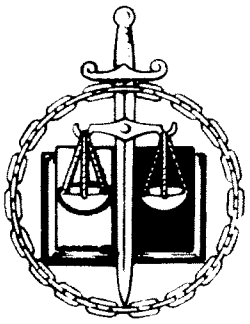

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Impartiality of the Party-Appointed Arbitrator

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I. INTRODUCTION

IN an international commercial arbitration ostensibly to be heard before an independent and impartial three member tribunal it is often the case that one of the parties perceives that his nominee is acting impartially but that the other party-appointed arbitrator is not. Craig, Park and Paulsson in their book on ICC arbitration suggest that such an imbalance would threaten the fundamental equilibrium of the proceedings.[1]

The role of the party-appointed arbitrator in international arbitration is a much debated issue. Wetter notes that the dichotomy between those systems which require a judicial standard of conduct and those which permit a party-appointed arbitrator not to respect such moral standards goes to the heart of the international arbitral process and causes practical problems in most proceedings.[2] The degree of bias might range from a covert sympathy with the cause of the nominating party to an overt taking of instructions from, and offering of advice to, the nominating party.

Is the party-appointed arbitrator to be an advocate for the nominating party during the course of the hearings and deliberations? Does a uniform standard exist? What are the legal limits to an arbitrator's conduct? At the Iran-United States Claims Tribunal hearings it was alleged in one case that an Iranian arbitrator revealed the contents of a draft award to the Iranian party, leading to a last minute settlement, and in another case that the Iranian arbitrator solicited further evidence from the Iranian party to satisfy questions that arose during the deliberations.[3] Is such conduct permissible under the UNCITRAL Rules chosen by the parties?

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* B.Sc., LL.B., LL.M., Barrister. This article was first presented as a paper at a Joint Symposium of the ICC Institute of International Law and Practice and the School of International Arbitration held in London on 5th March 1990 on the subject of impartiality and independence of arbitrators. The author is indebted to V. V. Veeder Q.C. of London and Professor Pierre Lalive of Geneva for their critique of early drafts of this article but any opinions or errors remain those of the author.

1 Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed., (Oceana, 1990), Part III, para. 13.07, p. 240.

2 J. G. Wetter, *The International Arbitral Process* (Oceana, 1979), Vol. II, p. 364.

3 S. A. Baker and M. D. Davis, 'Establishment of an Arbitral Tribunal Under the UNCITRAL Rules,' (1989) Vol. 3, No. 1, *The International Lawyer* 112.

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The dichotomy of views held internationally on the role of the party-appointed arbitrator is well illustrated by the different approaches taken in the ABA/AAA's 'Code of Ethics for Arbitrators in Commercial Disputes' and the IBA's 'Ethics for International Arbitrators'. The former allows for predisposition toward the nominating party.[4] The latter makes no distinction between the standard to be expected of a party-appointed arbitrator and the third or presiding arbitrator.[5] This also points to a difference in attitude between American and European practice. The general custom in Europe is for the party-appointed arbitrator to remain independent and impartial and not act as a representative. The American practice is said to be much more one of having partisanship on the arbitral tribunal with only the presiding arbitrator expected to maintain strict independence and impartiality.[6]

This article will survey the major western international arbitral systems with respect to the treatment of the role of the party-appointed arbitrator on a tripartite arbitral board. This will include the legislative regimes of the United States, England, France, Switzerland and Canada, the last an example of a country whose legislation is based on the UNCITRAL Model Law. Consideration will also be given to the treatment of this issue in the rules of the major arbitral institutions including the American Arbitration Association, the London Court of International Arbitration, the International Chamber of Commerce and in the UNCITRAL Rules. The ABA/AAA Code of Ethics and the IBA's Ethics for International Arbitrators will also be compared.

Relevant headings for consideration will include provisions specifying duties of independence and impartiality, whether a distinction is made between a party-appointed arbitrator and the third arbitrator, requirements with respect to disclosure of interests and relationships, rules regarding communication with the parties and finally, the voting of the award, that is, whether a majority is required or the third arbitrator may decide unilaterally in the event of a deadlock. The comments of writers on the role of the party-appointed arbitrator will also be reviewed.

It is beyond the scope of this article to review the myriad judicial decisions in the countries to be surveyed where arbitrators have been successfully challenged or awards set aside on the basis of a lack of independence or impartiality. Examples range from current business dealings with one of the

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4 The full text of the American Bar Association – American Arbitration Association Code may be found at (1985) 10 Y. B. Comm. Arb. 131.

5 The full text of the International Bar Association Ethics may be found in D. J. Branson, 'Ethics for International Arbitrators', (1987) Vol. 3, No. 1, *Arbitration International* 72.

6 deVries, International Commercial Arbitration: A Transnational View, (1984) 1 *Journal of International Arbitration*. 7 at 13; for a comment on European practice and a suggestion that impartiality of all arbitrators is now required in all international commercial arbitrations see Craig, Park and Paulsson, *supra*, note 1 at para 12.04, p. 209; for US practice in international cases see section III(a), *infra*.

parties to *ex parte* communications during the course of the proceedings. Cases will be selectively referred to where they are helpful in understanding a particular system.[7]

It is also beyond the scope of this article to address idiosyncratic types of arbitration found in certain trades domestically, and sometimes internationally, where the parties habitually nominate a biased arbitrator to be their agent on the tribunal. Neither will any attempt be made to deal with such difficult questions as what an arbitrator should do when confronted with bias on the part of a fellow arbitrator or what role an arbitrator should play in settlement negotiations or how fee arrangements should be handled as between an arbitrator and the parties. No attempt will be made to discuss immunity of arbitrators from suit where they have misconducted themselves. These are related topics but cannot be covered in one article.

As the analysis which follows will show, there is a consistent standard in western systems that requires all members of an international arbitral tribunal to maintain the same standard of independence and impartiality unless the parties choose otherwise. There is accordingly no room for debate that a party-appointed arbitrator may be partisan in an international arbitration absent party authorization.[8]

The debate that does occur may arise out of a failure of the courts strictly and effectively to enforce the legal requirements of impartiality that exist in the western systems surveyed. Difficulty in proving a lack of impartiality should not be taken as approval of partisanship in party-appointed arbitrators.

II. DEFINITIONS

Systems such as the ICC Rules and Swiss law specify a requirement of independence but not of impartiality. The AAA Rules refer to neutral and non-neutral arbitrators. It is necessary to clarify these terms.

Section 3 of the IBA's Ethics for International Arbitrators defines the elements of bias as follows:

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[7] For an exhaustive and sometimes confusing review of American authorities detailing examples of judicial review of arbitral proceedings see Annotation, 'Setting Aside Arbitration Award on Grounds of Interest or Bias of Arbitrators', 56 ALR 2d 697–808 (1974) with supplement update to August 1989.

