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## Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest For Arbitral Justice

Ronán Feehily

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**NEUTRALITY, INDEPENDENCE AND  
IMPARTIALITY IN INTERNATIONAL  
COMMERCIAL ARBITRATION, A FINE  
BALANCE IN THE QUEST FOR  
ARBITRAL JUSTICE**

*Ronán Feehily\**

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## I. INTRODUCTION

Arbitration is predicated on a consensual agreement between disputing parties that ostensibly provides for a neutral, private and efficient forum to resolve their disputes. The process is largely prescribed in the agreement by the parties and the final and binding award that emerges is enforceable in all countries that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, commonly known as the New York Convention,<sup>1</sup> to which 159 states have to date subscribed.<sup>2</sup> In most cases the arbitration will be administered by an arbitral institution, while in the absence of a pre-existing arbitration agreement, it will be *ad hoc*. The agreement will cover issues such as the substantive choice of law and the procedural rules that will apply, and the place and language of the arbitration. International commercial arbitration has enjoyed increasing popularity<sup>3</sup> as an alternative to litigation in court, with high standards expected by parties of the appointed arbitrators in managing a fair process and ensuring a just outcome. Central to the concepts of fairness and justice are neutrality, independence and impartiality, themes that are often closely associated with each other in arbitral proceedings and often lack specific guidance as to their meaning. This article evaluates these concepts and discusses how adherence to them is largely dependent upon the appointed arbitrators.<sup>4</sup> Part II discusses the close association between the concepts and the distinctions between them. Parts III and IV assess the legislative and judicial approaches respectively to dealing with the concepts, with a particular focus on the contrasting approaches adopted in England and the

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<sup>1</sup> See GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 99–105 (2nd ed. 2014).

<sup>2</sup> UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Aug. 22, 2018).

<sup>3</sup> See TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Mary Jude V. Cantorias, *Party-Appointed Arbitrator Ethics and Ethos – Cross-Cultural Differences and How They Affect Arbitrator Behaviour in Rendering Arbitral Awards*, 12 ARELLANO L. & POL'Y REV. 53, 53 (2014).

<sup>4</sup> See GARY BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 1–2 (2nd ed. 2016).

United States of America. Part V discusses the impact of human rights on the development of standards. Part VI discusses the absence of legislative or regulatory unanimity in this area, while part VII proposes possible reforms to ensure greater international cohesion and consistency. The final part draws the various parts together into a reflective conclusion.

## II. CLOSELY ASSOCIATED DISTINCT CONCEPTS

Although impartiality, independence and neutrality are often understood as the same thing under a narrow construct by some commentators, the neutrality of an arbitrator goes much further than the other two concepts.<sup>5</sup> Impartiality and independence are often used synonymously to reflect the unbiased quality that arbitrators are expected to possess. While often used interchangeably,<sup>6</sup> they are conceptually different albeit linked.<sup>7</sup> Impartiality is assessed subjectively while independence adopts an objective test.<sup>8</sup> Similar to independence, neutrality reflects an objective status, and requires that the arbitrator is intermediate and equidistant in thought and action throughout the arbitral process.<sup>9</sup> Conversely, impartiality is subjective and abstract in nature and requires an investigation to determine evidence of bias,<sup>10</sup> which can be very difficult to establish in practice, hence the need to look for external behaviour that establishes the

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<sup>5</sup> See generally Giorgio Bernini, *Cultural Neutrality: A Prerequisite to Arbitral Justice*, 10 MICH. J. INT'L L. 39 (1989); Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 24 (1984).

<sup>6</sup> See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION* 140–41 (3rd ed. 2017).

<sup>7</sup> See NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 255 (6th ed. 2015).

<sup>8</sup> Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INT'L ARB. L. REV. 999, 1007–08 (2007).

<sup>9</sup> Bernini, *supra* note 5, at 39. See also BORN, *supra* note 4, at 8.

<sup>10</sup> Rom K.L. Chung, *Conceptual Framework of Arbitrators' Impartiality and Independence*, 80 ARB. 2, 3–4 (2014). See generally Shivani Singhal, *Independence and Impartiality of Arbitrators*, 11 INT'L ARB. L. REV. 124 (2008).

arbitrator's state of mind.<sup>11</sup> A lack of neutrality does not automatically result in partiality, but no arbitrator may be deemed neutral if he or she is behaving partially.<sup>12</sup>

Neutrality in the context of international arbitration has two aspects.<sup>13</sup> As noted above, the first is that parties choose arbitration as it offers a neutral forum, with neither party having the advantage of their domestic court.<sup>14</sup> The second relates to the nationality of the arbitrator. In situations where the parties appoint a sole arbitrator, it is suggested that the nationality of the appointed individual be independent of the nationalities of the appointing parties. This approach should also be followed when party-appointed arbitrators appoint a presiding arbitrator. With regard to the neutrality of party-appointed arbitrators,<sup>15</sup> it has been suggested that a party-appointed arbitrator may be influenced by the particular appointing party's desired outcome.<sup>16</sup> Hence, the key motivation for this approach

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<sup>11</sup> See Hong-Lin Yu & Laurence Shore, *Independence, Impartiality and Immunity of Arbitrators - US and English perspectives*, 52 INT'L & COMP. L.Q. 935, 936 (2003). See generally Rom K.L. Chung, *The Rules of Natural Justice in Arbitration*, 77 ARB. 172 (2011).

<sup>12</sup> Bernini, *supra* note 5, at 39–40.

<sup>13</sup> Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 501 (2006).

<sup>14</sup> MOSES, *supra* note 6, at 1.

<sup>15</sup> See David J. McLean & Sean-Patrick Wilson, *Is There a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 167, 168–69 (2008). See also Laurens J.E. Timmer, *The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration*, 78 ARB. 348, 350–51 (2012).

<sup>16</sup> Hans Smit, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice*, by Pieter Sanders, 11 AM. REV. INT'L ARB. 429, 429 (2000). The logic for party appointed arbitrators ostensibly developed in part, in order that the appointed arbitrator could explain the party's position to the other arbitrators to combat the risk that the other arbitrators could not grasp the party's position due to national, cultural, legal and language differences. See M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L ARB. 31, 39 (1992). Balancing the tensions inherent in the party-appointed arbitrator regime has been a challenge for some time, see Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998). For an interesting discussion on, and persuasive arguments against the unilateral appointment of arbitrators, see Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished

regarding “national neutrality,” perceived as a vital factor for the effective functioning of the arbitral process,<sup>17</sup> is to avoid actual or perceived bias.<sup>18</sup>

Neutrality fundamentally relates to the arbitrator’s predisposition towards a party personally or to the party’s position,<sup>19</sup> and as noted, this predisposition has generally been accepted as resulting from the nationality and culture the arbitrator and one of the parties share.<sup>20</sup> An international arbitrator should be neutral regarding the nationalities, the political systems and the legal systems of both parties, and effectively possess a high degree of “international mindedness.”<sup>21</sup> Hence the link between neutrality and nationality is predicated on the assumption that an arbitrator who shares the same nationality, culture and language as one of the parties will be susceptible or sympathetic to that party and to their position in the arbitration, with obvious concerns for both the fairness of the process and ultimate award,<sup>22</sup> as the acceptability of the award will be dependent on the quality, skills and credibility of the arbitrators who deliver it. While this is an assumption and may not be the practice in most cases, the concerns with regard to bias, or the perception of bias, have been sufficient such that the general practice is to select sole arbitrators and presiding arbitrators that possess nationalities that are different from the nationalities of the parties to the arbitration.<sup>23</sup>

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Scholar Chair, (Apr. 29, 2010), [https://www.arbitration-icca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](https://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf).

