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List of Abbreviations

ADR	Alternative Dispute Resolution
ALARB	The Latin American Arbitration Association
BITs	Bilateral investment treaties
Brexit	The United Kingdom's departure from the European Union
CCP	The Code of Civil Procedure
CIArb	Chartered Institute of Arbitrators
CJEC	the Court of Justice of the European Communities
EU	European Union
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
ICC	International Chamber of Commerce. May also refer to the ICC International Court of Arbitration, depending on the context.
ICC Rules	ICC Rules of Arbitration (either the 1998 ICC Rules, or the 2012 ICC Rules, depending on the context; the current version is the 2012 ICC Rules as amended and effective since 1 March 2017).
ICC Court	ICC International Court of Arbitration.
ICCA	International Congress and Convention Association
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the settlement of investment disputes between States and nationals of other States (1958)
ISDS	Investor-state dispute settlement
LCIA	London Court of International Arbitration
MMR	Morbidity and Mortality Report
NAFTA	North American Free Trade Agreement
P2P	Peer-to-Peer
PILA	(Swiss) Private International Law Act
RAS	Riunione Adriatica di Sicurtà

SCC	Stockholm Chamber of Commerce. Also refers to the Arbitration Institute of the SCC, depending on the context.
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the current version entered into force on 1 January 2017).
SCEUS	Salzburg Centre of European Union Studies
SIAC	Singapore International Arbitration Centre
SLTA	Swiss LegalTech Association
UKIP	The United Kingdom Independence Party
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules, as amended in 2013
UNCTAD	United Nations Conference on Trade and Development
US	United States
ZPO	Zivilprozessordnung

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Key words:
academic activity | arbitration | disclosure duty | disqualification of arbitrator | fair trial | IBA | impartiality | independence | lex arbitri | material dependence | objective test | transparency | UNCITRAL Arbitration Rules

Independence and Impartiality in Light of International Standards and Disclosure Duty of the Arbitrator

Abstract | *The independence and impartiality of arbitrators is one of the fundamental principles of arbitration, and is an issue that has rightfully been the subject of intense discussion. It has also been elaborated on in national arbitration laws (lex arbitri), but also in all other standards and rules on, or applicable to, arbitration. This is related to the mechanisms for review of the independence and impartiality of arbitrators and for the challenging of arbitrators. Special importance at the international level must be attributed to rules created by permanent arbitral institutions, as well as, for instance, the UNCITRAL Arbitration Rules and the IBA Guidelines on Conflict of Interest in International Arbitration. However, in order to maintain the independence and impartiality of arbitration, it is necessary to first make sure that a careful check of any conflicts of interest will be undertaken primarily by the nominated/appointed arbitrators before they accept their appointment. If there is any doubt or any qualified fact concerning the arbitrators that could be assessed differently by the arbitrators themselves, on the one hand,*

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and by the parties, on the other, most international standards require the arbitrators to disclose such circumstances to the parties and to other arbitrators appointed in the same case, or to the permanent arbitral institution in the case of institutionalised arbitration. It is then primarily up to the parties as to how they assess those circumstances. The importance of the arbitrators' disclosure duty is on the rise. It is a principal obligation of the arbitrators in connection with their independence and impartiality, and its significance is beyond any doubt. On the other hand, one may have certain reservations as to whether this duty has not reached its objective limits and whether its definition has become too broad.

I. The Requirement of Impartiality and Independence of Arbitrators in Connection with the Essence of Arbitration

2.01. The impartiality and independence of arbitrators represents one of the fundamental issues of arbitration. The possibility of influencing the composition of the arbitral forum called upon to hear and resolve the dispute, including the possibility of having specific requirements placed on the arbitrators, belong among the essential components of arbitration and often constitute one of the primary reasons why the parties decide to exclude the jurisdiction of courts in favour of arbitration. Some argue that the possibility of choosing the arbitrator may significantly enhance the flexibility of arbitration and an expedient hearing and resolution of the dispute, and that it also augments the parties' confidence in arbitration and acceptance of the outcome thereof. From this perspective, the right to appoint an arbitrator must be considered a special right inherent to arbitration.

2.02. The resolution of a dispute in arbitration generally requires an intentional private-law act of the parties – the arbitration agreement. The agreement means a voluntary waiver of the parties' right to take their dispute to court. This theory is based on the assumption that arbitration is a contentious procedure within the framework of which the arbitrators exercise their decision-making powers, which were transferred or delegated to them by the State, with the objective of resolving the existing dispute in the form of a finding of the law. This is at least the view of the jurisdictional theory of the essence of arbitration,

which has become the prevalent theory in an increasing number of countries over the past two decades. Contrary to a public-law judicial authority, the decision rendered in arbitration is issued by a private-law entity. The State prescribes that arbitral awards have the effects of a final judicial decision, i.e. their nature is that of a decision that may be equipped with enforcement measures. The requirement of the impartiality and independence of arbitrators must also be perceived with due regard for the fact that the private-law autonomy suspends the constitutional or statutory right to a lawful judge, as this principle is laid down in the constitutional law and provided for by the doctrine in a number of countries (at least in civil-law countries). Furthermore, the parties are able to influence the person resolving the dispute by a direct choice of the person in their arbitral agreement.

2.03. The principle mentioned in the preceding paragraph is also in line with the fact that the State retains, in the overwhelming majority of cases, certain control, regulatory, or at least auxiliary functions with respect to arbitration. However, the court may not reopen the legal or factual assessment of the case, and consequently, no potential *review* implemented by the court may be perceived as an appeal or another decision-making level in arbitration. It is merely a retrospective control exercised by courts, the purpose of which should be to establish whether the requirements were fulfilled for the delegation of court jurisdiction to a private-law entity, and at the same time, whether the fundamental prerequisites were also fulfilled that apply to the activity performed by the private-law entity of arbitrators aimed at issuing an enforceable decision on the merits.

2.04. Considering the above, arbitration cannot be perceived as a procedure that would be inconsistent with or in violation of the right to a fair trial guaranteed by the State; it is a procedure that exists and is conducted on the basis of the conditions and requirements stipulated by the law. If all the state requirements are fulfilled for the proper opening and conduct of arbitration and for the appointment of the arbitrator, the arbitrator can be perceived as analogous to a *lawful judge* from the perspective of the statutory and fundamental right to a fair trial.

2.05. In other words, the transfer of a certain part of the state's jurisdictional powers to an arbitrator inherently involves (again from the perspective of the increasingly popular and, correct jurisdictional theory of arbitration) the necessary guarantee that the arbitrators meet the standards of independent and impartial decision-making. Considering the nature of arbitration, the

principle of the equality of the parties requires that arbitration be conducted and that decisions be made by an unbiased person who has no qualified relation to the parties, their counsel or the matter itself, and consequently, has no interest whatsoever in the course or the outcome of the proceedings. The parties' inherent rights thus include the possibility of challenging the appointed arbitrator if any doubts arise as to their impartiality and independence.

2.06. As mentioned above, the State fulfils its role in arbitration through its control functions. One may infer that the purpose of these control functions entrusted to the courts is to allow the courts to check, in a forum other than the arbitral proceedings themselves, whether the basic conditions are met for the hearing and resolution of the case by the arbitrators, i.e. the basic conditions for suspending the fundamental constitutional right of asserting one's case in an impartial and independent court.

II. The Independence and Impartiality of Arbitrators as an Expression of the Transparency of Arbitration with Specific Features

2.07. In connection with the general interest in conducting arbitration in compliance with the principles immanent to it, i.e. as flexibly and speedily as possible, the provisions of the *lex arbitri* and, as applicable, rules of the arbitral institutions usually stipulate the arbitrator's obligation to immediately disclose any circumstances that could give rise to legitimate doubts as to the arbitrator's lack of bias and that would disqualify the arbitrator. In international practice, this obligation is perceived as one of the pillars on which the arbitrators' independence is based and it is deemed to be self-evident, i.e. there is no need to incorporate the obligation in the arbitration laws (*lex arbitri*).

