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Standards and Procedures for Disqualifying Arbitrators

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I Introduction

The right to an impartial and independent judge also exists in arbitration. Indeed, the mere fact that parties agree to settle their disputes by a private adjudicatory mechanism does not deprive them of the protections universally recognized as a fundamental human right.(1) Because arbitration is a form of adjudication, albeit a private one, it is important that the final outcome be the result of an impartial process in which all sides have been fully heard. Not only must the procedure be conducted fairly, but the parties, particularly the one losing, must also perceive it as such. As Lord Hewart said: "it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done".(2) For parties to accept the outcome of an arbitration, even if it runs against them, they must be confident that those who sit in judgement do so fairly and with an open mind.

What happens if this trust is compromised, either by the action or inaction of the tribunal, or because of one or several of the arbitrators? Court procedures allow for the recusal of judges under certain circumstances. Similarly, the arbitral process provides means to remove arbitrators from a tribunal if the circumstances show that he or she can no longer be considered impartial or independent of the parties. This process is known as the "disqualification" or "challenge" of arbitrators.(3)

Although the disqualification procedure is a necessary escape valve to guarantee the integrity of the arbitral process, at the same time it is also a device which in the hands of unscrupulous parties can be used to sabotage or impede an arbitration.

Challenging a member of the tribunal disrupts an ongoing arbitration because it shifts the focus away from the object in dispute onto the tribunal itself. It is in this context that the parties' choice of the type of arbitration or their choice of rules becomes important. If an arbitration is conducted under institutional rules, the process for disqualifying an arbitrator will normally be supervised and conducted by the institution. This institutional oversight may go a long way in reducing the disruption to the arbitral process. However, if the arbitration is *ad hoc*, it may be that parties and arbitrators are left to their own devices and that the courts of the place of arbitration must resolve the resulting disruption of the arbitral process.(4)

II Standards for Disqualification

As stated above, an arbitral tribunal must not only be fair-minded, but also be perceived by the parties as such. When speaking about the standards that arbitrators must maintain, the most commonly referred to terms are "independence" and "impartiality".(5) For example, Article 7 of the ICC Rules of Arbitration states:

> Every arbitrator must be and remain *independent* of the parties involved in the arbitration. (emphasis added)

whereas according to the LCIA Rule 5.2:

> All arbitrators conducting an arbitration under these Rules shall be and remain at all times *impartial* and *independent* of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute. (emphasis added)

Article 3.1 (Elements of Bias) of the 1986 IBA Rules of Ethics for International Arbitrators explains the difference between the terms as follows:

> The criteria for assessing questions relating to bias are *impartiality* and *independence*. Partiality arises where an arbitrator favors one of the parties, or where he is

> prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties. (emphasis added)

Does that mean that an arbitrator appointed by the ICC is bound to less stringent standards because he or she has only to be independent while the LCIA arbitrator must not only be independent but also impartial?(6) Let us look at these two notions and see how they interrelate, or if they exist as separate standards for arbitrators.

A Independence

"Independence" means that an arbitrator must be free from any involvement or relationship with any of the parties. An arbitrator who has acted or continues to act in some professional capacity for one of the parties in the dispute will certainly not pass the independence test. Similarly, if an arbitrator were to be materially interested in the financial fortunes of one of the parties involved, i.e. by owning shares in that company, the "independence" standard would not be met and that person could be disqualified from being an arbitrator. Nor would an arbitrator with family ties or another emotional connection to one of the parties be considered "independent".

Independence is said to be an "objective" fact-based standard to evaluate whether an arbitrator is fit to do the job. However, the independence standard is not as cut and dried as it might appear. For example, let us assume that five years prior to the arbitration, someone in the arbitrator's law firm assisted one of the parties with a tax issue in a wholly unrelated matter. It was a one-time service that generated negligible fees and there has not been any other contact between that firm and the party since. Is the arbitrator independent? The answer will depend from whose perspective the question is being addressed. The potential arbitrator may well consider himself independent and may never have heard of either of the parties. However, the parties, or one of them, may see it differently, particularly if the fact has not been disclosed to them before. Again, justice must not only be done but it must be seen to be done! Thus, what looks like a fairly objective standard turns out to also have a strong subjective component.(7)

Looking at "independence" tempts one to ask: "Independent of whom?" Focusing only on the relationship between a party and an arbitrator may not be enough. Arbitral proceedings usually involve more than a claimant, defendant and the tribunal. Indeed, the main protagonists in the procedure will usually be the parties' counsel rather than their clients. Does the independence requirement extend to relationships between counsel and arbitrator? The answer should be: "As a rule, yes!" Thus, one would normally expect arbitrators to also be independent of the counsel representing the parties. Therefore, if an arbitrator were to work in the same firm as one of the parties' counsel, this would usually be considered as grounds for challenge for lack of independence.(8)

There is, however, an exception to this rule. In England, barristers who work in the same set of chambers are considered independent of one another even though they may be sharing offices and expenses. Barristers sharing chambers are not partners because they do not share profits or the risks of doing business. Thus, barristers of the same chambers do appear in court on opposite sides of the same case and one finds them sitting as arbitrators in cases where a colleague from the same chambers may be advising a party. Accepted in England, this peculiarity raises legitimate questions about independence in an international setting where parties, not used to this system, are seriously concerned about the independence of an arbitrator from the same chambers as the counsel.(9) However, even the French courts have held that in the case of barristers, belonging to the same chambers will not in itself be sufficient indication of an arbitrator's lack of independence.(10)

While, as a general principle, arbitrators, like judges, should be independent from the lawyers representing the parties, the rule is applied less strictly when the former are concerned. In one case involving the independence of a judge in a criminal matter, the Swiss Supreme Court (Tribunal Fédéral) held that the fact that the trial judge was a personal friend of counsel for the accused did not compromise his independence. Interestingly, the court found that, had they been enemies, the verdict might have been different.(11) Friendships and close personal relationships are a part of the fabric of any organized human society. This is also true in the world of international commercial arbitration. If the world as a whole is becoming a global village, the "global arbitration world" has always been one. The arbitration village is peopled by a relatively few highly specialized practitioners who tend to congregate at the same conferences and act in different capacities in arbitral procedures. In the "arbitration village" it is therefore quite often that persons acting as counsel for a

party may be very well acquainted or even friends with one or several of the arbitrators sitting on the tribunal. Generally, this in itself would not be considered a ground for disqualifying an arbitrator. However, should two practitioners often appear together in the same arbitrations either as counsel or as arbitrators, it may be an indication that these individuals systematically appoint each other and, therefore, may no longer be independent of one another.