<sup>17</sup> Lalive, *supra* note 5, at 23–25.

<sup>18</sup> See William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12 J. INT’L ARB. 99, 103 (1995).

<sup>19</sup> BLACKABY & PARTASIDES, *supra* note 7, at 254.

<sup>20</sup> Ilhyung Lee, *Practice and Predicament: The Nationality of The International Arbitrator (With Survey Results)*, 31 FORDHAM INT’L L.J. 603, 613 (2007).

<sup>21</sup> See Park, *supra* note 18, at 103–05; LCIA Court Decision on the Challenge to Mr Judd L Kessler in the Arbitration of *National Grid Plc v The Republic of Argentina*, LCIA Case No. UN 7949 (2005) (holding that the “concept of neutrality involves an arbitrator taking a certain distance in relation to his legal, political and religious culture”).

<sup>22</sup> Donahey, *supra* note 16, at 32.

<sup>23</sup> BORN, *supra* note 4, at 8.

However, others contend that a common outlook associating neutrality with nationality should not be generalised, as any arbitrator who is “neutral,” regardless of nationality, should be sufficiently competent to use their judgment and determine the arbitration in favour of the party that makes the better case.<sup>24</sup> Regardless of such contentions, neutrality is clearly linked to nationality, and some contend that independence, impartiality and neutrality are all synonymous concepts.<sup>25</sup> However, there are clearly differences as neutrality relates more to the perception of bias rather than actual bias, and is consequently different from impartiality that relates to actual bias, and adopts a subjective test.<sup>26</sup>

The requirement that an arbitrator’s nationality be different from that of the parties<sup>27</sup> is reflected in various international arbitration rules including the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules (“UNCITRAL Rules”),<sup>28</sup> the American Arbitration Association International Arbitration Rules (“AAA Rules”),<sup>29</sup> the London Court of International

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<sup>24</sup> BLACKABY & PARTASIDES, *supra* note 7, at 250.

<sup>25</sup> Murray L. Smith, *Impartiality of the party-appointed arbitrator*, 58 ARB. 30, 31–32 (1992). *See also* Lalive, *supra* note 5, at 24.

<sup>26</sup> Indeed, it is interesting that the earlier versions of the International Chamber of Commerce Arbitration Rules referred only to independence, for example, ICC Arbitration Rules, art. 7.1 (1998), impartiality was not mentioned as it was deemed difficult to define, in light of its subjective status. *See generally* Bruno Manzanares Bastida, *The Independence and Impartiality of Arbitrators in International Commercial Arbitration*, 6 REVISTA E-MERCATORIA 1 (2007); Stephen Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 ARB. INT’L 300 (1988). While an explicit impartiality requirement was absent, arbitrators were still required to be impartial. *See* Stephen Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 NW. J. INT’L L. & BUS. 1, 12 (1991). The most recent version of the ICC Rules published in 2017, includes the standards of impartiality and independence that are explicitly required in Article 11.1. However, the rules do not clarify the meaning of the terms. INT’L CHAMBER OF COMMERCE, ARBITRATION RULES, art. 11.1 (2017).

<sup>27</sup> Donahey, *supra* note 16, at 32.

<sup>28</sup> G.A. Res. 68/109, at 6.7, UNCITRAL Arbitration Rules (Dec. 16, 2013) [hereinafter ‘UNCITRAL Arbitration Rules’].

<sup>29</sup> AM, ARBITRATION ASS’N, INT’L ARBITRATION RULES art. 12.4 (2014) [hereinafter ‘AAA ARBITRATION RULES’].

Arbitration Rules (“LCIA Rules”),<sup>30</sup> the International Chamber of Commerce Arbitration Rules (“ICC Rules”)<sup>31</sup> and the World Intellectual Property Organisation Arbitration Rules (“WIPO” Rules).<sup>32</sup> The UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”), discussed further below, takes a somewhat different approach, stating that nationality cannot be a reason to preclude an arbitrator in the absence of an agreement to the contrary by the parties.<sup>33</sup> However, this general approach is tempered in the context where there is a sole or presiding arbitrator, and the Model Law requires that nationality should be considered in such circumstances.<sup>34</sup>

Impartiality requires that an arbitrator is free from bias due to preconceived notions regarding the dispute, or any other reason that may result in favouring one party over the other.<sup>35</sup> As noted above, impartiality relates to the arbitrator’s state of mind and actual bias. Proving actual bias requires a factual, subjective approach. In light of its abstract nature, measuring impartiality is quite difficult. Courts consequently review the facts and circumstances in which the arbitrator exercised his or her functions before inferring whether there was bias, and the courts have consequently relied upon a finding of apparent bias rather than actual bias in determining arbitrator impartiality.<sup>36</sup> Hence, while impartiality relates to the state of mind of the arbitrator that is demonstrated through conduct, partiality is displayed through showing preference to one of the parties usually leading to the detriment of the other. Albeit a subjective concept, impartiality must be demonstrated through some external behaviour that establishes the arbitrator’s state or frame of mind, such as a

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<sup>30</sup> LONDON COURT OF INT’L ARBITRATION, ARBITRATION RULES art. 6 (2014) [hereinafter “LCIA ARBITRATION RULES”].

<sup>31</sup> INT’L CHAMBER OF COMMERCE, ARBITRATION RULES, art. 13.5 (2017) [hereinafter “ICC ARBITRATION RULES”].

<sup>32</sup> WORLD INTELLECTUAL PROP. ORG., ARBITRATION RULES art. 20 (2014) [hereinafter “WIPO ARBITRATION RULES”].

<sup>33</sup> MODEL LAW ON INT’L COMMERCIAL ARBITRATION art. 11.1 (1985) (U.N. COMM’N ON INT’L TRADE LAW, amended 2006) [hereinafter “UNCITRAL Model Law”].

<sup>34</sup> *Id.* at art. 11.5.

<sup>35</sup> MOSES, *supra* note 6, at 141.

<sup>36</sup> Trakman, *supra* note 8, at 1007.

professional or personal relationship with one of the parties that may reasonably lead to a conclusion that an arbitrator was partial. Where no such relationship exists, partiality may be demonstrated through the arbitrator's conduct.<sup>37</sup>

Independence reflects the lack of a pre-existing relationship between the arbitrator and the parties—whether financial, personal or otherwise.<sup>38</sup> An arbitrator's independence essentially “emanates from his [or her] judicial function.”<sup>39</sup> Independence is diminished depending upon the closeness of the relationship. An objective test is employed to make this determination as it has nothing to do with the state of mind of the arbitrator. It is usually relatively easy to determine closeness in certain situations, such as when a business or financial relationship exists. The independence requirement must be discharged before the arbitral process can continue, and in the event that the objective test is not satisfied, bias will be assumed and the arbitrator will be removed. When the appearance of bias is sufficient, the presence of actual bias is not required, and circumstances may give rise to a party's concern about a lack of independence subsequently raising doubts about the arbitrator's impartiality.<sup>40</sup> Hence, in practice, “national courts and arbitral institutions [usually] base their decisions about impartiality entirely on ‘appearances’ and, in at least some significant number of cases, will disqualify presumptively unbiased arbitrators merely because the apparent risk (that is, the appearance) of actual bias is unacceptably great.”<sup>41</sup>

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<sup>37</sup> *Id.* at 1006–08. In *Re The Owners of the Steamship “Catalina” and Others and The Owners of the Motor Vessel “Norma”* [1938] 61 Llyod's Rep. 360 at 364 (Eng.), for example, the arbitrator's comment that Portuguese people were liars during the process was a sufficient basis to order the removal of the arbitrator.

