ML in Law

Defining an Appropriate Threshold for Apparent Bias in International Arbitration
A Comparative Study

June 2019
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Abstract

Defining an Appropriate Threshold for Apparent Bias in International Arbitration: A Comparative Study

Arbitration, as a dispute resolution method, places particular emphasis on efficiency in the proceedings as well as party autonomy. But there is a third point of emphasis as well: the right to an independent and impartial tribunal. Indeed, respect for this bedrock legal principle is the rock upon which arbitration is built.

Arbitral institutions and domestic courts have therefore created protections against actual and apparent bias in the arbitral panel. Yet, those protections vary substantially by jurisdictions, creating some uncertainty in the determination of the threshold for actionable bias. In turn, this creates challenges for states whose domestic law regarding arbitrator bias does not translate effectively to the field of international arbitration.

This thesis describes the existing threshold for actionable apparent bias in several influential jurisdictions. The goal is two-fold. First, eliminating uncertainty regarding this important element of the arbitral proceedings will aid in jurisdiction selection, as well as in deciding whether or not to pursue a challenge against an arbitrator – an endeavor that might turn out both costly and time consuming. For this purpose, the author developed and applied a three-tier guideline, to categorize the severity threshold required by select states and arbitral institutions, for apparent bias to be considered actionable. Second, by understanding the reasons why different authorities adopted different standards, smaller nations like Iceland can draw important lessons in creating their own standards. The author recommends a standard for Iceland that is workable in Iceland’s legal and social context, and also makes sense in positioning Iceland as an attractive potential forum for international arbitration.
Útdráttur

Afmörkun huglægrar hlutdrægni í alþjóólegum gerðardómsréttí: samanburðarrannsókn

Í gerðardómsréttí er veruleg áhersla lögð á skilvirni málsmeðferðar ásamt forræði aðila til að ákvarða hana. Ekki má þó gleyma þriðju áherslunni, þ.e. rétti aðila til að fá úrlausn hjá sjálfstæðum og óvilhöllum úrlausnaraðila. Þegar litið er til sögu gerðardómsréttar verður ljóst að í raun grundvallast hann á þeirri forsendu.

Bæði alþjóólegrar gerðardómsstofnanir og dómstólar mismunandi landa hafa uppi ýmsar varnir til að sporna gegen annars vegar hlutlægri hlutdrægni, og hins vegar huglægr hlutdrægni. Verulegur munur er þó á því hvernig mismunandi lögðögur haga þessum vörnum – ekki síst við mat á því við hvaða aðstæður úrlausnaraðilinn verður talinn vanhæfur. Það er því vandkveðum bundið fyrir hin ýmsu ríki að ákvarða hæfi gerðarmanna, sér í lagi þegar landslög og tulkun dómstóla endurspegla ekki ríkandi viðmið og áherslur á sviði alþjóólegrar gerðarmeðferðar.

Í ljósi þess að flest ríki og alþjóólegrar gerðardómsstofnanir leggja skýrt bann við hlutlægri hlutdrægni úrlausnaraðila, leitast ritgerð þessi við að afmarka þörlmörk valínna áhrifamikillla lögsgagna gagnvart huglægr hlutdrægni. Tílefníð er tvíþætt. Í fyrsta lagi mun það gagnast við val á lögðög ðö gerð gerðarsamningu, sem og við ákvörðun um hvort fara fram á vanhæfi gerðarmanns í þeirri lögðög – ákvörðun sem getur haft í för með sér verulegar tafir og aukinn kostnað. Til þessa þróaði höfundur þriggja þrepa kerfi til að greina mismunandi þölmörk gagnvart huglægrí hlutdrægni. Í öðru lagi telur höfundur að með því að gera grein fyrir mismunandi sjónarmiðum og aðstæðum þeim að baki geti smærri ríki, eins og Ísland, dregið mikilvægan lærdóm sem aðstoði við að þróa skymsamleg þölmörk hérlandis. Höfundur leggur að lokum til lagabreytingar á sviði gerðardómsréttar svo unnt sé að taka tillit til samfélagslegrar gerðar landsins en samtímis gera Ísland að aðlaðandi vettvangi fyrir alþjóólega gerðarmeðferð.
# Table of Contents

Table of Figures ........................................................................................................... vi

Index of Legal Acts ...................................................................................................... vi

Index of Cases and Awards ......................................................................................... vii

Index of Arbitration Rules and Guidelines ................................................................. ix

1 Introduction ............................................................................................................. 1

1.1 Methodology ........................................................................................................ 2

1.2 State and Institution Selection ............................................................................. 5

2 Arbitration: An Overview ....................................................................................... 6

2.1 Historical Development ....................................................................................... 7

2.1.1 Ancient Egypt .................................................................................................. 8

2.1.2 Ancient Greece ............................................................................................... 9

2.1.3 Ancient Rome .................................................................................................. 10

2.1.4 Jewish Traditions ........................................................................................... 11

2.1.5 Iceland and the Viking Era ............................................................................. 12

2.1.6 Middle Ages: Europe ...................................................................................... 13

2.1.7 The 20th Century ............................................................................................ 14

2.1.8 Modern Day Arbitration ................................................................................ 15

2.2 Arbitration Procedures ....................................................................................... 15

2.2.1 Agreement to Arbitrate ................................................................................ 15

2.2.2 Due Process .................................................................................................... 16

2.2.3 Appointment of Arbitrators .......................................................................... 17

2.2.4 The Duty to Disclose ...................................................................................... 18

2.2.5 Challenging an Arbitrator ............................................................................. 19

3 Impartiality and Independence ............................................................................... 19

3.1 Independence ....................................................................................................... 20
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2</td>
<td>Impartiality</td>
<td>21</td>
</tr>
<tr>
<td>4</td>
<td>The IBA Guidelines</td>
<td>22</td>
</tr>
<tr>
<td>4.1</td>
<td>Background</td>
<td>23</td>
</tr>
<tr>
<td>4.2</td>
<td>Structure and Content</td>
<td>23</td>
</tr>
<tr>
<td>4.2.1</td>
<td>General Standards</td>
<td>24</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Application Lists</td>
<td>27</td>
</tr>
<tr>
<td>4.2.2.1</td>
<td>The Non-Waivable Red List</td>
<td>27</td>
</tr>
<tr>
<td>4.2.2.2</td>
<td>The Waivable Red List</td>
<td>28</td>
</tr>
<tr>
<td>4.2.2.3</td>
<td>The Orange List</td>
<td>28</td>
</tr>
<tr>
<td>4.2.2.4</td>
<td>The Green List</td>
<td>29</td>
</tr>
<tr>
<td>4.3</td>
<td>Threshold for Bias under The IBA Guidelines</td>
<td>30</td>
</tr>
<tr>
<td>4.4</td>
<td>Issues with the IBA Guidelines</td>
<td>30</td>
</tr>
<tr>
<td>4.4.1</td>
<td>Contradictory Language</td>
<td>30</td>
</tr>
<tr>
<td>4.4.2</td>
<td>Tackling the Era of Social Media</td>
<td>32</td>
</tr>
<tr>
<td>5</td>
<td>England and Wales</td>
<td>34</td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>34</td>
</tr>
<tr>
<td>5.2</td>
<td>Bias under English Law</td>
<td>35</td>
</tr>
<tr>
<td>5.3</td>
<td>Duty to Disclose under English Law</td>
<td>36</td>
</tr>
<tr>
<td>5.4</td>
<td>Barristers and Solicitors: A Different Standard</td>
<td>37</td>
</tr>
<tr>
<td>5.5</td>
<td>Notable English Case Law on Arbitrator Bias</td>
<td>38</td>
</tr>
<tr>
<td>5.6</td>
<td>London Court of International Arbitration</td>
<td>39</td>
</tr>
<tr>
<td>6</td>
<td>France</td>
<td>41</td>
</tr>
<tr>
<td>6.1</td>
<td>Introduction</td>
<td>41</td>
</tr>
<tr>
<td>6.2</td>
<td>Bias under French Law</td>
<td>41</td>
</tr>
<tr>
<td>6.3</td>
<td>Duty to Disclose under French Law</td>
<td>43</td>
</tr>
<tr>
<td>6.4</td>
<td>Notable French Case Law on Arbitrator Bias</td>
<td>43</td>
</tr>
</tbody>
</table>
Table of Figures

Figure 1: Severity threshold for actionable apparent bias. .................................................................5
Figure 2: ICC Arbitrator Challenges 2013-2017 ..................................................................................47
Figure 3: Proportion of Accepted ICC Challenges 2013-2017 ............................................................47

Index of Legal Acts

Iceland
Lög um mannréttindasáttmála Evrópu nr. 62/1994
Lög um meðferð einkamála nr. 91/1991
Lög um samningsbundna gerðardóma nr. 53/1989
Stjórnarskrá lýðveldisins Íslands nr. 33/1944

Acts from Other Jurisdictions

9 U.S.C. §1 et seq (USA)
Arbitration Act 1996 (England)
Décret n° 2011-48 du 13 janvier 2011 (France)
Lag (1999:116) om skiljeförfarande (Sweden)

International Conventions and Model Laws

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
(Lugano Treaty, as amended)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome,
4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S.
55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 3 Sept.
1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1

UNCITRAL Arbitration Rules (With New Article 1, Paragraph 4, as Adopted in 2013)
Index of Cases and Awards

England and Wales

ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)

AT&T Corporation & Anor v Saudi Cable Co [2000] EWCA Civ 154

Catalina (Owners) v Norma (Owners) [1938] 61 Llyod’s Law Reports 360 et seq.

Cofely Limited v Bingham & Knowles Limited [2016] EWHC 240 (Comm)

Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Limited and another [2016] EWHC 1301 (QB)

Hussman (Europe) Ltd v Pharaon [2003] EWCA Civ 266

Laker Airways Inc v FLS Aerospace Ltd [2000] 1 WLR 13

Medicaments and Related Classes of Goods (no 2) [2001] 1 WLR 700

Norbook Laboratories Ltd v Tank [2006] EWHC 1055

Porter v Magill [2001] UKHL 67

Porter v Magill [2002] AC 357, HL

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)[1999] 2 WLR 272

R v Gough [1993] AC 646 (UKHL)

R v Sussex Justices, ex parte McCarthy [1923] EWHC KB 1

Sierra Fishing v Farran [2015] 1 All ER (Comm) 560

W Ltd v M Sdn Bhd [2016] EWHC 422, Comm

France


BKMI et Siemens c/ société Dutco C.A. Paris, 5 mai 1989
Civ. 1ère, 18 déc 2014, Bull. civ. n°14-11085


*Tesco v Neoelectra Group C.A. Lyon*, 11 mars 2014, n°13/00447

**Iceland**

Hrd. 20. ágúst 2012 í máli nr. 479/2012
Hrd. 20. mái 1966 í máli nr. 127/1964
Hrd. 26. mars 2019 í máli nr. 14/2019
Hrd. 3. nóvember 2014 í máli nr. 696/2014
Hrd. 30. apríl 2014 í máli nr.266/2014
Hrd. 9. janúar 2004 í máli nr. 492/2003
Dómur Héraðsdómss Reykjaness 10. nóvember 2016 í máli nr. Ö-13/2016

**Sweden**

NJA 2007 s. 841
RH 2013 T 2484-11

**USA**


*Commonwealth Coatings Corp v Cont’l Cas Co* (1968) 393 US 145 (US SCt)

*Dealer Computer Servs, Inc v Michael Motor Co* (2012) 485 F Appx 724 (5th Cir)

*Del Monte Corporation v Sunkist Growers* [1993] 11th Cir 10 F.3d 753, 760

*Freeman v Pittsburgh Glass Works* (2013) 709 F3d 240 (3d Circ)


*Johnson & Graham’s Lessee v McIntosh* (1823) 21 US 543 (US Supreme Court)

*Merit Ins Co v Leatherby Ins Co* (1983) 714 F2d 673 (7th Cir)
New Regency Prods, Inc v Nippon Herald Films, Inc (2007) 501 F3d 1101 (9th Cir)

Noble China Inc v Cheong (1998) 43 OR (3d) 69

Sphere Drake Ins Ltd v All Am Life Ins Co (2002) 621 F3d 617 (7th Cir)

Stmicroelectronics Nv v Credit Suisse (2011) 648 F3d 68 (2d Cir)

European Court of Human Rights

Sara Lind Eggertsdottir v Iceland App No 31930/04 (ECHR 5 July 2007)

X v. Federal Republic of Germany, App no 1197/61 (ECHR 5 March 1962)

London Court International Arbitration

LCIA Case No 142862, Decision on Challenge, (abstract) 2 June 2015

LCIA Case No 163283, Decision on Challenge (abstract), 3 October 2016

LCIA Case No 9147, 27 January 2000

LCIA Case No UN152998, Decision on Challenge, (abstract) 22 June 2015

LCIA Case No UN96/X15, 29 May 1996

Arbitration Institute of the Stockholm Chamber of Commerce

Claimant (Estonian) v Respondent (Kazakh) SCC Case No. 2015/025

Claimant (Swedish) v Respondent (Swiss) SCC Case No. 2013/192

Index of Arbitration Rules and Guidelines

2014 LCIA Arbitration Rules

2016 NAC Arbitration Rules

2017 ICC Arbitration Rules

2017 SCC Arbitration Rules

IBA Guidelines on Conflicts of Interest in International Arbitration (International Bar Association 2014)
The arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail.

Aristotle
1 Introduction

Arbitration has long been recognized as an alternative to court proceedings, especially in international business disputes. The motivating force behind arbitration’s success is the desire for efficiency in resolving disputes, sculpted by party autonomy and the need for a ‘neutral forum’ between disputing parties, where concern exists that domestic courts might show bias to one party or the other.¹

Although grounded in efficiency and party autonomy, arbitration (like all dispute resolution systems) requires fairness. Disputants – perhaps especially the loser – need to feel like they received a fair hearing. Thus, arbitration continues to be governed by the prevailing principle of ‘due process’ to ensure the perception and reality of justice, and the fair and equal treatment of the parties.² Modern principles of due process derive from two maxims of law. First, that no man shall be condemned unheard. This includes the right to be heard, make submissions and present evidence. Second, that every man has a right to an impartial and independent adjudicator.³ This means that no person with a meaningful interest in the dispute, or a preference with respect to the parties, may determine its outcome. The second principle is the focus of this thesis; its operation within the international arbitration community and current standards in different legislative regimes.

An arbitrator who is not independent and/or impartial is considered to be biased. While bias can be either actual or apparent, virtually all civilized states explicitly prohibit actual bias. Therefore, this thesis will focus on apparent bias. It is, after all, under those circumstances that a test has to be applied to evaluate whether they give rise to the level of actionable bias, while actual bias does not.⁴ While there is almost universal agreement on the existence of arbitrators’ obligations of independence and impartiality throughout the arbitral proceedings, there is

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² Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (Sixth Edition, Oxford University Press 2015), p. 6; Born (n 1) p. 3493-3494; In jurisdictions where common law is prevalent, the expression is often used along with the phrase ‘natural justice’, expressed in the negative as a binding rule derived from judicial precedents, entitling the affected party to challenge the decision or seek judicial review. In civil law jurisdictions the requirement is often communicated in the positive; an article of law within the national code of civil procedure, making equal treatment of the parties a precondition or laying out the grounds on which a judge can be disqualified, or judicial review sought.
⁴ ibid 8.
substantial difference in how the content of these obligations is assessed under various legal regimes and arbitral institutions. This thesis delves into these varying approaches, addressing and categorizing the threshold for actionable bias under select regimes, hence the first research question:

1. What is the threshold for arbitrator disqualification on the basis of apparent bias in international arbitration?

Iceland, the author’s home country, is a relatively underdeveloped arbitral jurisdiction by modern standards. With a population of approximately 340,000 people, it also faces serious practical issues due to its small size – particularly in relation to bias thresholds. This thesis aims to address the practical issues facing smaller states and propose a solution that facilitates both domestic and international arbitration. Thus, the second research question is:

2. Which threshold for apparent bias would be best suited for smaller nations, like Iceland?

In Chapter 2, the history and fundamentals of arbitration will be examined in order to provide a better understanding of the topic before delving into the research questions directly. In Chapter 3, the terms ‘independence’ and ‘impartiality’ will be analyzed from a theoretical perspective. In Chapter 4, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, are assessed and criticized. While the IBA Guidelines are not binding, they are widely used by arbitration practitioners and give good insight into the current ‘best practices’. Chapters 5 to 9 undertake a comparative analysis of the chosen states and institutions. Finally, conclusions are presented in Chapter 10.

1.1 Methodology

Virtually all civilized states and arbitral institutions impose some kind of requirement of independence and/or impartiality in their rules or legislation. The process of accurately outlining, and comparing these requirements is complex, but not impossible. Through the examination of case law, books, rules and domestic law, the author has developed the below guideline to articulate and categorize the threshold of bias in arbitrator challenges. This is done in order to identify the current standard of impartiality and independence within these different

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5 Born (n 1), p. 1762.
6 Luttrell (n 3), p. 6.
regimes and ultimately suggest a standard for smaller nations, such as Iceland, to incorporate into their domestic arbitration regimes.

This categorization assesses the level of severity required for a challenge against an arbitrator to be successful; that is, how severe the underlying circumstances must be, in order for an arbitrator to be deemed apparently biased. Each category consists of two aspects. First, there’s the **vantage point** from which the determination is made. It can either be the vantage point of ‘the court’ or that of a ‘reasonable third person’, and eventually affects the required severity for a successful challenge. Second, there’s the **substantive threshold** for a successful challenge – how closely must the apparent bias resemble actual bias for a challenge to be successful. If the threshold is high, then the existing circumstances must be more severe than where the threshold is lower.

A. **‘Real Danger’** of bias: Strict vantage point and high threshold.\(^7\)

1. In this category, a bias challenge is determined through the eyes of the court, arbitral institution, or anyone with greater than average skills or knowledge of this particular field. If the test is applied through the eyes of ‘the court’, the standard of proof will most likely be higher, simply due to the fact that judges/arbitrators have better knowledge of what their counterparts’ circumstances truly are, due to their own station and experience.

2. For a challenge to be successful under the ‘Real Danger’ category, a concrete showing that bias is probable, in the eyes of the court, is required before an arbitrator is removed or an award vacated. It sets the highest threshold for a challenge on the basis of apparent bias to succeed. This is because not only does the threat of bias require footing in reality, but it also has to be probable – that is, more likely than not.

B. **‘Real Possibility’** of bias: Mild vantage point, relatively high threshold.

1. The vantage point is that of the reasonable and informed third person. The term is related to the notion of *bonus pater familias*, and derives from the idea that “justice must not only be done; it must also be seen done”\(^8\) This vantage point does not require expertise in a certain field, only knowledge of the facts of the case (and not the actual field within which arbitrators or judges exist), and as such the threshold is considered lower than the first.

\(^7\) The standard derives from the judgment in *R v Gough* [1993] AC 646 (UKHL).

\(^8\) *R v Sussex Justices, ex parte McCarthy* [1923] EWHC KB 1.
2. The second threshold is still set rather high, although not as high as the first one. Like the first, the doubts as to the arbitrator’s impartiality and independence must have footing in reality (a discernible interplay of worldly elements that are actual and true). These doubts also have to be possible. While the difference between possibility and danger is a subtle one, it lies in the probability of a situation materializing. A danger of something happening means it is more likely to happen than not, while the possibility of it happening might be less likely to happen than not, but still exists.

C. ‘Reasonable Apprehension’ of bias: Mild vantage point, low threshold.  

1. The vantage point is also that of the reasonable and informed third party. The reasonable third party, as previously explained, does not share the characteristics of the person being judged (the arbitrator), and hence may not understand the idiosyncrasies that come with the position. While it may sound unfair – at least to a certain extent – this may very well be even more important in arbitration because the parties are required to opt into the procedure. If the actual parties, who aren’t specialized in the field of law, do not trust the arbitrator, they would not have entered into it.

2. The threshold of reasonable apprehension is also the lowest one. It does not require footing in reality and while a suspicion (or apprehension) can be reasonable per se, those facts may raise suspicion, but do not rise to a level where the suspected result becomes a real possibility.