B Impartiality

As suggested above, impartiality deals with the arbitrator's mental predisposition toward the parties or the subject matter or controversy at hand. It is the interior frame of mind that the arbitrator brings to the reference. Impartiality is therefore referred to as a "subjective" standard.
The English Arbitration Act 1996 allows parties to petition the courts to remove an arbitrator "if circumstances exist that give rise to justifiable doubts as to his impartiality".(12) English courts have also held that arbitrators and judges must adhere to the same standard of impartiality.(13) The English courts have recently had to deal with a number of cases regarding judicial or arbitral impartiality. One of the more famous ones involved Senator Pinochet, the ex-dictator of Chile, against whom an international arrest warrant for crimes against humanity had been issued by a Spanish judge. The House of Lords had to decide whether or not to grant the ex-dictator immunity from prosecution. In a first decision the House of Lords narrowly voted against immunity. After publication of the decision, it transpired that one of their Lordships had close links to Amnesty International. This was considered by the House of Lords tantamount to being a "judge in one's own cause" and sufficient grounds to re-decide the case.(14)
The English courts apply two tests to ascertain impartiality. The first is known as the "actual bias" test. Actual bias is hard to prove and practically never invoked. The second is an "apparent bias" test. This test is based on facts and circumstances, which would indicate that there might be grounds for bias. Since 1852, the mere fact that a judge or arbitrator had a personal interest in the outcome of the case sufficed to disqualify him or her because he or she would be judge in his or her own cause. The test was formulated in the *Dimes* case.(15) Lord Cottenham, then Lord Chancellor, owned a substantial holding in one of the parties appearing before him. He was disqualified on the common law principle that "no man should be judge in his own cause" even though the court found that "no-one could suppose that Lord Cottenham could be in the remotest degree influenced by the interest that he had in that concern".(16)
Apparent bias also exists if the facts or circumstances are such that one may be justified in being suspicious about the impartiality of the judge or arbitrator. The test has been formulated in terms of the existence of a "real danger of bias." The Court of Appeal found that:

> [T]he Court should ask itself whether, having regard to the relevant circumstances, there was *a real danger of bias* on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favor or disfavor the case of a party to the issue under consideration by him. (emphasis added)(17)

This is still the standard favored by the English courts in determining whether the facts show that a judge or arbitrator is apparently biased.
AT&T v. Saudi Cable(18) is an interesting illustration of both "independence" and "impartiality". It involved, first, a challenge against the Chairman of an ICC arbitral tribunal before the ICC International Court of Arbitration for lack of independence and, then, an application before the English courts to remove him and set aside awards under section 23 of the English Arbitration Act 1950 for apparent bias and misconduct.(19)
The facts were as follows. At the beginning of the 1990s, the government of Saudi Arabia tendered for bids for the improvement of the country's telecommunications system. The project was worth around US$4.5 billion. Among the bidders was a Canadian company called NORTEL, as well as AT&T jointly with Saudi Cable Company and several other telecommunications companies. The AT&T and Saudi Cable team won the contract. In their Pre-Bid Agreement they had agreed to negotiate a final commercial contract if and when the project was awarded to them. However, once AT&T obtained the contract the partners fell out because they could not agree on the terms of the final contract. In 1995, AT&T filed an arbitration claim under the ICC Rules against Saudi Cable, demanding that the Pre-Bid Agreement be declared terminated and that it had no further obligations towards Saudi

Cable. Saudi Cable counterclaimed, alleging that AT&T had violated its duty to negotiate in "good faith".

The Tribunal was constituted and the Chairman appointed by agreement between the parties. The Chairman, a highly respected arbitrator and lawyer, filed a statement of independence as well as a CV, in which he listed his past and present achievements, directorships and other personal information he believed to be relevant. Two years after the arbitration had commenced and the Tribunal had issued two partial awards, the first on the applicable law and the second deciding that AT&T had violated its duty to negotiate in good faith, AT&T found out that the Chairman had not indicated on his CV that he was also a director and shareholder of NORTEL, the unsuccessful bidder for the Saudi contract. The omission was not intentional but was due to a secretarial error.

AT&T first challenged the Chairman under Article 2.8 of the 1988 ICC Arbitration Rules, alleging that he had violated his duty to disclose facts which, in the eyes of the parties, might be of such a nature as to cast doubt on his independence.(20) This violation did cast sufficient doubt as to his independence to warrant his removal. Moreover, as a director of NORTEL, a direct competitor of AT&T, he was indirectly interested in the outcome of the case, because if AT&T lost the case, NORTEL would indirectly benefit. The ICC rejected the challenge without giving reasons. However, one can imagine that the ICC Court felt that requiring arbitrators also to be independent of the competitors of the parties before them might be stretching the concept of independence a little too far.