<sup>38</sup> BLACKABY & PARTASIDES, *supra* note 7, at 255.

<sup>39</sup> BORN, *supra* note 1, at 1762 (quoting “Judgment of 2 June 1989, Société Gemanco v. Société Arabe des engrais phosphates et azotes, 1991 Rev. arb. 87, 87 (Paris Cour d'appel)”).

<sup>40</sup> Donahey, *supra* note 16, at 31.

<sup>41</sup> BORN, *supra* note 1, at 1786. Historically, a lack of neutrality or indeed the appearance of impartiality were not requirements in some countries. In medieval Iceland, for example, arbitrators were neither required nor expected “to be neutral or impartial so long as they acted in moderation and remained effective.” Moreover, eleventh century France saw parties selecting “relatives, friends or business

In *Locabail (UK) Ltd v. Bayfield Properties Ltd*, the English Court of Appeal provided clear guidance on possible circumstances where a lack of independence by an arbitrator *vis a vis* one of the parties cannot be raised, including “previous political associations,” previous memberships of “social or sporting or charitable bodies,” masonic associations, or circumstances where the acting arbitrator previously received instructions “to act for or against any party, solicitor or advocate” involved in an arbitration, or “membership of the same Inn[s] of Court], circuit, local Law Society or [barristers’] chambers. . . .”<sup>42</sup> Conversely, a real danger of bias could arise where there is a personal friendship, close acquaintance or animosity between the arbitrator and anyone involved in the arbitration, as the credibility of the arbitrator is centrally significant in making the award.<sup>43</sup> The English courts have stressed that most arbitrators have significant experience and are highly knowledgeable, and in light of the limited pool of arbitrators,<sup>44</sup> it is highly likely that arbitrators will have had dealings either with parties or with one another previously.<sup>45</sup>

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associates” to arbitrate disputes involving property. See Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1820 (2003).

<sup>42</sup> *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451 at [480] para. 25 (Eng.).

<sup>43</sup> *Id.* The judgment referred to judges, but it is also applicable to arbitrators. See generally Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. INT’L ARB. 325 (2003).

<sup>44</sup> This has given rise to the issue of “Repeat Players,” where the same party or law firm appoints the same arbitrator numerous times. See William W. Park, *Rectitude in International Arbitration*, 27 ARB. INT’L 473, 491–92 (2011).

<sup>45</sup> For example, in *Rustal Trading Ltd. v. Gill & Duffus SA* [2000] 1 Lloyd’s Rep. 14 at [237] (QBD), one of the arbitrators had previously been involved in an arbitration with a consultant of the plaintiff. Moore-Bick, J., held that the previous arbitration occurred more than two years previously and could not be described as recent, and there was nothing to indicate that the arbitrator maintained any animosity towards the consultant resulting from it. For an interesting discussion of this issue in the context of investment treaty arbitration, and proposals to resolve the issues discussed, see generally Carly Coleman, *How International is International Investment Dispute Resolution? Exploring Party Incentives to Expand ICSID Arbitrator Demographics*, 26 TRANSNAT’L L & CONTEMP. PROBS. 121 (2016).

It has been suggested that independence and impartiality describe the same thing, but in different ways.<sup>46</sup> The concepts of impartiality and independence have also been integrated into the rules of international arbitral institutions as an obligation placed upon arbitrators to act with fairness and without bias. The UNCITRAL Rules,<sup>47</sup> the AAA Rules,<sup>48</sup> the LCIA Rules<sup>49</sup> and the WIPO Rules<sup>50</sup> impose the requirement on arbitrators to act fairly and without bias during the proceedings. As noted, the ICC Rules also include impartiality and independence requirements.<sup>51</sup>

### III. LEGISLATIVE APPROACHES

UNCITRAL developed the Model Law to assist states in reforming and modernizing their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration.<sup>52</sup> It is representative of an arbitrator's obligations of independence and impartiality in contemporary arbitration legislation,<sup>53</sup> and has acted as a template for the adoption of domestic arbitration statutes in eighty states.<sup>54</sup> The Model Law provides that if circumstances exist that give rise to justifiable doubts

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<sup>46</sup> Koch, *supra* note 43, at 331. *See also* Park, *supra* note 44, at 477–79. For an interesting discussion on impartiality generally, and how it is a virtue, albeit a limited one in the author's view, see generally William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3 (2005).

<sup>47</sup> UNCITRAL Model Law, *supra* note 33, at art. 12; UNCITRAL Arbitration Rules, *supra* note 28, at art. 12.

<sup>48</sup> AAA ARBITRATION RULES, *supra* note 29, at art. 13.1.

<sup>49</sup> LCIA ARBITRATION RULES, *supra* note 30, at art. 10.1(iii).

<sup>50</sup> WIPO ARBITRATION RULES, *supra* note 32, at art. 37.

<sup>51</sup> ICC ARBITRATION RULES, *supra* note 31, at art. 11.1. *See* sources cited *supra* note 26. For an interesting discussion on the rights of arbitrators within the parameters of the ethical issues facing arbitrators from the perspective of a seasoned US arbitrator, see generally James H. Carter, *Rights and Obligations of the Arbitrator* 63 ARB. 170 (1997).

<sup>52</sup> *See generally* UNCITRAL Model Law, *supra* note 33.

<sup>53</sup> BORN, *supra* note 1, at 1764.

<sup>54</sup> This equates to 111 jurisdictions to date. *See* UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Aug. 22, 2018).

regarding the impartiality or independence of an arbitrator, then this is a basis upon which he or she may be challenged.<sup>55</sup> The “justifiable doubts” standard is an objective one, and does not require evidence of certainty or likelihood of partiality or dependence.<sup>56</sup>

While many jurisdictions have adopted a similar approach to the Model Law in their domestic law, England is an exception. The English Arbitration Act 1996 does not require independence or that arbitrators disclose their interests. Section 24(1)(a) provides that one of the grounds on which an arbitrator can be removed relates to where “circumstances exist that give rise to justifiable doubts as to his impartiality.”<sup>57</sup> Additionally, Section 33(1)(a) relating to the general duty of the arbitral body, imposes the requirement that it “act fairly and impartially as between the parties.”<sup>58</sup> This appears to be based on the understanding that because arbitration is consensual, a lack of independence is not significant unless it results in justifiable doubts about the impartiality of the arbitrator.<sup>59</sup> The English Court of Appeal also supported this view in *Stretford v. Football Association Ltd*,<sup>60</sup> where it remarked, “lack of independence is only relevant if it gives rise to

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<sup>55</sup> UNCITRAL Model Law, *supra* note 33, at art. 12.2. India incorporated the Model Law in 2015 and Section 12 of the Arbitration and Conciliation Act 1996 imposes this requirement of disclosure. *Shakti Bhog Food Ltd v. Kola Shipping Ltd and Anr* OMP 194 of 2009, High Court of Delhi, held a lack of independence and impartiality by an arbitrator where he failed to disclose a previous connection with one of the parties was “likely to give rise to justifiable doubts as to his independence and impartiality.” See generally the Australian case of *Gascor v Elliot* [1997] 1 VR 332, where the Victoria Court of Appeals also applied a similar principle. See also Dominique Hascher, *Independence and Impartiality of Arbitrators*, 27 AM. U. INT’L L. REV. 789, 792–806 (2012) for a discussion of this issue.