2.08. This enhances transparency and strengthens the guarantee of a potentially high measure of expertise and the quality of arbitration. This requirement is also inherently linked to the parties' right to have their dispute heard by impartial and independent arbitrators. Increased transparency goes hand in hand with increased efficiency of arbitration. The disclosure duty of arbitrators ensures that the parties are aware from the very beginning of all circumstances that they could (albeit theoretically) consider a threat to the independence and impartiality of an arbitrator. This is a principal issue especially in connection with the internationally recognised preclusive effect of a failure to express such an objection. The absence of

the objection is regarded as an expression of a party that the given fact is not contrary to impartiality. International practice is also based on the absolute nature of the party's omission in this regard, which cannot be reviewed by the court on condition that the arbitrator met their disclosure duty.

2.09. Facts that were duly disclosed by the arbitrator may essentially not give rise to doubts as to the moment at which the party became aware of the circumstances undermining the arbitrator's impartiality and independence. It is only the respective party that is responsible for (i) the assessment of the information explicitly disclosed by the arbitrator, and for (ii) the decision as to whether this information represents sufficient grounds for disqualification of the arbitrator, and, as applicable, for (iii) challenging the arbitrator accordingly.

2.10. Consequently, international practice is based on the premise that if the party raises no objection based on the grounds covered by the arbitrator's disclosure, the party forfeits the possibility of making an objection invoking those circumstances at any later moment in the course of the proceedings, as well as in the potential proceedings for setting aside an arbitral award or any other proceedings following the issuance of the arbitral award. A party's failure to make objections thus results in the irrefutable presumption that the party or parties do not consider the fact disclosed by the arbitrator to be a fact disqualifying the arbitrator, and the court may not do so either. This opens space for an exclusively subjective evaluation of these circumstances by the party, which, in view of the autonomy enjoyed by the parties to arbitration, becomes a principal issue. It increases the efficiency of the entire process and, at the same time, minimizes the possibility of tactical manoeuvres and obstructions by the parties at later stages of the proceedings.

III. Contents of Disclosure Duty

2.11. The scope of the arbitrator's disclosure duty must be perceived in the context of the possibility of a subjective and frequently contradictory perception of certain circumstances by the arbitrator, on the one hand, and by the parties, on the other. From the perspective of legal practice, the circumstances to be disclosed by the arbitrator should not include any circumstances that constitute an obstruction to the arbitrator's participation in the arbitration in the subjective view of both the arbitrator and the parties. If the arbitrator were convinced that such circumstances exist, they would be obliged to decline their

appointment.[1] Indeed, the arbitrator is bound by the disclosure duty throughout the entire proceedings, should the arbitrator become aware of such circumstances later. The purpose of the disclosure duty is to notify the parties of any circumstances that the arbitrator themself does not consider a reason for their disqualification, while the arbitrator is also convinced that these circumstances do not and cannot have any influence on their impartial approach to the case. Even if the arbitrator assesses such circumstances as innocuous from their perspective, they must also have regard to the fact that the parties may assess such circumstances differently and may indeed consider them a threat to the arbitrator's independence and impartiality.

2.12. Put simply, the disclosure duty is not a question of circumstances that the arbitrator considers harmful, but of circumstances that could be considered harmful by a party. The purpose of this instrument is to provide the parties with maximum information that should enable them to decide whether the information disclosed by the arbitrator is sufficiently serious from the party's perspective and whether it constitutes grounds for challenging the arbitrator.

IV. The Increasing Importance of Disclosure

2.13. The importance of the disclosure duty has gradually been increasing, and arbitrators are commonly expected to disclose any circumstances that could, however remotely, raise any doubts of a party as to the arbitrator's independence and impartiality. International practice currently considers the disclosure duty to be absolutely essential, and it is by no means impossible (although not applied absolutely) that a failure to meet the disclosure duty in relation to any fact that would in itself be principally insufficient to materially disqualify the arbitrator would make that fact into a fact disqualifying the arbitrator. Consequently, the failure to meet the disclosure duty in relation to that fact may give rise to serious doubts entertained by a party. For instance, in ICC 20185,[2] an arbitration conducted

[1] Alexander J. Bělohlávek, *Notifikační povinnost rozhodců o svých vazbách na strany řízení ve světle mezinárodních standardů* [Title in translation – *Arbitrators' Disclosure Duty Regarding their Connections to the Parties in Light of International Standards*], 9 BULLETIN ADVOKACIE, Prague: Česká advokátní komora (Czech Bar Association) 36-39 (2018); Alexander J. Bělohlávek, Беспристрастность и независимость арбитра и его обязанность уведомлять о наличии связей со сторонами в свете международных стандартов [transcript – *Bespristrannost i nezavisimost arbitra i jevo objazannost uvjedomlat o nalichiji svjazej so storonami v svjete mezhdunarodnych standartov*] [Title in translation - *Impartiality and Independency of Arbitrators and Their Disclosure Duty in Light of International Standards*] ARBITRATION AND REGULATION OF INTERNATIONAL TRADE: RUSSIAN, FOREIGN AND CROSS-BORDER APPROACHES, Moscow: Statut 71-96 (Nataliya G. Markalova, Alexander I. Muranov eds., 2019).

[2] The decision was not published.

in 2017, the arbitrator failed to disclose that, 25 years prior to the arbitration, the arbitrator had been a witness at a wedding of one of the many legal counsels representing the party that nominated her. The arbitrator was disqualified despite the fact that she had essentially had no contact with that legal counsel subsequent to the wedding. Participation at a wedding as a witness must be deemed a confirmation of a truly qualified relation to a particular person,[3] and consequently, failure to disclose that fact was deemed capable of raising doubts with the parties regarding the independence and impartiality of the arbitrator. But it is more likely than not that had the arbitrator disclosed the fact, she might not have been disqualified, i.e. the objection might have been dismissed.

2.14. Conversely, disclosure of a particular fact in connection with the absence of any objection subsequently raised by a party elevates the fact to a level at which the arbitrator is not disqualified, though naturally, this is not an absolute rule, but rather a generalisation. Consequently, the disclosure duty in international practice represents one of the fundamental instruments in the assessment of the impartiality and independence of arbitrators, and it is by no means surprising that the arbitrators themselves undertake an ever-expanding search into their potential connection with the parties or their legal counsel. However, one cannot unequivocally argue that the international trend of expanding the catalogue of such disclosed facts could be considered as absolutely positive, and the question is often posed whether and where this trend has its limits. One may therefore encounter disclosures of purely personal relations, i.e. relations other than those connected with the individuals' professional activities and with effects on assets.[4] On the other hand, one may come across a very surprising, and frequently even alarming, resistance to the practice in certain jurisdictions, or indeed the resistance of

[3] For instance, in ICC 13929 – the mere attendance at a wedding, i.e. not in the special position of a witness, did not result in the disqualification of the arbitrator. The ICC abbreviation in the relevant case numbers means that the proceedings were conducted at the ICC International Court of Arbitration, i.e. at the International Chamber of Commerce in Paris, whose case law has been considered by many to be one of the important standards of international practice.

[4] See also:

ICC 13135 (unpublished): a party's counsel is a respected colleague and a *good friend* of the chairman of the tribunal elected together with the party-appointed arbitrators;

ICC 15007 (unpublished): close friendship between the party's legal counsel and the arbitrator appointed by the party since school days.

The facts in both these cases were held to be facts that do not render the arbitrator disqualified, primarily because they were disclosed by the arbitrator, although – in ICC 13135 – in combination with other circumstances it was sufficient.

arbitrators in certain jurisdictions to disclose facts that could raise potential doubts.

