>PSM</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CB</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>LQ</td>
<td>1</td>
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</tr>
<tr>
<td></td>
<td>19</td>
<td>18</td>
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<td>12</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

(*) 'Total' includes 2 challenges of neutral-nominated co-arbitrators (1 LP/N and 1 PSM/F).

Figure 12. Accepted challenges grouped according to the grounds invoked by the challenging party (differentiating failure to disclose) and the time of the challenge (*)

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>PNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>F</td>
<td>N</td>
<td>F</td>
</tr>
<tr>
<td></td>
<td>ToR</td>
<td>Later</td>
<td>ToR</td>
<td>Later</td>
</tr>
<tr>
<td></td>
<td>ToR</td>
<td>Later</td>
<td>ToR</td>
<td>Later</td>
</tr>
<tr>
<td></td>
<td>ToR</td>
<td>Later</td>
<td>ToR</td>
<td>Later</td>
</tr>
<tr>
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<td>Later</td>
<td>ToR</td>
<td>Later</td>
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<td>1</td>
<td></td>
</tr>
<tr>
<td>LQ</td>
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<td>9</td>
<td>3</td>
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</table>

(*) 'Total' includes 2 challenges of neutral-nominated co-arbitrators (1 LP/N/ToR and 1 PSM/F/ToR).

Figure 13. Challenges of arbitrators, 1992-2000 and 2001-2009

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>cases</td>
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<td>PNA</td>
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<td>51.9%</td>
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<tr>
<td>Pres</td>
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<td>SA</td>
<td>35</td>
<td>19.1%</td>
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<tr>
<td>NNCA</td>
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<td>0.0%</td>
</tr>
<tr>
<td></td>
<td>183</td>
<td>100%</td>
</tr>
</tbody>
</table>
Figure 14. PRC v. APC in tribunals with party-nominated arbitrators, 1992-2000 and 2001-2009

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>PNA</td>
<td>66.6%</td>
<td>64.2%</td>
</tr>
<tr>
<td>Pres</td>
<td>33.3%</td>
<td>35.8%</td>
</tr>
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</table>

Figure 15. Who challenges who, 1992-2000 and 2001-2009 (*)

<table>
<thead>
<tr>
<th>Challenging party</th>
<th>CNA</th>
<th>RNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimant</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
<tr>
<td>Respondent</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
<tr>
<td>All</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
</tbody>
</table>

(*) Only challenges of claimant-nominated arbitrators ('CNA'), respondent-nominated arbitrators ('RNA'), presiding arbitrators ('Pres') and sole arbitrators ('SA') are considered. Challenges of neutral-nominated co-arbitrators (9) are not included.

Figure 16. Who challenges who (excluding challenges against the entire arbitral tribunal), 1992-2000 and 2001-2009 (*) (**)  

<table>
<thead>
<tr>
<th>Challenging party</th>
<th>CNA</th>
<th>RNA</th>
<th>Pres</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimant</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
<tr>
<td>Respondent</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
<tr>
<td>All</td>
<td>66.6%</td>
<td>89.5%</td>
<td>66.6%</td>
<td>89.5%</td>
</tr>
</tbody>
</table>

(*) Only challenges of claimant-nominated arbitrators ('CNA'), respondent-nominated arbitrators ('RNA'), presiding arbitrators ('Pres') and sole arbitrators ('SA') are considered. Challenges of neutral-nominated co-arbitrators (9) are not considered.