<sup>56</sup> BORN, *supra* note 1, at 1764. This objective test is followed in numerous arbitral institutional rules, such as the ICC Rules.

<sup>57</sup> Arbitration Act 1996, c. 23, § 24(1)(a).

<sup>58</sup> *Id.* at § 33(1)(a).

<sup>59</sup> UK DEP’T ADVISORY COMM. ON ARBITRATION LAW, REPORT ON THE ARBITRATION BILL 102–04 (1996). See also Chung, *supra* note 10, at 2. An action by a party relating to “justifiable doubts” regarding impartiality under Section 24(1)(a), would be focused on the process while an action by a party that the arbitrator failed to “act fairly and impartially as between the parties” under Section 33(1)(a) would be focused on the award. There is a more stringent standard to set aside the award than to remove the arbitrator.

<sup>60</sup> [2007] EWCA (Civ) 238 [39], [2007] All ER (Comm.) [1] (Eng.).

[justifiable] doubts, in which case the arbitrator can be removed for lack of impartiality.”<sup>61</sup> Another reason that motivated the explicit exclusion of the term “independence” is that if it was included, it could lead to endless challenges, where almost any remote connection between an arbitrator and a party could be furnished as a basis to challenge the independence of the arbitrator, and could consequently significantly diminish the availability of experts who could act as arbitrators.<sup>62</sup>

Section 10(a)(2) of the U.S. Federal Arbitration Act provides that “evident partiality” by the arbitrator is one basis upon which an arbitral award may be set aside.<sup>63</sup> This provision has been characterised as less direct and less effective compared to most other developed jurisdictions, as it does not provide for interlocutory challenges or the removal of arbitrators and does not directly address the standards of impartiality and independence required of arbitrators, and only deals with an arbitrator’s impartiality in the context of vacating an award.<sup>64</sup>

The test to determine justifiable doubts regarding the arbitrator’s impartiality, discussed further below, is to assess whether there is a real likelihood that the arbitrator was biased, taking into account the circumstances adduced by the party challenging the impartiality of the arbitrator and the relevant legal traditions and cultures.<sup>65</sup> As noted above, this concern is also reflected in the Model

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<sup>61</sup> *Id.* The court referred specifically to the rationale of the UK DEP’T ADVISORY COMM. ON ARBITRATION LAW, REPORT ON THE ARBITRATION BILL 101 (1996).

<sup>62</sup> UK DEP’T ADVISORY COMM. ON ARBITRATION LAW, REPORT ON THE ARBITRATION BILL 102–04.

<sup>63</sup> 9 U.S.C. § 10(a)(2).

<sup>64</sup> BORN, *supra* note 1, at 1765.

<sup>65</sup> On the influence of culture generally in international arbitration, see generally Rosabel E. Goodman-Everard, *Cultural Diversity in International Arbitration—A Challenge for Decision-Makers and Decision-Making* 7 *ARB. INT’L* 155 (1991); Lara M. Pair, *Cross Cultural Arbitration: Do the Differences between Cultures still influence International Commercial Arbitration Despite Harmonisation?* 9 *ILSA J. INT’L & COMP. L.* 57 (2002); William K. Slate II, *Paying Attention to Culture in International Commercial Arbitration* 59 *DISP. RES. J.* 96 (2004). See also Cantorias, *supra* note 3, at 53–72, for an interesting comparative analysis of Asian and Western models of arbitration, and how this affects arbitrator behavior.

Law and numerous arbitration rules provide that arbitrators must disclose any circumstances that could “give rise to justifiable doubts” regarding their “impartiality or independence,”<sup>66</sup> and this obligation begins before they are appointed and remains a continuing one throughout the process.<sup>67</sup>

#### IV. JUDICIAL APPROACHES

The English courts have adopted divergent standards at various stages “ranging from a ‘reasonable suspicion’<sup>68</sup> . . . to a ‘real danger’ or ‘real possibility’ of bias,”<sup>69</sup> to automatic disqualification for pecuniary interest,<sup>70</sup> often failing to explain the differences between the different categorizations.<sup>71</sup> The current standard to challenge an arbitrator in England is based on whether a “fair-minded and informed observer” would conclude that there was a “real possibility” that the arbitral tribunal was not impartial.<sup>72</sup> The reasonable appearance of bias, rather than evidence of actual bias, is sufficient.<sup>73</sup> Other common law jurisdictions, such as Australia and South Africa have adopted less

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<sup>66</sup> UNCITRAL Model Law, *supra* note 33, art. 12.1.

<sup>67</sup> See generally MOSES, *supra* note 6, at 141. See also BLACKABY & PARTASIDES, *supra* note 7, at 255.

<sup>68</sup> R v. Mulvihill [1990] 1 All ER 436, 441. See also BORN, *supra* note 1, at 1771, for a discussion of this issue.

<sup>69</sup> BORN, *supra* note 1, at 1771; AT&T Corporation v. Saudi Cable Co. [2000] 2 Lloyd’s Rep. 127, 134–35.

<sup>70</sup> R v. Gough [1993] 2 All ER 724 (HL) at 729, 732. See also BORN, *supra* note 1, at 1771, for a discussion of this issue.

<sup>71</sup> See BORN, *supra* note 1, at 1770–71, for a discussion of this issue and the related caselaw.

<sup>72</sup> Porter v. Magill [2001] UKHL 67 [103], [2002] 1 All ER 465 at 507 [103].

<sup>73</sup> ASM Shipping Ltd. v. TTMI Ltd. [2005] EWHC (Comm) 2238 [39], [2006] All ER (Comm) 122 at 130 [9]. This was preceded by the House of Lord’s decisions in Lawal v. Northern Spirit Ltd. [2003] UKHL 35 [19], [2004] 1 All ER 187 at 195 [19], where it also applied the test of “a real possibility of unconscious bias”, and Porter v. Magill [2001] UKHL 67 [103], [2002] 1 All ER 465 at 507 [103], where it stated the test 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”. French courts have adopted a similar standard requiring “definite risk of bias”. See BORN, *supra* note 1, at 1771–73, for a discussion of this issue and the related case law.

demanding standards and consider whether there is a “reasonable suspicion” or “apprehension” of bias.<sup>74</sup>

The leading case in the U.S. dealing with this issue is *Commonwealth Coatings Corporation v. Continental Casualty Company*,<sup>75</sup> in which the Supreme Court set aside an award based on the principle of “evident partiality” as the presiding arbitrator failed to disclose a four to five-year consulting relationship with a party to the arbitration. However, the Court failed to provide a clear standard of impartiality and independence.<sup>76</sup> Justice Black, with whom three other Justices joined, said, “[W]e should . . . be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.”<sup>77</sup> Conversely, Justice White, with whom one other Justice concurred, agreed with the result but made comments that reflected a very different standard of impartiality: “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum . . . of any judge[].”<sup>78</sup> The remaining three Justices dissented. The fractured Supreme Court decision has led to confusion in light of the diverging opinions of Justice Black and Justice White, who agreed on little other than the result.<sup>79</sup> It has led to varied and inconsistent lower court decisions. Some courts have followed Justice Black’s analysis, that they must be more scrupulous to safeguard the impartiality of arbitrators than judges, resulting in domestic awards being vacated based on an appearance of bias or a

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<sup>74</sup> See the decision of the Australian High Court in *R v Watson* (1976) 136 CLR 248, [40] and the decision of the Supreme Court of South Africa (Appellate Division), in *BTR Indus. South Africa (Pty) Ltd. v. Metal & Allied Workers’ Union* [1992] (3) SA 673 at [51].