2.15. The commitment assumed by an arbitrator who is repeatedly mentioned in the business terms and conditions of a party is in and of itself capable of raising doubts of the parties as to the independent exercise of the arbitrator's duties. When providing the list of the disclosed circumstances, the arbitrator may also not rely on the fact that they include information that the party could theoretically obtain from other sources (with the exception of commonly used public registers, such as the Commercial Register, etc.), and consequently, no special reference to such information is necessary. An analogous situation may also arise when the arbitrator is repeatedly appointed by one of the parties in unrelated disputes, although it is not the repeated appointment itself that may raise doubts in this case, but the fact that the arbitrator failed to meet his or her disclosure duty.[5] The due fulfilment of the disclosure duty by the arbitrator is thus crucial in these and other similar cases.[6] Despite the fact that, when assessing the disqualification of arbitrators, for instance, in connection with repeated appointments, the international practice has regard to local conditions in the place of arbitration or in the State of the party's registered office (habitual residence or *domicile*, as applicable),[7] most States cannot be considered States with an absolute lack of individuals specialised in a particular area. Underestimating the disclosure duty by arbitrators in a particular State corroborates the fact that the practice in these countries (the practice of arbitrators and attorneys, but also judges) is not sufficiently familiar with international standards.

[5] Cf. also ICC 18697 – The challenge was granted because the arbitrator had been nominated seven times in the past twelve years by the same party, while five of such nominations occurred in the past five years, and at least one of these cases concerned a case very similar to ICC 18697; ICC 20900 – The arbitrator was not confirmed because he was appointed three times by the same party over a very short period of time, and the International Court of Arbitration concluded that the cases concerned very similar matters. A major discussion revolved around ICC 21325, in which the Court ultimately confirmed the arbitrator, who was simultaneously acting as arbitrator in other proceedings on the basis of a nomination made by a party that was personally and economically connected with the party in ICC 21325; the decisive factor was the fact that the cases concerned entirely unrelated matters.

[6] ICC 20900 (see the preceding footnote) and ICC 21098 involved the same arbitrator appointed three times by the same party over a short period of time. Whereas the nomination of the arbitrator was not confirmed in ICC 20900, the nomination by Court in ICC 21098 was confirmed specifically for the reason that the party made no objections to the disclosed repeated appointments.

[7] For instance, in ICC 19204 and ICC 19021, the International Court of Arbitration confirmed the arbitrator or, as applicable, dismissed the challenge of the arbitrator (in the latter case) specifically on grounds that the Court had regard to local conditions. But the arbitrators involved in those cases had a long and very intensive practice in international arbitration and were considered to be respected and recognised authorities by the international community.

V. International Rules and Standards in Relation to Disclosure Duty

V.1. Unifying Tendencies in International Practice

2.16. The arbitrator's disclosure has principal consequences for the parties' right to invoke the absence of their impartiality on grounds specified in the disclosure, because various rules regulating international arbitration stipulate a deadline by which the arbitrator may be challenged, in the interest of preventing delays and uncertainty in the proceedings.

2.17. According to the IBA Guidelines, this time limit is 30 days after the receipt of the disclosure. If a party raises no objection, the party is deemed to have waived the right with preclusive effect, and thus the party may not, as a rule, raise the objection at a later stage.[8] Similar provisions are contained in the UNCITRAL Arbitration Rules,[9] which are the most common rules used in international *ad hoc* arbitration; the time limit stipulated for challenging the arbitrator is 15 days after the delivery of the arbitrator's disclosure or after the circumstances become known to the party which, in the party's opinion, raise justifiable doubts as to the arbitrator's independence and impartiality.[10] It needs to be emphasized that international practice has long ceased to draw any differences between domestic and international arbitration. It is thus also a manifestation of the codified practice regarding the fact that there is no reason why international practice should not be followed in national or domestic arbitration too, or as applicable, in arbitration lacking any qualified international dimension. The Rules of Arbitration of the International Court of Arbitration (ICC Court) at the International Chamber of Commerce (ICC) which are considered to be a very important standard in the international practice of arbitration, stipulate that a party must submit a challenge of an arbitrator within 30 days from receipt by that party of the notification of the appointment of the arbitrator, or within 30 days from the date when the party became aware of any facts that, in the party's opinion, undermine the arbitrator's independence or impartiality.[11]

[8] Part I, General Standard (4) of IBA Guidelines on Conflict of Interest in International Arbitration, available at: goo.gl/G2iWDf (the "IBA Guidelines") (accessed on 15 January 2020).

[9] Available at: goo.gl/TouqwU (accessed on 15 January 2020).

[10] Article 13 in conjunction with Articles 11 and 12 of the UNCITRAL Arbitration Rules.

[11] Article 14 of the ICC Rules of Arbitration.

V.2. The UNCITRAL Model Law on Arbitration

An important, albeit non-binding, instrument unifying the international practice of arbitration is the UNCITRAL Model Law[12] on Arbitration, the first version of which was adopted in 1985, and which has since served as an important platform for reforms of national arbitration laws. It contains a comprehensive set of rules on arbitration, including on the independence and impartiality of arbitrators. Similarly to the IBA Guidelines, the UNCITRAL Model Law also with regard to international consensus regarding the fundamental aspects of international arbitration, and ever since its adoption, has inspired or has been adopted in its entirety by 76 states worldwide. Some States have not adopted the UNCITRAL Model Law in the drafting of their national *lex arbitri* or, as applicable, have not referred to this standard, but they de facto copy the structure thereof and also incorporate a number of its provisions.

2.18. Concerning the fundamental principles of the arbitrators' bias, the IBA Guidelines, as well as the UNCITRAL Model Law, primarily refer to the obligation of each arbitrator to be an independent and impartial arbitrator of the dispute, from the acceptance of the office to the formal conclusion of the arbitration.[13] If an arbitrator has any doubts in the given case regarding their ability to honour that obligation (in other words, if the arbitrator doubts their lack of bias), the arbitrator must decline their appointment as arbitrator.[14] The IBA Guidelines stipulate that the arbitrator must proceed similarly if at any moment after the opening of arbitration any circumstances arise that raise justifiable doubts as to the arbitrator's impartiality or independence from the perspective of an uninvolved, informed and reasonable third party.[15] Similar provisions are also incorporated in the UNCITRAL Model Law, which provides that a party may challenge an arbitrator if the party has justifiable doubts as to the arbitrator's independence and impartiality.[16]

[12] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006.

[13] Part I, General Standard (1) of the IBA Guidelines; Article 11(5), Article 12(1) and 12(2) of the UNCITRAL Model Law.

[14] Part I, General Standard (2)(a) of the IBA Guidelines.

[15] Part I, General Standard (2)(b) of the IBA Guidelines.

[16] Article 12(2) of the UNCITRAL Model Law.

V.3. IBA Guidelines on Conflicts of Interest in International Arbitration

V.3.1. Importance and Standards of IBA Guidelines

2.19. The plurality of rules, characteristic of international arbitration, has resulted in a demand for standardized rules that would comprehensively regulate the issue of the arbitrators' bias in international disputes. Hence, in 2004, the first version of the IBA Guidelines was adopted, codifying the basis of our current international practice regarding the independence and impartiality of arbitrators; the IBA Guidelines were prepared on the platform of one of the most important international professional institutions, the *International Bar Association* (IBA), a leading international organization connecting tens of thousands of lawyers and more than 190 professional organizations of lawyers from more than 160 countries worldwide. The IBA Guidelines represent the notional core of the international practice, reflecting the principles and rules from a number of legal systems and cultures, not to mention the experience gathered by leading international arbitral institutions, arbitrators and academics. The IBA Guidelines were subject to a review implemented in 2012 – 2014, which was preceded by a broad discussion and detailed public consultations, among the participants being many leading arbitrators, legal practitioners and arbitral institutions from all over the world.