(**) The three members of the arbitral tribunal were jointly challenged 16 times in the period 1992-2000 (16×3=48 challenges) and 31 times in the period 2001-2009 (31×3=93 challenges). Out of these 31 times (2001-2009), 29 times the arbitral tribunal had party-nominated members (29×3=87 challenges) while 2 times the co-arbitrators had not been unilaterally nominated by the parties (2×3=6 challenges). This is the
reason why the total of cases in categories ‘CNA’, ‘RNA’ and ‘Pres’ for the period 1992-2000 in Fig. 16 (29, 34 and 37, respectively) is in each case 16 below the total of cases in categories ‘CNA’, ‘RNA’ and ‘Pres’ for the period 1992-2000 in Fig. 15 (45, 50 and 53, respectively). It is also the reason why the total of cases in categories ‘CNA’ and ‘RNA’ for the period 2001-2009 in Fig. 16 (43 and 49 respectively) is in each case 19 below the total of cases in categories ‘CNA’ and ‘RNA’ for the period 2001-2009 in Fig. 15 (72 and 78 respectively) while the total of cases in category ‘Pres’ for the period 2001-2009 in Fig. 16 (87) is 31 (29+2) below the total of cases in category ‘Pres’ for the period 2001-2009 in Fig. 15 (118).

Figure 17. Grounds invoked by the challenging party, 1992-2000 and 2001-2009 (*)

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
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</tr>
<tr>
<td>M</td>
<td>39</td>
<td>143</td>
<td>33</td>
<td>63</td>
<td>18</td>
<td>53</td>
<td>8</td>
<td>25</td>
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<tr>
<td>M+LP</td>
<td>3</td>
<td>16</td>
<td>2</td>
<td>9</td>
<td>1</td>
<td>6</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>M+PSM</td>
<td>8</td>
<td>11</td>
<td>4</td>
<td>4</td>
<td>2</td>
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<td>2</td>
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<tr>
<td>LP</td>
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<td>34</td>
<td>45</td>
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<td>28</td>
<td>8</td>
<td>10</td>
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<tr>
<td>LP+PSM</td>
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<td>7</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
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<tr>
<td>PSM</td>
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<td>21</td>
<td>6</td>
<td>8</td>
<td>4</td>
<td>8</td>
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<tr>
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<td>3</td>
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<td>Others</td>
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<td>335</td>
<td>95</td>
<td>150</td>
<td>100</td>
<td>118</td>
<td>35</td>
<td>58</td>
</tr>
</tbody>
</table>

(*) ‘Total’ includes 9 challenges of neutral-nominated co-arbitrators in 2001-2009 (2 M, 2 LP, 3 PSM, 1 LQ and 1 Others).

Figure 18. Challenges in which failure to disclose is and is not alleged, 1992-2000 and 2001-2009 (*)

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<tr>
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</tr>
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<tbody>
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<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
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<tr>
<td>Alloge</td>
<td>22</td>
<td>12.0%</td>
<td>49</td>
<td>14.6%</td>
<td>13</td>
<td>13.7%</td>
<td>29</td>
<td>19.3%</td>
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<tr>
<td>Not a</td>
<td>161</td>
<td>88.0%</td>
<td>286</td>
<td>85.4%</td>
<td>82</td>
<td>86.3%</td>
<td>121</td>
<td>80.7%</td>
</tr>
<tr>
<td></td>
<td>183</td>
<td>100%</td>
<td>335</td>
<td>100%</td>
<td>95</td>
<td>100%</td>
<td>150</td>
<td>100%</td>
</tr>
</tbody>
</table>

(*) ‘Total’ includes 9 challenges of neutral-nominated co-arbitrators in 2001-2009 (2 Alleged, 7 Not alleged).
Figure 19. Grounds with which failure to disclose is invoked, 1992-2000 and 2001-2009 (*)

<table>
<thead>
<tr>
<th></th>
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<td>4.1%</td>
</tr>
<tr>
<td>M+LP</td>
<td>1</td>
<td>4.5%</td>
<td>7</td>
<td>14.3%</td>
</tr>
<tr>
<td>M+PSM</td>
<td>0</td>
<td>0.0%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>LP</td>
<td>16</td>
<td>72.7%</td>
<td>26</td>
<td>53.1%</td>
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<tr>
<td>LP+PSM</td>
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<td>6</td>
<td>12.2%</td>
</tr>
<tr>
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<td>4.5%</td>
<td>2</td>
<td>4.1%</td>
</tr>
<tr>
<td>CB</td>
<td>2</td>
<td>9.1%</td>
<td>2</td>
<td>4.1%</td>
</tr>
<tr>
<td>CB+LQ</td>
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<td>0.0%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>LQ</td>
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<td>4.5%</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>Others</td>
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<td>4.5%</td>
<td>4</td>
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<tr>
<td></td>
<td>22</td>
<td>100%</td>
<td>49</td>
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</table>