[8] This article is confined to western systems and it is not claimed that the requirement is universal. The author has heard it said that some Middle Eastern countries do not allow for the challenge of a party-appointed arbitrator on grounds of partiality but clear support for this could not be found. The laws of Iran and of the United Arab Emirates appear to be silent as to the disqualification and challenge of party-appointed arbitrators but the laws of Libya and Saudi Arabia provide for the challenge of arbitrators for the same reasons for which a judge may be challenged. For Iran see the report of Dr. J. Abdoh (1979) 4 Y. B. Comm. Arb. 89. For Libya see the report of Dr. A. Buzghaia (1979) 4 Y. B. Comm. Arb. 151. For Saudi Arabia see ICCA International Handbook on Commercial Arbitration, Vol. II, National Reports, Saudi Arabia, p. 15. For the UAE see S. Saleh, *Commercial Arbitration in the Arab Middle East* (Graham & Trotman, 1984), p. 347.

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

Redfern and Hunter define those two terms in a similar way:

> The concept of 'dependence' is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties whether financial or otherwise. By contrast, the concept of 'partiality' may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a much more abstract concept than independence, in that it involves primarily a state of mind which presents special difficulties of measurement. Actual bias is something fairly easily recognized, albeit difficult for a challenging party to prove. The appearance of bias usually merges into the ambit of dependence.[9]

Pierre Lalive notes that under a narrow and superficial interpretation the terms independence, impartiality and neutrality are used synonymously but that neutrality in its proper meaning refers to national neutrality where parties from different countries will require that the third arbitrator not have the same nationality as one of the parties.[10] This is not however the meaning given to neutrality in the American rules where the term is clearly used to distinguish between a party-appointed arbitrator who is predisposed to a party and the neutral third arbitrator who must remain completely impartial.

References in this article to independence will refer to the obligation to remain free of any undisclosed relationship likely to give rise to a personal interest in the result of the arbitration. Impartiality and neutrality will be used synonymously to refer to the obligation not to favour one of the parties or prejudge an issue. All of these terms connote a duty of freedom of thought to decide against the nominating party if the evidence so warrants. However, it is necessary to make some distinction between independence and impartiality because in practice it is common for parties to waive the independence 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.

III. NATIONAL LEGISLATIVE SCHEMES

Most arbitrations having their seat in a particular country will be governed by the law of that country whatever the choice of the proper law to determine the merits of the dispute. Unless the parties make a clear choice to the contrary, the *lex arbitri* will coincide with the law of the forum. It is important for the parties to be aware of the provisions of the local law with respect to

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[9] Redfern and Hunter, Law and Practice of International Commercial Arbitration, (Sweet and Maxwell, 1986), p. 170.

[10] Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration,' *Swiss Essays on International Arbitration*, (1984), p. 23 at 24.

the duty of impartiality owed by an arbitrator. The expectations of a party that both his and the other party's nominee will remain completely impartial may be frustrated by the governing law or for that matter by the institutional rules that have been adopted.

(a) The United States

Even though the ABA/AAA Code of Ethics contemplates party-appointed arbitrator predisposition, the nominee to an international arbitration with its seat in the United States must be careful not to adopt such a posture unless clearly authorized by the parties.

International arbitrations held in the US are governed by the Federal Arbitration Act (9 USCS) which preempts any conflicting State legislation.[11] That Act requires all members of an arbitral tribunal to maintain the same degree of impartiality. In the *Standard Tankers* case Larkins C.J. of the US District Court ruled as follows:

> The view that Congress contemplated when enacting the Act that the parties would appoint partisan arbitrators is rebutted by the express language of s. 10(b). That section provides that the court shall vacate an award, 'Where there was evident partiality or corruption in the arbitrators, or *either of them*.' (Emphasis added) This underlined language directs that the evident partiality test should apply to every member of the panel.[12]

If the parties either agree that there may be bias on the part of the party-appointed arbitrator or fail to make a timely objection when a ground of bias comes to their attention they will be treated as having waived their entitlement to the statutory right to an impartial tribunal.[13] The perception that American practice allows for partisanship on the arbitral tribunal, as referred to in the Introduction,[14] must be confined to domestic and not international practice.

The degree of partiality to be avoided is that of evident partiality which is more than a mere appearance of bias but less than actual bias. Evident partiality would be found where a reasonable person would have to conclude that an arbitrator was partial to one party.[15] This standard is less stringent than that appropriate for a judge because of the commercial reality that arbitrators will often have some degree of professional association with the parties or familiarity with the subject in issue.

A curious gap in the Federal Arbitration Act leaves the parties no avenue of judicial review of an appointment until after an award has been rendered unless the rules of procedure adopted provide for earlier review.[16] This is unfortunate in that a party with a valid objection to the composition of the

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11 *Southland Corp.* v. *Keating* 465 US 1 (1984).

12 *Standard Tankers (Bahamas) Co. Ltd.* v. *Motor Tank Vessel*, AKTI 438 F. Supp. 153 (1977) at 159.

13 *Island Territory of Curacao* v. *Solitron Devices, Inc.* 356 F. Supp. 1 (1973) at 12; affirmed on appeal without consideration of the impartiality issue 489 F. 2d 1313 (1973).

14 Note 6, *supra.*

15 *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Funds* 748 F. 2d 79 (1984).

16 *Florasynth, Inc.* v. *Pickholz* 750 F. 2d 171 (1984); *Hunt* v. *Mobil Oil Corp.*, 583 F. Supp. 1092 (1984).

tribunal would have to make the objection on the record and then wait until the end of the case before challenging the award itself.

The Act does not specify any duty of disclosure of interest in or connection with the dispute or the parties; but the courts have interpreted the duty of avoiding evident partiality as including a strict duty of disclosure. The Supreme Court of the United States set a very high standard in the *Commonwealth Coatings* case by requiring disclosure of any dealings which might create an impression of bias.[17] In that case the award was set aside even though the award was unanimous and there was a finding that there was no actual bias. One of the arbitrators had failed to disclose material facts regarding business connections with one of the parties. However, White J., in a judgment concurring in the majority decision, stated that remote business connections need not be disclosed and that the Act did not call for a 'complete and unexpurgated business biography'.[18] The same requirement of disclosure would extend to social connections with the parties, their counsel and perhaps witnesses.[19]

There is likewise no specific statutory prohibition against *ex parte* communications with the parties but such a requirement in all but the most trivial of circumstances would be subsumed under the rule against evident partiality.

The FAA also does not address the issue of whether a majority award is required. This would be left to the parties to decide *ad hoc* or through the adoption of institutional rules.