<sup>75</sup> 393 U.S. 145, 147–48 (1968).

<sup>76</sup> See McLean & Wilson, *supra* note 15, at 177.

<sup>77</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). See also BORN, *supra* note 1, at 1767.

<sup>78</sup> *Commonwealth*, 393 U.S. at 150 (White, J., concurring). See also BORN, *supra* note 1, at 1767–68.

<sup>79</sup> See Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 55–56 (2005).

reasonable impression of bias or partiality.<sup>80</sup> Other courts have followed Justice White's analysis, that arbitrators are not necessarily to be held to the same standards as judges, and have vacated awards only where "a reasonable person . . . 'would *have* to conclude' that an arbitrator was partial to one side."<sup>81</sup> Despite this uncertainty, the majority view among U.S. courts appears to be that an arbitral award can be vacated based only on "evident partiality,"<sup>82</sup> such that an objective observer would be compelled to conclude that an arbitrator was biased or partial. Hence, an "impression" of partiality or "serious doubts" about impartiality are not sufficient.<sup>83</sup>

While the courts in various jurisdictions have adopted a divergent approach as discussed above, "the trend in recent years has . . . been a move away from equating or linking standards of impartiality of international arbitrators to those of national court judges."<sup>84</sup> This is based on the premise that arbitration and litigation can be distinguished in important ways, and an understanding that experts in particular industries, disciplines and legal communities have contacts and relationships with the parties and their counsel, and that disqualifying experienced individuals based on such factors is not required to preserve impartiality and would deprive the parties of competent experienced specialists to decide on their disputes. However, this approach must be balanced against the fact that arbitrators are not subject to appellate review, strict disclosure obligations or judicial institutional controls, and such contentions are used to argue that arbitrators should be held to the same standard as

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<sup>80</sup> See, e.g., *Dealer Computer Services Inc. v. Michael Motor Co.*, 485 F. App'x 724, 727–28 (5th Cir. 2012) that applied the "reasonable impression of bias" standard (referred to in BORN, *supra* note 1, at 1768).

<sup>81</sup> See, e.g., *NGX Network Asia v. PAC Pac. Group Int'l, Inc.*, 511 F. App'x 86, 88 (2d Cir. 2013) (quoting *Applied Indus. Materials Corp. v. Onalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (referred to in BORN, *supra* note 1, at 1769).

<sup>82</sup> *Commonwealth*, 393 U.S. at 147.

<sup>83</sup> See BORN, *supra* note 1, at 1770 (citing RESTATEMENT (THIRD) U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–20 (Am. Law Inst., Tentative Draft No. 2, 2012)).

<sup>84</sup> *Id.* at 1787.

judges.<sup>85</sup> Outside the U.S., some national statutes have consequently explicitly stated that arbitrators are to be held to the same standards of impartiality and independence as domestic court judges.<sup>86</sup> The English Court of Appeal for example, held that the same standards of impartiality that apply to judges should apply to arbitrators, but appeared to soften this position when it remarked, consistent with the international trend, “the courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold [for bias] to apply to courts of law than applies to a private tribunal whose ‘judges’ are selected by the parties.”<sup>87</sup>

## V. IMPACT OF HUMAN RIGHTS

It has long been established that arbitration agreements do not breach constitutional or human rights relating to the right of access to court as parties can waive their rights by entering into arbitration agreements.<sup>88</sup> The advent of the Human Rights Act 1998 gave effect to the European Convention on Human Rights (ECHR). Article 6 of the ECHR includes the guarantee of “a fair and public hearing within a reasonable time by an independent and impartial tribunal established

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<sup>85</sup> See generally Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT’L & COMP. L. 499 (2006).

<sup>86</sup> The Articles 1456 and 1506(2) of the French Code of Civil Procedure applies domestic judicial independence standards to arbitrators sitting in France. See BORN, *supra* note 1, at 1789 (citing CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 1456, 1506(2) (fr.)).

<sup>87</sup> See BORN, *supra* note 1, at 1788–89 (citing *AT&T Corp. v. Saudi Cable Co.* [2000] EWCA (Civ) 154 [40], [2000] 2 Lloyd’s Rep 127 [135] (Eng.)).

<sup>88</sup> *Scott v. Avery and others* (1856) All ER 1,1. Article 5 of the Model Law also provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law”. Waiver of one’s right of access to court was also explicitly acknowledged by the European Court of Human Rights in *Deneer v. Belgium*, 2 Eur. H.R. Rep. 439, 460–61, where it stated “civil matters, notable in the shape of arbitration clauses in contracts . . . [t]he waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention”. However, the waiver must be voluntary. See David Altaras, *Arbitration in England and Wales and the European Convention on Human Rights: Should Arbitrators be Frightened?*, 73 ARB. 262, 265–66 (2007).

by law.”<sup>89</sup> Consequently, UK courts have considered Strasbourg jurisprudence when determining the impartiality and independence of arbitral tribunals.<sup>90</sup> The mandatory provisions of the Arbitration Act 1996 reflect Article 6 rights, such as Section 1 of the Arbitration Act 1996, which prescribes that the overarching object of the process is “to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.”<sup>91</sup>

As noted above, Section 24 of the Act empowers the court to remove arbitrators on grounds that include justifiable doubts as to their impartiality, incapacity, and refusal or failure to properly conduct the proceedings, provided that “substantial injustice has been or will be caused to” a party.<sup>92</sup> Also as noted above, Section 33 expressly requires the tribunal to act fairly and impartially between the parties. Challenges to an award based on a lack of substantive jurisdiction or serious irregularity are provided for in Sections 67 and 68 of the Act, respectively.<sup>93</sup> Section 68(2) defines “serious irregularity” as one or more of the specified kinds of irregularity that the court considers will “cause substantial injustice to the applicant” and this includes failure of the tribunal to comply with Section 33 of the Act discussed above.<sup>94</sup> The Court of Appeal has also helpfully provided the following:

These provisions of the 1996 Act are important in the context of Article 6 of the Convention because they provide for a fair hearing by an impartial tribunal. Moreover, the mandatory provisions ensure that the High Court has power to put right any want of impartiality or procedural fairness, so that the only provisions of Article 6 which could arguably be said

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<sup>89</sup> Council of Europe, European Convention on Human Rights, art. 6 para. 1.