Because London was the place of arbitration, AT&T applied to the English courts under section 23 of the English Arbitration Act 1950 to have the Chairman replaced and the partial awards issued by a unanimous tribunal set aside. As the issue arose out of an ICC arbitration and under the ICC Rules, the ICC's decision on the challenge was "final". The High Court had, thus, first to decide whether it had jurisdiction to review the matter. The court found that, since the ICC was concerned only with "independence", it could review the facts to determine whether there was "apparent bias" or misconduct on the part of the arbitrator. The Court of Appeal did not agree that English courts had to defer to the decisions made by an arbitral institution and held that they could freely review whether the arbitrator was impartial or had misconducted himself in such a manner as to warrant replacement and setting aside of the awards.(21) However, on the substance of the matter, both courts agreed that there were no grounds for a finding of "apparent bias" or misconduct on the part of the Chairman.

Bias or partiality may not only result from an arbitrator's relationship with one of the parties or a party's counsel, it can also be a function of an arbitrator's prior involvement in a similar case, or his previously published opinions. In complex disputes it is not uncommon for arbitrators to be appointed by parties to sit on two or more panels in closely related cases. This may happen in disputes, which arise out of large industrial or infrastructure projects and which involve a chain of interrelated contracts. Here, a party may be involved in two or more different arbitrations, based on different contracts with different contracting parties but in a dispute arising out of the same facts and legal provisions. Thus, in a construction case, the owner may have a dispute against the contractor who, in turn, may have a claim against a sub-contractor arising out of a separate but identically worded contract. If, for example, the contractor claims that "force majeure" excuses its performance, an arbitrator having decided this issue in a first arbitration between owner and contractor may be biased if he has to consider exactly the same facts and identical contractual language in a dispute involving the contractor and a sub-contractor.

Similarly, if a lawyer has published his or her opinion that a certain political event can never be considered "force majeure," he or she may well be biased in determining in an arbitration whether that specific event constituted "force majeure" in the dispute under scrutiny by the tribunal.(22)

C The difference between independence and impartiality

What is the difference between independence and impartiality? As Yves Derains and Eric Schwartz state: "Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind".(23) It has been said that independence is an "objective" standard because it addresses the relationship between arbitrator and party, and impartiality a "subjective" measure of a person's inner attitude toward a party or a situation which can be seen from the outside only in the behavior of the arbitrator.(24)

I do not believe that the difference is material. By looking at "independence" one is really trying to measure the probability of "bias." On the other hand, even though impartiality may be regarded as a subjective standard dealing with the arbitrator's state of mind, the English courts have had to develop the notion of "apparent bias," a fact-based test, to determine impartiality. Independence and impartiality are two ways of looking at the same thing. It is therefore not surprising that with the

same facts, the outcome of a challenge based on independence and one based on impartiality will be identical, as the AT&T case showed.
If a party were certain that an arbitrator was absolutely unbiased and impartial even though not independent of the other party, it would most likely accept him as arbitrator. If, however, an arbitrator were manifestly independent of the parties but known to be partial towards one of them, it is most unlikely that the opponent would want him to act as arbitrator.

D Fitness and qualifications

There may also be objective grounds for disqualifying arbitrators, which have nothing to do with their relationship with or predisposition toward the parties or the dispute. This is the case when an arbitrator does not fulfill the contractually agreed and stipulated qualifications required by the arbitral agreement.
If an arbitration clause calls for all arbitrators to be engineers and a party nominates a lawyer without any engineering background, this might be a ground for the other party to challenge the appointment. The appointment of an arbitrator in violation of such contractual requirements may not only lead to the disqualification of the arbitrator but could also lead to the setting aside the award or to its non-enforcement, because the arbitral tribunal was not constituted in accordance with the parties' wishes.(25)
On the other hand, if the parties have not specifically called for certain characteristics or qualifications, arbitrators' nominations will stand even if the persons so nominated do not possess skills or qualifications that might objectively be considered very useful, if not essential, to the task. For example, it may be considered useful for an arbitrator to be able to understand as well as read and write the language of the arbitration. However, his or her inability to do so would not necessarily justify a disqualification. Here, the right of a party to choose its arbitrator must be balanced against the efficiency that might result from an arbitrator having the necessary linguistic skills.
In this respect, the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the ICSID Convention")(26) is interesting. In Article 14, the Convention sets out the characteristics and qualifications of persons, whom state parties can appoint to the ICSID panels of arbitrators:

> (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

The manifest lack of such characteristics may be grounds for a challenge according to Article 57 of the Convention.(27) As each member state may nominate four persons to a permanent panel of arbitrators, these characteristics seek to unify the quality of panelists proposed by the member states.(28) However, because arbitrators can be challenged for the manifest lack of these characteristics, they are not merely abstract or non-enforceable notions but tools in the hands of the parties, meant to ensure that their tribunal will meet certain standards of competence in dealing with the issues before it.

E Cultural differences in applying standards

International commercial arbitration is very much a "cross-cultural" business in which differences of understanding and perception play a great role in the evaluation of such imprecise and ultimately subjective notions as "independence" and "impartiality".
International arbitration rules require that all arbitrators be independent (and/or) impartial. However, national arbitration customs may be at variance with this requirement. Thus, in domestic arbitration, it may be customary and even expected for the party-appointed arbitrator to act as the advocate of the party in the deliberations of the tribunal. For instance, in domestic arbitration in the United States, the American Arbitration Association (AAA) only requires the chairman or sole arbitrator to be "neutral". Implicitly, this means that the party-nominated arbitrators are not neutral.(29) The same is true for arbitration in many Middle Eastern countries.
The problem becomes acute when arbitrators from different backgrounds and with little or no

international experience find themselves in an international commercial arbitration. Here the whole concept of "independence" or "impartiality" and their perception of their role as co-arbitrators may be deeply colored by their background.
The role of the party-appointed arbitrator is a subject which has filled many pages of print and will continue to do so. It goes to the very soul of the international arbitral process, where cultural affinity and empathy will color and shade an arbitrator's perception of right and wrong.(30) When does an arbitrator cross the fine line between being sympathetic to the party that has nominated him and being biased? Martin Hunter, a well known arbitrator, once said that a party-appointed arbitrator should combine maximum predisposition towards the party that has nominated him with a minimum appearance of bias.
There are no hard and fast rules to decide these questions. In the best of cases, party-appointed arbitrators are bridges to understanding. They help their colleagues on the panel understand a party's position. In the worst of cases, they become vociferous and blatant champions of their party's cause, and, in doing so, will lose credibility and standing within the tribunal and become quite ineffective in helping their party before the other members.