As previously mentioned, there is a difference between actual bias and apparent bias. These standards differ in a qualitative manner, since actual bias means that subjectively speaking the arbitrator is biased, while apparent bias means that there is a perception of bias. The vantage points and thresholds used to categorize the standard for apparent bias do not differ in a qualitative manner – rather, it is a difference of degree and probability. An enormous range of circumstances indicating lack of impartiality or independence exist. But they are not equally severe and create a variable amount of probability of bias. This degree and probability of bias is what sets the thresholds apart and is affected by the vantage point. These concepts can be illustrated as follows:

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9 The standard derives from the judgment in *R v Sussex Justices, ex parte McCarthy* [1923] EWHC KB 1.
Distinguishing between the degrees is important, because it provides a clearer picture for practitioners before challenging an arbitrator. Challenges should be rare as a matter of policy – they cost time and money, and in the aggregate have an impact on the reputation of arbitration as a whole and the attraction of particular arbitration regimes to potential parties. Challenges against arbitrators were once a rare thing but have increased considerably over the past couple of decades. Challenges are a way for lawyers to delay proceedings, disrupt the case and even to attempt immediate corrective action when faced with an arbitrator’s procedural decision, against which there is no recourse.

1.2 State and Institution Selection

For the purposes of this thesis, the author has selected five states to study; England and Wales, France, Sweden, the United States and Iceland. The reasons for this particular selection are simple. First, due to practical constraints, the author was not in a position to study every jurisdiction in the world. Second, the states were chosen on the basis of historical importance (England), perceived neutrality and proximity to Iceland (Sweden), popularity (France) and economic significance (USA). Iceland is chosen, of course, because of the author’s nationality and to answer research question No 2.

The arbitral institutions discussed are located in the selected states and are: The London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), The

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10 Born (n 1), p. 1913–1914.
Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and finally the Nordic Arbitration Centre (NAC). Not all of the selected states’ arbitral institutions will be covered, due to strictly imposed confidentiality measures resulting in lack of public case law to make a proper assessment.

2 Arbitration: An Overview

In its most basic form arbitration is a dispute resolution method where the parties have agreed to submit their disputes to an individual, or panel of individuals, whom they trust. These individuals, referred to as arbitrators, consider the parties’ submissions presentations on the facts and law relating to the dispute before making a final and binding award. This award is final, not because of some coercive power of any national state, but because the parties have agreed so beforehand. As such, arbitration is an effective way of obtaining a final and binding decision on a dispute without reference to a court of law.12

By nature, arbitration is an informal process, governed by rules selected, and sometimes written, by the parties themselves. It is unsurprisingly a method often chosen by merchants, specialized in one area of the market, to deal with other merchants. Indeed, it is “more surprising that such a simple system of resolving disputes has come to be accepted worldwide”.13 And accepted it has been – arbitration has become the preferred method for international dispute resolution, which means millions, even billions, of dollars may be at stake.14

Arbitration offers disputants the option to choose the procedures the arbitration will follow; whether it gets fast-tracked, if document disclosure and witness evidence gets dispensed with or if the award rendered be kept private. In short: arbitration offers otherwise unavailable party-autonomy and control over the proceedings.15 Secondly, and most relevant in international transactions, it offers a neutral playing ground. Being forced to litigate in a foreign country, before foreign courts with a legal culture unknown to their legal team – that on the contrary is

12 Blackaby and others (n 2), p. 535; While international commercial arbitration is normally described as a non-national process, it delves into domestic legal systems at various times. After all, the binding nature of arbitral awards is achieved by domestic rules, inspired by international conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
13 ibid 2.
15 Blackaby and others (n 2), p. 1–3.
very well known to the opposite parties’ counsel – is not a welcome prospect. To avoid any ‘home court’ advantage, the seat of arbitration (place of arbitration) is usually a third and neutral country; putting both parties at an equal disadvantage when it comes to the *lex arbitri.*

None of the above means that arbitration is a lawless procedure. On the contrary, it works because it is supported by a “complex system of national laws and international treaties”. Party autonomy grants the provisions from the arbitration agreement the most power in the regulatory matrix. They will prevail over equivalent provisions in the chosen arbitration rules, which in turn prevail over international arbitration practice. Then there is the *lex arbitri* (usually the law where the arbitration takes place), meant for the substantive issues of the dispute. All rules are then constrained by internationally mandatory provisions regarding arbitrability and due process.

At present, arbitration is the best instrument available to preserve and establish a supra-national rule of law in an international marketplace. “There is no omni-jurisdictional world commercial court and no international bailiff to enforce state court judgments abroad.” In fact, most States have very few enforcement agreements with other States. Meanwhile, no international enforcement instruments exist that are even comparable to the New York Convention. Subsequently, international commercial arbitration is an essential feature of a global market.

### 2.1 Historical Development

Arbitration, as described above in its more basic form, is no modern concept. The origin of arbitration is lost in obscurity. At what particular time or place man first decided to submit to his chief or companion for a decision with his adversary, instead of resorting to violence or to the public legal machinery available, is unknown, and any inquiry of this sort may even find better place in history of social growth or ethics than law.

We can rewind thousands of years, but the basic principles of arbitration still applied. A cornerstone of arbitration, whether it be with the Ancient Greeks, Romans or the Viking

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16 ibid 3.
17 ibid.
18 Lew, Mistelis and Kröll (n 1), p. 29-30.
20 Although there are some international treaties permitting enforcement of judgments, e.g. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Treaty, as amended).
21 Luttrell (n 3), p. 2.
civilizations, was the quality of arbitrators. In 320 BC, Aristotle wrote that “[t]he arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail.”

Commenting on Aristotle’s writing, Martin Domke said: “Equity is justice in that it goes beyond the written law, and it is equitable to prefer arbitration to the law court. For the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.” Ballentine’s Law Dictionary defined the phrase *arbitrium est judicium boni viri, secundum aequum et bonum* to mean: “an award is the judgment of a good man according to equity and goodness.” But in order for such equity and goodness to prevail, the arbitrator must be a just and equitable individual – a fact that has been recognized throughout the centuries – and even historical arbitrations that were not conducted with that principle in mind, only seem to highlight its importance.

### 2.1.1 Ancient Egypt

The oldest traces of commercial arbitration in Ancient Egypt were discovered in the Middle East (now Iraq). Clay tablets described a dispute over water rights between merchants, with an award of ten silver shekels (and an ox), awarded through arbitration. Additionally, primitive arbitration clauses – an agreement to settle any future dispute through arbitration – were uncovered in a funerary trust in Egypt, dated back to before 2300 BC.

The ancient Egyptians had plenty of gods, and the pantheon even included a ‘divine arbitrator’: the god Thoth. He was often depicted having the head of an ibis, was considered the wisest of the gods and was often called upon to settle disputes between the other deities. Arbitration is also mentioned in a particularly interesting part of ancient Egyptian mythology: *The Contendings of Horus and Set.*

According to the manuscript (dating back to 1090-1077 BC), Horus – raised in exile until strong enough to challenge his uncle for his late father’s kingdom – brings a complaint against Set, claiming he has unlawfully taken the throne from his father. He brings the complaint before

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the *Ennead*, a tribunal of nine powerful gods – amongst whom are both Set and Osiris (circumstances which under modern standards would qualify as *actual bias*). The *Ennead*’s ruling was that the two had to compete in a series of challenges to prove who is better suited to reign. After decades of fighting, Horus emerges victorious and Egypt begins to prosper anew.  

2.1.2 *Ancient Greece*  

In Greek mythology there are several mentions of arbitrated disputes between the deities, and the importance of selecting impartial and independent arbitrators was ever present. In one such instance, Poseidon fought Athena over stewardship of Athens. First, a contest was held to decide the dispute; Poseidon rammed his trident into the ground, generating a large spring flowing with salt water, to which Athena responded by sticking her spear into the ground and creating a brilliant olive tree (the most important tree of the Greeks). Since there was no obvious winner, Zeus ascribed the conflict to the Pantheon for arbitration. In a praiseworthy gesture, Zeus recused himself due to bias. The male gods sided with Poseidon and the female gods with Athena, and since Zeus had refused to cast a vote, Athens went to Athena.  

The ancient Greeks not only referred to the dispute resolution method in their religion, but commonly settled disputes through arbitration in what was referred to as a Court of Reconcilement. Like modern day arbitration, the litigants paid for the expenses of the arbitration and the arbitrator’s decision was final and binding – even enforceable.  

The Greek tragedy, *Seven against Thebes*, tells the story of the prince of Argos and a great warrior, Adarastus. The warrior had married the prince’s sister, Eriphyle, on the condition that, in case of any arising dispute between the two men, she would arbitrate the matter. The warrior had been persuaded to partake in a war that the prince, who had allegedly had psychic powers, knew would be lost and refused to involve himself in. Those who wanted war, knowing that Eriphyle would be arbitrating the matter, bestowed on her jewelry to sway her decision in their favor. The plot worked and the prince went off to a war that, as predicted by the psychic prince, ended in their utter defeat. The story might provide an early case of arbitrator corruption, demonstrating the importance of arbitrator independence and impartiality.
Arbitration was not particularly effective in obtaining peace during these times, but “we nevertheless witness the innovation of pledges for the peaceful settlement of future disputes.”

Such pledges were commonplace between Sparta and Athens, the most notable revolving around the Peloponnesian War. In 445 BC, Athens and Sparta agreed not to go to war against any party that was willing to submit a dispute to arbitration. A few years later a dispute arose, and while Athens was willing to arbitrate, Sparta was not. The Spartans invaded Athens and were thoroughly conquered. For a long time, this was said to have been their punishment for breaking their solemn vow to arbitrate. Yet, the states executed another peace treaty in 421 BC, *The Peace of Nicias*, which contained the following provision:

> It shall not be permissible for the Lacedaemonians and their allies to make war upon the Athenians and their Allies or to inflict upon them damage in any manner or any pretext whatsoever. The same prohibition is made to the Athenians and their allies as to the Lacedaemonians and their allies, but if there should arise a difference between them they will remit its solution to a procedure according to a method upon which they will come to an agreement.

This time it was Athens that refused to arbitrate which prompted the Spartans to attack. Sparta was successful, which was subsequently blamed on Athens’ refusal to arbitrate and the consequences of losing the Gods’ protection. After the Peloponnesian War’s end in 404 BC, international arbitration became a favorable option yet again. The war had reduced Sparta and Athens’ resources, putting them on more equal ground with the other smaller states.

### 2.1.3 Ancient Rome

The Romans also adopted arbitration as a tool to resolve disputes – both between states and domestically. Yet, Roman arbitration springs from humble beginnings: *ad hoc* arbitrations, presided over by a *bonus vir* (a good man), bound by honor to adjudicate a dispute in good faith and with integrity. The *Bonus vir* had a duty to bring a dispute to a satisfactory conclusion. This was due to the fact that in the beginning, Roman society was based on the *familia* as a social unit and had no judges, lawyers or advocates. Each unit had a *pater familias*, a citizen

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36 Verzijl and others (n 34), p. 10.
37 Fraser (n 33), p. 187.
who owned all the familia’s property and was granted authority, and responsibility, over his dependents.\(^{39}\)

Later in Roman history, this ideology would develop and historically speaking, arbitration terminology derives from Roman law. Citizens could opt out of legal processes by what they called a *compromissum*; an agreement to refer a matter to an *arbiter*.\(^{40}\) The arbitrator (*arbiter ex compromisso*) acted according to the arbitration agreement (*receptum arbitrii*). As such, similar to modern proceedings, the arbitrator’s jurisdiction was limited to the terms of the arbitration agreement. Within their jurisdiction however, arbitrators reportedly remained free in their decision making and according to scholar Reinhard Zimmerman “they were not bound by any rules of substantive law.”\(^{41}\) This gave arbitrators more power than the formal judges (*iudexes*), as they could rule at their own discretion by focusing on equity rather than formalism, but also emphasized the need for an impartial and independent arbitrator.\(^{42}\)

Arbitration is believed to have been a popular method of dispute resolution in Rome, and an important one; it was the only acceptable avenue for legal redress for women and non-citizens (such as slaves).\(^{43}\) However, with respects to interstate or international arbitration, it must be kept in mind that Rome was at heart a militant empire. As such, settling disputes with foreign states through arbitration or other peaceful means was hardly representative. At least not for Rome itself – rather, Rome facilitated arbitrations between smaller independent states, sometimes acting as *arbiter* where it was not itself a party to an arbitration.\(^{44}\)

### 2.1.4 Jewish Traditions

Arbitration has been prevalent in Jewish tradition both in the Middle East and elsewhere. The *Beth Din* (a system of Jewish courts) were developed at an early stage to resolve disputes.\(^{45}\) Arbitration by means of the *Beth Din* was a way to preserve local autonomy, an alternative to local courts.\(^{46}\) In the words of one writer, arbitration “was the outgrowth of a period of persecution and oppression that followed the destruction of the Second Temple”.\(^{47}\) An

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39 Fraser (n 33), p. 118.
42 Cicero, *Pro Roscio Comedo* 4.10-11
43 Christian W. Konrad (n 26), p. 11.
44 Fraser (n 33), p. 189–190.
45 Born (n 1), p.56–57.
interesting characteristic of arbitration within Jewish communities in the Classical era was the party-appointment of arbitrators. Indeed, the Hebrew term *Zabla* (arbitration) is derived from the phrase “zeh borer lo ehad”, which means “he chooses one”.

The migration of Jewish people around the world (the Diaspora) resulted in widespread use of arbitration within the newly formed Jewish communities; although with slightly varying adaptations. Again, autonomy had the greatest impact. Where substantial autonomy existed, e.g. in Germany, Jewish communities could formalize their procedures and occasionally set up Jewish “houses of judgement” (*Beth Dins*). Where autonomy was restricted, e.g. in Italy, arbitral mechanisms existed, but were more informal. Thus, the amount of autonomy bestowed upon Jewish communities affected the *form* of arbitration, rather than the cultural reliance on it.

One can speculate as to why became such a prevalent component within the Jewish communities and why it endured. Most likely it stemmed from a form of cultural adaptation against widespread hatred and discrimination that persisted for centuries. It was a peaceful response to ensure that justice would be served within the community, even if not outside it.

**2.1.5 Iceland and the Viking Era**

Arbitration has a long history in Iceland, and one that is, like Iceland itself, somewhat unconventional. Icelanders frequently chose to arbitrate disputes (submit disputes to *gerð*), rather than resorting to the courts or resort to violence. A third party, independent of the dispute, would propose a settlement. As most had agreed to this method beforehand, they also agreed to the resolution.

According to the *Sagas of Icelanders*, perhaps the most noteworthy arbitration award was rendered in the year 1000. Faced with religious bloodshed, the legal assembly *Althingi* authorized Thorgeir Ljosvetningagothi, a respected lawman, to determine in a final and binding manner which religion should be practiced in Iceland (apparently there could be only one). Thorgeir lay under a pelt for one day and one night. Although he was a pagan priest and

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49 ibid.
50 Born (n 1), p.57.
51 ibid 58.
chieftain himself at the time, he picked Christianity. The arbitral award – converting an entire nation to a single religion – came with three concessions: Icelanders could still eat horse meat, worship the old gods (in secret), and practice the exposure of infants.\textsuperscript{55}

2.1.6 Middle Ages: Europe

Following the collapse of the Roman Empire, Europe no longer had the stability of the Roman legal system and quickly fell into disarray. This lead to arbitration’s popularity in the Middle Ages.\textsuperscript{56} Another very plausible explanation for its popularity was the efficiency of the proceedings as well as merchants’ preference of having their disputes settled by an adjudicator that understood industry, and whose ruling would be based on fairness, rather than the literal wording of the law.\textsuperscript{57} In France, arbitration was even made mandatory for merchants in 1560 by King Francis II – a practice that remained until the French Revolution in 1789.\textsuperscript{58}

When considering arbitration in the Middle Ages, the influence of the Catholic Church must be kept in mind. The Church repeatedly “set the wheels of arbitration moving”.\textsuperscript{59} Occasionally, the Popes themselves would arbitrate disputes. The most famous case of a ‘Papal arbitration’ was Alexander VI’s division of the New World discoveries. In the Papal Bull “\textit{Inter Caetera}”, issued in 1493, the Spanish-born Pope supported Spain’s exclusive rights to the lands discovered by Columbus. It drew a demarcation line through the New World and effectively gave Spain monopoly on the lands. Furthermore, the Papal Bull stated that any land not inhabited by people of the Christian faith was up for ‘discovery’. This “Doctrine of Discovery” became the basis for all European claims in the Americas. In the US Supreme Court case of \textit{Johnson v. McIntosh} from 1823, the Court held that “the [papal bull] gave European nations an absolute right to New World lands” and effectively made sure Native Americans only had a right of occupancy, which could be abolished. The case regarded land that a former Supreme Court Justice had bought from a Native tribe, which had subsequently been passed on to his descendants and leased to individuals. These individuals brought legal action against a man, who had obtained a land patent from the federal government to the same land. In a unanimous opinion, the Court found that only the government held title to the land (after ‘inheriting’ it from the European countries after the American Revolution) and as the Native American tribe

\begin{thebibliography}{9}
\bibitem{Jochens} Jenny Jochens (n 53), p. 650.
\bibitem{Born1} Born (n 1), p. 31; Christian W. Konrad (n 26), p. 12.
\bibitem{Born2} Born (n 1), p. 31.
\bibitem{David} Rene David, \textit{Arbitration in International Trade} (Springer 1985) 88–89; Born (n 1), p. 32.
\bibitem{Fraser} Fraser (n 33), p. 191.
\end{thebibliography}
did not have the right to convey the land, Johnson’s initial purchase and chain of title stemming from it was invalid.\textsuperscript{60}

The Papal Bull demonstrates what colossal effects a biased arbitrator can have, rippling over continents and centuries. In the 21\textsuperscript{st} century, representatives of Native Americans have organized protests and raised petitions in order to have \textit{Inter caetera} repealed – reminding the Catholic leaders of the devastation caused by the conquests, oftentimes justified in the name of Christianity.

\subsection*{2.1.7 The 20\textsuperscript{th} Century}

Arbitration in the 20\textsuperscript{th} century can best be described as an era of institution and treaty establishment. Following the devastation of two World Wars, arbitration became recognized as an effective method of solving commercial disputes. A surge of foreign investments caused the resolution of disputes between high-profile corporations to impact the daily lives of the general public. “[T]herefore, the conclusion of multilateral treaties, the establishment of permanent tribunals and consistency became desired features in the world on international arbitration.”\textsuperscript{61} This desire evolved into the establishment of the New York Convention in 1958, whose signatories are obligated to recognize and enforce arbitration agreements and awards from other signatory states.\textsuperscript{62} The New York Convention was a moving force for modern day arbitration, preparing the soil from which the current cultural reliance on arbitration springs.

The UNCITRAL Arbitration Rules were introduced in 1976, designed for use in \textit{ad hoc} arbitrations and to reconcile common and civil law differences.\textsuperscript{63} The UNCITRAL Model Law followed suit, and in 1985 a template for domestic legislation was available to all member states. The Model Law addressed all phases of arbitral procedures, the extent to which domestic courts could intervene and award enforcement and recognition.\textsuperscript{64} The number of bilateral investment treaties shot up around the 1990s, usually establishing arbitration as the dispute

\begin{footnotesize}
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\item \textsuperscript{60} \textit{Johnson & Graham’s Lessee v McIntosh} (1823) 21 US 543 (US Supreme Court).
\item \textsuperscript{62} Wolaver (n 22), p. 134.
\item \textsuperscript{63} Georgios Petrochilos, ‘Introductory Note to the 2010 UNCITRAL Arbitration Rules’ (2010) 49 International Legal Materials 1640.
\item \textsuperscript{64} J. Martin H. Hunter, ‘The UNCITRAL Model Law’ (1985) 13 International Business Lawyer 399, p. 399.
\end{itemize}
\end{footnotesize}
resolution method. Subsequently, international arbitration developed significantly over this period, readying it for fine-tuning in the next century.\textsuperscript{65}

\subsection*{2.1.8 Modern Day Arbitration}

Driven by increased globalization and technological advancements, arbitration has gained an even more important role in the 21\textsuperscript{st} century. Contracting parties now have access to a wide array of institutional rules and domestic legislation to choose from. Although these legal frameworks differ in many respects, contemporary obligations of independence and impartiality are no less important today than they were centuries ago.\textsuperscript{66} While these obligations used to find ground in people’s minds and ideologies, today they can be found in international treaties, domestic legislation, institutional rules and arbitration agreements.\textsuperscript{67}

\section*{2.2 Arbitration Procedures}

\subsection*{2.2.1 Agreement to Arbitrate}

Before there can be an arbitration, there must first be a valid arbitration agreement, a fact recognized by both domestic laws and by international treaties.\textsuperscript{68} The agreement is usually contained in a contractual arbitration clause but can also be made after a dispute has arisen, which is called a submission agreement.\textsuperscript{69} Then there are so called ‘agreements to arbitrate’, which arise under international instruments (e.g. bilateral investment treaties) entered into by one state with another, but they lie outside the scope of this thesis.