<sup>90</sup> For example, the judgment in *Porter v. Magill*, [2001] UKHL 67 [84] [2002] 2 AC 357 (appeal taken from Eng.), discussed at *supra* note 73, was influenced by the jurisprudence of the European Court of Human Rights. Similarly, arbitrators are under an obligation to construe UK domestic legislation in a way that is compatible with ECHR Rights. *See Altaras, supra* note 88, at 263.

<sup>91</sup> Arbitration Act 1996, c. 23, § 1(a) (Eng.).

<sup>92</sup> *Id.* at § 24(1).

<sup>93</sup> *Id.* at §§ 67–68.

<sup>94</sup> *Id.* at § 68(2)(a).

not formally to be met by the Act are the requirements that the hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and that the judgment be pronounced publicly.<sup>95</sup>

The court also held:

In our judgment the provisions of English law contained in the 1996 Act amply satisfy the principles in the Strasbourg cases. . . . In particular the mandatory provisions require the arbitrators to be impartial and to act fairly and impartially as between the parties. They allow for the removal of an arbitrator, for example, if there are justifiable doubts as to his impartiality or if there is a refusal or failure properly to conduct the proceedings. The court has power to set aside the award on the grounds of lack of substantive jurisdiction or serious irregularity, which includes a failure to act fairly and impartially between the parties. Moreover Section 69 of the 1996 Act . . . affords greater access to the court by way of appeal than is permitted in many countries and, indeed, by many standard forms of arbitration such as arbitration under the ICC Rules.<sup>96</sup>

The approach adopted in England may be contrasted with the approach on the other side of the Atlantic. In the U.S., the Fifth and Fourteenth Amendments to the Constitution guarantee “due process of law,”<sup>97</sup> which includes impartial and independent judicial tribunals, but these provisions do not directly apply when determining the independence and impartiality required of arbitrators. In that context, an arbitration agreement is viewed as an exchange of formal court protections for different benefits and protections, and the Federal

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<sup>95</sup> *Stretford v. Football Ass’n Ltd.* [2007] EWCA (Civ) 238 [38] (Eng.).

<sup>96</sup> *Id.* [65].

<sup>97</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

Arbitration Act was introduced in 1925 to support this.<sup>98</sup> In *Elmore v. Chicago & Illinois Midland Railway Co.*, for example, the court declared “Private arbitration . . . really is private . . . the fact that a private arbitrator denies the procedural . . . ‘due process of law’ [safeguards] cannot give rise to a constitutional complaint.”<sup>99</sup> Indeed one of the primary reasons that parties elect to resolve disputes through the arbitral process rather than litigation, is due to the fact that it is a different process, and it would frustrate this central objective of disputing parties to require their chosen process to function in an identical way to courts, by applying constitutional protections designed for the court process.<sup>100</sup>

## VI. ABSENCE OF UNANIMITY

The rules of arbitration institutions such as the ICC Rules,<sup>101</sup> the AAA Rules,<sup>102</sup> the LCIA Rules,<sup>103</sup> the WIPO Rules<sup>104</sup> and the UNCITRAL Rules<sup>105</sup> provide that a party can request in writing that an arbitrator be disqualified, providing the supporting reasons for the request. Some institutional rules also provide that the arbitrator should resign if the parties unanimously agree.<sup>106</sup> Where there is no consensus, the Model Law provides that the arbitral tribunal will determine the challenge<sup>107</sup> while other arbitration institutions provide that they will

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<sup>98</sup> BORN, *supra* note 1, at 1791–92. See Federal Arbitration Act, 9 U.S.C. §§ 1–16.

<sup>99</sup> 782 F.2d 94, 96 (7th Cir. 1986). See also BORN, *supra* note 1, at 1792–93.

<sup>100</sup> See BORN, *supra* note 1, at 1793. For an interesting discussion on a unitary understanding of public civil dispute resolution, that recognises ADR is often energized by state action and consequently constitutionally required to comply with minimal but meaningful due process requirements, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956 (2000).

<sup>101</sup> ICC ARBITRATION RULES, *supra* note 31, at art. 14.1.

<sup>102</sup> AAA ARBITRATION RULES, *supra* note 29, at art. 14.1.

<sup>103</sup> LCIA ARBITRATION RULES, *supra* note 30, at art. 10.3.

<sup>104</sup> WIPO ARBITRATION RULES, *supra* note 32, at art. 25.

<sup>105</sup> UNCITRAL Arbitration Rules, *supra* note 28, at arts. 13.1-2.

<sup>106</sup> UNCITRAL Model Law, *supra* note 33, at art. 13.2; AAA ARBITRATION RULES, *supra* note 29, at art. 14.2; LCIA ARBITRATION RULES, *supra* note 30, at art. 10.5.

<sup>107</sup> UNCITRAL Model Law, *supra* note 33, at art. 13.2.

look into the challenge themselves or provide for a specialised body to do so.<sup>108</sup> Both the AAA and the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes provide disclosure requirements when acting as an international arbitrator.<sup>109</sup>

The application of impartiality and independence standards under state law and institutional rules is heavily dependent on the specific context of the parties' arbitration agreement, in particular their expectations regarding the arbitrator's role, and the factual circumstances of each case.<sup>110</sup> The procedural context can also be critical, as objections can be made at any stage from the outset of the arbitration, during the course of it or after the arbitration has concluded, and different standards will be applied at these various stages.<sup>111</sup> There are significant differences in approach when the court assesses the possibility of removing an arbitrator compared with annulment or non-recognition of an award.<sup>112</sup> Differing standards of independence and impartiality result in different national and procedural law requirements applying as a matter of national law, depending on the arbitral seat, which is inconsistent with the intentions of the New York Convention and the Model Law, which collectively promote uniformity in international commercial arbitration.<sup>113</sup> This is tempered to some degree by 'autonomous' standards in institutional arbitral rules. However, the standards of "justifiable doubts" and "reasonable suspicion" vary regarding the degree of risk or likelihood of bias that will be tolerated. While they are objective standards, they are merely starting points for analysis. The commercial, legal and contractual context within which an arbitrator acts is critical.<sup>114</sup>

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<sup>108</sup> AAA ARBITRATION RULES, *supra* note 29, at art. 14.3; LCIA ARBITRATION RULES, *supra* note 30, at art. 10.6.

<sup>109</sup> CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (AAA/A.B.A. 2004).

<sup>110</sup> BORN, *supra* note 1, at 1763.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1775. For an interesting conceptual analysis of impartiality and the elucidation of a functional approach that could be applied prescriptively to the international arbitration system, see Rogers, *supra* note 79, at 53–121.