(b) England

International commercial arbitrations in England are governed by the Arbitration Act 1950, the Arbitration Act 1975 and the Arbitration Act 1979. These Acts do not form a comprehensive code of arbitration law and practice and one must also look to court decisions and writers for guidance. *Russell on Arbitration* contains the following passage:

> The arbitrators selected, one by each side, ought not to consider themselves the agents or advocates of the party who appoints them. When once nominated they ought to perform the duty of deciding impartially between the parties, and they will be looked upon as acting corruptly if they act as agents or take instructions from either side.[20]

Special considerations would apply where the parties agree to a negotiating advocate in commercial arbitrations such as valuations or the parties have agreed each to nominate an arbitrator with an umpire to decide in the event

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17 *Commonwealth Coatings Corp.* v. *Continental Casualty Co.* 393 US 145 (1968).

18 *Ibid.*, at p. 152.

19 *Merit Ins. Co.* v. *Leatherby Ins. Co.* 714 F. 2d 673 (1983).

20 *Russell on Arbitration*, 20th ed., Anthony Walton QC and Mary Vitoria, (Stevens & Sons, 1982), p. 233. See also the comments of: Donaldson J. (as he then was) in *The 'Myron' (Owners)* v. *Tradax Export S. A.*, [1969]1 Lloyd's Rep. 411, at p. 415, and Erle, J. in *Oswald* v. *Earl Grey* (1854) 24 Law J. Rep. (N.S.). 69, at p. 72.

of disagreement.[21] In the English conception of the arbitrator/advocate type of proceeding the parties may agree to a reference to two arbitrators with an umpire appointed only in the event of a disagreement. At that point the party nominees either withdraw from further proceedings or continue in the role of advocates of the parties.

Section 23 of the 1950 Act provides for the challenge of an arbitrator or an award where there has been misconduct in the proceedings. Lack of impartiality is considered to be a ground of misconduct. On this point *Russell on Arbitration* reads as follows:

> Unless the parties have agreed, with full knowledge of the position, to accept the decision of a person whose position with regard to them or to the matters referred to him is otherwise, they are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide, and they are entitled to expect from him a faithful, honest and disinterested decision. It follows that personal misconduct, or any personal interest which will tend to bias an arbitrator's mind, which was unknown to either of the parties at the time when the dispute concerned was agreed to be referred, will unfit a person to act as arbitrator.[22]

A duty of disclosure of interests and relationships and of non-communication with the parties after the start of proceedings is attendant to the duty not to misconduct oneself and is well established in English law.[23]

The test for impartiality in an arbitral tribunal has recently been considered to be one of a reasonable suspicion of bias as opposed to a requirement of a real likelihood of bias.[24] This is consistent with the standard to be expected in all judicial decision-making as set out in the famous statement of Lord Hewart C.J., in *Rex v Sussex Justices (Ex parte McCarthy)*,[25] that it is 'of fundamental importance that justice not only be done, but should manifestly and undoubtedly be seen to be done.'

Section 9 of the 1950 Act, as amended by section 6(2) of the Arbitration Act 1979, provides that: 'Unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to three arbitrators, the award of any two of the arbitrators will be binding.' If the parties have agreed to a procedure whereby the arbitrators nominated by each party need not be impartial then care would have to be taken that either the proceedings were not frustrated by a stalemate on the tribunal or that the correct award could not be given by the presiding arbitrator by virtue of the fact that he had to bargain with one of the party nominees in order to effect a decision in compliance with this section.

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21 See *W. Naumann* v. *Edward Nathan and Co.* (1930) 37 Lloyd's L. Rep. 249 and *Veritas Shipping Corp.* v. *Anglo-Canadian Cement Ltd.* [1966] 1 Lloyd's Rep. 76; for arbitrator/advocate proceedings, see Mustill and Boyd, *Commercial Arbitration*, 2nd ed., (Butterworths 1989) pp. 258–264.

22 *Supra*, note 20, at p. 144.

23 See *Re Camillo Eitzen and Jewson & Sons* (1896) 40 S. J. 438 and *Blanchard* v. *Sun Fire Office* (1890) 6 TLR 365 and see Mustill and Boyd, *Commercial Arbitration*, 2nd ed., (Butterworths, 1989) pp. 247–257.

24 *Tracomin S. A.* v. *Gibbs Nathaniel (Canada) Ltd.* [1985] 1 Lloyd's 586, at p. 596.

25 [1924] 1 K.B. 256.

(c) France

In France international commercial arbitrations are governed by Articles 1442 to 1507 of the Code of Civil Procedure (as promulgated May 12, 1981). Arbitrators in France are held to the same standard of impartiality as a judge and no distinction is made between the standard expected of a party-appointed arbitrator and that of the third arbitrator. The requirements for a judge are found in Article 341 of the Code of Civil Procedure, but this Article does not specifically refer to arbitrators.

There is some debate as to the right of a party to an arbitration governed by French law to seek judicial review of an appointment when the parties have provided for a review mechanism through the adoption of institutional rules such as the ICC Rules. In most respects the courts will not review the final ruling of a body such as the ICC regarding the composition of a tribunal since this is viewed as within the exclusive competence of the institution as an administrative not jurisdictional matter.[26] But doubt exists as to whether this would be restricted only to matters of pure formality and not questions of bias.[27] Robert and Carbonneau make the following comment with respect to questions of bias:

> The mandatory provisions of French law would be triggered, however, in the event that one or both parties establish an arbitrator's lack of impartiality. Such circumstances would amount to a violation of basic defense rights. According to French conceptions, international public policy requires that the parties' basic defense rights be guaranteed. Under Article 1502(5), an arbitrator's lack of impartiality would lead either to a denial of recognition or enforcement to a foreign or international arbitral award or to the annulment of an international arbitral award if the latter were rendered in France.[28]

By the same reasoning, Article 1504 of the Code of Civil Procedure would allow an arbitral award in France in international arbitral proceedings to be set aside by a court where an arbitrator lacked impartiality. The foregoing comment on French law is also relevant to the ground for refusal of recognition and enforcement under Article V(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for violation of public policy. Challenges to an arbitrator may be brought during the course of the proceedings (Articles 1457 and 1463).

Article 1452 requires disclosure of any personal cause of disqualification of which the arbitrator has knowledge.[29]

Ex parte communications would be prohibited under the general rule requiring impartiality and Article 1469 specifically states that the deliberations are secret.

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[26] *Raffineries de Pétrole d'Homs et de Banias* v. *CCI*, found in (1985) Revue de l'Arbitrage 141, at p. 147.

[27] See note by E. Mezger to case of *Société Ópinter France* v. *Société Dacomex* found at (1986) Revue de l'Arbitage 87.

[28] Robert and Carbonneau, *The French Law of Arbitration*, (Matthew Bender, 1982), p. II, 3–5.

[29] For a case of the French Supreme Court in which an award was set aside because the winning party's nominee failed to disclose that he had given a legal opinion on the case to that party prior to his nomination see Craig, Park and Paulsson, *supra*, note 1, at para 13.04, p. 225.

Article 1470 provides that the award is to be rendered by majority vote.