The fact that arbitration rests on the parties’ agreement is particularly important. Once the parties have agreed to arbitrate, that consent cannot be unilaterally withdrawn – even if the contract that the arbitration clause formed part of comes to an end. This allows the Claimant to initiate arbitration proceedings, independent from the contract of which the arbitration clause formed part (Doctrine of Separability). Furthermore, this permits the arbitral tribunal to decide its own jurisdiction (kompetenz-kompetenz principle).\textsuperscript{70}

Arbitration has grown substantially over the past 70 years – a period that coincides with the European Convention on Human Rights (ECHR) coming into force.\textsuperscript{71} Article 6(1) of the ECHR

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\textsuperscript{65} Szalay (n 61), p. 14.
\textsuperscript{66} Born (n 1) p 1761.
\textsuperscript{67} Wolaver (n 22), p. 134.
\textsuperscript{68} See Article V of the New York Convention
\textsuperscript{69} Blackaby and others (n 2), p. 13.
\textsuperscript{70} ibid, p. 16-17.
\end{flushright}
states that “everyone is entitled to a fair and public hearing...by an independent and impartial tribunal”, raising questions as to arbitration’s compatibility with the ECHR.\textsuperscript{72} However, if an arbitral tribunal enjoys full adjudicative authority and derives its powers from a valid agreement to arbitrate, arbitration is considered an acceptable replacement for a State court.\textsuperscript{73} However, this freedom to contract does not mean that the right to a fair trial can be waived. The right to a fair trial is still part of all democratic countries and ranks to the level of international public policy.\textsuperscript{74} Hence, while the consensual signing of an arbitration agreement can waive the right to a State court, it does not affect the right to an independent and impartial tribunal.\textsuperscript{75}

2.2.2 Due Process

Due process is a central and essential principle in any justice system. The core guarantees of due process in arbitration consists of the arbitrator’s duty to ensure a) that each party has the opportunity to present their case and rebut the case presented by their opponent, b) that the parties have a meaningful opportunity to participate in the constitution of the arbitral tribunal in accordance with their agreed-upon processes, and (most importantly for the purposes of this thesis) c) that the tribunal be impartial and independent.\textsuperscript{76}

Accordingly, the independence and impartiality of arbitrators – throughout the entire proceedings – is a cornerstone of international arbitration.\textsuperscript{77} The purpose of ensuring the arbitrators’ impartiality and independence is to preserve the due process requirements throughout the arbitration. This preservation first takes place in the constitution phase of the tribunal, during which the arbitrators’ independence and impartiality is first assessed but is ongoing throughout the proceedings. As will be explained in the next couple of chapters, these considerations materialize in a number of obligations and rights of both parties and arbitrators.\textsuperscript{78}

\textsuperscript{72} European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), Article 6(1).
\textsuperscript{73} X v Federal Republic of Germany App no 1197/61 (ECHR 5 March 1962).
\textsuperscript{74} Besson, Universität Bern and Séminaire du Troisième Cycle Romand (n 71), p. 83.
\textsuperscript{75} Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice (Kluwer Law International 2004), p. 204.
\textsuperscript{77} ibid 132–133.
\textsuperscript{78} ibid 133–134.
2.2.3 Appointment of Arbitrators

To the extent that independence and impartiality is not affected – the parties to an arbitration are free to determine the tribunal’s composition unless they have delegated this freedom to a third party, such as an arbitral institution.\(^79\) This is one of the features that makes arbitration an attractive choice, and although it may seem tempting in such a situation to choose a party that you believe can ‘win’ the case for you – the principle of due process hinders such a choice. Rather, the parties enjoy the autonomy to appoint an independent and impartial arbitrator they believe may have experiences that might shed light on, or sway, the decision to their benefit. The right to an independent and impartial tribunal is a principle of law, not limited to arbitration; the maxim *nemo iudex sua causa* – no one may be a judge in his own case – applies equally to arbitral processes as it does to judicial ones.\(^80\) While hard law usually makes independence and impartiality a requirement, instruments of soft law tend to assist in defining what these concepts mean in practice.\(^81\)

Selecting the right arbitral tribunal is a crucial element in making an arbitration successful. “It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration”.\(^82\) It has been said that arbitration is only as good as the arbitrators,\(^83\) and choosing a suitable arbitrator involves many considerations: Is it an international or domestic arbitration? Will the process be improved by appointing a specialist in a relevant field? If it is an international arbitration, a matrix of different legal systems will likely apply, the seat of the arbitration in a foreign country to the parties, who themselves are of different nationalities. Each of the arbitrators (if it is a three-person tribunal) may be of different nationalities, with different legal customs and culture, and in such instances having an experienced presiding arbitrator can help keep the proceedings moving.\(^84\)

The parties of course remain entitled to appoint an arbitrator of their choice (or in accordance with the arbitration agreement) so long as the independence and impartiality requirements are preserved. The parties therefore frequently choose arbitrators based on their prior experiences, professional or business associations or expertise – e.g. a person with a commercial background may be more sympathetic to an investor’s legitimate rights and expectations, while a person

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\(^79\) Blackaby and others (n 2), p. 22.
\(^80\) Charles Nairac (n 76), p.132.
\(^81\) ibid 134.
\(^82\) Blackaby and others (n 2), p. 233.
\(^84\) Blackaby and others (n 2), p. 21.
with a government background may be more attuned to arguments suggesting that a sovereign state enjoys broad rights to regulate its affairs, and so on.

2.2.4 The Duty to Disclose

While the notions of independence and impartiality are fundamental to due process, they are also subject to some interpretation. This is why an arbitrator is required to disclose information that allows the parties to decide whether they are satisfied with the arbitrator’s independence and impartiality. As such, disclosures are intended to inspire trust at the outset – and to prevent challenges at subsequent stages.\(^\text{85}\)

As previously mentioned, balancing party autonomy with due process is a delicate process, but “[t]he competing goals of party choice, desired expertise and impartiality must be balanced by giving the non-appointing party access to all information which might reasonably affect the arbitrator’s independence and impartiality.”\(^\text{86}\) The prospective arbitrator’s duty of disclosure permits due process and party autonomy to be harmonized.

Arbitrators, as well as the parties, are often unsure of the scope of disclosure requirements.\(^\text{87}\) Perhaps as a result, disclosures have become more frequent and more complex. Most states and arbitral institutions lay out disclosure requirements in their rules and domestic legislation, in an attempt to battle any uncertainty that may lead to unwarranted challenges within their jurisdiction, but they differ from one codex to the next.\(^\text{88}\) The IBA Guidelines, a codification of ‘best practices’ in international arbitration, are an example of an attempt to unify those disclosure requirements (see Chapter 4).

However, what is ‘reasonable’ differs from one person to the next, perhaps especially in relation to what an experienced practitioner deems reasonable as opposed to a reasonable layman. As a general rule, prospective arbitrators should disclose all of the facts that might reasonably be considered grounds for disqualification, in the eyes of the parties. But the parties carry a certain level of responsibility as well; if an arbitrator discloses the relevant information and no objection is made, the right to contest the arbitrator’s independence and impartiality is deemed waived – at least in respect to objections founded on the facts presented in the disclosure statement.

\(^\text{85}\) Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (Kluwer Law International 2012), p. 2.
\(^\text{86}\) ibid 2–3.
\(^\text{87}\) Blackaby and others (n 2), p. 256.
\(^\text{88}\) Blackaby and others (n 2), p. 92.
2.2.5 Challenging an Arbitrator

A challenge is essentially an action against an arbitrator (either appointed or confirmed), in which the challenger (one of the parties) alleges that the arbitrator is either actually or apparently biased. In those cases, the parties have the choice of pursuing a challenge against the arbitrator, either in an attempt to have him or her removed or to have the arbitral award vacated.

In some cases, challenges are made in order to gain a tactical advantage by hindering the formation of the tribunal, attempting to get rid of an arbitrator that doesn’t seem convinced by the arguments being made, or as a dilatory tactic. It should be kept in mind that the mere act of challenging an arbitrator does not guarantee that the challenged arbitrator will not arbitrate the matter. Parties have to weigh the likelihood of a challenge being successful against the prospect of an irked arbitrator.

The grounds and procedures surrounding challenges vary based on the applicable rules set out by the arbitration agreement. If an arbitration takes place in accordance with certain institutional arbitration rules, the bias test and procedures will be laid out in those rules. If the arbitration is ad hoc however, and there is no chosen set of rules, the test and procedure will be laid out in the lex arbitri. While states and arbitral institutions have different sets of rules and tests, in general, the parties may challenge an arbitrator when there exists ‘reasonable doubt’ as to his or her impartiality or independence. The standard to which that reasonable doubt is required to reach, within different regimes, in order for a challenge to be successful is the main topic of this thesis.

3 Impartiality and Independence

A fundamental principle in international arbitration is that arbitrators must be independent and impartial, both in connection with the parties and the dispute itself. The obligations of impartiality and independence derive from a variety of sources; arbitration agreements, institutional rules and the lex arbitri. Even the New York Convention indirectly addresses the

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89 Luttrell (n 3), p. 16.
90 Blackaby and others (n 2), p. 260.
91 ibid, p. 258-259.
92 ibid.
93 ibid, p. 260.
94 ibid, p. 264; 2014 LCIA Arbitration Rules 2014, Article 5(3); 2017 ICC Arbitration Rules, Article 11(1); 2017 SCC Arbitration Rules, Article 18.
subject in Article V(1), which provides for the non-recognition of awards where a party was denied the opportunity to be heard, a failure that can ensue from a biased arbitral tribunal, as well as in Article V(2)(b), where it provides for a non-recognition of awards that violate public policy of the judicial enforcement forum (rules that more often than not include policies against a biased judiciary).  

Lack of independence or impartiality can provide the basis for arbitrators being rejected or challenged under most domestic legislation or institutional rules. Equally, a biased arbitrator threatens the legitimacy of the arbitral process and integrity of the arbitral award, which can consequently be challenged. There was some confusion that arose from former practices in the US, where party-nominated arbitrators were considered to be ‘non-neutral’, as was provided for in the 1977 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. One commentator stated that this stemmed from the misconception that arbitration was to be a form of alternative dispute resolution rather than a neutral adjudication. This approach was even supported by the American courts, and in Del Monte Corporation v. Sunkist Growers the Court stated that party-appointed arbitrators were not only permitted to be predisposed towards the nominating party’s case – they were expected to be. However, this presumption for domestic arbitration disputes was reversed in the 2004 Revision of the American Arbitration Association AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, and now arbitrators are expected to be neutral, irrespective of their appointer. It is widely considered to have brought the American arbitrator ethics system into line with international norms.

### 3.1 Independence

The *independence* term is generally considered to concern the relationship between an arbitrator and one of the parties. Such a relationship may be a financial one or of another kind (normally some form of dependency). As such, *independence* has nothing to do with an arbitrator’s state of mind and is considered susceptible to an objective test. Within the context of arbitration, independence issues normally arise when an arbitrator has a relationship with a party, an entity linked to a party, or with counsel in the dispute.

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95 Born (n 1), p. 1761; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article V(1)(b), Article V(2)(b). See also Articles 11(1), 11(3) and Article V(1)(d).
96 Born (n 1), p. 260.
97 Blackaby and others (n 2), p. 253; Del Monte Corporation v Sunkist Growers [1993] 11th Cir 10 F.3d 753, 760.
98 Blackaby and others (n 2), p. 254.
99 ibid 255.
100 Samuel Ross Luttrell (n 19), p. 21.
Even though lack of independence can arise out of a variety of situations, the concept itself is much more concrete than its legislative bunkmate. It concerns itself with relationships rather than mindset. It is the absence of a connection or interest in any prospective wellbeing, financial or otherwise, of one of the parties or the result of the dispute. Subsequently, it is easier to determine whether an arbitrator is independent, than whether he is impartial. Many states’ laws even include standards defining the level of affinity or connection to individual cases which prevent adjudicators from partaking in the resolution of certain disputes.\textsuperscript{101}

Theoretically speaking, once the facts have been established, it should be simple to determine independence – or lack thereof.\textsuperscript{102} But the real world is more complex, and in determining independence one has to consider the practical realities, as well as the social construct, behind the relationship. A good example of the need for further examination is the different standard applied to barristers and solicitors under the English regime. While solicitors from the same offices cannot take upon themselves different roles in the same dispute, barristers from the same barristers’ chambers can. While this topic will be covered more extensively in Chapter 5.4, the basic principle justifying the separation is the lack of economic dependency between barristers and the historic relations between the two professions.\textsuperscript{103}

3.2 Impartiality

While the \textit{independence} term is considered an objective one, \textit{impartiality} is more elusive. It can be in relation to either of the parties involved or issues within the dispute itself. Thus, it is a subjective and abstract concept involving the arbitrators state of mind, and his/her perceived state of mind when it comes to apparent bias.\textsuperscript{104} It is not a requirement of complete indifference – rather, it is “the duty to maintain an open mind and decide the case on the evidence presented, free from any preconceptions or connection with the parties”.\textsuperscript{105} This involves the concurrent absence of two things: 1) outcome preference and 2) party preference. Outcome preference is when an adjudicator has pre-judged legal issues in the dispute while party preference relates to the parties’ or the arbitrator’s identity.\textsuperscript{106}

\textsuperscript{101} see e.g. Lög um meðferð einkamála nr. 91/1991 (Iceland) Article 5; Décret n° 2011-48 du 13 janvier 2011 (France), Article 341.
\textsuperscript{103} Daele (n 85), p. 315.
\textsuperscript{104} Blackaby and others (n 2), p. 255.
\textsuperscript{105} ibid.
\textsuperscript{106} Samuel Ross Luttrell (n 19), p. 17.
Outcome preference is when an arbitrator enters the arbitration already having decided who should win, and why. While most courts understand that arbitrators will have formed opinions on various legal issues, outcome preference based on legal opinion is still actionable when the adjudicators give the appearance that they have already decided the matter, prior to the scheduled hearing.107

Party preference refers to either a) relative characteristics between the arbitrator and the party, or b) familiarity between the two. Relative characteristics might include a nationality preference, a race preference or even political preference, which then leads to bias.108 Familiarity on the other hand, refers to any kind of financial or non-financial relationship between an arbitrator and a party. This is where the independence and impartiality terms overlap but they are not mutually exclusive. An arbitrator can be independent but still be partial (due to outcome preference or bias based on relative characteristics), but the arbitrator cannot be dependent and impartial. This is because “the appearance of party preference flows from proximity, but the appearance of proximity does not necessarily flow from party preference.”109 Similarly, all apples are fruit but not all fruit are apples.

4 The IBA Guidelines

In the past 20 years or so, there has been an increased emphasis on using guidelines and codified ‘best practices’ – often referred to as the ‘soft law’ of arbitration procedures.110 The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines or Guidelines) are one of these codifications. They attempt to guide prospective arbitrators through the disclosure phase by demonstrating and elaborating on the current ‘best practice’ in international arbitration, and thus endeavor to avoid the risk that arbitrators from different cultures (and of different temperaments) will apply radically divergent disclosure standards, and consequently avoid unwarranted challenges.111

107 ibid, p. 21.
108 For example of nationality bias, see Catalina (Owners) v Norma (Owners) [1938] 61 Llyod’s Law Reports 360 et seq.; for example of racial bias see Noble China Inc v Cheong (1998) 43 OR (3d) 69; for example of political bias see R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)[1999] 2 WLR 272.
111 Blackaby and others (n 2), p. 257.
The fact that the IBA Guidelines are ‘soft law’, means that they are “not legal provisions and do not override any applicable domestic law or arbitral rules.”¹¹² Nonetheless, domestic courts have relied the guidelines,¹¹³ and:

[The IBA Guidelines] have gained general acceptance as a non-binding set of principles with which most international arbitrators seek to comply. In the experience of the authors, the Guidelines are relied upon heavily by parties challenging arbitrators and those defending such challenges. And whilst the Guidelines may not always be directly cited, they are nonetheless also present in the minds of the authorities when reaching decisions on concepts of independence and impartiality.¹¹⁴

If prospective arbitrators receive a nomination and realize they have ties to one of the parties because of the IBA Guidelines, they may well turn down the nomination or the parties may be satisfied with their disclosures, leading to fewer challenges. The same applies to practitioners who are seeking an arbitrator to nominate.¹¹⁵

4.1 Background

The IBA Guidelines were first issued in 2004. The product of a Working Group of 19 experts, the Guidelines are used frequently in arbitrations by most parties; by prospective arbitrators when assessing what information to disclose, by the parties when assessing the disclosure by the prospective arbitrator, and by arbitral institutions and courts when considering challenges to arbitrators. A revised version of the IBA Guidelines was published in 2014, meant reflect the accumulated experience of using them, and to accommodate clarifications where improvements could be made.¹¹⁶

4.2 Structure and Content

The IBA Guidelines are comprised of ‘The General Standards’ and ‘Application Lists’, which are both “based upon statutes and case law in a cross-section of jurisdictions.”¹¹⁷ With the aim of bridging the gap between common and civil law jurisdictions – and setting forth an

¹¹² ‘IBA Conflict Guidelines’, Introduction p. 3.
¹¹³ see e.g. RH 2013 T 2484-11.
¹¹⁴ Blackaby and others (n 2), p. 258.
¹¹⁶ ‘IBA Conflict Guidelines’ (n 112), p. i-ii: ‘These identified issues include “the effects of so-called “advance waivers”, whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, “issue” conflicts, the independence and impartiality of arbitral or administrative secretaries and third-party funding.’
¹¹⁷ ibid, p. 1-2.
acceptable standard – the General Standards set out certain principles and conclude with a section on the Practical Application of the General Standards. The last section of the guidelines then segregates a (non-exhaustive) list of ‘circumstances’ into the following four separate color separated categories: 1) The ‘Non-Waivable Red List’; 2) The ‘Waivable Red List’; 3) The ‘Orange List’, and; 4) The ‘Green List’.  

4.2.1 General Standards

The IBA Guidelines’ General Standards include seven separate principles, each followed by explanatory remarks. The General Standards override the ‘Application Lists’, as the lists are only meant to provide real life examples to help clarify the General Standards, but not supersede them. Essentially, the General Standards consist of similar requirements as those set forth in most domestic legislation and institutional rules. The General Standards, along with a brief summary, are as follows:

1) **General Principle:** pursuant to the general principle, all arbitrators shall be impartial and independent at the time of their appointment and throughout the proceedings. In the 2014 revision, the working group clarified that arbitrators’ disclosure obligations ended when a final award was rendered, not throughout the period during which the award might be challenged. If a matter might be referred back to the same tribunal, a fresh round of disclosure would be due.

2) **Conflict of Interest:** the second principle sets out the IBA Guidelines’ standard of impartiality and independence. Arbitrators should decline an appointment if they have any doubts as to their ability to be impartial and independent. Furthermore, the same principle is to be applied “if facts or circumstances exist…which would give rise to justifiable doubts in the eyes of a reasonable third person who has knowledge of the facts and circumstances.” The justifiable doubts standard is further elaborated on in General Standard 2(c), where doubts are considered justifiable when the third person would find that “there is a likelihood that the arbitrator might be influenced by other factors than the merits of the case.” An important explanation is provided for General Standard 2(b), stating that the test for disqualification, in order to ensure that the standards are applied as consistently as possible, is an objective one.

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118 Blackaby and others (n 2) 257; ‘IBA Conflict Guidelines’ (n 112).
119 Born (n 1), p. 1842.
120 ‘IBA Conflict Guidelines’ (n 112), General Standard 1.
121 ibid, General Standard 2(b).
122 ibid, General Standard 2(c). Emphasis added.
123 ibid, explanation for General Standard 6(a)-(d).
3) **Disclosure by the Arbitrator:** an arbitrator is dutybound to disclose any facts or circumstances that may, in the eyes of the parties, give rise to justifiable doubts. Note though, that circumstances listed on ‘The Green List’, are not subject to disclosure since they could never lead to disqualification under the objective test laid out in General Standard 2. Advance declarations or waivers cannot release an arbitrator from his ongoing disclosure duties. Hence, they only apply to circumstances that the parties actually waived and is not a ‘get-out-of-jail-free card’ for any future indiscretions. Disclosure, in and of its own, does not imply an existence of a conflict of interest and the working group hoped that the updated standards would eliminate the misconception within the arbitration community that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even constitutes a presumption in favor of disqualification. If the arbitrator has any doubt as to whether or not to disclose certain circumstances, that doubts should be resolved in favor of disclosure.