2.20. During their 14 years of existence, the IBA Guidelines have had a significant success in their broad application, because they are currently a firm part of the international practice, despite their legally non-binding nature, but are frequently also of the national legal systems, and a principal unifying instrument as regards the independence and impartiality of arbitrators. The parties to international arbitration and their legal representatives commonly invoke the provisions of the IBA Guidelines whenever the independence and impartiality of arbitrators is the subject of assessment. Arbitrators voluntarily abide by the IBA Guidelines regulating their disclosure duty, and the courts and arbitral institutions similarly have regard to the IBA Guidelines in their decisions on challenges of arbitrators.

V.3.2. The Objective Test According to Standards Introduced by IBA Guidelines

2.21. International practice has gradually settled on the objective test of an informed and reasonable third party whenever an

assessment is to be made of justifiable doubts as to the arbitrator's bias. Justifiable doubts exist if an informed and reasonable third party (a person aware of all relevant circumstances of the case) reached 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. The IBA Guidelines add that doubts always exist if any of the most serious circumstances occur, which are described on the Red List.

2.22. Apart from the disclosure duty, it is also appropriate to mention the other part of the IBA Guidelines entitled *Practical Application of the General Standards,* which contains lists of situations that, depending on the facts of a given case, may give rise to justifiable doubts as to the arbitrator's impartiality and independence. No other document in international arbitration contains a similar list, which is why the second part of the IBA Guidelines is nowadays regularly invoked by the parties, arbitrators, arbitral institutions, as well as the courts in their pleadings or decisions, respectively. It has to be pointed out, though, that this list is by no means exhaustive, and conversely, only contains the most serious situations that must be considered in the examination of impartiality and independence.[17] They are essentially examples that ought to serve as guidance. Consequently, legal practice has often witnessed other situations that, while not included in the IBA Guidelines, may raise justifiable doubts as to the arbitrator's independence or impartiality. But this author's own experience confirms that Part II of the IBA Guidelines represents the general basis of the international practice as concerns specific circumstances that may result in justifiable doubts as to the arbitrator's independence and impartiality. As stated above, these situations are classified into three main lists – the Red List, the Orange List and the Green List, and the existence of any such fact (again, depending on the circumstances of the individual case) may raise justifiable doubts as to the arbitrator's independence and impartiality.

2.23. **The Red List of the IBA Guidelines** is further divided into two parts according to the seriousness of the situations provided for therein – a non-waivable Red List and a waivable Red List. The nonwaivable Red List is an expression of the general principle that no person can be their own judge. It contains situations in which the arbitrator is simultaneously one of the parties, a legal representative of a party, a party's employee, manager, director or any other person with a similar position in relation to a party

[17] Otherwise, the authors of the IBA Guidelines could never have agreed on the text thereof, because they come from many diverse legal systems.

or in relation to any other person who has a direct economic interest in the outcome of the arbitration.[18] If any such situation occurs in the arbitration, the arbitrator should principally decline to accept their appointment, unless all parties, arbitrators and the arbitral institution are aware of the fact and explicitly agree with the appointment of this arbitrator.[19] The Red List, which thus means automatic disqualification of the arbitrator, contains situations where:

(i) the arbitrator has a connection to the arbitration. For instance, the arbitrator used to provide legal advice in the case or was otherwise interested in the case;[20]

(ii) the arbitrator has a direct or indirect interest in the outcome of the arbitration. For instance, the arbitrator is a shareholder of a party or any other entity connected with a party to the dispute, or the arbitrator has a financial interest in the outcome of the arbitration, or a person close to the arbitrator has a financial interest in the outcome of the arbitration…); or[21]

(iii) the arbitrator has a relation to the parties or their legal representatives. For instance, the arbitrator represents one of the parties, the arbitrator's law firm represents one of the parties, the arbitrator works in the same firm as the legal representative of the parties, the arbitrator may influence the management of a party, the arbitrator has a family connection to a party or the managers of a party, or a person close to the arbitrator has a financial interest in a party.[22]

2.24. Despite the seriousness of such situations, the arbitrator may accept their appointment, but only on condition that the parties, the other arbitrators and, as the case may be, the arbitral institution are all aware of the facts (such circumstances have been announced/disclosed to them) and explicitly agree with the appointment of the arbitrator.

2.25. **The Orange List of the IBA Guidelines** contains less serious situations that could, again depending on the circumstances of each case, give rise to justifiable doubts of the parties as to the arbitrator's independence and impartiality. The Orange List contains the following categories of situations:

(i) the arbitrator has within the past three years provided their services to one of the parties or an affiliate of one

[18] Part I, General Standard (4)(c) of the IBA Guidelines.
[19] Part II, Article 1 of the IBA Guidelines.
[20] Part II, Article 2.1 of the IBA Guidelines.
[21] Part II, Article 2.2 of the IBA Guidelines.
[22] Part II, Article 2.3 of the IBA Guidelines.

of the parties. For example, they worked for them as an attorney, advised them in an unrelated matter, acted as an attorney for their counterparty in an unrelated matter, or was appointed as arbitrator by a party in two or more disputes. Additionally, an example could be that the arbitrator's law firm provided services to one of the parties, or the arbitrator served in a different dispute involving one of the parties, the subject matter of which is related to the dispute in which the arbitrator is to be appointed;[23]

(ii) the arbitrator's law firm is rendering services to one of the parties or to an affiliate of one of the parties. This could include a situation where the law firm in which the arbitrator works – without their involvement – provides services to one of the parties;[24]

(iii) the existence of a relationship between arbitrators, or a relationship between the arbitrator and a party's legal counsel. For example, this could be that the arbitrators are lawyers in the same law firm, the arbitrator and the counsel for one of the parties are members of the same barristers' chambers, a lawyer in the arbitrator's law firm is an arbitrator in another dispute involving at least one of the parties, a close personal friendship or animosity exists between the arbitrator and the counsel of one party, or the arbitrator has been repeatedly appointed by the counsel of a party within the past three years;[25]

(iv) the existence of a relationship between the arbitrator and others involved in the arbitration. This could involve the arbitrator's law firm acting in an adverse fashion to one of the parties in an unrelated matter, the arbitrator had been associated with a party in a professional capacity, such as a former employee or partner, a close personal friendship or animosity exists between the arbitrator and a person having a controlling influence or powers in one of the parties, or the arbitrator has, as a judge, within the past 3 years, heard a significant case involving one of the parties); or[26]

(v) other circumstances, such as the arbitrator publicly voicing an opinion regarding the case that is being arbitrated, or that the arbitrator holds a share in

[23] Part II, Article 3.1 of the IBA Guidelines.
[24] Part II, Article 3.2 of the IBA Guidelines.
[25] Part II, Article 3.3 of the IBA Guidelines.
[26] Part II, Article 3.5 of the IBA Guidelines.

a company that has a certain shareholding in one of the parties).[27]

2.26. The IBA Guidelines stipulate that the arbitrator is obliged under any circumstances to disclose the circumstances listed on the Orange List to the parties, which have 30 days after such disclosure to express an objection as to the arbitrator's bias.

2.27. It needs to be explained that the **Green List**, conversely, contains a list of situations that the arbitrator does not have to disclose to the parties. It therefore serves as a reasonable benchmark for the arbitrator and for the parties, which prevents the disclosure duty from becoming a nonsensically detailed recapitulation of the arbitrator's professional and personal life. The situations mentioned on the Green List include, for instance that the arbitrator has expressed their legal opinion in an unrelated matter, the arbitrator and the legal counsel for one of the parties are members of the same professional association, the arbitrator and the legal counsel for one of the parties teach at the same university or college, the arbitrator and the legal counsel for one of the parties attend the same conferences or seminars, the arbitrator has been at a meeting with one of the parties with respect to the arbitrator's qualification, willingness and possibility to accept the appointment as arbitrator, the arbitrator has a disclosed minor shareholding in one of the parties, or the arbitrator has contacted one of the parties via social networks.