III Procedures for Disqualification(31)

We now turn to the mechanics of disqualifying an arbitrator. In institutional arbitration these procedures will be set out in the rules of the institution. In *ad hoc* arbitration, the parties may have agreed to a set of rules, such as the UNCITRAL Arbitration Rules, which contains a challenge mechanism. However, if they have not agreed to such rules and if an arbitrator refuses to resign after being challenged, the resulting deadlock may have to be solved by the courts in the place of arbitration.

A Introducing the challenge

1 Notification: Exchange of Information

A party wishing to challenge an arbitrator must make this known to all concerned. The request for disqualification must be in writing and must specify the facts and circumstances on which it is based.(32) If the arbitration is conducted under institutional rules, the institution will usually ensure that all participants are informed of the challenge and are given an opportunity to comment. Many rules stipulate that if all the parties agree on the challenge, the challenged arbitrator must resign. Under those circumstances, the resignation will not be considered an admission or acceptance of the grounds of the challenge. However, having lost the confidence of both parties, the arbitrator can no longer serve his or her purpose.(33)
For the institution to be able to decide upon the challenge, it must be informed about how all of the participants feel about it. The ICC Rules even stipulate that the comments of the participants are to be made available to the others by the ICC so that there may even be a second round of arbitrator and party comments.

2 Time Limits

Most institutional rules as well as those of UNCITRAL stipulate that a challenge must be brought within a specified time limit as of the arbitrators' appointment or knowledge of the fact upon which the challenge is based. In most cases, the time limit is fifteen days after the appointment or knowledge of the facts. The ICC Rules are somewhat more generous, allowing for thirty days. Most rules also stipulate that a party may request the disqualification of an arbitrator whom it nominated, only for reasons which came to light after the nomination was made.(34)
For investment disputes under the ICSID Convention, the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) do not define a time limit but state that a proposal for disqualification shall be made *promptly* but in any case before the closing of the procedure.(35)
These time limits serve an important protective function. Without them a party could keep information about an arbitrator's independence as a secret weapon to sabotage the arbitration at the end of the arbitration or to challenge successfully the validity of the award rendered by the tribunal. The time-bar obliges a party with knowledge of facts which might disqualify an arbitrator to make them known immediately or be estopped from being able to invoke the fact later on.

3 Timing and the Shifting of the Burden of Proof

The burden of proving that there are facts that raise sufficient doubts as to an arbitrator's independence or impartiality lies with the party making the challenge. However, whether a fact raises justifiable doubts about an arbitrator's independence may actually vary according to how advanced the arbitral process is.
Appointing authorities are likely to apply less stringent standards of proof when deciding whether to confirm or allow a challenge of an arbitrator if the objection or challenge is brought up before any significant progress in the arbitration has been made.
Arbitral institutions pursue two goals. As appointing authorities they will try to put together the best possible tribunal to determine the parties' dispute. At this stage of the arbitration, the emphasis will be on constituting a panel which, to the greatest extent possible, has the trust of all parties. However, once the tribunal has been formed and the reference is under way, the institutional focus will shift to protecting the arbitral process from disruption.
In the case of challenges, this means that it is likely that the burden of proof for allowing a challenge will shift to a higher standard as the arbitration progresses. This reality is reflected in an UNCITRAL decision regarding the challenge of an arbitrator, in which the Appointing Authority designated by the Secretary General of the Permanent Court of Arbitration stated:

> The next guidepost involves the timing of the challenge to an arbitrator. Does the standard of impartiality take on a shifting or ambulatory character depending on the stage of the proceedings? The standard to be applied for impartiality and the proof required to establish a lack thereof should, in theory, be no different according to whether the issue is raised at the threshold or at the conclusion of the proceedings. In relation to my task here, I agree with the view put forward by Baker and Davis in The UNCITRAL Arbitration Rules in Practice, *supra*, at p. 51 where it is stated:
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> A prudent appointing authority may be tempted to sustain an early challenge simply to be on the safe side and avoid potential for delay and disruption later, even though the same circumstances later on would not justify disqualification in the closing days of a case. But such an approach would muddle the standard for arbitrator impartiality — after all, if an arbitrator is biased he should be disqualified no matter how late the challenge, and if he is impartial he should be allowed to serve, no matter how timely the challenge.(36)

Of course, proof of actual bias or evident lack of independence will warrant the replacement of the offending arbitrator at any stage of the arbitral process. What shifts, however, is the yard-stick by which the institution measures when one might reasonably find that a fact shows apparent bias or lack of independence in cases where the situation is not absolutely clear.

B Who decides the challenge?

1 Institutional Arbitration

If the arbitration is conducted under institutional rules, the institution or a special body will usually decide on challenges against an arbitrator. Thus, under the LCIA and ICC Rules, the decision is made by their respective courts. Because the institutional decisions on challenges have an administrative character rather than a judicial one, challenge proceedings are not adversarial. This means that, while the challenged arbitrator and all other persons involved in the arbitration will be given a chance to comment on the challenge, neither the arbitrator nor the challenging party will appear before the institution in defense of their position.(37) The exchange of comments should merely ensure that the institution is as fully informed as possible before making its determination. If the challenge is brought under the ICC Rules, it is decided by a Plenary Session of the International Court of Arbitration. One of the members of the court presents a report and recommends a course of action after which the Plenary Session will debate and decide whether or not to accept the challenge.(38)
Of all institutional rules reviewed here, only those of the German Institute for Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit, DIS) do not attribute the decision on challenges to the