4) **Waiver by the Parties:** pursuant to General Standard 4(a), a party is deemed to have waived any objection if that objection has not been raised within 30 days of the date on which the party learns of the facts or circumstances behind the objection. If circumstances exist that are included on ‘The Waivable Red List’, an arbitrator should not serve unless: first, all the parties, arbitrators and the arbitral institution (or appointing authority have full knowledge of the conflict, and; second, all those parties expressly agree that the arbitrator may serve. This is meant as a balancing act between party autonomy and the desire to have a tribunal that only consists of independent and impartial arbitrators. But what if, once an arbitration has already commenced, the parties wish to reach a settlement or attempt mediation? Pursuant to General Standard 4(d), an arbitrator may act as mediator or assist the parties without risking disqualification. However, in order to avoid it, the arbitrator should get an express agreement from the parties stating that these attempts should not disqualify him/her. Depending on the jurisdiction and the *lex arbitri*, formal requirements may differ. Some constitutions may recognize express consent given at a hearing and reflected in the minutes or transcript, while others may require a more formal agreement. The explanatory remarks further emphasize that in order to properly avoid parties using this

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124 ibid, General Standard 3(a) w explanations.
125 ibid, General Standard 3(b) w explanations.
126 ibid General Standard 3(c) w explanations.
127 ibid General Standard 3(d).
128 ibid, General Standard 4(a) w explanations.
method as a means to disqualify the arbitrator, the waiver should remain effective if the mediation or settlement attempts are unsuccessful. However, if the arbitrators find themselves in a situation where the failed attempts generate doubts as to their independence and impartiality in the future, they should resign (consistent with General Standard 2(a)).

5) **Scope:** The IBA Guidelines are to apply equally to all members of the arbitral tribunal whether they are presiding arbitrators, sole arbitrators or co-arbitrators, and despite how they were appointed. This means there is no room for *party-appointment bias* within the IBA Guidelines.

6) **Relationships:** Certain relationships will cause an arbitrator to be assimilated with another entity. General Standard 6(a) makes clear that arbitrators are considered to bear the identity of their law firms. While in principle the arbitrators have to bear the identity of their law firms, such activities do not automatically create a conflict of interest. Rather, the relevance of such activities, their scope, nature and timing of the work, have to be considered in each individual case. When the party to an arbitration is a member of a conglomerate of companies, there are special considerations to be had in mind: individual corporate structures generally vary and as such, a one-size-fits all arrangement is not appropriate. Rather, the specific “circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator’s law firm, should be considered in each individual case.”

Meanwhile, General Standard 6(b) clarifies on the issue when one of the parties is a legal entity, or any other legal or physical persons that have a controlling influence on that legal entity, that may have an economic interest in the award – they may be considered effectively to be that party. This relates in particular to the topic of third-party funders and insurers, for whom the result of the arbitration is of direct economic interest, and as such may be considered to be the equivalent of that party.

7) **Duties of the Parties and the Arbitrator:** General Standard 7 elaborates on the investigative and disclosure duties of the parties and arbitrators. At their own initiative, the parties are required to inform the arbitrator, the tribunal and other parties, if there

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129 Ibid General Standard 4(a)-(d) w explanations.
130 Ibid General Standard 5 w explanations.
131 Party-appointment bias when party-appointed arbitrators are considered ‘champions’ for their appointed party.
132 ‘IBA Conflict Guidelines’ (n 112) General Standard 6(a) w. explanations.
133 Ibid General Standard 6(a) w explanations.
134 Ibid General Standard 6(b) w explanations.
exists a relationship, whether direct or indirect, between an appointed arbitrator and themselves (as well as any legal entities that may effectively be considered to be that party pursuant to General Standard 6). This duty extends to disclosing the identity of their counsel, namely the persons involved in the representation. Lastly, the parties are required to investigate whether any relevant information exists (that is reasonably available to them). Arbitrators have the same obligations to investigate and divulge information regarding possible relationships and conflicts of interest.\(^{135}\)

### 4.2.2 Application Lists

In order for the General Standards to have an actual impact on the disclosure and selection of arbitrators, the IBA Guidelines must address real-life situations that may occur in practice. Hence, the IBA Guidelines include lists of specific situations that categorize situations in the following Application Lists (Lists).

The boundaries between the lists can be thin, and whether certain situations should be on one List rather than another, is subject to debate. Furthermore, the situations described on the Lists oftentimes include wording such as ‘significant’ or ‘relevant’, which are general and rather non-descriptive. But ultimately, the Lists reflect international principles and best practices and setting overly strict boundaries might prove unproductive, as they might not age well with ever-developing standards being set in practice and in the mind of practitioners.\(^{136}\)

#### 4.2.2.1 The Non-Waivable Red List

The Non-Waivable Red List contains circumstances where a prospective arbitrator should outright reject a nomination, even with the consent of all parties; hence the label ‘Non-Waivable’.\(^{137}\) The notion derives from the overriding principle that no-one should be the judge in their own case and as such, acceptance (or waiver) by the parties cannot cure that conflict.\(^{138}\) The prohibition, described by Gary Born as “difficult to reconcile with the central role of party autonomy”, is meant to safeguard any rendered award from being challenged on the basis of a violation of public policy.\(^{139}\)

The list consists of four items: 1) when there is an identity between an arbitrator and a party or the arbitrator is a legal representative or employee of an entity that is party to the arbitration;

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\(^{135}\) ibid General Standard 7(a)-(d) w explanations.

\(^{136}\) ibid 1–8.

\(^{137}\) Blackaby and others (n 2), p. 257.

\(^{138}\) ‘IBA Conflict Guidelines’ (n 112), part II, para 4.

\(^{139}\) Born (n 1), p. 1847; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), see Article V(2).
2) when the arbitrator is a manager, director or a board member (or has a controlling influence on one of the parties or an entity that has a direct economic interest in the outcome of the dispute); 3) where the arbitrator has a significant financial or personal interest in the outcome (or one of the parties); 4) when the arbitrator, or his/her firm, regularly advises a party, or an affiliate of the party, and the law firm derives significant income therefrom.  

4.2.2.2 The Waivable Red List

The Waivable Red List consists of situations that might lead to disqualification but can nonetheless be accepted by the parties using an express agreement. As such, ‘The Waivable Red List’ consists of situations that are surely severe, but not as severe as those listed in its ‘non-waivable’ counterpart. What sets it apart from ‘The Orange List’, addressed in the next chapter, is that the situations described therein can be waived but only when the parties, aware of the situation, expressly state their willingness to do so. The list describes 14 circumstances concerning an arbitrator’s financial interest, prior involvement and family relations.

Again, Gary Born finds it difficult to reconcile this position with party autonomy as the express waiver requirement goes a step further than most domestic legislation and institutional rules, wherein silence or acquiescence can constitute as ‘waiver’ in this sense. The author is inclined to disagree. The Guidelines endeavor to avoid the risk of arbitrators from different cultures (and of different temperaments) applying any radically different standards of disclosure. Requiring an express waiver where circumstances exist that are widely recognized as severe, is an easy way of avoiding a challenge later on, whether it is put forth in good faith or bad.

4.2.2.3 The Orange List

‘The Orange List’ is a non-exhaustive list of circumstances, which in the eyes of the parties might give rise to justifiable doubts as to the arbitrator’s impartiality or independence. Consequently, an arbitrator has a duty to disclose the existence of circumstances on The Orange List. However, in all the described situations, the parties must make a timely challenge or else they have effectively accepted the arbitrator’s appointment. The idea is that once the

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140 ‘IBA Conflict Guidelines’ (n 112) The Non-Waivable Red List, paras 1.1-1.4.
141 Blackaby and others (n 2), p. 257.
142 ‘IBA Conflict Guidelines’ (n 112), General Standard 4(a).
143 Born (n 1), p. 1847.
144 Blackaby and others (n 2), p. 257.
145 ‘IBA Conflict Guidelines’ (n 112), The Orange List, 3.1-3.5.
146 ibid, part II, para 3.
prospective arbitrator has disclosed such facts, the parties cannot use that information to challenge at a ‘convenient’ time.\textsuperscript{147}

This category has raised the most debate since the publication of the IBA Guidelines, as they do not provide any substantive guidance on which, if any, of the listed conflicts within the list ought to result in disqualification.\textsuperscript{148} Rather, they state that a challenge deriving from situations mentioned in ‘The Orange List’, not disclosed by an arbitrator, do not automatically result in non-appointment – making them subject to a case-by-case analysis.\textsuperscript{149}

Interestingly, while the ICC has expressly stated that the Guidelines are non-binding, they may still play a role in challenges before the ICC Court, especially if the challenge is based on circumstances that are included or resemble those listed within the Guidelines. “Although never a ground for disqualification in itself, the act of failing to make a disclosure that can be considered as necessary may prove decisive in otherwise doubtful cases”.\textsuperscript{150} Thus, failure to disclose circumstances on The Orange List may affect the case-by-case analysis, and tip the scales in favor of removal.

\textbf{4.2.2.4 The Green List}

While the previously mentioned categories list examples of circumstances that either give rise to justifiable doubts or might do so, ‘The Green List’ contains examples of situations in which no appearance of conflict of interest arises from an objective viewpoint. A prospective arbitrator has no duty to disclose the circumstances that appear on the Green List.\textsuperscript{151} It is non-exhaustive and lists situations where there is no appearance of, nor any actual conflict of interest from the objective point of view.

But is such a list even necessary? Presumably, it exists for practical reasons. “As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test if ‘in the eyes’ of the parties.”\textsuperscript{152} The Green List may dissuade parties from challenging on grounds listed therein, and thereby reduce unwarranted challenges.

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\textsuperscript{147} Blackaby and others (n 2), p. 257.
\textsuperscript{148} ibid.
\textsuperscript{149} ‘IBA Conflict Guidelines’ (n 112), Part II, para 5.
\textsuperscript{151} Blackaby and others (n 2), p. 257.
\textsuperscript{152} ‘IBA Conflict Guidelines’ (n 112), Part II, para 7.
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4.3 Threshold for Bias under The IBA Guidelines

The IBA Guidelines provide a standard for both disclosure and disqualification. While the standard for disclosure is to interpret any doubt in favor of disclosure, General Standard 2(b) sets out the ‘justifiable doubts’ standard for disqualification, pursuant to which ‘doubts’ are considered justifiable if “a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case”. The vantage point is that of a ‘reasonable and informed third party’

The hypothetical perspective comes from a ‘reasonable and informed third party’, and the suggested threshold is set relatively low, indicating a standard of ‘Reasonable Apprehension’. That being said, the IBA Guidelines are exactly that; guidelines. Thus, the standard that will be applied to decide a challenge, will be the standard used by the institution or domestic court making the decision.

4.4 Issues with the IBA Guidelines

4.4.1 Contradictory Language

As demonstrated in a 2016 decision from the High Court of England and Wales, W Ltd v M Sdn Bhd, even the latest updated version of the guidelines can cause some confusion. In the matter, the Claimant challenged two arbitral awards under Section 68 of the 1996 English Arbitration Act. The Claimant argued that there had been serious procedural irregularities, due to the sole arbitrator’s failure to disclose circumstances that fell within ‘The Non-Waivable Red List’.

The arbitrator was a Canadian lawyer, a partner at a law firm that regularly advised an affiliate of the Respondent. The firm had received significant compensation for the work, but the arbitrator had never been part of it. Nevertheless, under the IBA Guidelines, the arbitrator should have disclosed his firm’s work for the affiliate company, as per the language of section 1.4 of the IBA Guidelines: “[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant income therefrom.” Despite the clear language of the IBA Guidelines, and seemingly clear implications, the judge rejected the challenge, noting that while the IBA Guidelines could be of some assistance in assessing challenges, that was the extent of their value as they were not

153 ibid General Standard 2, w explanations. Emphasis added.
binding on the English courts. He noted that the relevant test for bias under the English law, as set forth in *Porter v Magill*, was whether “a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. 156

While *W Ltd v M Sdn Bhd* suggests that the IBA Guidelines do not hold much clout, it should be noted that the arbitrator himself indicated that had he known of his firm’s relationship with the affiliate company of the Respondent, he would have disclosed the fact.157 Theoretically speaking, under the IBA Guidelines, he should have then recused himself.158 Yet, a closer look at the circumstances and the language of General Standard 6(a), implies that this would not necessarily have been the result.

The arbitrator was indeed a partner at the law firm, yet his role there was more along the lines of a sole practitioner, only using his firm for secretarial and administrative assistance. This warrants a closer look at General Standard 6(a) in comparison to section 1.4 of ‘The Non-Waivable Red List’. Under the 2004 version of the IBA Guidelines, only regular advice given to the affiliate of a party by arbitrators themselves had to be disclosed, not when their law firms relayed such advice. This might suggest that the situation in *W Ltd v M Sdn Bhd* would have rather fallen under either ‘The Waivable Red List’ or ‘The Orange List’ under the old Guidelines. Currently however, relayed advice from an arbitrator’s law firm to an affiliate of a party, is placed on ‘The Non-Waivable Red List’; by nature, the parties cannot waive such a conflict of interest and an arbitrator should not be permitted to adjudicate. However, the explanatory remarks for General Standard 6(a), clearly state that:

> [T]he activities of the arbitrator’s firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator’s firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.159

In order to balance these two views in a functional manner, it is only logical that a situation does not fall under section 1.4 on ‘The Non-Waivable Red List’, until after the preliminary case-by-case analysis mentioned in the explanation of General Standard 6(a) has been performed. As is confirmed in the first paragraph of Part II of the IBA Guidelines, “the General Standards should control the outcome” of a situation assessment.160 Despite this, the addition

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156 *Porter v Magill* [2002] AC 357, HL [103]; *W Ltd v M Sdn Bhd* (n 154) paras 22, 24, 34 and 38.
157 *W Ltd v M Sdn Bhd* (n 154) para 24.
158 ‘IBA Conflict Guidelines’ (n 112), Part II, para 2.
of a law firm’s relayed advice to ‘The Non-Waivable Red List’ in the 2014 revised version of the guidelines seems ill thought out, requiring a certain amount of mental gymnastics before reaching the correct conclusion at the risk of unwarranted challenges of arbitrators.

4.4.2 Tackling the Era of Social Media

It is hard to imagine that little over 10 years ago social media was hardly more than a fledgling trend. Fast forward to 2019, and you will be hard pressed to find a person who is not connected on at least one of the platforms available. Whether it is through the ‘sharing’ of a news article or blog post portraying bias, through posting a ‘tweet’ on Twitter or simply befriending persons through Facebook, a person’s ideologies can now easily be deduced from the content they share or create, and the ‘friends’ they make. Whether these deductions are fair or even correct is not necessarily dispositive – especially when the question at hand is whether there exists an ‘appearance of bias’, such as in the case of arbitrators.161

The topic of arbitrators’ online identity is relatively untapped, but social media networks have undoubtedly added a new dimension to the topic of arbitrators’ independence and impartiality. Arbitrators’ reputations and overall social and professional profiles have never been so readily accessible, as well as vulnerable to interpretation.162 A strict prohibition against any social media usage might be the safest way to avoid any suspicion of bias, but such a ban would deprive arbitrators of the advantages of social media, such as marketing and networking.163

In light of social media’s proliferation in the modern world, providing guidance for arbitrators on how to behave online is a smarter solution than fighting windmills.164 The IBA has in fact formulated the International Social Media Principles for the legal profession, wherein it stresses the importance of carefulness on such platforms.165 Section 4.4.4 of the IBA Guidelines has placed the scenario of the arbitrator having a relationship with one of the parties or its affiliates through a social media network on The Green List – with the effect that the relationship does not warrant disclosure (or disqualification).166 However, the issue still raises

163 Suar Sanubari, ‘Arbitrator’s Conduct on Social Media’ (2017) 8 Journal of International Dispute Settlement 483, p. 484.
164 International Bar Association (n 161), p. 12.
166 ‘IBA Conflict Guidelines’ (n 112), p. 27.
questions. Social media platforms vary wildly, as does their nature. LinkedIn, for example, is a *professional platform* – a ‘modern day Rolodex’, if you will. Meanwhile Facebook and Twitter have a friendlier and more social undertone, often categorized as *personal platforms*.

In *Tesco v Neoelectra*, a French Court of Appeal refused to vacate an award based on the arbitrator’s failure to disclose a relationship – a Facebook ‘friendship’ – with the other party’s counsel. When the ‘friendship’ was examined, it was noted that the party’s counsel had ‘liked’ a status posted by the arbitrator to announce his bid for the upcoming Paris Bar elections. Yet, the interaction had taken place after the award had been rendered and as such, the scope of the interaction was deemed insufficient to raise justifiable doubts and the challenge was dismissed.

However, had the IBA Guidelines’ approach been used by the French courts, no such examination even would have taken place, as no differentiation is made between social media platforms or the interaction that takes place therein. The approach has been criticized and it has been suggested that platforms with personal networking be elevated to The Orange List. The author agrees. Circumstances on The Orange List warrant a case-by-case analysis and so should ‘friendships’ on personal platforms. Some connections through the platforms may be innocuous ones where no real connection exists but in other cases it does. The tipping point, in the author’s opinion, should be the substance of the interaction analyzed under the same threshold for bias that is applied in other challenges.

Furthermore, the IBA Guidelines’ one-size-fits-all approach not only disregards the nuances of social media, but also underestimates its possibilities. Relationships on social media tend to reflect the form of conventional relationships, but unlike the conventional ones, they can be measured quantitively. ‘Social media mining’ is “the process of representing, analyzing, and extracting meaningful patterns from data in social media, resulting from social interactions”, and when combined with a structural analysis, it can test the strength of interpersonal ties.

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167 A Rolodex is a rotating file device used to store business contact information. Its name is a portmanteau of the words ‘rolling’ and ‘index’.
171 Sanubari (n 163), p. 505.
173 Sanubari (n 163), p. 496.
In short: social media mining can be used to measure closeness between people, which could be beneficial in assessing bias challenges based on such relationships.

Social media mining doesn’t only work in hindsight, after an arbitrator is appointed; it can also work as a profiling mechanism. It can identify political views, cognitive behaviors and personal traits and “[t]herefore, social media can be a tool for identifying an arbitrator’s implicit bias.”

As previously noted, the selection of arbitrators is a delicate process where experience, background and policy views are of great importance. Profiling arbitrators through their social media use can assist the parties in making better arbitrator selections and can even help younger and less known arbitrator’s market themselves. However, the social media mining gives rise to plenty of concern as well, mostly relating to data protection issues. While such issues lie outside the scope of this thesis, the main concerns identified are insufficient data sets (leading to inaccurate analyses) and invasion of privacy.

5 England and Wales

5.1 Introduction

The English lex arbitri encompasses The Arbitration Act from 1996 and the common law rules that inform it. England is not a Model Law seat, but the 1996 English Arbitration Act (EAA) is still considered a progressive law and seems inspired by the UNCITRAL Model Law. The EAA is a ‘monist’ arbitration act, meaning that it does not differentiate between international and domestic arbitrations by creating a unified regulatory model for arbitration. Contrarily, a ‘dualist’ act does so differentiate.

The EEA imposes a general duty of impartiality on the Arbitral Tribunal, pursuant to section 33(1). A breach of this rule entitles the wronged party to challenge an arbitral award on the basis of a “serious irregularity” pursuant to Section 68. This is an irregularity that the Court considers likely to cause, or having caused, substantial injustice to the applicant. Meanwhile, pursuant to Section 68(2)(a), lack of impartiality is grounds for court-ordered remission. It should be noted that the ‘removal provision’ of Section 24(1)(a) is only a partial adoption of...
the Model Law Article 12, as the EEA makes no use of the ‘independence’ term. It was concluded that there was no need for it and noted that endless arguments about independence had tainted arbitration in the United States and in Sweden. An even better explanation, in the author’s opinion, is the English fondness for their barristers’ chambers (see Chapter 5.4).