2.28. However, it is indeed disappointing that, despite the relatively unequivocal international practice, even these and other similar situations included on the Green List are objected to by the parties and held against the arbitrators, during a challenge to an arbitrators. It has essentially become widespread practice that the parties avail themselves of any and all objections in their disputes provided to them by the formally applicable procedural rules and the provisions of the *lex arbitri*, even if the objections are manifestly unjustified. The real reasons for such practice undoubtedly merit closer analysis, but it is rather a sociological or socio-legal matter, which therefore greatly exceeds the subject matter of this article.

2.29. For illustration purposes only, an objection was made in a particular arbitration against the chairperson of the arbitral tribunal, which was based on the fact that he and the respondent's legal counsel were professors at the same university.[28] There are a lot of similar cases. On the other hand, there are also exceptions where the active academic and

[27] Part II, Article 3.4 of the IBA Guidelines.

[28] ICC 13266 (unpublished).

professional interaction between the arbitrator and the party's legal counsel resulted in the disqualification of the arbitrator, or rather the arbitrator's nomination was not confirmed by the permanent arbitral institution. In one of these cases, the Court (ICC) declined to confirm the nomination of an arbitrator who alternated as a lecturer with a party's legal counsel.[29] But in the latter case, there existed five more significantly more compelling reasons that led the ICC to decline confirmation of the arbitrator's nomination. Among others, these included the fact that the nominated arbitrator failed to disclose (the absence of disclosure) that he had been mandated by a party to the dispute over the course of the last couple of years. Besides, there is a major difference in ICC arbitration between (i) grounds for a denial of confirmation of a nominated arbitrator, where the ICC enjoys substantially broader discretion and also endeavours to prevent, where applicable, any potential future problems, and (ii) a situation in which a decision is being made on a challenge of an arbitrator made by a party.[30] Indeed, the latter case involves strict decision-making as to whether any grounds for disqualification exist in terms of the applicable *lex arbitri* and the rules applied to the respective arbitration. Similarly, a permanent arbitral institution (ICC) declined to confirm the nomination of an arbitrator who had had active academic contacts with the legal counsel for the party who nominated the arbitrator. But these contacts were so intensive, and the nominated arbitrator played such an important role in the professional and especially academic career of the legal counsel for the nominating party, that these accumulated circumstances led the ICC to decline confirmation of the nomination of this potential arbitrator.[31] In any case, academic cooperation itself is generally covered by the Green List.

2.30. However, there is another interesting case discussed in the international practice with relation to academic cooperation between an arbitrator and a party or a party's legal counsel that deserves to be mentioned in this article on the disclosure duty. The arbitrator challenge was dismissed in that case, despite the fact that the arbitrator had failed to meet his disclosure duty.[32] The new fact that should have been disclosed by the arbitrator according to the challenging party was that the chairman of the arbitral tribunal had become a dean at the same faculty at

[29] ICC 13266 (unpublished).

[30] For an analogous opinion, see also Jason Fry, Simon Greenberg, *The Arbitral Tribunal: Application of Articles 7-12 of the ICC Rules in Recent Cases*, 20(12) ICC BULLETIN 12 et seq. (2009) et al.

[31] ICC 18202 (unpublished).

[32] ICC 19294 (unpublished).

which another member of the same arbitral tribunal lectured as a professor. The reason was that academics at one and the same faculty or school do not share one and the same salary, as opposed to, for instance, partners in law firms.[33] Consequently, no mutual material dependence exists here. In this particular case, the new dean who was also the chairman of the arbitral tribunal had previously been a deputy dean, and consequently, nothing had de facto changed. The ICC concluded in that case that the subject matter of the situation was similar to a situation where one of the members of the arbitral tribunal is the supervisor of a dissertation written by another member of the arbitral tribunal. Hence, the ICC qualified the case analogously to those cases where arbitrators as legal practitioners are members of the same professional organisation, which the IBA Guidelines typically include on the Green List.

VI. The Duty to Disclose

VI.1. The Duty to Inform Parties, Other Arbitrators and Permanent Arbitral Institutions

2.31. Under any arbitration rules and arbitrations laws, an arbitrator has a duty of independence and impartiality to the parties. An arbitrator therefore has a principal duty to disclose information so as to enable the party that is considering appointing them to determine whether it is satisfied with their independence and impartiality. Disclosure thus helps to select the right arbitrator and to avoid selecting an arbitrator who could subsequently be challenged by the other party on account of a conflict of interest. Be that as it may, parties of course remain entitled to nominate the arbitrator of their choice. Arbitrating parties frequently choose arbitrators on the basis of their prior professional or business associations or commercial expertise.

2.32. A person with a certain background, for instance, might be more attuned to and possibly more sympathetic to the arguments of a party. Parties do analyse the background of arbitrators. Whereas for the appointing party, this background may be the reason to appoint a particular arbitrator, it may also be the reason why the non-appointing party will oppose the appointment of that arbitrator. The competing goals of a party's choice, desired expertise and impartiality must be balanced by giving the non-appointing party access to all information that might reasonably

[33] Klaus Günther, *Merging Law Firms and Coping with Conflicts of Interests*, 18 ASA BULLETIN 45-55 (2001).

affect the arbitrator's independence and impartiality. This information will allow the non-appointing party to evaluate the arbitrator's suitability to serve on the arbitral tribunal, and to challenge the arbitrator if it disagrees with their appointment to the tribunal or continued service on the tribunal on account of the disclosed information. In international arbitration, the disclosure duty is especially important, since a party may not have easy access to information regarding the reputation and relationships of an arbitrator domiciled in a foreign country.

2.33. If an arbitrator discloses all facts that could conceivably be considered as grounds for disqualification, and if no objection is made in a timely manner, any subsequent challenge during or after the arbitration proceeding will be unsuccessful. The right to propose disqualification due to the facts contained in the disclosure is then deemed to have been waived. In this respect, disclosure avoids, or at least reduces, the risk that the arbitration proceeding will be frustrated and interrupted by late challenges. So what exactly does a disclosure duty mean according to major arbitral institutions?

VI.2. Standards of International Court of Arbitration at International Chamber of Commerce (ICC)

2.34. Article 11(2) of the ICC Rules stipulates:

> Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such amateur as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.

2.35. The circumstances that must be disclosed have recently been clarified in the January 2019 ICC Note. This Note provides additional guidance to parties and arbitrators on how to conduct ICC arbitration by stipulating the following:

- Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all potentially

relevant circumstances, including, but not limited to, the following:

- The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer or otherwise.
- The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.
- The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.
- The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.

2.36. The note further stipulates that, when assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration. The Secretariat may in this respect assist prospective arbitrators by identifying relevant entities and individuals in the arbitration. Such an indication does not release any arbitrator or prospective arbitrator from their disclosure duty with respect to other relevant entities and individuals of whom they may be aware. In case of any doubts concerning such an indication made by the Secretariat, an arbitrator or prospective arbitrator is encouraged to consult the Secretariat. Therefore, the ICC has

effectively adopted its own list of circumstances that warrant disclosure and has thus created a new standard for disclosure in the context of the ICC, independent of the IBA Guidelines.

2.37. The ICC's statement of acceptance also provides that 'any doubt as to disclose or not must be resolved in favour of disclosure'. The impression is that, in practice, arbitrators do not pay much attention to this statement. The ICC disclosure standard is extensive. It requires disclosure of facts or circumstances that 'might' be of such a nature as to call into question the arbitrator's independence 'in the eyes of the parties' or that 'could' give rise to reasonable doubts as to the arbitrator's impartiality.

2.38. The ICC International Court of Arbitration has repeatedly ruled on arbitrator challenges made on grounds of a breach of the disclosure duty and has formulated the above-mentioned rule, i.e. that the breach of the disclosure duty in and of itself does not constitute grounds for disqualification.[34]

2.39. Nonetheless, the ICC International Court of Arbitration commonly regards more serious breaches of the disclosure duty (in terms of the nature of the withheld information) as an important factor indicating a lack of impartiality on the part of the arbitrator.[35] The ICC Court has therefore held that a failure to disclose certain information raises justifiable doubts regarding the arbitrator's impartiality and independence.[36] This practice and the relatively rigorous approach to the disclosure duty have been on the rise, and the past twenty years have witnessed an increasingly rigorous approach, according to which a breach of the disclosure duty has been classified, in an increasing number of cases, as a presumption of the existence of grounds for disqualifying the arbitrator. The ICC case law is an important benchmark of international practice.[37] This is the reason why the author has, from time to time, referred to the ICC decisions in the preceding parts of this article.