institution but to the arbitral tribunal.(39) The DIS Rules reflect the approach of the UNCITRAL Model Law, which was recently adopted in Germany. In this system a challenge must first be brought before the arbitral tribunal and if the challenging party is not happy with the tribunal's decision it may request a decision from the courts at the place of arbitration. This solution is obviously problematical, because the tribunal becomes a judge in its own cause. In the case of a three-member tribunal all three arbitrators will take part in the decision, if it is a sole arbitrator that person decides alone. This system is problematical, particularly in case of a sole arbitrator, because it is hardly compatible with the notion that justice must be seen to be done and that a judge should not sit in his or her own cause.
The ICSID Rules are interesting because they solved the same problem another way. If the challenge relates to a sole arbitrator or to the majority of an arbitral tribunal it will be decided by the Chairman of the ICSID Administrative Council, who *ipso jure* is the President of the World Bank.(40) However, if the challenge is directed at one (or at a minority) of arbitrators, it will be decided by the majority.(41) Thus, ICSID has avoided the unfortunate solution of the Model Law, by leaving the decision on the challenge with the arbitral tribunal for as long as is consistent with the notion of justice being seen to be done. When that perception cannot be maintained, an outside authority steps in to make the decision.

2 Ad Hoc Arbitration

Arbitration that is not conducted under the rules of an arbitral institution is known as *ad hoc* arbitration. The parties may nevertheless have agreed on a set of rules such as the UNCITRAL Rules. They may, however, have agreed to none at all, in which case the arbitration will take place only under the framework of the arbitration law of the place of arbitration.
We shall first look at the challenge procedure as set out in the UNCITRAL Arbitration Rules, which are widely accepted and frequently used.
Because the UNCITRAL Rules were developed for *ad hoc* arbitration, they could not rely on an internal authority, which would deal with a challenge procedure. To shield the arbitration from intervention of national courts, the UNCITRAL Rules created a mechanism for designating an appointing authority. The Secretary General of the Permanent Court of Arbitration in The Hague is mandated to be the default designator of an appointing authority.(42) While the system seems convoluted, it does avoid giving one institution the status of default UNCITRAL appointing authority. Thus, the "appointing authority" designated by the Secretary General will be in charge of any challenge against an arbitrator, even if the panel was not constituted with the help of an appointing authority.
Finally, if an *ad hoc* arbitration is not conducted under rules like those of UNCITRAL, the parties will have to refer a challenge to the national courts in accordance with the arbitral law (*lex arbitri*) of the place of arbitration. If the *lex arbitri* is based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), then there will be a two-step process.(43) First, the arbitral tribunal, in its full composition, decides the challenge. If a party is not satisfied with the decision, it can, within thirty days, apply to the state courts to decide the issue. Unlike under the ICSID Rules, the challenged arbitrator participates in the decision-making process and, if he is a sole arbitrator, he decides himself. Of course, the problem is attenuated by the possibility to appeal the tribunal's decision to the state courts. However, having to call on the state courts may seriously disrupt the arbitral process. This danger is only partially alleviated by the provision that the arbitration may proceed while the challenge is pending before the state courts.
The U.S. Federal Arbitration Act(44) does not foresee a challenge procedure. Lack of independence or impartiality can generally only be sanctioned by petitioning that the final award be vacated under section 10(a)(2) of the Act for "evident partiality or corruption in the arbitrators".(45) Thus, the Act gives the parties no possibility to petition the court to remove an arbitrator during the reference where the facts supported a finding that he or she was not impartial or independent. Some U.S. courts have, nevertheless, assumed jurisdiction over a pre-award challenge on the grounds that a biased arbitrator violated the arbitration agreement. Because the courts have the power to enforce the arbitration agreement, they could also disqualify an arbitrator for lack of independence or bias before an award was rendered.(46)
If the arbitration takes place in Switzerland and involves at least one non-Swiss party, Chapter 12 of the Swiss International Private Law Act (SPILA) would govern it. Article 180.3 foresees that the courts at the place of arbitration will be competent to deal with challenges. Being a federal state, and because in Switzerland civil procedure is governed by cantonal laws of procedure, the competent court and manner in which the challenge must be filed will be set out in the relevant cantonal code.

However, all cantonal courts will be applying the same standard as set out in the federal SPILA, i.e. "justifiable doubts as to the arbitrator's independence".

C Form of the decision

Most institutional arbitration rules do not prescribe in which form the decision concerning a challenge is communicated to the parties. Article 7.4 of the ICC Rules is unique because it stipulates that no reasons for the decision accepting or rejecting a challenge shall be given. The ICC refusal to communicate the reasons for its decisions on challenges has been criticized as lacking transparency.(47) By not communicating the reasons for its decisions, the ICC seeks not only to protect the finality of those decisions, but also hopes to spare arbitrators from the embarrassment which might be caused by a decision concerning their independence.
I have not come across any other institutional rules that excluded the communication of reasons for the decision. The rules of the Chamber of Commerce and Industry of Geneva (CCIG) expressly stipulate that the decision "summarily states the reasons".(48) Most institutional rules, however, do not stipulate anything to this effect and it will be left to the discretion of the institution to decide whether and in what length it wishes to give reasons for the decision taken.