5.2 Bias under English Law

If an English judge is guilty of actual bias, then the rendered judgment must be set aside. In cases where actual bias has not been established, judges are presumed to be impartial and independent. Thus, it is for the applicant to establish the existence of apparent bias. Subsequently, there is a difference between the common law rule of automatic disqualification (note that this extends to the rule of automatic vacations of judgements), which is based on the maxim nemo debet esse judex, and the body of law that addresses the appearance of partiality. For the purposes of this thesis, the focus is on the latter; apparent bias.

English case law provides for three tests to be applied to a challenge based on apparent bias – in fact, it was inspiration for the three-tier categorization for the thesis. Pursuant to the first, an arbitrator should be removed if a ‘reasonable and informed observer’ would have ‘reasonable apprehension’ as to whether the arbitrator was biased. It derives from the 1924 decision, *R v Sussex Justices*, which is also the source of the famous phrase that ‘justice must not only be done, it must also be seen done’ comes from. The second test, is whether the same reasonable and informed person could perceive that there was ‘a real possibility’ that the arbitrator was biased, which derives from *Porter v Magill*, a 2002 judgment rendered by the House of Lords.

Note that there are 78 years between the two cases, but in between there is the 1993 case of *R v Gough*, which broke the common law trajectory they had created. It is also where the third test comes from. In *Gough* the appellant was convicted of conspiring with his brother to commit armed robbery but when the conviction was read out loud, it came out that one of the women on the jury was the brother’s neighbor. The case was appealed on the point that there was a possibility of bias and as such the conviction should be quashed. The House of Lords held that

179 ‘English Departmental Advisory Committee Report on the Arbitration Bill’ (1996) paras 101–102 state: “it seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance”.
180 Medicaments and Related Classes of Goods (no 2) [2001] 1 WLR 700 [83].
182 *R v Sussex Justices, ex parte McCarthy* (n 8); Luttrell (n 3) 36.
183 *Porter v Magill* [2001] UKHL 67.
184 *R v Gough* (n 7).
in order for apparent bias to be actionable, there had to be a ‘real danger’ of bias. The decision in *Porter v Magill* registered the end of the highest-level threshold established in *Gough*, but the two cases are not totally different. While the vantage point is not the same, they both pose a higher threshold for apparent bias than the one observed in *Sussex Justices*.185 Both thresholds are rooted in ‘reality’ rather than mere suspicions (or apprehension), the difference being the probability of the situation materializing.

In a 2003 decision, *Hussman (Europe) Ltd v Pharaon*, the applicant argued that an arbitral award should be vacated under Section 68, as there was real possibility of bias on the part of the Arbitral Tribunal, due to the fact that the Court had criticized the Tribunal and reduced its fees when setting aside a prior award.186 But Judge Brindle held that invoking an ‘apprehension of bias’ was not the same as establishing serious irregularity, referencing a report from the Departmental Advisory Committee on the [EEA] which had characterized Section 68 as a “longstop, only available in extreme cases”.187

In a more recent judgment, *ASM Shipping v TTMI*, the interpretation was turned around. Justice Morrison held that the showing of a real possibility of bias would satisfy both the ‘serious irregularity’ and ‘substantial injustice’ requirements of Section 68.188 Justice Colman in *Norbook Laboratories v Tank* agreed,189 and for now it seems that the threshold-position is settled; a ‘real possibility’ of bias, will satisfy the requirements of Section 68.

### 5.3 Duty to Disclose under English Law

While the EEA contains no express provision regarding the duty of disclosure, an arbitrator is still implicitly expected to disclose any relevant factors to the parties that might give rise to justifiable doubts as to his or her impartiality. This was established in *AT&T Corporation v Saudi Cable Co*, which provides an excellent illustration of the English courts’ approach to challenges (see Chapter 5.5).

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185 Luttrell (n 3) 29–30.
186 *Hussman (Europe) Ltd v Pharaon* [2003] EWCA Civ 266.
187 ‘English Departmental Advisory Committee Report on the Arbitration Bill’ (n 179) para 280: ‘The test for substantial injustice is intended to be applied by way of support for the arbitral process, not by way of interference...Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of that arbitral process that we would expect the court to take action...In short, clause 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.’; *Hussman (Europe) Ltd v Pharaon* (n 186).
188 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm).
189 *Norbook Laboratories Ltd v Tank* [2006] EWHC 1055.
5.4 Barristers and Solicitors: A Different Standard

Under the English regime, and the IBA Guidelines, two lawyers (solicitors) from the same law firm are not considered independent from one another while barristers who are part of the same chambers are. This differentiation stems from a distinctive feature of the English legal system which separates the legal profession into two branches: solicitors and barristers. Solicitors, as well as lawyers in international law firms, share the profits, operate under the same professional name and out of the same office (or group of offices). Barristers, on the other hand, consider themselves self-employed. They may organize themselves into chambers wherein they share expenses such as rent, clerking services and may even engage in promotional activities to advertise the chambers as an entity – but they do not have any economic interest in the financial success of the chambers.

These intricacies may be well known and routine to an individual already familiar with the English system. But to an outsider these differences are not so apparent. In a hypothetical scenario, X is a partner at an international law firm’s New York office and Y is a partner at that same law firm’s Berlin office. The two have never met, talked or even seen one another. Why should X have to turn down an arbitrator appointment because Y gave legal advice to one of the parties pertaining to the dispute, while barristers from the same chambers who share a secretary and see one another every day, wouldn’t? The answer is that partners at law firms are, in most cases, bound by ethical rules to represent the firm’s client, irrespective of the lawyer in charge of the matter. The same rules do not apply to barristers and when conjoined with lack of economic dependency and historical values ascribed to the position, their independence becomes justifiable.

In case of a challenge based on the barristers’ chambers dilemma, the ICC considers the parties’ awareness and familiarity with the concept as well as the law of the seat of the arbitration and the likely location of enforcement for the award. In 2016 the ICC had received nine such challenges, out of which three were successful. While the ICC has not singled out a single

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191 The terms, as well as the separation is also known in Australia and Hong Kong, see Carlevaris and Rocio Digon (n 150), p. 34-35.
192 Daele (n 85), p. 315.
193 Carlevaris and Rocio Digon (n 150), p. 34.
194 This means that challenges on the basis of an arbitrator being from the same barristers’ chambers as party counsel has a significantly higher success rate before the ICC than other challenges before the institution (see Chapter 5.4), see ‘2017 ICC Dispute Resolution Statistics’ (ICC Dispute Resolution Bulletin, 2018) <https://iccwbo.org/publication/2017-icc-dispute-resolution-statistics/> accessed 27 April 2019, p. 57.
determining factor, it has “rejected all challenges that involved disputes with a place of arbitration in London and likely enforcement jurisdictions familiar with barristers’ chambers”.\(^{195}\)

### 5.5 Notable English Case Law on Arbitrator Bias

London’s historical role as a seat for arbitration has led to quite a number of bias challenges having been brought before the English courts. But the best-known arbitrator challenge is \textit{AT&T v Saudi Cable}.\(^{196}\) The dispute arose out of a Pre-Bid Agreement for a telecommunications project. After the parties had each appointed their arbitrator, they agreed to Canadian lawyer Yves Fortier QC as chairman of the tribunal. Despite having signed a declaration of independence, during the proceedings Mr. Fortier’s ownership of shares in a Canadian telecommunications company (Nortel) emerged. Consequently, he was exposed as a director at Nortel, who had lost the bidding war for the disputed project to AT&T. Whether due to a clerical error or bad faith, his directorship at Nortel had been left out of the CV circulated to the parties prior to the appointment. Subsequently, AT&T made a complaint, and while Mr. Fortier offered to resign his chairmanship, the ICC dismissed the challenge. During the challenging procedures, the tribunal awarded several interim awards, all against AT&T, who proceeded to challenge the arbitrator before the English courts. The Court of Appeals affirmed the dismissal of the challenge, holding that the arbitrator was only a non-executive director of a company that might indirectly profit from his ruling against AT&T, and these circumstances did not create a real danger of bias. It should be noted that the case was decided when the \textit{R v Gough} ‘Real Danger’ threshold was still in use.

An example of a successful and more recent challenge is \textit{Cofely v Bingham}.\(^{197}\) The case touched on the issue of ‘repeat appointments’ of arbitrators. The challenged arbitrator had derived 18\% of his arbitrator appointments and 25\% of his income as an arbitrator, over a three-year period, from appointments that involved one of the parties. The arbitrator had failed to disclose this and responded evasively (and later aggressively) to questions about the matter. The Court held that his past appointments demonstrated a ‘real possibility’ of apparent bias, when looked at cumulatively, and the challenge was accepted.\(^{198}\) In fact, this is how arbitral institutions and domestic courts tend to assess challenges based on ‘repeat appointments’ or

\(^{195}\) Carlevaris and Rocio Digon (n 150), p. 36.
\(^{196}\) \textit{AT&T Corporation & Anor v Saudi Cable Co} [2000] EWCA Civ 154.
\(^{198}\) ibid.
several individual circumstances. If there is a series of events which individually would not lead to the acceptance of a challenge, the cumulative effect may suffice.\(^{199}\)

While English courts have not accepted many arbitrator challenges, *Sierra Fishing v Farran* is an example of a successful challenge\(^ {200}\) Here, the challenged arbitrator was a partner at a law firm owned by his father. The firm, and the arbitrator’s father, represented one of the parties, deriving significant financial benefit from the relationship. The arbitrator had also been involved in drafting the agreement wherein the dispute’s arbitration clause derived from. The arbitrator had not disclosed this relationship, and the Court had “little hesitation in concluding that these connections would give rise to justifiable doubts as to [the arbitrator’s] ability to act impartially…The fair minded observer would take the view that this gave rise to a real possibility that [the arbitrator] would be predisposed”.\(^ {201}\)

In *Enterprise Insurance v U-Drive Solutions*, the Court refused a challenge where the alleged bias was based on repeat procedural findings in favor of one party (11 listed instances), and undue latitude (for example issuing an extension where he had previously stated no extension would be granted). The Court ruled in favor of arbitrators’ wide discretionary powers to conduct proceedings as they see fit. The judgment is not surprising. The applicant’s argument was more of an argument against ‘due process paranoia’, than apparent bias.\(^ {202}\) The applicant felt that it gave such a degree of leniency, that it amounted to bias, but the Court disagreed.\(^ {203}\)

### 5.6 London Court of International Arbitration

The London Court of International Arbitration (LCIA) is the world’s oldest (currently operating) arbitral institution. Since its establishment in 1893 and until 2006, the LCIA applied the same level of confidentiality to arbitral proceedings and arbitral challenges, placing a flat ban on the publication of arbitrator challenges. In 2006, the ban was lifted when the institution decided to start publishing its decisions on arbitrator challenges. The reason for this shift, was

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\(^ {201}\) *Sierra Fishing v Farran* (n 200), para. 57.

\(^ {202}\) Due process paranoia is a term often used in international arbitration to describe arbitrators’ reluctance to make decisive case management decisions out of fear of their award being challenged on the basis that a party did not have suitable opportunity to argue its case. See Al Trent (n 200).

\(^ {203}\) *Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Limited and another* [2016] EWHC 1301 (QB).
the LCIA’s perceived obligation to provide guidance on arbitrator challenges.\textsuperscript{204} According to the LCIA’s challenge decision database, since 2010 there have been 32 challenges against arbitrators of which 7 have been successful or partially successful.\textsuperscript{205} Hence, the ratio of successful arbitrator challenges is 22\% over this period of time.

The LCIA’s rules pose a clear obligation of both independence and impartiality on arbitrators for the full period of the arbitration and leaves no latitude for ‘party-arbitrators’. As provided for in Article 5(3) of the LCIA Rules:

\begin{quote}
All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties’ dispute or the outcome of the arbitration.\textsuperscript{206}
\end{quote}

Articles 5(4)-(5) put forth intricate disclosure requirements. While Article 5(5) places an ongoing obligation upon an arbitrator to disclose any circumstances that may arise during the arbitration in writing, Article 5(4) provides the following:

\begin{quote}
Before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter’s request) a \textit{brief written summary} of his or her qualifications and professional positions (past and present); the candidate shall also agree in writing fee-rates conforming to the Schedule of Costs; the candidate shall sign a written declaration stating: (i) 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; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration.\textsuperscript{207}
\end{quote}

The LCIA can revoke an arbitrator’s appointment on its own initiative, at the written request of the other members of the arbitral tribunal or following a written challenge by the parties if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence.\textsuperscript{208} The determination of whether an arbitrator is unfit to act is made by the LCIA Court pursuant to Article 10(2), placing a further duty on the arbitrator to behave fairly and impartially towards the parties.


\textsuperscript{206} LCIA Arbitration Rules, Article 5(3).

\textsuperscript{207} ibid, Article 5(4). Emphasis added.

\textsuperscript{208} ibid, Article 10(1).
The balance between arbitrators’ wide discretionary powers in respect to conduct of the proceedings and duty to behave fairly and impartially towards the parties was tackled in LCIA challenge decision No 163283. The underlying dispute arose out of a shareholder’s agreement and settlement agreement governed by Israeli Law but contained an LCIA arbitration clause making the seat of arbitration London and the language of the arbitration English. Issues arose when the arbitrator tried to set submission deadlines for the parties. The Respondents argued that religious holidays stood in the way of the proposed submission dates and although they were granted an extension, they later challenged the arbitrator on the basis that she had acted unfairly towards them by disregarding the number of holidays within the extension. The LCIA Court found that a challenge could not serve to attack procedural decisions made by the tribunal due to its wide discretionary powers in respect to the conduct of proceedings, stating that “a fair-minded and informed observer, having considered the facts…would not conclude that there is a real possibility that the sole arbitrator was biased.”\textsuperscript{209} Hence, the ‘Real Possibility’ threshold is applied by both domestic courts and the LCIA.

6 France

6.1 Introduction

From the beginning of the French revolution, judicial independence has been an integral part of the ideology of \textit{la patrie} – the fatherland. Pursuant to Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen all citizens were equal before the law.\textsuperscript{210} In the more recent years, the European Court of Human Rights (ECtHR) has reinforced supremacy of equality in French law, and “[i]n recent years, the geo-political and jurisprudential proximity of the [ECtHR] has lowered the tolerance of Paris courts for breaches of due process.\textsuperscript{211}

6.2 Bias under French Law

For a long time, France did not require both independence and impartiality – at least not in writing, and domestic courts would often use the terminology ‘independence of mind’ rather

\textsuperscript{209} LCIA Case No 163283, Decision on Challenge (abstract), 3 October 2016, para. 139. Emphasis added.


\textsuperscript{211} Samuel Ross Luttrell (n 19), p. 88.
than ‘impartiality’.

Currently however, Article 1456 of the New Code of Civil Procedure (NCCP) is as follows:

The constitution of an arbitral tribunal shall be complete upon the arbitrators’ acceptance of their mandate. As of that date, the tribunal is seized of the dispute.

Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate.

If the parties cannot agree on the removal of an arbitrator, the issue shall be resolved by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration to whom the application must be made within one month following the disclosure or the discovery of the fact at issue.

Although the French arbitration act is technically ‘dualist’ – having separate articles for international arbitration and domestic – pursuant to Article 1506(2), it applies the same standard for arbitrators’ impartiality and independence.

France is one of the world’s most developed arbitral jurisdictions, and the Paris Cour d’appel is regarded by many as the worlds’ most experienced domestic court in arbitration matters.

The language of the 2011 revised arbitration clauses implies a relatively low threshold for arbitrator bias and the Paris Cour d’appel has stated that the jurisdictional value of arbitration is found in the arbitrators’ independence.

Furthermore, the Court has explained:

[T]he independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, through the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favor of a party to the arbitration.

Additionally, evidentiary burden has historically been rather high, and French courts seem to apply the test objectively and importantly, in a pragmatic manner. Unless there is a ‘definite

\[212\] Luttrell (n 3) 79.
\[214\] Samuel Ross Luttrell (n 19), p. 88.
risk’ of pre-judgment or antagonism on the arbitrator’s behalf, challenges will most likely fail.\(^{217}\)

### 6.3 Duty to Disclose under French Law

Article 1456(2), states that “before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality.”\(^{218}\) To French law, disclosure is at the heart of an arbitrator’s duty to remain independent and impartial. Arbitrators should disclose any circumstance that could affect their judgment, in order for the parties to challenge at the earliest stage possible. This duty is ongoing throughout the proceedings.\(^{219}\) Failure by an arbitrator to make a complete disclosure, or even an unjustified refusal to disclose, may lead to the award’s annulment.\(^{220}\)

A subjective test that focuses on the impression created in the minds of the parties, is used to determine the scope of disclosure. French courts have been found to consistently set aside awards in cases where arbitrators have been found to have provided inadequate disclosures. This might yet again indicate a low threshold for removal of arbitrators, but the standard of proof, which rests on the party making the challenge, is a heavy one.\(^{221}\) Combined, the threshold for arbitrator disqualification is deduced as that of ‘Real Possibility’.

### 6.4 Notable French Case Law on Arbitrator Bias

A case commonly cited in support of the French courts’ heavy burden of proof is *TAI v SIAPE*. The ruling is from 1991, at which time the French Civil Code only named ‘independence’ as a requirement, but the Court seems to have taken ‘impartiality’ into account:

> The independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, through the existence of material or intellectual links, *a situation which is liable to affect...*

\(^{217}\) ibid; *État de Dubai et société Dubaï Drydocks c sociétés Halcrow et F Mc Williams* TGI Paris, 1er avril 1993, Rev. arb., 1993,455, note P. Bellet.

\(^{218}\) Décret n° 2011-48 du 13 janvier 2011 (France) Article 1456(2).

\(^{219}\) *J&P Avax SA v Société Tecnimont SpA* Reims Cour d’appel, 2 November 2011 Rev. Arb. 112; ‘the duty of disclosure that lies with the arbitrator... is effective throughout the entirety of the arbitration proceedings until the arbitrator’s mission comes to an end.’).

\(^{220}\) In *Société Nykcool AB c/ société Dole France et autres*, C.A. Paris, 10 mars 2011, n°09/21413, Rev. arb., 2011, n°3. (an award was set aside because the arbitrators had refused to provide a declaration of independence and the court observed that one of the arbitrators was involved in another arbitration proceeding between the same parties); Décret n° 2011-48 du 13 janvier 2011 (France), Article 1520(2).

\(^{221}\) Luttrell (n 3) 82–83.
the judgment of the arbitrator by creating a definite risk of bias in favour of a party to the arbitration.222

In the more recent judgment of GAT v Republic of Congo from 2015, a motion to vacate an award rendered in an ICC arbitration, was rejected. After the arbitral tribunal had issued its final award, GAT applied to have the award set aside on the grounds that one of the arbitrators had a business relationship with a group of companies that were guaranteeing any award made against one of the parties to the dispute which he had failed to disclose. The Supreme Court decided, despite the strict disclosure demands, that the omission did not constitute sufficient grounds for annulment as it had no impact on the outcome of the case. In other words, the affiliate company that the arbitrator had done business with, would be paying the same hefty sum irrespective of the outcome of the proceedings.223 The ruling is interesting for two reasons: first, because it tackles third party funding and second, because it suggests that it might be the actual effect of an award, rather than the nature of the arbitrator’s interests, that determines the scope of an arbitrator’s disclosure obligations and the extent to which doubts may arise as to their independence and impartiality.

In Guadeloupe v Columbus, the French Supreme Court confirmed that an arbitrator had breached his duty of disclosure by leaving out an operation that was of considerable importance to his law firm. The arbitrator’s law firm had been providing advice to the parent company of one of the co-defendants in the arbitration, and the arbitrator had stated in his declaration of independence that he understood “that at present there are no matters in respect of which my firm is currently providing advice to” the parent company. However, after the proceedings had come to a close, the fact that his law firm had never ceased to provide advice to the parent company, was exposed. Although the Respondents claimed that the arbitrator had been unaware of the continued representation by his firm, the Supreme Court noted that the arbitrator had an ongoing duty of disclosure.

First, in its ruling, the Supreme Court reiterated the Court of Appeals judgment, that the arbitrator had not fulfilled his disclosure duties by not revealing the existence of a conflict of interest, especially since the fact was unknown to the Claimant before the start of the proceedings and because it was a considerably important deal for his law firm, in light of the extensive publicity it entailed.