(d) Switzerland

International arbitrations are now covered by the Swiss International Arbitration Law which is Chapter 12 of the new Swiss Private International Law Act that came into force on January 1, 1989. Where at least one of the parties is not domiciled or habitually resident in Switzerland, the new Act replaces cantonal law unless the parties choose otherwise (Article 176).

Considerable autonomy is left to the parties regarding the composition of the arbitral tribunal, and if, for example, the parties have chosen the ICC Rules, the Swiss courts will not interfere in matters related to the appointment, removal or replacement of arbitrators as prescribed by the Institution (Article 179). These matters are viewed as administrative. However, as with France, there is an exception with respect to impartiality of the arbitrators. Article 180(1)(c) provides for the challenge of an arbitrator if circumstances give rise to justifiable doubts as to his independence. Under the former rules of the Concordat, the party-appointed arbitrator was required to maintain the same standard of independence and impartiality as a judge. The right to an impartial judge is given by Article 58 of the Federal Constitution and exists in international arbitration as well.[30]

The deletion of a requirement of impartiality in the new law is said by Marc Blessing to be a deliberate attempt to restrict the requirement to the more objective notion of independence alone as a compromise designed to meet the exigencies of practice.[31]

The absence of a requirement of impartiality in Article 180 might be seen to allow for a party-appointed arbitrator who is predisposed to his nominating party but it is submitted that this would not be a correct conclusion to draw. Article 18 of the Concordat mandatorily holds arbitrators to the same standard of impartiality as a judge but nowhere is the term impartiality to be found in that document. The new Swiss law thus does not 'delete' impartiality from the former requirements of the Concordat in relation to international arbitrations and certainly does not override the constitutional right referred to above. Blessing must therefore be referring to the term being deleted from earlier drafts of the new law. The Swiss Federal Tribunal will indeed look to drafting history to discern legislative intent[32] but in the absence of an express provision overriding the former requirement of impartiality it is unlikely that a fundamental rule demanding judicial attitudes on the part of arbitrators will be superseded. Some consider this to be a matter of *ordre public.*

It is accordingly submitted that the new Swiss law does prohibit partiality

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30 Lalive, Poudret & Reymond, *Le Droit de l'Arbitrage interne et international en Suisse*, Ed. Payot, Lausanne (1989), p. 339.

31 See Blessing, 'The New International Arbitration Law in Switzerland', (1988), Vol. 5, No. 2, *Journal of International Arbitration* 9, at p. 39 (full text of Ch. 12 set out at Appendix 2, p. 83).

32 *Westland Helicopters Ltd.* v. *Arab Republic of Egypt* (1986) Bulletin de l'Association Suisse de l'Arbitrage 16.

in arbitral proceedings. Further support for this submission may be found in Article 190 of the new Swiss law and Article V(2) of the New York Convention. Article 190 of the Swiss International Arbitration Law provides for an award to be set aside where it is incompatible with public policy. This article is clearly intended to conform with Article V(2) of the New York Convention just as Article 1502(2) of the French Code of Civil Procedure and Article 34(2) of the UNCITRAL Model Law are. We have already seen how the French view a biased award as contrary to international public policy.[33] Van den Berg comments that the New York Convention similarly contemplates that arbitrator impartiality is a fundamental requirement of public policy under Article V(2).[34] Courts will refuse recognition and enforcement under the Convention where there is actual bias.[35]

Under the Concordat the courts of Switzerland placed great emphasis on the duty of disclosure. In the case of *Centrozap* v. *Orbis* the highest Swiss court, the Swiss Federal Tribunal, held that the failure to disclose that the wife of one of the arbirators was the assistant of the lawyer of one of the parties was sufficiently egregious to warrant the disqualification of that arbitrator.[36] These strict standards will certainly not be superseded by the new law because there is an explicit reference to a requirement of independence in the new law. The rationale of a requirement of independence must be to ensure that a connection is not so close as to give rise to a danger that the arbitrator will be partisan.

The new law is silent as to prohibition of *ex parte* communications with the parties and the confidentiality of the deliberations but the courts are not likely to tolerate such an overt demonstration of partiality as discussing the merits of the case with only one of the parties outside the confines of the proceedings.

In the absence of an agreement by the parties to the contrary, the new law requires a majority decision, but allows for a decision by the presiding arbitrator alone where a majority cannot be reached (Article 189). Blessing suggests that the provision for a unilateral award by the presiding arbitrator is sufficient protection to allow for a biased party-appointed arbitrator in Swiss law.[37] As submitted above, however, a majority award that included a partial arbitrator will probably be set aside in Switzerland under Article 190. Enforcement in any other country that is party to the New York Convention could be refused as well. For example, the Court of Appeal for the Federal Republic of Germany in discussing the New York Convention noted that it is a fundamental principle of their law and of the international legal order that

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[33] *Supra*, note 28.

[34] Van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, (Kluwer, The Hague, 1981), p. 467.

[35] See *Billerbeck Cie* v. *Bergbau-Handel GmbH*, a decision of the Supreme Court of Switzerland of May 3, 1967 where Article V(2) of the NYC was interpreted as permitting a limited degree of lack of independence but not of the tribunal acting in a partial way.

[36] *Centrozap* v. *Orbis* (1966) ATF 92 I (Staatsrecht No. 47) 271.

[37] *Supra*, note 31.

an arbitrator be impartial in the same way as a judge.[38]

(e) Canada and the UNCITRAL Model Law

Under Canadian constitutional law every jurisdiction has authority to enact legislation governing international arbitrations. All of Canada's ten provinces and two territories have enacted legislation concerning international arbitrations. There is also a federal act which governs international cases to which a federal entity is a party. This article will consider the International Commercial Arbitration Act (ICAA) of British Columbia (SBC 1986, Ch. 14) as representative of legislation based on the UNCITRAL Model Law.[39]

Prior to the adoption of the Model Law the Supreme Court of Canada, in the case of *Szilard* v. *Szasz*,[40] held that the parties to an arbitration are entitled to a sustained sense of confidence in the independence of mind of the arbitrators. Even a reasonable apprehension that an arbitrator was not acting impartially would lead to the award being set aside. Rand J., in delivering the judgment of the court, stated:[41]

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.

The provisions of the Model Law will not alter this judge-made rule.

Article 18 of the Model Law (s.18, ICAA) requires that the parties be treated with equality. Article 11 (s.11, ICAA) requires consideration of the independence and impartiality of the nominee when it falls to a court to make a nomination when other appointment procedures fail. Article 13 (s.13, ICAA) provides for judicial review of a challenge to an arbitrator where there are justifiable doubts as to the independence or impartiality of an arbitrator arising out of circumstances which become apparent to a party after the appointment of that arbitrator. Article 34 (s. 34, ICAA) provides for an award to be set aside if it is in conflict with the law or is contrary to public policy, both of which require impartiality on the tribunal.