<sup>114</sup> For example, Rule 13(B) of the American Arbitration Association Commercial Rules 2013 allow for "non-neutral arbitrators". See BORN, *supra* note 1,

While parties have the freedom to choose their arbitrators, domestic laws rarely impose specific qualifications in order to act as an arbitrator. However, in light of the importance of the task that arbitrators must undertake, some minimum qualifications are generally imposed by international, institutional and/or national laws. As noted above, the legal requirement of impartiality and independence is the one most frequently provided for in court instruments, whereas neutrality is dealt with in a more subtle, indirect way.<sup>115</sup> Despite efforts by institutions such as UNCITRAL and the International Bar Association to create uniform standards of independence and impartiality, there is currently no unanimity on these issues between different jurisdictions.<sup>116</sup> While the UK Supreme Court recently confirmed that an arbitrator must be “independent of the parties” and “rise above partisan interests,”<sup>117</sup> there is, as discussed, a lack of clear and effective standards both domestically and internationally for measuring arbitrator performance and this is a cause of concern for some time,<sup>118</sup> leading one commentator from the U.S. to remark almost two decades ago that “barbers and taxidermists are subject to far greater regulation than [arbitrators].”<sup>119</sup>

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at 1795–96. For an interesting discussion on whether the parties, the arbitrator or the state controls the arbitral process, including an analysis of the concessionary and contractualist theories of arbitration, see Yu & Shore, *supra* note 11, at 935–67. For an interesting analysis of party control in arbitration, and the gradual shifting of control away from the parties to the tribunal during the process, see generally Thomas H. Webster, *Party Control in International Arbitration*, 19 *ARB. INT’L* 119 (2003). See generally Yeshnah D. Rampall & Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 23 *HARV. NEGOT. L. REV.* 345 (2018).

<sup>115</sup> See Lee, *supra* note 20, at 609–10.

<sup>116</sup> See, e.g., Michael Schafler et al., *The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law* 5 *INDIAN J. ARB. L.* 150, 150 (2017).

<sup>117</sup> *Jivraj v. Hashmani* [2011] UKSC 40 [41].

<sup>118</sup> In *AT&T Corp. v. Saudi Cable Co.* [2000] All ER (D) 657 at para. 10, for example, the English Court characterised the failure of a Canadian arbitrator to disclose his directorship in the company that was a party to the contract in dispute as a “most unfortunate secretarial error.”

<sup>119</sup> Reuben, *supra* note 100, at 1013.

## VII. REFORM

In terms of reform, one must consider national law standards, institutional rules, custom and practice, ideological forces, and the context and expectations of the parties in individual cases. In many instances, arbitrators are selected due to their specialised experience and familiarity to the parties and their advisors, and it can be difficult for individuals in these circumstances to identify and disclose all relationships that could subsequently cause suspicion, or for parties to find arbitrators that do have such connections. This was explicitly acknowledged by the U.S. Second Circuit Court of Appeals when it remarked:

Familiarity with a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth. Moreover, specific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time.<sup>120</sup>

Impartiality standards required of judges cannot be equated with the standards expected of international arbitrators, as the standards applied to judges are designed for and applied in defined comprehensively regulated specific domestic contexts, while standards expected of arbitrators are applied in an international context defined primarily by the agreement of the parties and their expectations in specific cases, reflecting the consensual nature of arbitration.<sup>121</sup> The fragmented framework of international arbitration depends on more

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<sup>120</sup> *Morelite Construction Corp. v. New York City District Council Carpenters Funds*, 748 F.2d 79, 83 (2d Cir. 1984). *See also* Timmer, *supra* note 15, at 349–50.

<sup>121</sup> The Model Law for example, omits any linkage between the impartiality of arbitrators and domestic judicial requirements. [UNCITRAL Model Law, *supra* note 33, art. 11]. Similarly, jurisdictions such as Italy, in Article 815 of the Italian Code of Civil Procedure and Japan, in Article 18 of the Japanese Arbitration Law, have abandoned legislative provisions that linked judicial and arbitral standards of impartiality. *See* BORN, *supra* note 1, at 1791, for a discussion of this issue.

fluid processes for the selection of decision makers and for vetting their integrity.<sup>122</sup>

However, as discussed above, “arbitral awards are not subject to appellate review and arbitrators are not subject to” judicial training and discipline. It is consequently quite essential that diligent, good faith disclosure is required and the arbitrators are disqualified in cases involving real risk of partiality.<sup>123</sup> One of the primary sources of legitimacy for international arbitration is actual and perceived impartiality.<sup>124</sup> In this context, standards of impartiality and independence must strike the right balance. They must be sufficient to ensure the integrity of the arbitral process, but not of an unrealistically high nature that they result in compromising the parties’ rights to select arbitrators, cause unreasonable delays in the arbitral process, and impose substantial costs on the parties.<sup>125</sup> Furthermore, “the acceptable degree of risk of partiality should vary depending on the circumstances of particular cases.”<sup>126</sup> As can be seen from the discussion above, the formulation of standards on impartiality and independence generally seek to be simultaneously generally applicable in a wide and varied range of cases and specifically relevant in specific cases. While the former has been achieved, attainment of the latter has proved more elusive.<sup>127</sup>

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<sup>122</sup> Park, *supra* note 44, at 482–84.

<sup>123</sup> BORN, *supra* note 1, at 1790–91.

<sup>124</sup> Rogers, *supra* note 79, at 120.

<sup>125</sup> See also Timmer, *supra* note 15, at 350.

<sup>126</sup> BORN, *supra* note 1, at 1779. For an interesting discussion on the expansion of expectations of arbitrators in international commercial arbitration and investment treaty arbitration, and the varied ethical standards and expectations in the two distinct fields, see James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT’L L. REV. 1003, [1003–06] (2017).

<sup>127</sup> Jurisdictions such as Sweden, in Section 8 of the Swedish Arbitration Act, provide guidance that is more specific by identifying specific disqualifying criteria. BORN, *supra* note 1, at 1794. However, such an approach has been criticised for failing to take account of changing circumstances and specific contexts. See BORN, *supra* note 1, at 1794. For an analysis of relevant instruments covering impartiality and independence standards in investment treaty arbitration and proposals for reform, see generally James D. Fry & Juan Ignatio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes* 30 ARB.

An approach that parties could adopt is to provide for a heightened impartiality requirement in their agreement requiring, for example, that the appointed arbitrators be free from any prior connection with, or predisposition towards either of the parties.<sup>128</sup> There is no legislative provision or judicial authority prohibiting this approach.<sup>129</sup> However, it would be prudent for parties not to adopt an overly prescriptive, strict approach in order to avoid disqualifying suitably qualified candidates.<sup>130</sup> The International Bar Association has produced non-binding guidelines on Conflicts of Interest in International Commercial Arbitration (“IBA Guidelines”) that appear to strike the right balance. Originally published in 2004, they were most recently revised in 2014 reflecting clarifications and improvements since they were first adopted a decade earlier. The purpose of the IBA Guidelines is to harmonise the standards of disclosure and provide guidance to best practice with regard to impartiality and independence at an international level.<sup>131</sup> The IBA Guidelines comprise standards together with practical examples of their application, and require more demanding standards for disclosure, independence, and impartiality than most national laws and institutional rules.<sup>132</sup> They are divided into two parts; the first part comprises the General Standards Regarding Impartiality, Independence and Disclosure, while the second part comprises the Practical Application of the General Standards. The second part elucidates a non-exhaustive list of circumstances that are put into different categories that reflect the colours of traffic lights.

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INT’L 189 (2014); Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 NW. J. INT’L L. & BUS. 371 (2016).

<sup>128</sup> See Franck, *supra* note 13, at 502–04.

<sup>129</sup> See *id.* The position as to whether the parties can agree to reduced standards of independence and impartiality is not as clear, and the validity of such agreements is open to question in some jurisdictions. See Section 33(1)(a) of the English Arbitration Act 1996 discussed above, that requires arbitrators to act fairly and impartially “notwithstanding any agreement to the contrary”. See also BORN, *supra* note 1, at 1814–18.