222 Paris CA (Civ.1ère), (n 216) Emphasis added.
Second, the Supreme Court clarified the scope of the parties’ duty to investigate. The Court of Appeal had previously found that the parties were to carry out small investigations since some circumstances did not give rise to justifiable doubts, especially when the circumstances were public knowledge.\textsuperscript{224} A few months later, however, the Cour de Cassation had freed the parties of an arbitral dispute from any obligation to investigate, despite the facts being easily accessible because the arbitrator’s declaration of independence had not called his sincerity into question.\textsuperscript{225} The French Supreme Court’s judgment in \textit{Guadeloupe v Columbus} reaffirms the ruling of the Cour de Cassation, which effectively entails that if the arbitrator’s declaration is either clear on a particular subject (in this case that the business relationship was concluded), or is intentionally shortened to omit certain details – despite the information being publicly available – the parties are not bound to investigate.

Interestingly, the Respondents (Claimants in the arbitration) in \textit{Guadeloupe v Columbus}, argued that the arbitrator had satisfied his disclosure requirements – claiming it was a ‘best efforts’ obligation – partly because his research had not revealed that the parent company was still being represented by his law firm. But if the arbitrator’s ‘best efforts’ had not revealed the information, which was supposedly ‘publicly available’, then why should the threshold for the applicants’ burden to investigate be any higher? It stands to reason that the Supreme Court ruled the way it did, otherwise it would effectively be agreeing that the parties’ duty to investigate was more extensive than that of arbitrators.

The wording “definite risk” in \textit{TAI v SIAPE} might indicate a threshold of ‘Real Danger’. But when taking into account the broader body of authority from the French Courts, in conjunction with the subjective disclosure test, the ‘Real Possibility’ threshold prevails.

\textbf{6.5 ICC International Court of Arbitration}

The International Chamber of Commerce’s International Court of Arbitration (ICC) was established in 1923 and has since then contributed greatly to France’s popularity as a seat in international arbitration.\textsuperscript{226} Pursuant to Article 11(1), a general provision of the ICC Rules, “[e]very arbitrator must be and remain impartial and independent of the parties involved in the

\textsuperscript{224} \textit{État de Dubai et société Dubai Drydocks c. sociétés Halcrow et F. Mc Williams} (n 217).

\textsuperscript{225} \textsuperscript{225} Civ. 1ère, 18 déc 2014, Bull. civ. n°14-11085.

Prospective arbitrators are required to sign a statement of impartiality and independence before their appointment or confirmation and must disclose, in writing, any facts or circumstances which might call their independence into question in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubt as to their impartiality. This disclosure requirement is ongoing throughout the arbitration.

Pursuant to Article 14 of the ICC Rules, an arbitrator may be challenged “whether for an alleged lack of impartiality or independence, or otherwise”. Much like the LCIA Rules, the obligation of impartiality extends beyond the personal circumstances of the arbitrator to the proceedings themselves. Hence, arbitrators are required to conduct the arbitration in a fair and impartial manner.

Case law on arbitrator challenges in the ICC is not published and determining the standard for independence and impartiality in practice is therefore difficult. Yet, according to the (most recent) statistics report for the year 2017:

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The number of challenges filed in 2017, whether based on an alleged lack of impartiality, independence or otherwise, amounted to 48, out of which 6 were accepted by the Court. In the course of the year, 29 arbitrators resigned. A total of 37 replacements were made, following the resignation or death of an arbitrator, the filing of a successful challenge, at the request of the parties or on the Court’s own initiative.
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The statistics report also demonstrates that the number of arbitrator challenges filed, seems to be going down:

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228. ibid, Article 11(2).
229. ibid, Article 11(3).
230. ibid, Article 14(1).
231. ibid, Article 22(4).
Interestingly, as the number of challenges seem to be steadily decreasing (with the exception of 2015 where the drop was significant) the proportion of successful challenges seems to be rising:

A plausible explanation for both developments – fewer challenges and higher success rate – is that with the implementation of the 2017 ICC Rules, the ICC took steps towards more transparency. First was the publication of a Guidance Note on the disclosure obligations on impartiality and independence. Therein the ICC clarified that it does not consider disclosure to
imply the existence of a conflict – on the contrary, arbitrators who make disclosures consider themselves impartial and independent or else they would have declined to serve. But if an arbitrator is worried whether disclosure of certain circumstances is required, any doubts should be resolved in favor of disclosure.\textsuperscript{233} Hence, less confusion might exist as to how disclosure should be conducted and subsequently there are fewer challenges arising due to such confusion. The second step was to provide for an enhanced system for communicating certain decisions. This is a major improvement, as the ICC did not publish any decisions on arbitrator challenges (due to the confidentiality of the proceedings), nor did it publish any reasoning for them.

Between the years 2010 and 2016, 12 of the 34 accepted challenges were accepted on the basis of “alleged financial ties between the arbitrator and an individual or entity involved in or related to the arbitration”.\textsuperscript{234} In one such challenge, a shareholder of one of the parties belonged to a conglomerate of companies represented by the arbitrator’s law firm (the guarantor of the party’s contractual obligations belonged to the same group). The law firm had represented the conglomerate for a few years, but the work was isolated to one department and the firm’s revenue from these projects amounted to less than 1\% of its annual income. The arbitrator was not a member of the department and offered assurances that he was in no way connected to it. However, the ICC’s general approach is not to confirm arbitrators whose law firms have an ongoing relationship with any conglomerate to which a party belongs, irrespective of the significance of the financial relationship.\textsuperscript{235}

The public position of the ICC Court is that there is no uniform standard of independence and impartiality and that all challenges are determined on a case-by-case basis.\textsuperscript{236} Despite this, notable commentators have hinted that the threshold for arbitrator bias is high. Former Secretary General Yves Derains stated that “the [ICC] Court has not normally accepted to replace an arbitrator unless it appears likely that he is not, in fact, independent.”\textsuperscript{237} While these remarks on their own do not provide a concrete answer, they are a good indicator. As such the ICC Court’s, much like French courts’, standard for arbitrator bias will be concluded to be that of ‘Real Possibility’.

\textsuperscript{234} Carlevaris and Rocio Digon (n 150), p. 38.
\textsuperscript{235} ibid, p. 39.
\textsuperscript{236} Samuel Ross Luttrell (n 19), p. 99.
7 Sweden

7.1 Introduction

A combination of location, historic neutrality and moral authority is what originally made Sweden an attractive location for arbitration in the so-called East-West disputes in the 1970s. These conflicts, in particular those between the United States and the Soviet Union, turned Stockholm into a prominent forum for dispute resolution, and its reputation quickly extended beyond the East-West disputes. Sweden continues to play a big role in the world of international arbitration today, especially through resolution of disputes involving China and some of the former communist states in Eastern Europe.\textsuperscript{238}

7.2 Bias under Swedish Law

The Swedish Arbitration Act (SAA) is a ‘monist’ arbitration act that does not take after the Model Law.\textsuperscript{239} The SAA was recently updated, revisions entering into force on March 1, 2019. Formerly, Section 8 of the SAA referred only to impartiality, but according to the revised version “[a]n arbitrator shall be impartial and independent.”\textsuperscript{240} No further amendments were made to Section 8. The SAA is also notable for providing a list of circumstances in which an arbitrator will always be considered biased. Section 8 of the SAA provides the following:

If a party so requests, an arbitrator shall be released from appointment if there exists any circumstance that may diminish confidence in the arbitrator’s impartiality or independence. Such a circumstance shall always be deemed to exist:

1. if the arbitrator or a person closely associated with the arbitrator is a party, or otherwise may expect noteworthy benefit or detriment as a result of the outcome of the dispute;

2. if the arbitrator or a person closely associated with the arbitrator is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect noteworthy benefit or detriment as a result of the outcome of the dispute;

\textsuperscript{238} Samuel Ross Luttrell (n 19), p. 119.
\textsuperscript{239} Lew, Mistelis and Kröll (n 1), p.63.
\textsuperscript{240} Lag (1999:116) om skiljeförfarande Sect. 8.
3. if the arbitrator, in the capacity of expert or otherwise, has taken a position in the dispute, or has assisted a party in the preparation or conduct of its case in the dispute; or

4. if the arbitrator has received or demanded compensation in violation of Section 39, second paragraph.\textsuperscript{241}

However, the list in Section 8 is not exhaustive. This was demonstrated in \textit{Jilken v Ericsson} where the Swedish Supreme Court cited preparatory documents with the SAA as authority for the inclusive approach of Section 8.\textsuperscript{242} Hence, situations that are not listed but may still diminish confidence in the arbitrator’s impartiality and independence, still qualify as such.

7.3 Duty to Disclose under Swedish Law

Pursuant to Section 9 of the SAA, persons who are asked to serve as arbitrators are to immediately disclose all circumstances which, according to Section 8, might be considered to prevent them from serving as arbitrators. This duty of disclosure is also ongoing throughout the proceedings.\textsuperscript{243}

7.4 Notable Swedish Case Law on Arbitrator Bias

The most notable judgment pertaining to arbitrator bias before Swedish courts is \textit{Jilken v Ericsson},\textsuperscript{244} in which an allegation of bias was made during a challenge against an arbitral award. After the parties had appointed their arbitrators, they agreed that a former Supreme Court Judge would be chairman of the tribunal. After a final award was rendered, in favor of Ericsson, Jilken learned that the chairman had worked at a major Swedish law firm, Mannheimer Swartling (MS), who represented Ericsson. Jilken subsequently challenged the award, arguing that the chairman had breached Section 9 of the SAA when he failed to disclose his relationship with Ericsson’s lawyers. Ericsson on the other hand, argued that Jilken had knowledge of these circumstances and had lost their right to challenge the award by not objecting to the appointment, pursuant to Section 34 of the SAA. Ericsson also maintained that the nature of the chairman’s relationship with MS should not call his impartiality into question.

The Svea Court of Appeal executed a detailed examination of the chairman’s relationship with MS, placing heavy reliance on the terms of his contract with MS. The contract stressed the independence of the chairman’s arbitration practice, and the chairman himself testified that his

\textsuperscript{241} ibid Section 8.
\textsuperscript{242} NJA 2007 s. 841.
\textsuperscript{243} Lag (1999:116) om skiljeförfarande Section 9.
\textsuperscript{244} (n 242).
arbitration practice was separate from other business with MS. The Court dismissed the challenge, deciding that the chairman did not appear to lack impartiality, because even though the wrote memoranda and opinions for them, his arbitration practice was a separate entity. Hence the reality of his relationship did not create an appearance of bias.

The case was appealed to the Supreme Court, who reversed the judgment on the following grounds:

First, because the nature of the chairman’s engagement with MS was unclear. The Court found that the chairman’s position better resembled that of a part-time employee than a consultant. This was due to the fact that he had a private office, was listed on MS’s website as a staff member and in a report, the chairman was listed as an employee of the firm.

Second, because the chairman derived roughly 20% of his overall income from his position at MS. The income stream itself was considered significant, but that the chairman was not dependent on it. However, the law firm generated a significant portion of its income from its relationship with Ericsson and partners therefrom had recused themselves in matters relating to Ericsson in the past.

Third, although the chairman’s arbitration practice was specified as being run as separate from his work at MS – the chairman used his office there to conduct all of his arbitration matters. The parties had even received correspondence on MS stationery from the chairman.

The Supreme Court held that disclosure had been warranted, and if the parties had raised objections following the disclosure, the arbitrator should have recused himself. The Court set the award aside in full, stating the following:

The relationship between the law practice and the client is of commercial importance to the law practice, it must be considered that the bonds of interests and loyalties between the partners of and lawyers employed in the law practice, on the one hand, and the client, on the other, constitute a circumstance that may diminish confidence in the impartiality of an arbitrator employed at the law practice, when the client is a party in the arbitration. … Such a conclusion finds support in the IBA Guidelines and in case-law from the Arbitration Institute of the Stockholm Chamber of Commerce.245

The main difference between the two apparent thresholds applied by the Svea court of Appeals and the Supreme Court, is how much importance is given to appearances. The Svea court of Appeals was less concerned with appearance, rather the reality of the situation; which, for the

245 ibid at 174. Emphasis added; Luttrell (n 3) 121.
purposes of this thesis would be classified as the ‘Real Possibility’ threshold. Meanwhile, the
Supreme Court seems to apply a ‘Reasonable Apprehension’ threshold, emphasizing the
importance of the parties having faith in the arbitrator during the proceedings. Subsequently,
the determined Swedish threshold is that of ‘Reasonable Apprehension’.

7.5 The Arbitration Institute of the Stockholm Chamber of Commerce

Established in 1917, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
is one of the oldest arbitral institutions in the world. As previously noted, it gained notoriety in
the 1970’s when chosen to facilitate disputes between the East and the West in the middle of
the Cold War. Currently, the SCC plays a leading role internationally as the second largest
forum for investor-state arbitrations, administering the arbitrations under its own rules.246

Pursuant to Article 18 of the 2017 SCC Rules, arbitrators must be impartial and independent.
This requirement is ongoing and arbitrators are to disclose any circumstances that may give
rise to justifiable doubts as to their impartiality or independence.247 Article 19(1) provides that
a party can challenge an arbitrator if “circumstances exist that give rise to justifiable doubts as
to the arbitrator’s impartiality or independence”.248

Much like other institutional rules, the SCC Rules do not define ‘justifiable doubts’ or set a
specific standard for arbitrator bias. Rather, the SCC Board “looks to applicable law and best
practices in international arbitration for guidance.”249 The SCC Board has been known to rely
on the IBA Guidelines when deciding arbitrator challenges.250 Additionally, both the Swedish
Supreme Court and the Svea Court of Appeals have made note that the IBA Guidelines may
be considered in arbitrator challenges.251

In the SCC Board’s challenge decision No 2015/025, the Respondent challenged an arbitrator
on several grounds. Those arguments included that the arbitrator’s law firm was engaged in
two transactional projects with Claimant’s counsel and that the arbitrator and the arbitration’s
chairman were included on another arbitral institution’s list of arbitrators. The SCC Board
dismissed the challenge, as the arbitrator’s law firm and Claimant’s counsel represented

246 The Arbitration Institute of the Stockholm Chamber of Commerce and others, ‘Statistics - The Arbitration
247 2017 SCC Arbitration Rules, Article 18.
248 ibid, Article 19(1).
249 Anja Havedal Ipp and Elena Burova, ‘SCC Practice Note: SCC Board Decisions on Challenges to Arbitrators
2013-2015’, p.3.
250 ibid.
251 (n 242); (n 113).
opposite parties in those transactional projects and because being included on the same lists as other arbitrators does not give rise to justifiable doubts. Hence, the SCC Board does not punish lawyers (and arbitrators who are also practicing attorneys) for having to face off in separate proceedings.252

By contrast, in decision No 2013/192, the SCC Board accepted a challenge against an arbitrator. In the case, the Respondent challenged the chairman of the tribunal, arguing that he had served as an expert witness for the Claimant’s law firm several times in the past, for which he had received substantial compensation. Additionally, the chairman had not disclosed this relationship and the Respondent claimed this failure should be seen as an aggravating factor.253 Meanwhile, the Claimant argued that there was no ongoing consultancy and no financial dependence between them. The chairman was a former judge, and as such it would be of no surprise that he would be hired as an expert by various law firms. In the end, the SCC Board agreed with the Respondent and accepted the challenge.

In conclusion, the general tendencies of the SCC Board when deciding arbitrator challenges are to consider both applicable law and the best practices in international arbitration (IBA Guidelines). When a party presents several different arguments for the removal of an arbitrator, the SCC Board makes an overall assessment. “It may be that several relationships or circumstances, when viewed in combination, are sufficient to sustain a challenge, even where, seen separately, they would not warrant release of the arbitrator.”254 Furthermore, much like before the domestic Courts, it is the appearance of bias that triggers a removal of the arbitrator, rather than the existence of actual bias.255 Consequently, the determined threshold is the same on both the institutional level as before the domestic courts; ‘reasonable apprehension’ of bias.

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252 Claimant (Estonian) v Respondent (Kazakh) SCC Case No. 2015/025.
253 Claimant (Swedish) v Respondent (Swiss) SCC Case No. 2013/192. (The argument is interesting because while arbitrators’ disclosure of certain circumstances should not be seen as an admission of bias on the arbitrators’ behalf – the fact that a circumstance is not disclosed can make a challenge successful where it otherwise it might not have been); see e.g. ‘IBA Conflict Guidelines’ (n 112) General Standard 3(c) w explanations.
254 Anja Havedal Ipp and Elena Burova (n 249), p. 10.
255 ibid, p. 10.
8 United States of America

8.1 Introduction

While the United States of America (US) schools its lawyers to be rights driven constitutionalists, US trial procedures are also extremely competitive. Some have even blamed the rise of arbitrator challenges on US lawyers, whose entrance onto the scene of international arbitration seemingly corresponds with a rise in arbitrator challenges.

In the US, arbitration legislation can be found on both the federal and state level. The federal statutory law is mainly found in the Federal Arbitration Act (FAA), which was first enacted in 1925 and has been amended several times since. Despite the revisions, the FAA is considered to be outdated and that case law gives a better picture of the current standard for arbitrator bias. Each state then has an arbitration statute, most of whom have adopted a version of the Uniform Arbitration Act (UAA), which dates back to 1955. Yet, cases that arise from international transactions are governed by the FAA pursuant to Section 2. The effect of the federal provision is to make an agreement to arbitrate enforceable, which overrides any inconsistent state law. The FAA also governs any case that falls within the New York Convention and as a result, commercial arbitrations very rarely fall outside the scope of the FAA.

8.2 Bias under US Law

The FAA addresses arbitrator independence, although less directly than in most other developed jurisdictions. Article 10 of the FAA provides that an award may be vacated if “there was evident partiality or corruption in the arbitrators, or either one of them.” The FAA does not provide for interlocutory challenges to remove arbitrators, nor does it directly address the standards of impartiality and independence. Consequently, most judgments regarding arbitrators’ independence and impartiality have been rendered in a context to vacate or recognize already rendered awards.

\[256\] Whether the constitutional right to a fair and impartial tribunal (sixth amendment) extends to arbitration is topic of debate, see Peter B Rutledge, Arbitration and the Constitution (Cambridge University Press 2012); however, it is part of public policy and as such any breach thereof can jeopardize the enforcement of the award, see Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article V(2).

\[257\] Samuel Ross Luttrell (n 19), p. 129-130.

\[258\] 9 U.S.C.§ 1 et seq (1925).

\[259\] ibid§10(a)(2).

\[260\] Born (n 1) 1765.
Louis Epstein has observed that this process would function properly if the FAA did not require the parties to assert an objection to avoid waiving it.\textsuperscript{261} However, because such an objection, is required, “the threat of a challenge becomes a Sword of Damocles, dangling over the heads of the arbitrators for the remainders of the proceeding.”\textsuperscript{262} But even without an objection, any procedure that does not permit for challenges to an arbitrator’s independence and impartiality during the proceedings is potentially damaging. If the arbitrator spends the proceedings worrying over a potential challenge, he or she may be more likely to act sympathetically towards the potentially ‘wronged’ party to avoid it.