Disclosure by an arbitrator of any circumstances likely to give rise to justifiable doubts as to impartiality or independence is required pursuant to Article 12 (s.12, ICAA). A duty of disclosure was also highlighted in the *Szilard* v. *Szasz* case referred to above. Under the Model Law the same

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[38] See the case of *Danish buyer, petitioner and German seller (F.R.), respondent*, June 10, 1961 reported at (1979) 4 Y. B. Comm. Arb. 258, at p. 260.

[39] For the full text of the Model Law and of the ICAA see Paterson and Thompson, *UNCITRAL Arbitration Model in Canada*, (Carswell, 1987), Appendix III p. 173).

[40] [1955] S. C. R. 3.

[41] *Ibid.*, at p. 4.

standard of impartiality and independence is applied to all members of the tribunal.[42]

The Model Law and ICAA are silent as to a prohibition on communication with the parties outside the hearing except that the ICAA does provide for involvement in mediation and conciliation or other procedures by the tribunal to encourage settlement (s. 30). There is no specific reference in these laws to the secrecy of deliberations, but it would be expected that any significant communication with the parties would violate the duty of impartiality.

Unless otherwise agreed by the parties, decisions must be made by a majority (Article 29 Model Law and s. 29, ICAA).

IV. INSTITUTIONAL RULES

(a) The UNCITRAL Rules

The UNCITRAL Rules are essentially consistent with the provisions of the Model Law in respect of matters related to duties of independence and impartiality.[43] The Rules make no distinction between the standard expected of a party-appointed arbitrator and that of the third arbitrator. Article 10 of the Rules provide for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Article 9 requires disclosure of circumstances likely to give rise to justifiable doubts as to impartiality and independence.

There are no rules specific to communications with the parties or the confidentiality of the deliberations but significant *ex parte* communications or disclosure to a party of the substance of discussions in deliberations would be strong evidence of a lack of impartiality and independence sufficient to justify a challenge of the arbitrator or of the award. Thus the problem alluded to at the beginning of this article regarding alleged communications during the US–Iran Claims hearings is not solved by any permission contained explicitly or implicitly in the UNCITRAL Rules.

Article 31 provides for the award to be by a majority.

(b) The International Chamber of Commerce

The 1988 ICC Rules make no specific mention of a requirement of impartiality but do require independence (Article 2). However, Article 2(8) provides for the challenge of an arbitrator, whether for a lack of independence *or otherwise*. There is no distinction made between the standard expected of a party-appointed arbitrator and that of the presiding arbitrator.

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[42] For the legislative history and commentary on Articles 12 and 13 see Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, (Kluwer, 1989), p. 388.

[43] For the full text of the UNCITRAL Rules see *supra*, note 39, Appendix IV, p. 225.

Disclosure of factors related to independence is required of all members of the tribunal by Article 2(7).

The Rules do not specifically prohibit *ex parte* communications with the parties and make no provision for the secrecy of the deliberations. However, ICC arbitrators are expected to avoid discussion of the merits of the case with a party and any communications, even in matters of procedure, should be relayed to the other party. Craig, Park and Paulsson set out general principles in this regard at page 240 of their book.

Article 19 allows for a decision by the Chairman alone where a majority is not attained.

Craig, Park and Paulsson report that the requirement of independence in the ICC Rules is a reaffirmation of the European concept that a party-appointed arbitrator should not act as the nominating party's agent or representative, thus embracing a requirement of impartiality.[44] But they go on to say that even where the parties have not provided for party-appointed arbitrator bias by agreement it is open to them to choose an arbitrator who is 'clearly sympathetic' to their case. The parties certainly may be inclined to nominate an arbitrator who is sympathetic to their case but the ICC Rules make no allowance whatsoever for an arbitrator to be 'clearly sympathetic' to the cause of the nominating party. Any arbitrator who is clearly sympathetic risks being challenged and puts the award and its recognition and enforcement in jeopardy under the laws of all the countries surveyed here. Even an appearance of favouritism may disqualify.

The absence of an explicit requirement of impartiality in the ICC Rules begs the question of whether a national court on a review of a challenge to an arbitrator or application to set aside an award or application for enforcement will view the adoption of those Rules as an implicit waiver of any right to an impartial tribunal. The court will first look to the applicable law. All the countries surveyed here require impartiality in all members of an arbitral tribunal unless the parties choose otherwise. The court will then look to the rules of procedure adopted by the parties to see if they have abandoned their statutory rights. Whilst such opting out could be implicit such as in the case of parties choosing the rules of a trade association which customarly has a party-appointed arbitrator who is an arbitrator/advocate it is submitted that in most cases the court will require a clear and unequivocal election. A clear election does not arise out of adoption of the ICC Rules. The practice of that institution is to refuse confirmation of an arbitrator who is not impartial.[45]

(c) The London Court of International Arbitration

The LCIA Rules (effective January, 1985) specify that all members of the tribunal must remain independent and impartial and may not act as advocates of a party (Article 3). The LCIA will refuse to appoint a party

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[44] *Supra*, note 1, at para 12.04, pp. 209–212.

[45] See *infra*, note 54, at p. 304.

nominee if it is determined that he is not independent or impartial.[46]

Disclosure by way of a resumé of past and present professional positions may be required and a declaration of impartiality and independence must be signed (Article 3.1).

Significantly, the LCIA Rules address communications with the parties requiring in most cases that they be through the Registrar and in writing (Article 4).

The Chairman of the tribunal may make a unilateral decision if a majority cannot be reached (Article 16).

(d) The American Arbitration Association

The AAA Rules (as amended Sept. 1, 1988) are the only rules that specifically contemplate party-appointed arbitrator bias. By reference to neutral, as opposed to non-neutral, arbitrators in sections 12 to 14 of the Rules a clear distinction is made between the standard of impartiality expected of a party-appointed arbitrator and that expected of the neutral third arbitrator.[47]

If the arbitration agreement simply provides for the parties each to nominate one member of the tribunal then pursuant to section 12 of the Rules those nominees would not be taken to be neutral. Accordingly, such nominees would not be subject to disqualification under section 19 on grounds of 'circumstances likely to effect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel.' It is likely that the courts would refuse to review a party appointment or the validity of the award on these grounds as the parties, by having adopted the AAA Rules, would be seen as having waived any right under the applicable law to an impartial tribunal.

Only neutral arbitrators are required by the Rules to disclose circumstances relating to impartiality and independence (s. 19).

Only neutral arbitrators are subject to the prohibition of *ex parte* communications with the parties (s. 40).

With such potential for polarization in the arbitral tribunal it is somewhat anomalous that the AAA Rules require at least a majority decision thus mandating that an award must have the concurrence of at least one of the non-neutral party nominees (s. 28). This could lead to a negotiated majority award that is not based solely on the merits of the case.

For international cases, however, reference must be made to the AAA Supplementary Procedures for International Arbitrations. M. Hoellering and H. Holtzmann state that the Supplementary Procedures contemplate that all arbitrators including those appointed by a party, shall be neutral.[48] The

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[46] Salans, 'The 1985 Rules of the London Court of International Arbitration', (1986) 2 *Arbitration International* 40.