<sup>130</sup> It has been suggested that if arbitrators are required to be sanitised from all possible external influences on their decisions, only the most naïve or incompetent would be available. See Park, *supra* note 44, at 477.

<sup>131</sup> BLACKABY & PARTASIDES, *supra* note 7, at 257.

<sup>132</sup> See BORN, *supra* note 1, at 1857. See generally David A. Lawson, *Impartiality and Independence of International Arbitrators – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 ASA BULL. 22 (2005).

First, the Red List is segregated between waivable and non-waivable circumstances reflecting situations of serious conflict of interests that makes the appointment of the arbitrator impermissible, unless the situation is waivable. Second, the Orange List, contains situations that the arbitrator must disclose, and third, the Green List comprises circumstances that would be unlikely to raise doubts about impartiality and independence, and consequently do not require disclosure.<sup>133</sup>

The IBA Guidelines assist arbitrators, disputing parties, practitioners, arbitral institutions and the courts to determine the issues that require disclosure, as they reflect a reasonable balance between disclosing everything and disclosing actual or potential conflicts.<sup>134</sup> They have been characterised as innovative in finding new solutions to old problems,<sup>135</sup> providing a useful universal standard on the disclosure requirements of arbitrators by providing a clear framework<sup>136</sup> and will no doubt continue to benefit from periodic review and revision in light of experience gleaned from their adoption and use in various legal and cultural contexts.<sup>137</sup> The IBA Guidelines could be explicitly incorporated into arbitration agreements, which would enhance certainty, consistency and predictability and would act as a guide to arbitrators, arbitral institutions and the courts. The IBA Guidelines have already been adopted by the English courts<sup>138</sup> and courts in the

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<sup>133</sup> For an overview of the IBA Guidelines, see BLACKABY & PARTASIDES, *supra* note 7, at 256–58.

<sup>134</sup> MOSES, *supra* note 6, at 147.

<sup>135</sup> For an interesting discussion on the original version of the IBA Guidelines, see Trakman, *supra* note 8, at 1020, who in addition to characterizing the guidelines as innovative, believes they represent meaningful progress, in particular with respect to the pre-existing context. See generally Claudia T. Solomon et al., *Arbitrator's disclosure standards: the uncertainty continues*, 63 DISP. RES. J. 78 (2008).

<sup>136</sup> See also Chung, *supra* note 11, at 175.

<sup>137</sup> The 2004 version of the IBA Guidelines were subject to criticism, see BORN, *supra* note 1, at 1841–51. As noted above, the 2014 version of the IBA Guidelines include clarifications and improvements to address the concerns raised since they were first adopted a decade earlier.

<sup>138</sup> See *Sierra Fishing Co. v. Hasan Said Farran* [2015] EWHC 140 (Comm); [2015] All ER (Comm) 560 (Eng.) at [58] (where the law firm that the arbitrator worked in had advised a party on the terms and effect of the arbitration clause, which was deemed to be a non-waivable red-list category). See generally Hew Dundas, *Arbitral Rarities: Recent Arbitration Cases in the English Courts with a Scottish Postscript*, 81 ARB. 332 (2015). For an overview of the approach of various courts throughout Europe, see

U.S.,<sup>139</sup> are referred to frequently by arbitrators in practice<sup>140</sup> and have received general acceptance in the international arbitration community.<sup>141</sup>

## VIII. CONCLUSION

While perfect objectivity may prove elusive, “a reasonable measure of arbitrator integrity is both desirable and attainable.”<sup>142</sup> The required behaviour that parties should expect from arbitrators is perhaps best epitomised by reference to the words of former British politician and political theorist Edmund Burke, when he remarked of parliamentarians “[y]our representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”<sup>143</sup> While Burke was effectively cautioning that a member of the British parliament is not simply a delegate of his electorate, similarly an arbitrator, while appointed by a disputing party or parties, has an obligation of good faith to the process and the award.

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*generally* Antonio Crivellaro, *Does The Arbitrators’ Failure To Disclose Conflicts Of Interest Fatally Lead To Annulment Of The Award? The Approach Of The European State Courts*, 4 *ARB. BRIEF* 121 (2014). The IBA Guidelines have also been relied upon in submissions to, and reportedly referred to in internal decision making of the ICC Court, the LCIA and the WIPO. *See* BORN, *supra* note 1, at 1851–52. *See generally* *W Ltd. v. M Sdn Bhd* [2016] EWHC 422 (Comm), [2016] 1 *Lloyd’s Rep.* 552 (Eng.), and for a comprehensive discussion of the relevant issues arising from this case, including the court’s support for and endorsement of the IBA Guidelines, see generally Hew Dundas, *An English Judicial Perspective on the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration: W Ltd v M Sdn Bhd*, 82 *ARB.* 331 (2016).

<sup>139</sup> A number of national court decisions relied upon the IBA Guidelines in annulment proceedings. *See, e.g., New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1108 (9th Cir. 2007). *See also* BORN, *supra* note 1, at 1853. Canadian courts have also referred to the IBA Guidelines. In *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604, para. 41 (Can. O.J.), the Ontario Superior Court referred to the IBA Guidelines as an authoritative source. *See* Schafner et al., *supra* note 116, at 159–60 for a discussion of this case.

<sup>140</sup> MOSES, *supra* note 6, at 147.

<sup>141</sup> BLACKABY & PARTASIDES, *supra* note 7, at 258.

<sup>142</sup> Park, *supra* note 44, at 475.

<sup>143</sup> Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774).

Arbitral integrity demands that arbitrators strike the “optimum balance between fairness and efficiency.”<sup>144</sup>

The concepts of neutrality, independence and impartiality are central to the arbitral process. Even if the delineation between the three words cannot easily be established in every case, the requirement that arbitrators must be independent, impartial and neutral has the common purpose of upholding equal treatment of the parties throughout the process.<sup>145</sup> As former UK Law Lord Denning famously remarked, “Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking, ‘that judge was biased.’”<sup>146</sup>

As the fairness of the process and the outcome that results from it depend in large part upon the conduct and the state of mind of the appointed arbitrators, parties should expect that an arbitrator will be impartial in his or her mind and independent in his or her decision making, with the common purpose of upholding equal treatment of the parties within a neutral forum. This is ostensibly supported by the requirement of good faith from arbitrators, and as mentioned previously, the need for their disclosure of any pre-existing contact with a party that may give rise to bias or the perception of bias throughout the arbitral process. Adherence in arbitration to the central themes of neutrality, independence and impartiality is particularly important in light of the private and confidential nature<sup>147</sup> of the arbitral process and the final and binding nature of the award that results from that process. The approach proposed above would enhance adherence to these distinctive and central themes in international commercial arbitration, in order that parties can experience a fair process and attain a just outcome.

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<sup>144</sup> Park, *supra* note 44, at 526.

<sup>145</sup> See Bernini, *supra* note 5, at 39–40.

<sup>146</sup> Metro. Properties Co. (F.G.C.) v. Lannon [1969] 1 QB 577, 599.

<sup>147</sup> For a discussion on the varied treatment that confidentiality in international commercial arbitration has received in different jurisdictions, and proposals for reform to make the process more transparent, see generally Ronán Feehily & Avinash Poorooye, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275 (2017).