A counter-argument is that the FAA’s approach minimizes judicial intervention and prevents the parties from using challenges to delay proceedings. In \textit{Insurance Co. of North America v Pennant Insurance Co.}, the Court stated that permitting challenges mid-proceedings “could have the disadvantage of enmeshing District Courts in endless peripheral litigation and ultimately vitiate the very purpose for which arbitration was created”.\textsuperscript{263} While the view that arbitrator challenges are bad for arbitration has a certain following,\textsuperscript{264} the fact of the matter is that they do take place, and not always in bad faith. Forcing the parties to wait until the matter is resolved is not only costly, but “it prefers the risk of procedural irregularity…to the reality of bias challenges.”\textsuperscript{265}

Additionally, US courts have had some trouble in developing a coherent standard for independence and impartiality. In the leading judgment \textit{Commonwealth Coatings Corp v Continental Casualty Co.}, the Supreme Court vacated an award because the presiding arbitrator had not disclosed his almost five-year consulting relationship with one of the parties – from which he made a large amount of money – partially from the projects involved in the arbitration.\textsuperscript{266} The Supreme Court vacated the award on the basis of the undisclosed business relationship with one of the parties, but had a difficult time articulating a clear rationing. Writing for the majority, Justice Black stated:

\textit{It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former…are not subject to appellate review.}

\textsuperscript{262} Samuel Ross Luttrell (n 19) 141, p. 141.
\textsuperscript{264} see e.g. Samuel Ross Luttrell (n 19), p. 54.
\textsuperscript{265} Luttrell (n 3) 141.
\textsuperscript{266} \textit{Commonwealth Coatings Corp v Cont’l Cas Co} (1968) 393 US 145 (US SCt).
We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias....Any tribunal permitted by law to try cases...not only must be unbiased but also must avoid even the appearance of bias.267

In his separate concurrence, Justice White (joined by Justice Marshall) implied that he agreed with the result, but clarified:

The Court does not decide today that arbitrators are to be held to the standards...of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory functions. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.268

The notable difference is that Justice White seems to apply the ‘Real Danger’ threshold, while the majority opinion relies on the ‘Reasonable Apprehension’ one. Unsurprisingly, US courts have found it difficult to rely on the Supreme Court’s ruling in Commonwealth. The Seventh Circuit remarked at one time that “[it] provides little guidance because of the inability of a majority of Justices to agree on anything but the result”.269

Some Courts have relied on Justice Black’s view, vacating awards based on an appearance of bias,270 or a “reasonable impression” of bias,271 making use of the ‘Reasonable Apprehension’ standard. Others have acted in accordance with Justice White’s reasoning, one specifically stating that “[a]rbitration differs from adjudication, among other ways, because the ‘appearance of partiality’ ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances of risks, spoils an award.”272 In Freeman v Pittsburgh Glass the Court commanded an even higher standard, stating that “[t]he conclusion of bias must be ineluctable, the favorable treatment unilateral.”273

267 ibid at 148-150. Emphasis added.
268 ibid at 150 (Justice White, concurring).
269 Merit Ins Co v Leatherby Ins Co (1983) 714 F2d 673 (7th Cir).
272 Sphere Drake Ins Ltd v All Am Life Ins Co (2002) 621 F3d 617 (7th Cir).
By contrast, US courts have formed a clear position on the issue of arbitrator predispositions. They recognize that arbitrators bring with them a substantial body of views on different legal issues, business and human nature. As explained by the Second Circuit:

[I]t is virtually impossible to find a judge who does not have preconceptions about the law.’ This is all the more true for arbitrators, ’[t]he most sought-after’ of whom ‘are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose.’…It would be strange if such an arbitrator were forced to search the record of all prior testimony for any statement that might – however tangentially – relate to any of the many legal issues that might arise in any given case. A party might like to know that information when shopping for arbitrators, but its absence cannot form a ground for vacating an arbitral award.274

In Gary Born’s words: “In selecting arbitrators, parties do not choose blank slates or empty vessels, but experienced practitioners, whose views and experience are strengths of the arbitral process, not ground for challenge”.275

While the US bias threshold is relatively ambiguous in the absence of better Supreme Court guidance, it is not completely unidentifiable.276 It must be kept in mind that, because a finding that an arbitrator is biased results in an award being vacated, much more is at stake when the challenge is being assessed than if the challenge was brought at the beginning or middle of the proceedings. In this respect, the language of the FAA is clear; an arbitral award can only be vacated on “evident partiality”, not the impression or apprehension of bias. In light of this, in combination with case law, the ‘Real Danger’ threshold will be surmised to apply.

8.3 Duty to Disclose under US Law

The FAA does not impose an express obligation of disclosure on prospective arbitrators. However, US courts have repeatedly held that prospective arbitrators have an obligation to disclose any potential grounds for challenge. According to Born:

[I]t is well-settled that the FAA imposes a presumptive obligation of disclosure on prospective arbitrators, prior to accepting appointment, and on arbitrators during the course of the arbitral proceedings; nonetheless, the precise scope of this disclosure obligation is unsettled.277

274 Stmicroelectronics Nv v Credit Suisse (2011) 648 F3d 68 (2d Cir).
275 Note that this view is applied in most other jurisdictions as well. See Born (n 1), p. 1766.
276 ibid 1770.
277 ibid 1898 Emphasis added.
Justice Black’s opinion in *Commonwealth Coatings* adopted a requirement of disclosure.\(^\text{278}\) While Justice White also adopted a similar requirement in his opinion, he also stated that an arbitrator could not be “expected to provide the parties with his complete and unexpurgated business biography,” where “an arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.”\(^\text{279}\) Recent rulings affirm that arbitrators are not required to disclose all relationships or connections with the parties, but only those which could reasonably provide a basis for doubting the arbitrator’s independence and impartiality”.\(^\text{280}\)

9 **Iceland**

9.1 **Introduction**

Arbitration has a long history in Iceland. The use of arbitration to settle disputes traces back to the era of the Icelandic Commonwealth, as early as the eleventh century (see Chapter 2.1.5). Thus, arbitration has long been part of Iceland’s legal and cultural history as means of resolving disputes to avoid bloodshed.\(^\text{281}\)

Notwithstanding this history, the first and only comprehensive Icelandic legislation relating to arbitration is the Icelandic Arbitration Act No 53/1989 (IAA) which entered into force on 1 January 1990. The preparatory documents indicate that the legislature sought inspiration from the arbitration laws of its neighboring jurisdictions (Norway, Denmark and Sweden), as well as the 1985 version of the Model Law.\(^\text{282}\) However, the IAA bears hardly any resemblance to the Model Law and Iceland cannot be considered a Model Law jurisdiction.\(^\text{283}\) The IAA consists of only 15 Articles. In light of its brevity, it should come as no surprise that there are numerous issues which are not addressed therein – for example, there is no mention of a tribunal’s competence to rule on its own jurisdiction or of interim measures, no distinction is

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\(^{278}\) *Commonwealth Coatings Corp v Cont'l Cas Co* (1968) 393 US 145 (US SCt).
\(^{279}\) ibid, para. 151-152; Born (n 1), p. 1899.
\(^{280}\) Born (n 1), p. 1900.
\(^{283}\) Garðar Viðir Gunnarsson (n 281) 4.
drawn between the setting aside of procedures and the recognition and enforcement of procedures, and provisions regarding the independence and impartiality of arbitrators lack detail. The IAA is not only ‘monist’, but its reference “to the Icelandic Act on Civil Procedure no 91/1991 has been criticized as it illustrates the [IAA]’s lack of emphasis on international arbitration.”

Despite being notably inadequate by modern standards, the IAA has been updated only twice: in 2002 when Iceland ratified the New York Convention and again in 2016 when a new appeals court (The Appellate Court) was introduced into the legal system and the language of the IAA was updated to reflect this new development as part of a purely formalistic amendment.

9.2 Bias under Icelandic Law

The IAA does not directly require arbitrator independence and impartiality. Article 6, as per an unofficial translation available at the Nordic Arbitration Centre’s website, provides:

The arbitrators shall be in sufficiently good physical and mental health to participate in an arbitral proceeding. They shall possess full legal capacity in regard to their actions and their property. Their reputation shall be unblemished.

The arbitrators shall fulfil the special requirements made upon district court judges for trialing individual cases.

The chairman of the tribunal shall determine whether the arbitrators meet the requirements of this Article in case a controversy arises. A party may bring action in the District Court challenging the decision of the chairman, in the same manner and to same effect as stated in Article 5. In such cases a District Court judge rules on the issue and that ruling cannot be appealed to a higher court.

Article 6(1) stipulates the general requirements arbitrators must fulfill, but Article 6(2) refers to the special requirements made towards District Court judges. This position is derived from a 1964 Supreme Court judgment, where the Court decided it was prudent that the same standard apply to arbitrators and judges.

Article 5 of the Icelandic Act on Civil Procedure (IACP) lists a number of circumstances that would render a judge biased. Sections (a) through (f) refer to objective situations of relations

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284 Garðar Víðir Gunnarsson (n 281), p. 7:40.
285 ibid, p. 5; While the IAA is silent on the issue, the importance of an independent and impartial judiciary is highlighted by Article 70 of the Icelandic Constitution, as well as Article 6(1) of the European Convention on Human Rights. See also Stjórnarskrá líöveldisins Íslands nr. 33/1944 (Iceland), Article 70; Lög um mannréttindasáttmála Evrópu nr. 62/1994 (Iceland), Article 6(1).

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to the parties or the dispute at hand. In case of any of these objective situations, a judge must recuse him- or herself, irrespective of whether the parties themselves trust the judge, or if the judge is truly biased. In other words, sections (a) through (f) list circumstances in which objective bias exists and which cannot be overcome by party consent (actual bias).288 Meanwhile, section (g) is a more general ‘catch-all’ clause, meant to deal with bias originating from subjective circumstances, stating (in the author’s translation) that a judge is incompetent if “there are other situations or circumstances that give rise to justifiable doubts as to [the judge’s] impartiality”.289

Pursuant to Article 6(3) of the IAA the parties can object to the appointment of an arbitrator, which will then be ruled upon by the chairman of the tribunal. The chairman’s decision can be appealed only to the District Courts, whose ruling is unappealable to any higher courts. From the outset this creates a problem for arbitration in Iceland, as the District Courts cannot establish the same level of precedent as the Supreme Court.290

Article 12(1)(2) of the IAA allows for the challenge of an arbitral award on the basis of an arbitrator’s lack of impartiality and/or independence. Parties cannot wait to challenge an arbitrator until they’ve seen the outcome of the dispute however, since any delay in objecting must be excusable. While the author could find no example of such a challenge before Icelandic courts, it is only logical that the standard for bias be even higher than if an arbitrator is challenged from the outset of the proceedings. First, the applicant must show that any delay in objecting to the arbitrator’s appointment was excusable and second, there is more at stake when an award is challenged than when an arbitrator is challenged before any proceedings have commenced.291

9.2.1 Arbitrator Bias

Icelandic case law on arbitrator bias is very scarce and as such, the standard for bias will be more easily identified from case law on judicial bias in Chapter 9.2.2. Nonetheless, the available examples give an interesting insight into how the Icelandic courts might evaluate such a challenge.

289 Lög um meðferð einkamála nr. 91/1991 (Iceland), see article 5(1)(g).
290 The legislative reasoned its decision by referring to possible delays to the proceedings and that the award could later be challenged. See Alþt. 1988-1989, A-deild, þskj. 615 - 342. mál (n 282), comments on Article 6(3).
291 Lög um sanningsbundna gerðardóma nr. 53/1989 (Iceland), Article 12(1)(2) and 12(3).
The first publicly available case of an arbitrator challenge dates back to 1966 (prior to the IAA’s enactment), wherein the Supreme Court accepted the challenge. The challenged arbitrator was also party to the dispute and had simply appointed himself to the tribunal. Without much reasoning, the Supreme Court removed him from the tribunal. The facts of the case were rather on the nose and it is as clear an example of actual bias as possible, but it does hint at the existence of a misunderstanding of the party-appointed arbitrator’s role in Iceland, perhaps similar to the former interpretation of party-appointed arbitrators in the United States (see Chapter 2.2.3).

In a recent case from a District Court in Iceland, the Court reviewed a decision to remove a party appointed arbitrator, made by the chairman of the tribunal. The applicant argued that the party-appointed arbitrator was biased due to his connections with one of the parties and his close friendship with their counsel. The former argument was based on the arbitrator’s position and work as partner at his law firm and was twofold: first, two associates from the law firm were alternate members of the appointing party’s board. Second, the law firm had assisted in the formation of a subsidiary for the parent company of the disputing party. For a short period of time the arbitrator had represented the subsidiary and been the sole authorized signatory, before it was merged with the disputing party. The daughter company had been used for the purchase of land on which a silicon plant was later built. The arbitrated dispute related to the building of said silicon plant. The second argument was based on the arbitrator’s close friendship with the appointing party’s counsel. The applicant argued that the counsel and the arbitrator went to law school together, went on vacations together and attended their children’s birthdays. The Respondent argued that the arbitrator had not been involved in any decision-making or matter relating to the dispute and it was a simple oversight that caused the associates at his law firm to have remained on the board after the company was sold. Additionally, his friendship with counsel should not lead to an appearance of bias.

The Court agreed that the challenged arbitrator was correctly removed. However, the Court explicitly stated that the mere fact of the arbitrator’s connection with the disputing party through the conglomerate, would not lead, on its own, to disqualification. Whereas the Court did accept the applicant’s other arguments and the arbitrator was eventually disqualified on the

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292 (n 287).
basis of apparent bias, this reasoning indicates a higher threshold than in the other states and institutions addressed within this thesis.  

These two cases hardly provide for a concrete analysis of the standard for arbitrator bias in Iceland, but it should be noted that the Supreme Court has held that when interpreting the IAA, regard should be had for the international sources upon which it was drafted. This indicates that in the event of a challenge, Icelandic courts might look to the UNCITRAL Rules as well as the law of neighboring countries, Sweden included.

9.2.2 Judicial Bias

The examination of the threshold for judicial bias also should take into account the practice of appointing expert lay judges in Iceland. Due to various reasons, there are different considerations to be had when assessing the impartiality and independence of judges on the one hand and expert lay judges on the other. Therefore, the assessment is split into the two following sections.

Judges

While judges determine their own competence pursuant to Article 6(1) of the IACP, whether a judge is considered biased pursuant to Article 5(1)(g) should be determined by whether the judge believes that a third party would have a legitimate or fair reason to question the partiality of a person in the judge’s position. In Case No 479/2012, the Supreme Court explicitly stated that even though judges evaluate their own independence and impartiality, the vantage point is not that of the judge, but whether the circumstances at hand raise justifiable doubts as to the judge’s impartiality in the eyes of others. Hence, the vantage point is that of the third person.

The Supreme Court has ruled that judges will not be considered biased merely because they have an interest in the outcome of the dispute. Differentiation must be made between common interests on the one hand, and special interests on the other. Special interests are those shared

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294 See e.g. LCIA Case No 9147, 27 January 2000 (the arbitrator’s law firm had previously provided one of the parties with advice pertaining to the dispute, and the challenge was accepted); LCIA Case No UN96/X15, 29 May 1996 (a challenge was accepted on the basis of the arbitrator’s law firm [without the arbitrator’s involvement] having worked on unrelated matters for a company that was associated with one of the parties); Carlevaris and Rocio Digon (n 150), p. 39 (an ICC challenge was accepted on the basis that ‘a shareholder of the respondent belonged to a group of companies which the arbitrator’s law firm represented’. The firm’s revenue because of the relationship was insignificant and the arbitrator was not part of the division that did the work, but the challenge was accepted as ‘the group of companies to which the arbitrator’s law firm gave legal advice had both an ownership interest in one of the parties and a financial interest in the outcome of the dispute’.)


296 Sigurður Tómas Magnússon, ‘Seminar um hæfi héraðsdómara’ (7 September 2015) see slide 6.

297 Hrd. 20. ágúst 2012 í máli nr. 479/2012.

298 Hrd. 30. apríl 2014 í máli nr.266/2014; Páll Hreinsson (n 288), p. 312.
with a (relatively) small group or with no one, while common interests are those shared by a very large group.\textsuperscript{299} The nature and significance of the interests also must be considered. A judge will be removed only if the interests being considered are significant enough to have bearing on the judge’s impartiality. At the same time, the further removed from the judge, the more bearing or impact the interests must have.\textsuperscript{300}

In 2019 the Supreme Court dealt with a challenge against a recently appointed Appellate Court judge. The appellant argued that the judge had done substantial amount of work for the appellee, Landsbankinn hf., in the years before his appointment which raised justifiable doubts as to his impartiality. In fact, the judge had represented Landsbankinn in dozens of cases, his last court appearance on behalf of Landsbankinn being April 2017. Most of the work, the appellant stated, was of the same nature as the dispute at hand where the judge had represented Landsbankinn’s interests. Even though he had not been an employee of the bank’s legal department, the assignments had not been insignificant or occasional but comprehensive and recurrent. The Court did not accede, noting that the judge had not held an executive position at the bank and the proportion of his caseload deriving from the bank, in his former operations as a lawyer, was relatively low. Furthermore, the judge was no longer active as an attorney. He had sold his shares in his law firm and no longer represented Landsbankinn in any way. Hence, the interests were no longer active, and the work was not considered significant enough to have bearing on the judge to raise justifiable doubts as to his impartiality.\textsuperscript{301}

In Supreme Court Case No 197/1998, the plaintiff’s attorney requested that a judge recuse himself because the attorney’s law firm had represented the judge’s wife in their divorce proceedings a few years prior, raising justifiable doubts as to his impartiality. The Supreme Court held that a working relationship between lawyers at a law firm did not raise justifiable doubts as to a judge’s impartiality in a case where different lawyers acted as representatives.\textsuperscript{302} Thus, it seems that Icelandic lawyers are not equated to their law firms to the same extent as elsewhere.\textsuperscript{303}

\textsuperscript{299} An example of common interests would be a dispute regarding taxation, where it would be impossible to find a judge who has no interest in the outcome of the dispute. See Páll Hreinsson (n 288), p. 312.

\textsuperscript{300} ibid, p. 318.

\textsuperscript{301} Hrd. 26. mars 2019 í máli nr. 14/2019.

\textsuperscript{302} Hrd. 25. maí 1998 í máli nr.197/1998.

\textsuperscript{303} ‘IBA Conflict Guidelines’ (n 112), General Standard 6(a); see also Chapter 5.4.
**Expert Lay Judges**

Pursuant to the IACP, expert lay judges can be called to serve on cases where expert knowledge is required. They participate in the process and have the same rights and duties as regular judges. However, their overall circumstances are very different. As was demonstrated in Supreme Court Case No 14/2019, once a judge is appointed, the interests he/she may have in the outcome of a dispute are no longer active. Thus, any benefit, such as more work or repeat appointments, that a judge might derive from ruling in favor of a (former) client, no longer exists.

Meanwhile, expert lay judges are appointed only for a short period and do not leave their careers behind. In this sense, arbitrators better resemble expert lay judges. The collective effect of the surrounding circumstances is that they are more likely to have active interests in the outcome of the dispute. Therefore, a closer look at case law on expert lay judges’ apparent bias is not only warranted but might provide a better picture for determining a standard for arbitrator bias.

In Supreme Court Case No 479/2012 the plaintiff’s lawyer had previously represented a client who had accused the recently appointed expert lay judge, who was a doctor, of malpractice. The Supreme Court found that the two cases were unrelated as they did not involve the same parties, and that the lawyer’s representation would not amount to justifiable doubts. Pursuant to the *Codex Ethicus*, provided for by the Icelandic Bar Association “[a] lawyer shall avoid identifying himself with his Client and has the right not to be personally identified with the views and interests which he protects for his Client.” While the provision is only soft law, it is echoed in the Supreme Court’s ruling.

In a 2014 ruling, the Supreme Court found that there were no justifiable doubts as to the impartiality of an expert lay judge, despite working for a company that bought services through one of the parties, from the party’s parent company. The challenged expert lay judge worked as middle manager for an aluminium plant, Rio Tinto Alcan, who bought energy from Landsvirkjun hf., through the services of its subsidiary, Landsnet hf. The dispute at hand regarded the acquisition of land to build new aerial pylons for electricity transmission. The

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304 Lög um meðferð einkamála nr. 91/1991 (Iceland), Article 2-3.
305 (n 301).
307 (n 297).
plaintiffs objected to the acquisition, insisting that the companies should go with underground structures for their electricity transferral, rather than aerial. The plaintiffs pointed out that the underground route was more expensive, and as such the outcome of the case could financially impact the expert judge’s employer, raising justifiable doubts as to his impartiality. The defendants objected, arguing that the expert judge had no connections to the disputed plans through his work, and that the contracts between Rio Tinto Alcan were technically only with the parent company, even though the energy transmission was carried out through Landsnet’s network. The Supreme Court held that the expert judge’s role within his company did not give rise to justifiable doubts of bias.\(^{309}\)

Case law indicates a high threshold for judicial bias compared to other examined states. While the author will later argue that this derives from the practical difficulties of running a legal system within a small country (see Chapter 9.2.3), these practical factors cannot infringe on the constitutional rights of individuals to an independent and impartial tribunal.\(^{310}\) In a 2007 ruling, the ECtHR found that the Supreme Court’s ruling to commission an expert opinion from the State Medico-Legal Board had been a clear violation of Article 6(1) of the ECHR.\(^{311}\) The dispute regarded alleged medical negligence during the birth of the applicant, resulting in severe mental and physical handicap. Her parents brought the negligence claim against the State, and while the District Court found the State partially liable, the Supreme Court overturned the judgment and rejected the claims. The Supreme Court’s rationale was based on a commissioned report by the State Medico-Legal Board. The applicant had objected to the commission of the report, demanding that four of the board’s members be disqualified as they were currently employees of the defendant and clearly biased. The Supreme Court had refused, on the basis that none of the board members were members of the hospital’s highest management or were employed in the department where the alleged neglect had taken place.