VI.3. Other Applicable Rules and National Practice

2.40. The duty to inform the parties of any and all circumstances that could give rise to doubts as to the arbitrator's lack of bias is laid down not only in the IBA Guidelines, but also in principally all

[34] See also decisions in ICC 20840, ICC 20611, ICC 19374, ICC 19079, ICC 18688, ICC 18088, ICC 18104, ICC 16903, ICC 16503 and ICC 15348 (unpublished).

[35] See also decisions in ICC 19233 and ICC 19021 (unpublished).

[36] See also the decision in ICC 15003 (unpublished).

[37] See also STEPHEN R. BOND, THE EXPERIENCE OF THE ICC IN THE CONFIRMATION/APPOINTMENT STAGE OF AN ARBITRATION. THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATOR, Paris: ICC Publishing S.A., ICC Publication No. 472 (1991).

rules adopted by important permanent arbitral institutions. Apart from those mentioned earlier, one may also refer to the LCIA Arbitration Rules.[38] In practice, the LCIA Registrar provides the nominated arbitrator with a standard form that has to be signed. The nominated arbitrator has to strike out one or the other of the following two declarations. Statement A provides: 'I am impartial, and independent of each of the parties, and I intend to remain so, and there are no circumstances known to me likely to give rise to any justified doubts as to my impartiality or independence.' Statement B says:

> I am impartial, and independent of each of the parties, and I intend to remain so, but I wish to disclose certain circumstances for the consideration of the LCIA Court prior to my appointment, whether or not any such circumstances is likely to give rise to any justified doubts as to my impartiality or independence. Other than such circumstances here disclosed by me, there are no circumstances known to me likely to give rise to any justified doubts as to my impartiality or independence.

2.41. The reference in Statement B to the 'consideration of the LCIA Court' relates to the appointment process of the Tribunal under the LCIA Rules. Pursuant to Article 7(1), parties are entitled to nominate an arbitrator. However, pursuant to Article 5(6), only the LCIA Court is empowered to effectively appoint arbitrators. This means that the LCIA, like the ICC Court, has to approve the arbitrators nominated by the parties. This approval is not a mere formality. The second sentence of Article 7(1) provides that 'such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee's compliance with Articles 5.3 to 5.5; and the LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable).' The nominated arbitrator will therefore have to sign the above-mentioned declaration, and the LCIA Court, if there is a disclosure, will subsequently have to

[38] Article 5.4 of the LCIA Rules (London Court of International Arbitration) (quote): 'before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present).' The article continues that the arbitrator 'shall sign a written declaration stating whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration...'

determine the relevance of the disclosed circumstances to the arbitrator's impartiality or independence.

2.42. Article 18(2) of the SCC Rules provides that an arbitrator 'shall disclose any circumstance which may give rise to justifiable doubts as to his/her impartiality or independence.' The SCC Rules apply the same standard (justifiable doubts) as the UNCITRAL and the LCIA rules, except that the SCC Rules require disclosure of circumstances that 'may' give rise to such doubts, while the LCIA Rules and UNCITRAL Rules only require the disclosure of circumstances that are 'likely' to give rise to such doubts. The word 'may' refers to a mere possibility, whereas the word 'likely' refers to a higher threshold of probability. Also, the SCC Institute of Arbitration provides the nominated arbitrator with a standard form to be signed, while the arbitrator has to select one of the following declarations. The first declaration provides:

> I hereby confirm that I am impartial and independent in the above arbitration. I am not aware of any circumstance that may give rise to justifiable doubts as to my impartiality or independence. If I become aware of any such circumstance, I undertake to immediately inform, in writing, the parties and the other arbitrators thereof.

2.43. The second declaration provides: 'I hereby confirm that I am impartial and independent in the above arbitration. In connection therewith I do, however, wish to make the following disclosure as to circumstances that may give rise to justifiable doubts as to my impartiality or independence.'

2.44. One may, naturally, also mention a number of other rules that inherently include the disclosure duty.

2.45. Failure to meet this duty may result in justifiable doubts as to the impartiality and independence of the arbitrator, or even to the setting aside of the arbitral award by a court. For instance, in *SA Serf* v. *Société DV Construction,* a French Court of Appeals set aside the arbitral award because the arbitrator failed to disclose to the parties that he had been listed in the arbitration agreement in the General Terms and Conditions and, consequently, systematically appointed in several preceding arbitral proceedings.[39] If the arbitrator fails to disclose this fact,

[39] Decision of the French Court of Appeals (Cour d'appel de Paris) [France] in *SA Serf* v. *Société DV Construction*, of 29 January 2004, published in: REVUE DE L´ARBITRAGE, 709 et seq. (2005), also cited and annotated in: Antonio Crivello, *Does the Arbitrator´s Failure to Disclose Conflicts of Interest Fatally Lead to Annulment of the Award? The Approach of the European State Courts*, 4(1) THE ARBITRATION BRIEF 131 et seq. (2014).

it is now commonly deemed to be a qualified fact capable of disqualifying the arbitrator.

2.46. In the *Tidewater Inc et al.* v.*Venezuela* investment dispute at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington D.C., the arbitrators confirmed the opinion that the failure to meet the disclosure duty does not in and of itself constitute grounds for disqualifying the arbitrator. But this fact needs to be factored in the comprehensive assessment of the arbitrator challenge in each individual case, and other circumstances need to be examined too, such as the nature of the information that the arbitrator failed to disclose, or whether the failure was intentional or only a result of negligence.[40] The Court of Appeals in Belgium held with respect to a similar objection made by a party that a breach of the disclosure duty did not in and of itself constitute grounds for disqualifying the arbitrator, and it was necessary to examine whether the information that the arbitrator had failed to disclose, despite their duty to do so, gives rise to doubts as to the arbitrator's independence and impartiality.[41] But the failure to meet the disclosure duty is an important factor indicating that the fact needs to be investigated in great detail.

2.47. In the *Alpha Projektholding GmbH* v. *Ukraine* investment dispute submitted to the ICSID, the arbitrators held in their decision on a challenge of the third member of the arbitral tribunal that they generally agree that a failure to meet the arbitrator's disclosure duty does not in and of itself constitute grounds for their disqualification (as laid down, for instance, in the IBA Guidelines). But they also added that, in their opinion, a situation may occur when the undisclosed circumstances are (quote):

> […] of such a magnitude that failure to disclose them either (1) would thereby in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment or (2) would be sufficient in conjunction with the non-disclosed

[40] ICSID decision of 23 December 2010 in the case of an arbitrator challenge made in *Tidewater Inc.*, *Tidewater Investment SRL*, *Tidewater Caribe, C.A. et al.* v. *The Bolivarian Republic of Venezuela*, No. ARB/10/5, paragraph 47, available at: goo.gl/kj2Nou (accessed on 14 January 2020). But it is necessary to emphasize that requirements of the arbitrators' independence and impartiality in investment disputes are substantially more rigorous than in regular international commercial disputes.

[41] Decision of the Court of Appeals in Brussels [Belgium] Case No. 2007/AR/70, of 29 October 2007, in *La République de la Pologne*, *Eureko B.V.* v. *X, Y. Z*, number, cited and annotated in: GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (2nd ed. 2014), et. 1891.

facts or circumstances to tip the balance in the direction of that result.[42]

2.48. In this particular case, the arbitrators ultimately dismissed the objection, arguing that the information that the arbitrator had not disclosed to the parties was not relevant for the arbitrator's independence and impartiality.