D Consequences of the challenge

1 Suspension of Arbitral Proceedings

What is the effect of a challenge on an ongoing arbitration? One might expect that a challenge would suspend the arbitration until it has been decided. However, this is rarely set out in arbitral rules. Of the surveyed arbitration rules only Rule 9(6) of the ICSID Arbitration Rules stipulates that the arbitration will be halted during the challenge proceedings.(49) The English Arbitration Act 1996, on the contrary, foresees that the arbitrators can continue the reference while the application to remove an arbitrator is pending.(50)
The ICC Rules say nothing to this effect, nor do the LCIA or AAA Arbitration Rules. There is a good reason for this silence. Arbitral rules are designed to reduce the disruption a challenge may cause to the arbitral process as much as possible. Arbitral proceedings usually have lengthy periods in which the parties are preparing and exchanging written material. During these periods there is little action on the part of the arbitral tribunal, so that there is no reason to "suspend" the arbitration. A challenge can be handled easily in the time of relative inaction of the tribunal without causing a disruption of the procedural calendar established by the arbitrators. On the other hand, a "suspension rule" might have the effect of delaying the whole arbitration, as a party intent in disrupting the process could interpret it as suspending the entire procedure, including the calendar for submissions established by the tribunal.
However, if a challenge coincides with a phase in which the tribunal is active, such as before hearings, on-site visits, deliberations or rulings on procedural matters etc., it may be wise to postpone such activity by the tribunal, until the challenge has been decided and all doubt as to the tribunal's composition has been removed.
This is partially also the solution adopted by the UNCITRAL Model Law, which stipulates that, while the request to the courts to reverse the tribunal's decision on the challenge is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.(51) This provision ostensibly only deals with what happens when the challenge is referred to the courts and does not expressly stipulate whether a tribunal may continue the arbitration before its own decision on the challenge. However, if a tribunal can continue the reference when it is no longer master of the decision about the challenge, it ought to be able also to do so while it still has the power to decide the challenge.

2 Replacement of Arbitrators

If a challenge is successful, the arbitrator is replaced. Normally, one would expect that the replacement procedure would mirror the original nomination process.(52) Thus, if a co-arbitrator nominated by the claimant is replaced, the claimant would be invited to nominate a new arbitrator. This was also the case under the previous version of the ICC Rules.(53) Modern institutional arbitration rules have departed from this assumption in favor of considerable discretion on the part of

the appointing authority to make its own nomination of a replacement arbitrator. Following the original appointment process leaves open the doors to abuse by a party. In cases in which arbitrators must be replaced, either because they have been successfully challenged, or for other reasons, maintaining the initial nomination process may allow a party to propose another arbitrator who might again be challenged successfully or otherwise removed.(54)
The LCIA Rules state that, "if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process". (55) Because challenges are rarely brought for purely dilatory reasons, institutions in most cases will follow the original appointment process. However, if the need arises, they have the necessary discretionary power to deal efficiently with pathological cases.
The Zurich Chamber of Commerce takes an even more drastic approach. According to Article 18.2, the President of the Chamber of Commerce appoints a replacement arbitrator if the previous one was successfully challenged. This means that if the challenge of an arbitrator is admitted the nominating party is automatically deprived of its right to nominate a replacement arbitrator.(56)

3 Effect of a Successful Challenge on the Arbitral Process

As we have seen, institutional rules of arbitration try to keep the disruption caused by challenges to a minimum. If a challenge is refused, the arbitration will simply continue where it may have been interrupted by the challenge. However, if the challenge is successful, one of the arbitrators on the panel must be replaced. Will the arbitral proceedings have to be repeated *ab initio* for the benefit of the new arbitrator or will they continue where they were before the new arbitrator came to the case? Most institutional rules stipulate that it is up to the tribunal to determine what, if any, procedural steps must be repeated. Thus Article 12.4 of the ICC Rules states:

> When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.(57)

Another solution is to exclude repeating anything. The Geneva Chamber of Commerce and Industry and the Zurich Chamber of Commerce Rules have taken this approach by stating that the arbitration continues at the point where the previous arbitrator ceased to perform his duties.(58)
The Greek Law on International Arbitration, which is a slightly amended version of the UNCITRAL Model Law, stipulates in Article 15 that there must be unanimity in the tribunal to decide to continue from the point where the previous arbitrator ceased to function.(59) This, of course, is a dangerous rule because it gives an unscrupulous party enormous power seriously to disrupt the process if a new arbitrator appointed by it is ready to collude in derailing the process by insisting that all procedural acts be repeated.(60)

IV Conclusion

Arbitrators are judges in as much as they adjudicate the disputes brought before them. The parties who voluntarily submit to their authority need to be assured that those sitting in judgement will be fair-minded and just. For this reason, the rules of arbitral institutions foresee mechanisms making it possible to challenge or disqualify arbitrators if facts arise which make it look as though someone is not as independent or impartial as he or she should be. However, challenging an arbitrator is potentially very disruptive to the arbitral process.
The standards to which arbitrators are held in their adjudicatory capacity are similar to those required of judges. They must be independent and impartial. There is little difference between the "objective" standard of independence, and the more "subjective" one of impartiality. Independence is not really a standard in itself but rather a way to measure the potential for "bias". Arbitrators can also be disqualified for not having characteristics required by the parties' arbitration agreement.
Looking at the various procedures for challenge set out in different institutional and UNCITRAL arbitration rules, one sees that the institutional preoccupation of protecting the arbitral process from the disruptive effects of challenges exists in practically all rules. It is in this context that the choice of whether to arbitrate *ad hoc* or within the framework of the rules of an arbitral institution takes on

much of its significance.
Institutions have developed certain methods to protect the arbitral process. By stipulating short time limits for bringing challenges and not allowing a challenge to paralyze an ongoing arbitration and by keeping discretionary powers in determining the method of selection or even the choice of a replacement arbitrator, arbitral institutions seek to minimize disruption.
Such protection may not be available to parties who decide to arbitrate wholly outside of the framework of an institution or rules such as those of UNCITRAL. In the worst of cases, they may not have any recourse against a biased tribunal until the reference is ended and the award may be vacated.

Appendix 1: Provisions Concerning Challenge Procedures in Selected Arbitration Rules

A AAA international arbitration rules

Article 8: challenge of arbitrators

1. A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.
2. The challenge shall state in writing the reasons for the challenge.
3. Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

Article 9

If the other party or parties do not agree to the challenge or the challenged arbitrator does not withdraw, the administrator in its sole discretion shall make the decision on the challenge.