In its judgment the ECtHR stated that the task of the board members was not to give a simple expert opinion that might differ from a prior opinion stated by their colleagues or management at the hospital, rather:

> In preparing the [board’s] expert opinion for the Supreme Court, the four members in question were called upon to do something more intricate, namely to analyse and assess the performance of their colleagues at the NUH with the

\(^{309}\) Hrd. 3. nóvember 2014 í máli nr. 696/2014.  
\(^{310}\) Sjóðarmálarlýðveldisins Íslands nr. 33/1944 (Iceland), Article 70; Lög um mannréttindasáttmála Evrópu nr. 62/1994 (Iceland) Article 6(1).  
\(^{311}\) Sara Lind Eggertsdottir v Iceland App No 31930/04 (ECtHR 5 July 2007).
aim of assisting the Supreme Court in determining the question of their employer's liability.\textsuperscript{312}

The EChHR further iterated that while the doctors who manned the board were not assigned to the department where the alleged negligence had taken place, the Chief Medical Executive, their supervisor, “had taken a clear stance against the District Court’s judgment by endorsing critical statements…by two hospital doctors that were forwarded to the Solicitor General and annexed to the State’s appeal to the Supreme Court”.\textsuperscript{313} The EChHR added:

In the light of the above, the Court considers that the applicant had legitimate reasons to fear that the SMLB had not acted with proper neutrality in the proceedings before the Supreme Court. It further transpires that, as a result of this deficiency and of the SMLB’s particular position and role, the applicant's procedural position was not on a par with that of her adversary, the State, as it was required to be by the principle of equality of arms.

What is more, the Supreme Court’s objective impartiality was compromised by the SMLB’s composition, procedural position and role in the proceedings before it.\textsuperscript{314}

9.2.3 A Practical but Unorthodox Approach

Iceland is a small country with a small legal community, circumstances that generate exponential proximity between professionals within the sector and make an expansive view of bias unworkable. Therefore, there is no obvious category in which the Icelandic threshold for bias challenges falls. The vantage point established in Supreme Court judgment No 479/2012 is that of the third person.\textsuperscript{315} By method of elimination this would mean that the standard should be either that of ‘Real Possibility’ or ‘Reasonable Apprehension’. Nevertheless, the consideration of whether a situation might possibly materialize is hardly the threshold derived from Icelandic case law, nor is a mere suspicion of bias – effectively eliminating the two categories in the second stage of the examination.

Appointed judges are assumed to have left behind their legal history when they take on their new role;\textsuperscript{316} doctors assumed capable of leaving behind all prior grievances against the lawyer who advocated their professional misconduct,\textsuperscript{317} and it would not suffice to show that the adjudicator effectively worked on a matter directly related to the dispute for the Court to find

\textsuperscript{312} ibid, para. 51.
\textsuperscript{313} ibid para. 52.
\textsuperscript{314} ibid para. 53-54.
\textsuperscript{315} (n 297).
\textsuperscript{316} (n 301).
\textsuperscript{317} (n 297).
apparent bias exists. The Icelandic standard is heavily influenced by the pragmatic realities of a small nation, and thus the disqualification threshold is set very high compared to other states. It seems that unless a party can show that the arbitrator is either inevitably biased because of ongoing circumstances or has acted in a way that demonstrates bias during the proceedings, a challenge will fail. Therefore, the author would argue that the Icelandic standard calls for a separate category: ‘Real Ongoing Danger’ of bias.

9.3 Duty to Disclose under Icelandic Law

While the IAA makes no mention of arbitrators’ disclosure requirements, the same requirements apply to arbitrators as domestic judges and, as such, “it is likely that there is an implied duty that the arbitrators themselves ensure their independence and impartiality in the same manner as domestic court judges.” The notable difference is that, pursuant to Article 6(3) of the IAA, the chairman of the tribunal decides arbitrator challenges while judges determine their own competency, pursuant to Article 6(1) of the Icelandic Act on Civil Procedure. This raises the question of what happens if the chairman is challenged? As judges’ rule on their own competence, the chairman of the tribunal should be permitted to do the same, especially since the decision is still subject to appeal.

9.4 The Nordic Arbitration Centre

The Nordic Arbitration Centre (NAC), established in 1920 and operated by the Icelandic Chamber of Commerce, is an independent arbitral institution in Iceland. Currently, it is the only arbitral institution in the country. Pursuant to Article 15 of the NAC Rules, arbitrators are required to be, and remain, impartial and independent. The NAC Rules also explicitly prohibit arbitrators from acting as party-advocates. Article 16(1) of the NAC Rules, which pertains to arbitrator challenges, states that a challenge may be brought against an arbitrator if

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318 (n 293).
319 Sara Lind Eggertsdottir v Iceland (n 311) (example of emphasis on ongoing conflicts of interest); Hrd. 9. januar 2004 í málí nr. 492/2003 (a challenge against a judge was accepted due to his comments during the trial).
320 Garðar Viðir Gunnarsson (n 281) 41–42; ibid 7–8.
321 Lög um samningsbundna gerðardómna nr. 53/1989 (Iceland), Article 6(1); Lög um meðferð einkamála nr. 91/1991 (Iceland), Article 6(3).
322 Lög um meðferð einkamála nr. 91/1991 (Iceland), Article 6; Lög um samningsbundna gerðardómna nr. 53/1989 (Iceland), Article 6(3).
324 2016 NAC Arbitration Rules, Article 15.
325 ibid, Article 15(2).
circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.\textsuperscript{326}

The NAC does not publish its decisions and according to the author’s gathered information, no challenges have been raised since the rules were revisited in 2013. Subsequently, there is no data or statements to analyze in order to determine which standard of bias the NAC administers.

\section*{10 Conclusion}

Two separate research questions were posed at the beginning of this thesis:

1. What is the threshold for arbitrator disqualification on the basis of apparent bias in international arbitration today?
2. Which threshold for apparent bias would be best suited for smaller nations, such as Iceland?

After reviewing and summarizing the apparent bias thresholds in the studied states, this thesis will turn to recommendations for Iceland that can be adopted by other smaller states as well.

\subsection*{10.1 Summary of Examined Regimes Outside of Iceland}

The manner in which the requirement of impartiality and/or independence are interpreted and applied under different legal regimes varies considerably.\textsuperscript{327} The author developed a three-tier guideline to categorize the severity threshold required by the selected states and arbitral institutions, for a challenge based on an arbitrator’s apparent bias to be successful:

1. Real Danger of bias: strict vantage point, in combination with a high threshold
2. Real Possibility: milder vantage point and somewhat high threshold
3. Reasonable Apprehension: milder vantage point and relatively low threshold

Predictability is important for both clients and counsel, and knowing what threshold applies for arbitrator disqualification will aid in jurisdiction selection, as well as in deciding whether to pursue a challenge against an arbitrator.

\textit{IBA Guidelines}

While the IBA Guidelines are soft law and will not override any domestic law or institutional rules, they are the ‘codification of best practices’ in international arbitration and are relied on

\footnotesize{\textsuperscript{326} ibid, Article 16(2)-(6).
\textsuperscript{327} Luttrell (n 3), p. 6.}

68
by professionals within the arbitration community. They provide guidance on disclosure and a clearer picture of the standards of impartiality and independence.\textsuperscript{328} That said, despite their revision in 2014, the Guidelines can be improved in several respects.

First, the updated language of Section 1.4 of the Non-Waivable Red List effectively provides that if an arbitrator’s law firm has a connection to one of the parties, justifiable doubts exist, and the arbitrator should resign.\textsuperscript{329} This contradicts the language of General Standard 6(a), pursuant to which the activities of an arbitrator’s law firm should be considered on a case-by-case basis. Although the introductory section to the Application Lists states that the General Standards prevail in case of any contradictions, the apparently conflicting language could still lead to unwarranted challenges or even qualified arbitrators turning down appointments. The author would suggest changing the language of Section 1.4 and moving the amendment to The Orange List, wherein circumstances are assessed on a case-by-case basis.

Second, the IBA Guidelines added social media conduct to The Green List, effectively categorizing it as a non-issue that does not warrant disclosure and will not lead to disqualification. In the author’s opinion this is an oversimplification of a complex phenomenon. Social media platforms should first be categorized into those that are purely professional (e.g. LinkedIn) and those that are personal (e.g. Facebook). The professional platforms belong on The Green List, but the personal ones ought to be placed on The Orange List and be subject to a case-by-case analysis, like the one performed in \textit{Tesco v Neoelectra}.\textsuperscript{330} Furthermore, social media conduct can be measured in a qualitative manner through social media mining. As such, with care being had for privacy concerns, social media data can be used to determine bias both after a challenge is brought and prior to any nomination to build arbitrator profiles which can aid in arbitrator selection.\textsuperscript{331}

\textit{England and Wales}

The English standard for impartiality and independence has undergone several changes throughout the years; bouncing between the two extremes in \textit{Sussex Justices} (Reasonable Apprehension) and \textit{R v Gough} (Real Danger), to settling on the middle road from \textit{Porter v Magill} (Real Possibility). From looking at case law, both the English domestic courts and the LCIA currently apply the ‘Real Possibility’ standard for arbitrator disqualification.\textsuperscript{332}

\textsuperscript{328} ‘IBA Conflict Guidelines’ (n 112), para 3-4.
\textsuperscript{329} ibid, Section 1.4; see also ibid General Standard 2(a)-(d).
\textsuperscript{330} \textit{Tesco v Neoelectra Group} (n 169).
\textsuperscript{331} Sanubari (n 163), p. 505.
\textsuperscript{332} LCIA Case No 142862, Decision on Challenge, (abstract) 2 June 2015; LCIA Case No UN152998, Decision on Challenge, (abstract) 22 June 2015.
France

Because of the French emphasis on a ‘definite risk of bias’, and the fact that evidentiary burden has historically been rather high, the French formulation resembles the prevailing standards in England.333 This indicates that the bias threshold used by French domestic courts, in practice, is that of ‘Real Possibility’. Statements made by key persons and decisions rendered by the ICC indicate the same threshold at the institutional level.

Sweden

Arbitrators’ impartiality is assessed objectively by Swedish courts – meaning that an arbitrator should be removed if there are circumstances that would lead to doubts as to impartiality, even if there is no reason to suspect the arbitrator is actually biased. It seems that Swedish courts are likelier to accept a challenge on the basis of apparent bias, compared to their English and French counterparts. Perhaps the traditions of moral authority and neutrality play an important role; perhaps it is the Swedish Arbitration Act's listing of circumstances in which bias will be made out; or, more likely, it is a combination of both. All things considered; Sweden’s threshold is determined as the lowest of the three categories: ‘Reasonable Apprehension’. The same applies to the SCC.

USA

An outdated Federal Arbitration Act and lacking guidance from the Supreme Court means that the threshold for arbitrator disqualification in the USA is not readily apparent. However, as challenges based on arbitrator bias can be brought only to vacate awards, the threshold is presumably high, as more will be at stake than if the challenge was brought prior to, or during, the proceedings. That, in conjunction with case law analyses, provide for a threshold of ‘Real Danger’.

10.2 Summary of the Icelandic Regime and Recommendations for Smaller States

Due to the Icelandic legal community’s atomity, personal connections and historical ties are virtually unavoidable. Both Supreme Court case law on judicial bias and the District Courts’ approach to arbitrator bias indicate that the threshold for arbitrator disqualification in Iceland is so uncommonly high that it falls outside the abovementioned categorization.334 Therefore,

333 Born (n 1) 1772.
334 see e.g. (n 293); (n 297); (n 301).
the author would argue that the Icelandic standard calls for a separate category: ‘Real Ongoing Danger’ of bias.

This leaves the question of whether such a high bias threshold is justified in arbitration, and if not – what standard should apply? Iceland is a small country with a small population, and an even smaller legal industry. It is a close-knit circle where most practitioners are familiar with one another. The need for trust is higher, and so is the need for leniency – both in determining bias, and in forgiving your ‘fellow lawyer’ for any prior conduct. The *Codex Ethicus* even explicitly states that lawyers have a right not to be identified with their clients’ views and interests.\(^{335}\)

Even though the determined vantage point is that of a reasonable third person, it is still necessary to know the society and culture from which that reasonable third person comes. Finding that a judge might harbor ill will towards the law firm that represented his ex-wife in their divorce proceedings might easily seem justifiable to an American, where lawyers are typically identified with their law firm. Meanwhile, to an Icelander, such a connection might seem less significant for practical reasons: someone had to represent the judge’s ex-wife and someone had to work with the lawyer who had to represent her – the odds of someone from that pool of *someones* having to appear before that judge (from yet another small pool of judges), at one point or another, are high. An expansive view of bias in light of these facts would be unworkable.

The high threshold for bias in Icelandic judicial affairs becomes understandable when the relevant factors are examined, but do the same principles of practicality apply to arbitration? To answer this question, in the author’s opinion, a distinction must be made between domestic arbitration on the one hand and international arbitration on the other. Domestic arbitration takes place between two parties who share the same nationality while the parties are of different nationalities in international arbitration. Where a party is a commercial entity, the author would argue that the majority shareholders’ nationality should determine whether an arbitration is domestic or international, in order to preserve trust in the proceedings and make sure that the international standard applies where the affected party is not of the same nationality.

Domestic arbitration in Iceland faces many of the same problems as the judicial system; there is a limited number of lawyers, experts and potential arbitrators. While all the groups have the potential to be somewhat more populous, due to party autonomy and fewer formal

\(^{335}\) Icelandic Bar Association (n 308), Article 8(2).
requirements, they still face most of the same practical barriers as domestic courts. In the case of domestic arbitration, the author proposes that the same bias threshold be applied in domestic courts and domestic arbitrations. Although it is set very high compared to other examined States, this bears semblance to the ICC’s approach to the barristers’ chambers dilemma. The ICC considers the parties’ nationalities, awareness and familiarity with the surrounding circumstances before deciding the challenge (see Chapter 5.4). Similarly, Icelandic disputants are familiar with the overall circumstances and the reasonable and informed Icelander will not view the domestic bias threshold as the same grave injustice as third parties hailing from other jurisdictions very well might.

International arbitration on the other hand, is a whole other animal. First, everything is bigger. There is a larger pool of available lawyers, of prospective arbitrators, and of experts. Whereas the odds of an Icelandic litigator or business person eventually developing a historic relationship with judges are almost inescapable, the odds of that same relationship existing between two practitioners in international arbitration are commensurably lower. Applying the same high threshold for apparent bias in international and domestic arbitrations alike is simply unnecessary and even runs the risk of Iceland becoming a venue of choice for those parties who wish to ‘misuse’ the advantage of getting to choose their arbitrator.

Second, confidence in the forum is essential. International arbitration is opted into and the seat of arbitration chosen by the parties themselves. If the parties do not trust that the arbitrators will be independent and impartial, they will not choose arbitration – at least not arbitration in Iceland. Parties to international arbitration are likely coming from legal cultures where the Icelandic standard for actionable apparent bias would be considered too high – a proposition that could too easily be exploited at the expense of trust in the proceedings as a whole. Even though such attempted exploitation might be caught by a non-Icelandic chairman, the final say currently lies with the Icelandic courts, who apply the threshold of ‘Real Ongoing Danger’.

International arbitration does not face the same practical issues as the Icelandic legal community and might even suffer if the same ‘practical blind eye’ was turned. A total rewrite of the IAA is timely, and in the author’s opinion the law should be made ‘dualist’. By differentiating between domestic and international arbitrations with regard to the standard of arbitrators’ impartiality and independence – the law could facilitate both the societal circumstances facing a small nation, as well as the greater international standards where they are required.
The practical realities of smaller nations and larger ones are dramatically different. They both develop their own sets of dos and don’ts to successfully operate within those realities. But sometimes, as part of an international forum, these realities converge. In the author’s opinion, the IAA must address two distinct sets of concerns: one domestic and one international. Rather than trying to adopt a middle-of-the-road approach that only ends up getting run over by traffic, two distinct sets of rules could handle two distinct situations. In light of its usage in the most prominent arbitral jurisdictions and to combat unwarranted challenges, the author’s research suggests that the ‘Real Possibility’ threshold would be the most reasonable standard to adopt.

Iceland’s geographical location and long history of neutrality make it an attractive choice in the active competition to attract international arbitrations. The Icelandic tourism industry has recognized that not all international tastes run to fermented shark, and a revised IAA that recognizes that similar preferences exist in the field of dispute resolution will help make Iceland an attractive forum for international arbitration.

In 1986, U.S President Ronald Reagan and Soviet Premier Mikhail Gorbachev, met in an attempt to end a staring contest that had kept the two countries, and the world, in an iron grip for decades. The meeting – which could be described as a high-stakes dispute resolution meeting – was held in historically neutral territory, midway between Moscow and Washington DC: Reykjavik, Iceland. The progress made at the summit played an integral part in bringing the Cold War to an end a few years later. See James E. Goodby, ‘LOOKING BACK: The 1986 Reykjavik Summit’ (Arms Control Today) <https://www.armscontrol.org/act/2006_09/Lookingback> accessed 15 May 2019.
Bibliography


Anja Havedal Ipp and Elena Burova, ‘SCC Practice Note: SCC Board Decisions on Challenges to Arbitrators 2013-2015’

Anton Ræder, L’Arbitrage International Chez Les Hellenes, vol 1 (Magnus Synnestvedt tr, H Aschheoug & Company (W Nygaard) 1912)

Assaf S, Jewish Courts and Procedure in the Post-Talmudic Period (1924)


Björn Magnússon Ólsen, ‘Um upphaf konungsvaðs á Íslandi’ [1908] Andvari: Timarit hins íslenska þjóðvinafélags 72

Blackaby N and others, Redfern and Hunter on International Arbitration (Sixth Edition, Oxford University Press 2015)


Daele K, Challenge and Disqualification of Arbitrators in International Arbitration (Kluwer Law International 2012)

David R, Arbitration in International Trade (Springer 1985)


Derains Y and Lévy L (eds), Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator (ICC Services 2011)


Fraser HS, ‘Sketch of the History of International Arbitration’ (1926) 11 The Conrell Law Quarterly 179


Icelandic Bar Association, ‘Codex Ethicus’ (Codex Ethicus for the Icelandic Bar Association) <https://www.lmfi.is/english/codex-ethicus> accessed 13 May 2019

International Bar Association, ‘IBA International Principles on Social Media Conduct for the Legal Profession’ (The Impact of Online Social Networking on the Legal Profession and


Jesse L. Byock, Feud in the Icelandic Saga (University of California Press 1982)

Kaufmann-Kohler G and Schultz T, Online Dispute Resolution: Challenges for Contemporary Justice (Kluwer Law International 2004)

Lapin H, Rabbis as Romans: The Rabbinic Movement in Palestine, 100-400 CE (Oxford University Press 2012)


Ornolfur Thorsson, The Complete Saga of Icelanders (Leifur Eiriksson Publishing Ltd 1997)
Páll Hreinsson, *Stjórnysýsluréttur: Málsmeðferð* (Bókaútgáfan Codex 2013)


*Political Dictionary*, vol 1 (Charles Knight and Co, Ludgate Street 1845)


Sanubari S, ‘Arbitrator’s Conduct on Social Media’ (2017) 8 Journal of International Dispute Settlement 483

Sigurður Tómas Magnússon, ‘Seminar um hæfi héraðsdómara’ (7 September 2015)


Skolnik F and Berenbaum M (eds), *Encyclopaedia Judaica* (2nd edn, Macmillan Reference USA in association with the Keter Pub House 2007)

Stefán Már Stefánsson, ‘Um Séfróða Meðdómsmenn’ (1995) 45 Timarit Lögfræðinga 281


Suar Sanubari, ‘Arbitrator’s Conduct on Social Media’ [2017] Journal of International Dispute Settlement 483


‘The Nordic Arbitration Centre | Viðskiptaráð Íslands’ (Iceland Chamber of Commerce) <https://chamber.is/services/NAC/> accessed 29 April 2019


Westermann WL, ‘Interstate Arbitration in Antiquity’ (1907) 2 The Classical Journal 197