[47] The complete text of the AAA Rules may be found in (1989) 14 Y. B. Comm. Arb. 263.

[48] M. Hoellering in ICCA Congress No. 3, 8th International Arbitration Congress, New York, 1986, P. Sanders ed., (Kluwer, 1986) p. 32; H. Holtzmann (1989), 14 Y. B. Comm. Arb. 266.

Supplementary Procedures will apply in default of the parties notifying the administration otherwise.[49] These procedures thus assume great importance in relation to international arbitrations because, as noted above, a party agreeing to the AAA Rules may be seen as having waived the statutory right to impartiality in all members of the tribunal. The Supplementary Procedures supersede section 12 of the Rules and a party need not fear that the right to an impartial tribunal under the FAA will be lost. By a 1986 amendment to section 2 all arbitrators in international cases are subject to challenge if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

V. CODES OF ETHICS

(a) American Bar Association/American Arbitration Association

The ABA and AAA jointly established the 'Code of Ethics for Arbitrators in Commercial Disputes' in 1977.[50] The Code establishes guidelines of ethical conduct which cover all types of commercial arbitrations both domestic and international. Accordingly, it provides for situations commonly found in US domestic arbitrations where the parties nominate arbitrators who act as representatives for their principals.

The first six Canons of the Code set out desirable standards of conduct for neutral arbitrators such as a duty to act with fairness and integrity and to make disclosure of facts which might objectively be seen as indicative of bias.

The last Canon is directed to non-neutral arbitrators (Canon VII). The non-neutral party-appointed arbitrator is not expected to observe the same standard of conduct as the neutral third arbitrator. The non-neutral arbitrator may be predisposed to the nominating party (VII A). Disclosure of interests and relationships should be made but not in as much detail as would be expected of a neutral arbitrator (VII B).

Communication is allowed with the appointing party with respect to the selection of the third arbitrator but discussions with respect to any other aspect of the case should be disclosed to the other arbitrators and party (VII C). Matters relating to the decision should be kept confidential (VII F). This last duty should preserve the secrecy of the deliberations.

If followed, the Code would ameliorate some of the more flagrant demonstrations of bias that might arise from having partisanship on the tribunal because many of the ethical standards for neutral arbitrators are also expected of non-neutrals.

The general attitude of the sponsors of the Code of Ethics toward partiality

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[49] The Supplementary Procedures for International Commercial Arbitration are set out in (1983), 8 Y.B. Comm. Arb. 195; amendments in (1987), 12 Y.B. Comm. Arb. 196.

[50] *Supra*, note 4.

in a party-appointed arbitrator is found in the Preamble where they specifically eschew such conduct saying that all arbitrators should comply with the same ethical standards. The Code makes provision for situations that have arisen out of long established practice in certain types of arbitration and a laudable attempt is made to minimize the damage that is done to what should be a judicial type proceeding. The Code is thus not an endorsement of party-appointed arbitrator partisanship in international commercial arbitrations.

(b) International Bar Association

The IBA's 'Ethics for International Arbitrators' was adopted in 1987.[51] These guidelines do not distinguish between a party-appointed arbitrator and the third arbitrator. The same standard of impartiality is expected of all members of the tribunal.

Arbitrators must remain free of bias, defined as including impartiality in relation to the parties and the subject matter of the dispute and independence from relationships with one of the parties or someone closely connected with one of the parties (Section 1 and 3).

Disclosure is required of all circumstances that may give rise to justifiable doubts as to impartiality or independence (Section 4). This mirrors the requirements of the UNCITRAL Model Law.

Communication prior to an appointment is permitted for the purpose of determining the suitability and availability of the potential nominee to sit but the merits of the dispute are not to be discussed. The other party to the dispute is to be informed in writing of the substance of the initial conversation. Discussion is also permitted with respect to the selection of a third arbitrator by the party nominees but only to the extent of inquiring as to the acceptability of candidates being considered. *Ex parte* communications during the proceedings are to be avoided and notice to the other party of any unilateral communications that do occur is required (Section 5).

Specific reference is made to the confidentiality of the deliberations of the tribunal (Section 6).

VI. COMMENTARY ON THE VIEWS OF WRITERS

(a) Craig, Park and Paulsson

These authors suggest that the dilemma they pose regarding a disequilibrium in the arbitral process created by differing party expectations as to party-appointed arbitrator impartiality is answered by the Chairman of the tribunal correcting for the party-appointed arbitrator who is not impartial.[52] They

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[51] *Supra*, note 5.

[52] *Supra* note 1, para 12.04, p. 212.

suggest that a party-appointed arbitrator who is not impartial will lose credibility with the other members of the tribunal and that a party choice of a biased nominee will be counter-productive. They argue that bias is a rare occurrence and say that it is unbecoming of an arbitrator not to remain impartial. They thus minimize the advantage of a guaranteed vote. However, it is submitted that this would be little consolation for the losing party whose arbitrator did play by the proper rules when the other party-appointed arbitrator did not.

Craig, Park and Paulsson also juxtapose the competing interests of the need for independence with the quite proper desire of a party to nominate an arbitrator who shares a common cultural, business and legal background. This is a conundrum because it is obvious that complete and total independence may not be possible in international arbitrations where the parties do not share the same cultural and legal background. In this respect the international arbitral process where each party nominates one member of the tribunal may be seen as having a built-in bias that no rules can correct. It is submitted that this does not mean that minimum standards of impartiality are to be abandoned and in fact is even better a reason to insist on such minimum standards to the extent possible.

The integrity of the process demands minimal associations with just one of the parties prior to appointment and minimal or no contacts with just one of the parties during the course of the proceedings. If there is a widely accepted high level of professionalism on the part of all arbitrators it will assist each of them in resisting the subtle or even direct pressures that parties might naturally bring to bear on their nominees.

(b) Marc Blessing

As discussed earlier under the section on the new Swiss law, Blessing explains the deletion of a requirement of impartiality as a practice oriented compromise.[53] With respect to the role of the party-appointed arbitrator he makes the following comments:

> Despite the deletion of 'impartiality', as a rule it can be expected that a party-nominated arbitrator considers it as nobile officium to remain impartial. This commitment to impartiality does not prevent the arbitrator from examining the arguments advanced by 'his party' with particular care, seeing to it that they are carefully examined and weighed within the framework of the deliberations. On the other hand, it would be quite wrong to conclude that de facto an arbitral tribunal cannot function properly if a party-nominated arbitrator lacks impartiality (or if both party-nominated arbitrators show considerable bias towards 'their' respective parties). It would amount to wishful thinking to expect an equally balanced degree of impartiality (or independence) on both sides of the arbitral tribunal, and yet, numerous and impressive examples have shown that an arbitral tribunal (or a presiding arbitrator) can cope with such situation. It would be unwarranted to say that a party is likely to be at a disadvantage if for example one party-nominated arbitrator lives up to expectations and remains very impartial, whereas the other party-nominated arbitrator

[53] *Supra*, note 31.