VII. The Nature of Disclosure Duty and Subjective Circumstances Attending the Absence of Disclosure Consisting in the Person of the Relevant Arbitrator

2.49. It is necessary to point out that, as mentioned above, the importance of the arbitrators' disclosure duty is constantly increasing, and any breach thereof has been associated with more and more negative connotations. It cannot be deduced that a breach of the disclosure duty should result in the automatic disqualification of the arbitrator. However, an ever-stronger approach has been discernible in international practice. Under this approach, a breach of the arbitrator's duty to inform the parties of the fundamental circumstances relating to their independence actually constitutes an irrebuttable presumption of the existence of grounds that give rise to justifiable doubts as to the arbitrator's lack of bias, for the sole reason that the arbitrator failed to disclose such circumstances, and this presumption ultimately results in the disqualification of this arbitrator.

2.50. Naturally, it is always necessary to have regard to the nature of the circumstances that the arbitrator failed to disclose. The breach of this duty must also be assessed from the perspective of the person bound by the disclosure duty, and especially their experience in arbitration. For instance, in a case before the ICC International Court of Arbitration, the fact that the expert witness appointed by a party had worked for a number of years as an accounting advisor for one of the co-arbitrators (i.e. not for the party itself) was ultimately held not to be a reason for disqualification, though after a very intense discussion and voting by the plenum of the ICC Court. It was ultimately held decisive in this regard that the issue did not concern the party itself, and that the respective activity consisted in the drafting of a tax return prepared regularly as of the end of each calendar year on the basis of only a few tax invoices. Likewise, the expert

[42] ICSID decision of 19 March 2010 in the case of an arbitrator challenge in *Alpha Projektholding GmbH* v. *Ukraine*, No. ARB/07/16, marg. 64. Also available online at: goo.gl/ykPHMM.

witness regularly charged only a fixed fee for this service in the amount of approximately EUR 200. At the same time, it was also found relevant that the arbitrator in question had essentially only been active in the academic sector, and until then, with the exception of the given arbitration, had not come into any contact with arbitration and was thus faced with the standards of arbitration for the very first time. Despite the fact that the ICC dismissed the arbitrator challenge, the case ignited a very controversial discussion when the decision on the objection was being made.

2.51. Consequently, when evaluating the importance of the failure to meet the disclosure duty, it is also possible to have some regard to the subjective circumstances attending the person of the arbitrator themself. One may assume that a person appointed as arbitrator will get well acquainted with at least the applicable standards. But arbitration is noted for the fact that it should involve persons who principally best comply with the parties' ideas as regards their expertise relating to the subject matter of the dispute. This may involve persons who have no experience with arbitration whatsoever, and who may, under certain circumstances, be found to have been unaware of the corresponding obligation, including the applicable standards. Therefore, one cannot draw absolute consequences from the breach of the disclosure duty. The important thing is whether the failure to meet the disclosure duty is or is not capable of raising, or relevantly increasing, the parties' doubts as to the arbitrator's impartiality. Conversely, this is certainly not the case when the arbitrator, in any manner whatsoever, sells themself as a person versed in arbitration, for instance, in their professional profile, in the promotion of their professional services, for example. Hence, if the respective arbitrator intentionally presents themself as an expert in arbitration, they are a person who must have been aware of the disclosure duty as an important instrument applied in arbitration, and the breach of the given duty by such a person is all the more serious and capable of raising doubts of the parties.

2.52. The arbitrators' obligation to inform the parties (and, as applicable, the arbitral institution and other arbitrators on the same arbitral tribunal) of any and all circumstances that could give rise to justifiable doubts as to their independence and impartiality before accepting their appointment as arbitrator is therefore certainly one of the most important instruments of control over the arbitrators' independence and impartiality

in international practice.[43] The arbitrator's disclosure should cover any and all information that could give rise to justifiable doubts as to their lack of bias. In accordance with the rules articulated above, the circumstances presented by the arbitrator in their disclosure do not give rise to any doubts on the part of the arbitrator as to their lack of bias, because otherwise the arbitrator would have to decline the appointment or resign. In other words, the arbitrator who meets their disclosure duty feels independent and impartial.[44] But the parties have a clear interest in being aware of all information concerning any and all relevant circumstances that could affect the arbitrator's independence and impartiality. The object of the disclosure duty is to provide the parties with this opportunity. On the other hand, the arbitrator is under no obligation to disclose circumstances that would have no influence on their independence and impartiality according to the objective test. If the arbitrator is unsure of whether any particular fact is relevant, they should, as a rule, include it in the disclosure.[45] After the arbitrator fulfils the disclosure duty, it is up to the parties to make a statement regarding the disclosure, assess the circumstances presented by the arbitrator, and decide whether or not they will challenge the arbitrator on grounds of bias.

VIII. Time Limits

2.53. The arbitrator's disclosure has principal consequences for the parties' right to challenge the arbitrator on grounds specified in the disclosure, because various rules regulating international arbitration stipulate, in the interest of preventing delays and uncertainty in the proceedings, a deadline by which the arbitrator may be challenged. The IBA Guidelines stipulate that this limit lasts 30 days after the receipt of the arbitrator's disclosure of circumstances that could influence their lack of bias If the party fails to express any objection, the party is deemed to have waived this right, and any objection (on the grounds mentioned in the disclosure) expressed at a later stage is inadmissible.[46]

2.54. Similar provisions are contained in the UNCITRAL Rules,[47] the most frequently used rules in international *ad hoc* arbitration (i.e. arbitration conducted other than under the auspices of a permanent arbitral institution). The UNCITRAL Rules

[43] Part I, General Standard (3)(a) of the IBA Guidelines. Assessment of the importance of this instrument under the IBA Guidelines is actually more rigorous.
[44] Part I, General Standard (3)(c) of the IBA Guidelines.
[45] Part I, General Standard (3)(d) of the IBA Guidelines.
[46] Part I, General Standard (4) of the IBA Guidelines.
[47] Available at: goo.gl/TouqwU (accessed on 14 January 2020).

stipulate a 15-day time limit for challenging an arbitrator after the delivery of the arbitrator's disclosure or after the party becomes aware of any circumstance that, in the party's opinion, raises justifiable grounds as to the arbitrator's independence and impartiality.[48]

2.55. The ICC Rules[49] stipulate that the parties have 30 days to challenge the arbitrator from receipt of the notification of the appointment of the arbitrator. This is preceded by the arbitrator's declaration of independence and impartiality, in which the arbitrator must present any and all circumstances that the parties might consider as undermining the arbitrator's independence and impartiality. Failing that, it stems from the date when the party became aware of any circumstances that, in the party's opinion, undermine the arbitrator's independence or impartiality.[50]

2.56. Article 5(4) of the LCIA Rules stipulates that 'before appointment by the LCIA Court the prospective arbitrator will have furnished a brief written summary of his past and present professional positions.' This means that disclosures are required to be made prior to the arbitrator's appointment by the LCIA Court. The duty of disclosure continues to apply until the conclusion of the arbitration. Article 5(5) of the LCIA Rules provides that,

> If appointed, each arbitral candidate shall thereby assume a continuing duty as an arbitrator, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence.

2.57. Article 18.2 of the SCC Rules provides that 'before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.' Article 18(3) continues that 'once appointed, an arbitrator shall submit to the Secretariat a signed statement of acceptance, availability, impartiality and independence, disclosing any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.' Article 18(4) of the SCC Rules then provides that 'an arbitrator shall immediately inform the

[48] Article 13 in conjunction with Articles 11 and 12 of the UNCITRAL Arbitration Rules, as amended in 2013.

[49] Available in various language versions at: goo.gl/GZ9qzH (accessed on 14 January 2020).

[50] Article 14 of the ICC Rules of Arbitration.

parties and the other arbitrators in writing if any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence arise during the course of the arbitration.'

2.58. The duty to disclose is thus also an ongoing and continuous obligation. This is the standard in international arbitration.