Article 10: replacement of an arbitrator

If an arbitrator withdraws after a challenge, or the administrator sustains the challenge, or the administrator determines that there are sufficient reasons to accept the resignation of an arbitrator, or an arbitrator dies, a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

B German institute of arbitration (DIS) arbitration rules

Section 18: challenge of arbitrator

11.1 An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator nominated by him, or in whose nomination he has participated, only for reasons of which he becomes aware after the nomination has been made.
11.2 The challenge shall be notified and substantiated to the DIS Secretariat within two weeks of being advised of the constitution of the arbitral tribunal pursuant to section 17 sub. 3 or of the time at which the party learns of the reason for challenge. The DIS Secretariat informs the arbitrators and the other party of the challenge and sets a reasonable time limit for comments from the challenged arbitrator and the other party. If the challenged arbitrator does not withdraw from his office or the other party does not agree to the challenge within the time limit fixed, the challenging party may within two weeks request the arbitral tribunal to decide on the challenge unless otherwise agreed by

the parties.
11.3 If the other party agrees to the challenge, or if the arbitrator withdraws from his office after being challenged, or if the application of challenge has been granted, a substitute arbitrator shall be nominated. Section 12 to 17 apply *mutatis mutandis* to the nomination and confirmation of the substitute arbitrator.

C 1998 ICC arbitration rules

Article 7: general provisions

1. Every arbitrator must be and remain independent of the parties involved in the arbitration.
2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.
4. The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.
5. By accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules.
6. Insofar as the parties have not provided otherwise, the Arbitral Tribunal shall be constituted in accordance with the provisions of Articles 8, 9 and 10.

Article 11: challenge of arbitrators

1. A challenge of an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
2. For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
3. The Court shall decide on the admissibility, and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the Arbitral Tribunal, to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Article 12: replacement of arbitrators

1. An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge or upon the request of all the parties.
2. An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.
3. When, on the basis of information that has come to its attention, the Court considers applying Article 12(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the Arbitral Tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.
4. When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.
Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such

determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

D ICSID Arbitration Rules

Rule 9: disqualification of arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
(b) notify the other party of the proposal.

(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.
(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall take that decision within 30 days after he has received the proposal.
(6) The proceeding shall be suspended until a decision has been taken on the proposal.

E LCIA Arbitration Rules

Article 10: revocation of arbitrator's appointment

10.1 If either (a) any arbitrator gives written notice of his desire to resign as arbitrator to the LCIA Court, to be copied to the parties and the other arbitrators (if any) or (b) any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator's appointment and appoint another arbitrator. The LCIA Court shall decide upon the amount of fees and expenses to be paid for the former arbitrator's services (if any) as it may consider appropriate in all the circumstances.
10.2 If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.
10.3 An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.
10.4 A party who intends to challenge an arbitrator shall, within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3, send a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the written statement, the LCIA Court shall decide on the challenge.

Article 11: nomination and replacement of arbitrators

11.1 In the event that the LCIA Court determines that any nominee is not suitable or independent or impartial or if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process.
11.2 If the LCIA Court should so decide, any opportunity given to a party to make a re-nomination shall be waived if not exercised within 15 days (or such lesser time as the LCIA Court may fix), after which the LCIA Court shall appoint the replacement arbitrator.

F UNCITRAL Arbitration Rules

Article 9: challenge of arbitrators

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) when the initial appointment was made by an appointing authority, by that authority;
(b) when the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
(c) in all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

G WIPO Arbitration Rules

Article 22: impartiality and independence

(a) Each arbitrator shall be impartial and independent.
(b) Each prospective arbitrator shall, before accepting appointment, disclose to the parties, the Center and any other arbitrator who has already been appointed any circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence, or confirm in writing that no such circumstances exist.
(c) If, at any stage during the arbitration, new circumstances arise that might give rise to justifiable doubt as to any arbitrator's impartiality or independence, the arbitrator shall promptly disclose such circumstances to the parties, the Center and the other arbitrators.

Article 24: challenge of arbitrators

(a) Any arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence.
(b) A party may challenge an arbitrator whom it has appointed or in whose appointment it concurred only for reasons of which it becomes aware after the appointment has been made.

Article 25

A party challenging an arbitrator shall send notice to the Center, the Tribunal and the other party, stating the reasons for the challenge, within 15 days after being notified of that arbitrator's appointment or after becoming aware of the circumstances that it considers give rise to justifiable doubt as to that arbitrator's impartiality or independence.

Article 26

When an arbitrator has been challenged by a party, the other party shall have the right to respond to the challenge and shall, if it exercises this right, send, within 15 days after receipt of the notice referred to in Article 25, a copy of its response to the Center, the party making the challenge and the arbitrators.

Article 27

The Tribunal may, in its discretion, suspend or continue the arbitral proceedings during the pendency of the challenge.

Article 28

The other party may agree to the challenge or the arbitrator may voluntarily withdraw. In either case, the arbitrator shall be replaced without any implication that the grounds for the challenge are valid.

Article 29

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the Center in accordance with its internal procedures. Such a decision is of an administrative nature and shall be final. The Center shall not be required to state reasons for its decision.

Appendix 2: Provisions Concerning Challenge Procedures in Selected National Arbitration Laws

A UNCITRAL Model Arbitration Law

Article 12: grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13: challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
2. Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

B English Arbitration Act 1996 Chapter 23

Section 24: power of court to remove arbitrator

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;
(b) that he does not possess the qualifications required by the arbitration agreement;
(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;
(d) that he has refused or failed:
    (i) properly to conduct the proceedings, or
    (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.
(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.
(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

C Swiss Private International Law Act: Chapter 12: International Arbitration

2 Challenge of arbitrators

Article 180

1. An arbitrator may be challenged:

(a) if he does not meet the requirements agreed upon by the parties;
(b) if there exists a ground for challenge under the arbitration rules agreed upon by the parties; or
(c) if circumstances exist that give rise to justifiable doubts as to his independence.