(*) ‘Total’ includes 2 challenges of neutral-nominated co-arbitrators in 2001-2009 (1 LP and 1 PSM).

Figure 20. Time of the challenge, 1992-2000 and 2001-2009

<table>
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<td>213</td>
<td>63.6%</td>
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<tr>
<td></td>
<td>183</td>
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<td>335</td>
<td>100%</td>
</tr>
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</table>

(*) ‘Total’ includes 9 challenges of neutral-nominated co-arbitrators in 2001-2009 (7 ToR and 2 Later).
### Figure 21. Challenge outcome, 1992-2000 and 2001-2009 (*) (**)  

<table>
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<tr>
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<tbody>
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<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
<td>c. prop.</td>
</tr>
<tr>
<td>Resigned</td>
<td>15 8.2%</td>
<td>21 6.3%</td>
<td>6 6.3%</td>
<td>5 3.3%</td>
<td>3 5.7%</td>
<td>11 9.3%</td>
<td>6 17.1%</td>
<td>5 8.6%</td>
</tr>
<tr>
<td>Replaced</td>
<td>2 1.1%</td>
<td>3 0.9%</td>
<td>1 1.1%</td>
<td>3 2.0%</td>
<td>1 1.9%</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
</tr>
<tr>
<td>Accepted</td>
<td>17 9.3%</td>
<td>20 6.0%</td>
<td>11 11.6%</td>
<td>12 8.0%</td>
<td>6 11.3%</td>
<td>3 2.5%</td>
<td>0 0.0%</td>
<td>3 5.2%</td>
</tr>
<tr>
<td>Rejected</td>
<td>149 81.4%</td>
<td>291 86.9%</td>
<td>77 81.1%</td>
<td>130 86.7%</td>
<td>43 81.1%</td>
<td>104 88.1%</td>
<td>29 82.9%</td>
<td>50 86.2%</td>
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<tr>
<td></td>
<td>183 100%</td>
<td>335 100%</td>
<td>95 100%</td>
<td>150 100%</td>
<td>53 100%</td>
<td>118 100%</td>
<td>35 100%</td>
<td>58 100%</td>
</tr>
</tbody>
</table>

(*) 'Total' includes 9 challenges of neutral-nominated co-arbitrators in 2001-2009 (2 Accepted, 7 Rejected).

(**) 'Resigned': resignation of the arbitrator accepted by the Court – the Court does not examine the challenge. 'Replaced': Court decision to replace the arbitrator – the Court does not examine the challenge. 'Accepted': challenge accepted by the Court. 'Rejected': challenge rejected by the Court.
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>A.F.D.I.</td>
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</tr>
<tr>
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<td>Arbitration (CIA Journal)</td>
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<td>Arbitration International</td>
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<td>Arbitration Journal</td>
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<tr>
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<td>ATF</td>
<td>Decision of the Swiss Federal Tribunal</td>
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<td>Bull.</td>
<td>Bulletin</td>
</tr>
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<td>Court of Appeal</td>
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</tr>
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<td>United Nations Economic Commission for Asia and the Far East</td>
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<td>Acronym</td>
<td>Full Name</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
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<td>United Nations Economic Commission for Europe</td>
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<td>ECHR</td>
<td>European Court on Human Rights</td>
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<td>Loyola of Los Angeles International and Comparative Law Review</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>NAI</td>
<td>Netherlands Arbitration Institute</td>
</tr>
<tr>
<td>Nw. J. Int.</td>
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</tr>
<tr>
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