IX. Conclusion

2.59. We may therefore conclude that, in international practice, a breach of the duty to disclose to the parties any and all relevant circumstances that could give grounds for justifiable doubts of the parties as to the arbitrator's ability to resolve the dispute in an independent and impartial manner need not generally be an automatic reason for disqualifying the arbitrator. However, the breach of the disclosure duty may constitute such grounds if the withheld circumstances are significant or if the breach, together with the nature of the non-disclosed facts and other relevant circumstances of the case, could jointly give rise to justifiable doubts as to the arbitrator's independence and impartiality. But as I have outlined above, this particular case concerns such serious circumstances that the non-disclosure of such circumstances may in and of itself lead to the conclusion that there are justifiable doubts as to the arbitrator's lack of bias. According to the objective test applied in the practice of international arbitration, and indeed in the national practice of a number of countries, the combination of (i) a serious breach of the arbitrator's disclosure duty, and (ii) the nature of the non-disclosed information is a fact that undoubtedly raises doubts as to the arbitrator's independence and impartiality.

Summaries

FRA [***L'indépendance et l'impartialité à la lumière des normes internationales et l'obligation des arbitres de signaler les faits susceptibles de les disqualifier***]

L'indépendance et l'impartialité des arbitres font partie des principes fondamentaux de la procédure arbitrale. Dans le même temps, il s'agit d'un sujet qui donne lieu – à juste titre – à des débats animés. Cette problématique est perçue comme importante non seulement dans les normes nationales concernant la procédure arbitrale (lex arbitri), mais aussi dans les autres normes et

règles applicables à cette matière. Cela concerne également les mécanismes d'examen de l'indépendance et de l'impartialité des arbitres et la possibilité des parties de soulever des objections à l'encontre des arbitres. Le Règlement d'arbitrage de la CNUDCI et les Lignes directrices de l'IBA sur les conflits d'intérêts dans l'arbitrage international occupent une place centrale sur la scène internationale, s'ajoutant aux règles établies par les institutions arbitrales permanentes. La condition première pour garantir l'indépendance et l'impartialité de la procédure d'arbitrage est cependant un examen rigoureux du conflit d'intérêts effectué par les arbitres désignés, avant qu'ils acceptent leur fonction. En vertu de la plupart des normes internationales, lorsqu'il existe des doutes ou des faits déterminés qui pourraient donner lieu à une appréciation différente par l'arbitre d'un côté et par les parties à la procédure de l'autre, l'arbitre est tenu de les signaler tant aux parties à la procédure qu'aux autres arbitres désignés, et, dans le cas d'un arbitrage institutionnel, également à l'institution arbitrale permanente. Il revient ensuite aux parties à la procédure d'apprécier ces circonstances. L'obligation des arbitres de signaler toute circonstance de nature à les disqualifier est considérée comme de plus en plus essentielle. Au regard de l'indépendance et de l'impartialité, il s'agit d'une obligation fondamentale des arbitres, dont l'importance ne saurait être contestée. Cependant, on peut se demander si cette obligation ne se heurte pas à des limites objectives et si sa définition actuelle n'est pas excessivement large.

CZE [***Nezávislost a nestrannost ve světle mezinárodních standardů a povinnost rozhodců informovat o skutečnostech, které by je mohly diskvalifikovat***]

Nezávislost a nestrannost rozhodců je jedním ze základních principů rozhodčího řízení. Jde o věc, která je oprávněně intenzivně diskutována. Současně je této problematice věnována pozornost nejen ve vnitrostátních předpisech o rozhodčím řízení (lex arbitri), ale v zásadě i ve všech jiných standardech a pravidlech upravujících rozhodčí řízení nebo použitelné na rozhodčí řízení. To souvisí i s mechanismy pro přezkum nezávislosti a nestrannosti rozhodců a pro uplatnění námitek stran proti rozhodcům. Zvláštního významu v mezinárodním prostředí mají vedle pravidel vytvořených stálými rozhodčími institucemi zejména Pravidla UNCITRAL o rozhodčím řízení a Směrnice IBA o konfliktu zájmů v mezinárodním rozhodčím řízení. Předpokladem pro prosazení nezávislosti a nestrannosti rozhodčího řízení je však primárně to, že důslednou kontrolu konfliktu zájmů provádí primárně nominovaní/jmenovaní

rozhodci před tím, než přijmout své jmenování. Podle většiny mezinárodních standardů jsou rozhodci, u nichž existuje buď pochybnost, či určitá kvalifikovaná skutečnost, která může být jimi samými na straně jedné a stranami na straně druhé hodnocena odlišně, povinni takové skutečnosti sdělit jak stranám, tak ostatním rozhodcům jmenovaným v téže věci, jakož případně i stálé rozhodčí instituci, jde-li o institucionalizované rozhodčí řízení. Následně záleží zejména na stranách, jak takové okolnosti vyhodnotí. Povinnosti rozhodců informovat o skutečnostech, které by je mohly diskvalifikovat, je přikládán stále větší význam. V souvislosti s nezávislostí a nestranností jde o zásadní povinnost rozhodců a její význam je nezpochybnitelný. Na druhou stranu však lze mít pochybnosti o tom, zda tato povinnost nenaráží na objektivní limity a zda není dnes koncipována již příliš široce.

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POL [***Niezawisłość i bezstronność w świetle międzynarodowych standardów oraz obowiązek arbitrów do informowania o okolicznościach mogących ich dyskwalifikować***]
Niezawisłość i bezstronność arbitrów należy uznać za aksjomat postępowania arbitrażowego. Zwraca się na nią uwagę we wszystkich normach regulujących arbitraż, w szczególności w przepisach krajowych dotyczących postępowania arbitrażowego (lex arbitri), jak również w regulaminach stałych trybunałów arbitrażowych i w innych standardach. Szczególne znaczenie mają mechanizmy autokontroli w postaci obowiązku arbitrów do informowania o okolicznościach mogących ich dyskwalifikować.

DEU [***Unabhängigkeit und Unparteilichkeit im Licht internationaler Standards und die Pflicht der Schiedsrichter, über Tatsachen zu berichten, die sie disqualifizieren könnten***]
Die Unabhängigkeit und Unparteilichkeit der Schiedsrichter gilt als Axiom des Schiedsverfahrens, das in allen Schiedsnormen behandelt wird, namentlich in den nationalen Schiedsregeln (lex arbitri), aber auch in den Regeln der ständigen Schiedsinstitutionen und in anderen Normen. Von besonderer Bedeutung sind die Selbstkontrollmechanismen in Form der Pflicht der Schiedsrichter, über alle Tatsachen zu informieren, die sie disqualifizieren könnten.

RUS [***Независимость и беспристрастность в свете международных стандартов и обязанность***

арбитров сообщать о фактах, которые могут их дисквалифицировать]

Независимость и беспристрастность арбитров следует считать аксиомой арбитража. Им уделяется внимание во всех стандартах, регулирующих арбитраж, в частности, в национальных регулированиях арбитража (lex arbitri), а также в регламентах постоянных арбитражных учреждений и в других стандартах. Особым значением обладают механизмы самоконтроля в виде обязанности арбитров сообщать обо всех фактах, которые могут их дисквалифицировать.

ESP [***Independencia e imparcialidad a la luz de los estándares internacionales y la obligación de los árbitros de informar sobre hechos que puedan impedirles participar en el proceso de arbitraje***]

La independencia y la imparcialidad de los árbitros se deben considerar como axiomas del proceso del arbitraje. Se les dedica atención en todos los estándares del arbitraje, especialmente en las normativas nacionales que lo regulan (lex arbitri), pero también en los reglamentos las instituciones de arbitraje permanentes u otros estándares. Tienen especial importancia los mecanismos de autorregulación, como por ejemplo la obligación de los árbitros de informar sobre los hechos que potencialmente puedan impedir su participación en el proceso de arbitraje.

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