> shows an obvious partiality (and even dependence). The president of the arbitral tribunal has the means and the power to restore the balance. It is, however, very important that he be given the power to rule and decide on his own if no majority decision can be made.

It is respectfully submitted that Blessing pays too little regard to the importance of there being an appearance of justice in the functioning of the tribunal and that parties will lose confidence in the process if their arbitrator acts fairly and the other obviously does not. Further, in Switzerland, both party-appointed arbitrators would have a duty to examine the arguments advanced by each party with equal care.

To suggest that the other members of the tribunal can compensate for bias on the part of a party-appointed arbitrator is to encourage the breeding of retaliatory bias on the part of the other party-appointed arbitrator. When bias is obvious on the part of one party-appointed arbitrator will not the other party then demand similar favouritism from his nominee (and will not that nominee be persuaded at least to some degree by the desire to be nominated again)? Will such escalating bias not bring the arbitral process into disrepute?

The benefit of having a third arbitrator who can compensate for party-appointed arbitrator bias on the tribunal is most effective in a system where complete impartiality is required of all members. Then when one party raises the lack of objectivity of the nominee of the other party as an objection or ground to challenge, that party's appointed arbitrator need feel no onus to compensate as it is his duty to remain impartial. Even though the objection may not be sustained, the Chairman will take note of the concerns expressed by the party and remedy any imbalance. If the system allows for party-appointed arbitrator predisposition the parties may not even have a ground of objection or challenge on the record. Further, it will be that much harder for the party nominees to maintain their professionalism if there is no legal duty to remain impartial.

(c) Stephen R. Bond

Bond, as the Secretary General of the ICC Court of Arbitration, emphasizes the importance of all members of an arbitral tribunal remaining independent including the party-appointed arbitrator.[54] He explains the absence of a requirement of impartiality in the ICC Rules in part on the subjective nature of the concept of impartiality and the lack of a satisfactory definition of impartiality. He goes on to qualify this gap in the rules by saying that it is not an endorsement of an arbitrator being biased.

(d) Robert Coulson

Coulson, as President of the American Arbitration Association, criticizes the requirement in the IBA's Ethics for International Arbitrators that a party-appointed arbitrator be held to the same standard of impartiality as the

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[54] Bond, 'The Selection of ICC Arbitrators and the Requirement of Independence', (1988), Vol. 4, No. 4, *Arbitration International* 300.

presiding arbitrator.[55] In defending the ABA/AAA Code, which provides for predisposition towards a party, as being more appropriate to international arbitrations than the IBA guidelines, Coulson says:

> The ABA/AAA code reflects a more pragmatic approach. It is known that in the United States some party-appointed arbitrators are expected to favor their appointing party's point of view. They are not strictly neutral. Their party appointed them because of a prior relationship, or because they came from a familiar branch of the industry, or because of their reputation, nationality or whatever. In *Vantage S.S. Corp. v Commerce Tankers Corp.* 342 NYS 281 (1973), the party-appointed arbitrator was an attorney for the party, a stockbroker for the party, related to the president of the corporation and had advised on the contract. However, the court held that there was no misconduct and upheld the arbitrators' award. Some systems of arbitration in the United States assume that party-appointed arbitrators serve as advocates during the arbitrators' deliberations, making certain that their party's point of view is fairly understood by the neutral arbitrator.[56]

It is respectfully submitted that the *Vantage* case referred to is not a good precedent for setting the permissible limits of duties of independence and impartiality. The party-appointed arbitrator in the *Vantage* case went even further than noted by Coulson in that there were, in addition, *ex parte* communications with the principal during the arbitration. There was a 3 to 2 split in the decision of the appellate court and the dissent is much to be preferred. The dissenting judgment argues that to allow such an award to stand would be to create a form of negotiation rather than arbitration and would be similar to a party passing judgment on his own claim. Even the AAA/ABA Code requires a predisposed party-appointed arbitrator nevertheless to conduct the proceedings with fairness and integrity.

(e) W. Michael Tupman

With respect to the role of the party-appointed arbitrator in international cases Tupman says the following:

> UNQUESTIONABLY all members of the tribunal in international artbiration should be held to the same standard of independence, whether appointed by a party or not. The concept of a non-neutral arbitrator as it exists in some common law systems simply has no place where the parties are of different nationalities and might lose faith in the arbitral process if a foreign, apparently lesser, standard were applied.[57]

(f) Mohammed Bedjaoui

Bedjaoui, a Judge of the International Court of Justice, highlights the parties' choice of who will judge them as distinguishing the duty of impartiality of a party-appointed arbitrator from that of an ordinary judge.[58] It is, in his view,

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[55] Coulson, 'An American Critique of the IBA's Ethics for International Arbitrators', (1987), Vol. 4, No. 2, *Journal of International Arbitration* 103.

[56] *Ibid.*, p. 105.

[57] Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration', (1989), 38 I. C. L. Q. 26 at p. 49.

[58] Bedjaoui, 'The Arbitrators: One Man- Three Roles', (1988), Vol. 5, No. 1, *Journal of International Arbitration* 7.

a necessary adjunct of freedom of choice that the parties have the right to nominate an arbitrator who has some connection whether it be by virtue of business relations or shared economic or professional backgrounds. To put too heavy a burden on the party-appointed arbitrator could discourage people from the commercial world. He endorses the ABA/AAA Code tolerance of partiality and reasons that disclosure of connections is sufficient to work a just result. In essence he sees party-appointed arbitrator partiality as a necessary evil which flows by definition from tribunals composed of party nominees.

This writer raises an important issue for international commercial arbitrations when he refers to the potential for commercial people being discouraged. It is common that in the narrow field of international arbitration there is some connection between the experienced arbitrator and counsel or the parties. If standards of independence were too strict then the international business community would soon find a grave shortage of eligible experienced arbitrators. As it is, disclosure will often suffice to satisfy a party of the integrity of the arbitrator who will be trusted to disabuse his mind of any previous association with the parties, their counsel or major witnesses. Common sense must prevail. We are certainly familiar with the notion that a judge is able to disabuse his mind of former associations or inadmissible evidence and no less should be expected of experienced arbitrators.[59] However, contrary to the view of Bedjaoui it is submitted that this need not be at the cost of sacrificing a duty of impartiality but rather, demands that duty.

(g) Martin Hunter and Jan Paulsson

Hunter and Paulsson review most of the issues related to party-appointed arbitrator bias in their pre-IBA guidelines discussion of whether a code of ethics was needed in international arbitrations.[60] They were instrumental in the subsequent drafting of the guidelines.

Hunter and Paulsson suggest that there is no coherent jurisprudence in this area and that different standards for different systems should be avoided. The practice which has developed of appointing a biased arbitrator is to be lamented. They draw a line between positive bias and a general sympathy toward the appointing party. The latter is permissible and would include best efforts by the party-appointed arbitrator to choose a third arbitrator who does not hold views inconsistent with the interests of their appointing party. With respect, it is submitted that it is a bit misleading to align a sympathy with a party with a duty to avoid a third arbitrator who is adverse to that party. Such a third arbitrator would be inappropriate in any event and it would fall

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[59] For a case which demonstrates that both English and Swiss courts are prepared to credit arbitrators with the intellectual dexterity to disabuse their minds of prejudicial matters see *Black Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A. G.* [1981]2 Lloyd's Rep. 446, at p. 451.

[60] Hunter and Paulsson, 'A Code of Ethics for Arbitrators in International Commercial Arbitration?' (1985), 13 *Arbitration* 153.

to either impartial party-appointed arbitrator to reject a third arbitrator who is not completely impartial.

Hunter and Paulsson also address the problem of unilateral communication with a party. They suggest that unilateral communications are to be expected in respect of the initial appointment of the party-appointed arbitrator and at the time of the selection of the third arbitrator. However they do not suggest, as one might have expected, that such communications as do occur should, at the time or later, be reduced to writing and made part of the record. They suggest that it is appropriate for the party-appointed arbitrator to obtain the general views of the appointing party with respect to the selection of the third arbitrator; but is this not dangerously close to taking instructions from that party? Would it not be better for the two party nominees to draw up a short list from which the parties could strike off any unsuitable names? *Ex parte* communications during the proceedings are condemned by these writers especially with respect to the deliberations.

They also highlight disclosure as very important in eliminating many of the problems seen when alleged bias is the basis for the challenge of the award.

Hunter and Paulsson point out the danger of a deadlock where a majority decision is required and there is no provision for the chairman to decide the case alone.[61]

VII. CONCLUSION

In all legislative regimes surveyed here international arbitrators must remain independent and impartial unless the parties choose otherwise. Although couched in different terms, each of the countries requires a similar general standard of impartiality. In the US an arbitrator must avoid evident partiality. In England the test is a real suspicion of bias. France requires an objective appearance of impartiality as would be expected of a judge. No test has yet been established under the new Swiss law. In Canada, an arbitrator in an international proceeding could be disqualified if there is a reasonable apprehension of bias.

Those idiosyncratic trade arbitrations which customarily have the party-appointed arbitrator as the agent of the nominating party should not be seen as existing in derogation of the rules of independence and impartiality, but rather as a waiver by the parties of the right to a completely impartial tribunal. The same may be said of the umpire system.

In all systems canvassed, the degree of independence may vary, based on circumstances and commercial realities. A limited degree of connection with the parties is not generally viewed as violative of public policy. Strict requirements of disclosure of relationships to the parties or the dispute are

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[61] See also Hunter, 'Ethics of the International Arbitrator', (1987), 53 *Arbitration* 219.

required in all of the systems. Rules of disclosure will usually resolve any problems with independence.

Impartiality is not so flexible a concept. There is much less tolerance with respect to a lack of impartiality in the conduct of the arbitration. Absent clear authorization from the parties, partiality will be a valid ground for challenge of an arbitrator. Where the evidence of partiality was not discovered until after the award, the award itself or its enforcement may be challenged.

It has been said that the practice in socialist States of having an employee of the State on the tribunal has been accepted by some western States (with some hesitation) as not contrary to *ordre public*.[62] This may be correct in principle if the agreement to arbitrate was entered into with knowledge that a State employee (who is not wholly independent and may lack impartiality) would probably be named to the tribunal and there was thus an implied waiver of the rules of independence and impartiality. One must wonder though whether cultural gaps are narrowing with recent political developments such that this would no longer be a reasonable inference to draw.

With respect to voting requirements, only Switzerland and the ICC Rules have a provision in default of party choice for a unilateral award to be made by the presiding arbitrator in the event of a deadlock. Such a provision must be a minimum requirement where partisanship is agreed by the parties. The requirement of a majority award is incompatible with partisan party-appointed arbitrators because the presiding arbitrator may have to bargain with one of the party-appointed arbitrators to form the majority and the result will not be based solely on the merits of the case but rather will be based on who offered the presiding arbitrator the best deal.

One of the most troublesome problems in the day to day practice of arbitration law is that of *ex parte* communications between a party-appointed arbitrator and his nominator. Such communications after the commencement of proceedings would be universally prohibited as a denial of justice where such communications are about the merits of the case. Some consider the duty of non-communication to arise on appointment not commencement thus excluding unilateral communications regarding the choice of the third arbitrator.[63] The prohibition is not as strict in relation to minor social contacts or discussions regarding times of hearings or choice of a chairman; but what is forbidden will always be a matter of degree to be decided in the circumstances of each individual case. Guidance from the courts in this area, especially regarding the time that the duty arises, would assist the international arbitral community in agreeing a consistent standard.

In the systems surveyed here, the same standard of conduct is required of all members of an arbitral tribunal with an option for the parties to choose otherwise. A universal standard of independence and impartiality is to be

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[62] R. David, *Arbitration in International Trade*, (Kluwer, 1985), p. 260.

[63] For an international panel discussion on the duty of non-communication and when it arises see the report of the 1986 ICCA Congress in New York, *supra*, note 48.

desired. In the interests of promoting internationalism it would be advantageous to have a coherent body of precedent with respect to the standards to be expected of arbitrators. This will establish some measure of certainty. Without this certainty the parties will not know where they stand and will respond defensively by making sure they have at least one guaranteed vote. This in turn will result in pressure being brought on international arbitrators to be partisan in favour of the nominating party. Further, awards that are not rendered in an impartial way may be in jeopardy of not being enforced under the New York Convention.

Where there is not the same degree of impartiality in all three members of the tribunal one in essence ends up with three different arbitral bodies working at once and potentially at cross purposes. If what the parties want is a compromise result based on negotiations in deliberations, then why not just agree to a negotiation? There can be little justification for the expense of two extra arbitrators to duplicate the function of counsel.

One eminent arbitration lawyer has said that he looks for a party-appointed arbitrator who has a maximum predisposition towards his client with the minimum appearance of bias.[64] Indeed no more could be expected of the parties whose economic survival may depend on the outcome of the arbitration. It falls to the arbitrators to maintain strict impartiality both as a matter of law and of professionalism. In addition, where an impartial tribunal is chosen or required by law it is incumbent upon the national court having jurisdiction to enforce requirements of independence and impartiality. This is one area where the courts should not adopt the hands-off approach typical of arbitration friendly countries. The courts will be friends to arbitration if they are vigilant in protecting the fundamental equation upon which such an arbitration is premised, that is, that the case will be decided by an independent and impartial tribunal on the basis of evidence put forward and for no other reason.

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[64] See Hunter, *supra*, note 61, at p. 222.