2. A party may only challenge an arbitrator whom it has appointed or in whose appointment it has participated on grounds of which it became aware after such appointment. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.
3. In the event of a dispute and to the extent to which the parties have not provided for this challenge procedure, the court at the seat of the arbitral tribunal shall make the final decision.

D U.S. Federal Arbitration Act (9 U.S.C. § 1)

Section 10: vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
    1. where the award was procured by corruption, fraud, or undue means;
    2. where there was evident partiality or corruption in the arbitrators, or either of them;
    3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
    4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made;
    5. where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

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[1] Robert Briner & Fabian von Schlaberndorff, *Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration*, *in* Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl Heinz Böckstiegel 94 (2001).

[2] R. v. Sussex Justices, *ex parte* McCarthy [1924] 1 K.B. 256. It is interesting to note that this famous aphorism was coined by a man who, after becoming Lord Chief Justice of England, was known for the bias he brought to the trials over which he presided. One commentator wrote:

> Hewart … has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever. (Lord Devlin, Easing the Passing: the Trial of Dr John Bodkin Adams (1985).

The evolution and use of this dictum are discussed by the Hon. J. J. Spigelman, Chief Justice of New South Wales, *Seen to be Done: The Principle of Open Justice*, available at <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_091099>.

[3] In this article the terms "disqualification" and "challenge" will be used as synonyms.

[4] National procedural rules will, however, not necessarily provide easy and clearly defined standards or procedures for challenging arbitrators. The French New Code of Civil Procedure, for example, does not define what standards arbitrators must meet. The Code merely states that, if an arbitrator believes that there is a ground for challenge, he must inform the parties and can only act as arbitrator if they all agree. What such grounds would be is left open (art. 1452 NCCP). However, the French courts have affirmed the notion that arbitrators must be independent (Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., Apr. 13, 1972).

[5] Art. 7 of the AAA International Arbitration Rules [hereinafter "AAA Rules"] requires "impartiality and independence" of all arbitrators; art. 14 of the ICSID Convention calls for "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment"; art. 22 of the WIPO Rules calls for "impartiality and independence" as do art. 6 of the UNCITRAL Arbitration Rules and Rule 7 of the CPR (Chinese Peoples Republic) Arbitration Rules.

[6] Most arbitral institutions and arbitration laws require arbitrators to be independent and impartial. Art. 7 of the AAA International Commercial Arbitration Rules and Rule 6 of the ICSID Arbitration Rules [hereinafter "ICSID Rules"] requires the arbitrators to issue a statement in which they promise to "judge fairly as between the parties"; *see also* art. 22(a) of the WIPO Arbitration Rules [hereinafter "WIPO Rules"] and art. 9 of the UNCITRAL Arbitration Rules [hereinafter "UNCITRAL Rules"].

[7] Indeed, the ICC Statement of Independence specifically contains language to this effect. By qualifying his statement of independence the arbitrator will check the box with the following text:

> I am independent of each of the parties and intend to remain so; however, I wish to call your attention to the following facts or circumstances which I hereafter disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties.

[8] There is no absolute presumption of this, of course. The Swiss Federal Tribunal held in 1998 that the mere fact that two lawyers, one counsel and the other arbitrator, shared the same law firm is not in itself a ground for challenge. If the challenge is not raised in time, the party knowing of a disqualifying fact loses its right to challenge an arbitrator: I. SA v. V. (Hong Kong), Feb. 9, 1998, Bull. ASA 634 (1998).

[9] John Kendall, *Barristers, Independence and Disclosure*, 8(3) Arb. Int'l 287–99 (1992); and John Kendall, *Barristers, Independence and Disclosure Revisited*, 16(3) Arb. Int'l 343–51 (2000).

[10] Cour d'Appel de Paris (1ère Ch. suppl.) June 28, 1991; 4 Revue de l'arbitrage 568–71 (1992).

[11] Swiss Federal Tribunal, Decision of March 20, 2000, 20(1) ASA Bulletin 70 (2000).

[12] English Arbitration Act 1996, ch. 23, § 24.

[13] Gillian Eastwood, *A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators*, 17(3) Arb. Int'l (2001).

[14] R v. Bow Street Magistrate, *ex parte* Pinochet (No. 2) [1999] 2 WLR 272.

[15] Dimes v. Proprietors of the Grand Junction Canal (1852) 3 HL Cas. 759.

[16] *Id.*

[17] R. v. Gough [1993] AC 646.

[18] [2000] 1 Lloyd's Rep. 22; [2000] All ER (D) 657, CA; also 14(11) Mealeys' Int. Arb. Rep. 6.

[19] English Arbitration Act 1950, § 23:

> *Removal of an arbitrator and setting aside an award*
>
> 1. Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
> 2. Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

[20] Art. 2.7 of the ICC Rules:

> Every arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in

> the arbitration.
> Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time limit for any comments from them.

[21] Under the English Arbitration Act 1996, this might be handled differently. Section 24(2) provides that, if the parties have agreed to institutional rules, which contain a procedure for removing arbitrators, an application to the court can only be made if the previous venue has been exhausted. (*cf.* Appendix II). However, this language appears to leave open the possibility for an English court to review an institutional decision on a challenge.

[22] E. Loquin, *La Validité de Principe de la Désignation d'un Arbitre commun à Deux Procédures d'Arbitrage Parallèles*, J.D.I 2, 455 (1994).

[23] Yves Derains & Eric Schwartz, A Guide to the New ICC Rules of Arbitration 109 (1998).

[24] Jean Robert, L'Arbitrage, Droit interne, Droit international privé 135 (6th ed., 1993).

[25] Art. 34(2)(iv) of the UNCITRAL Model Law; art. 5(1)(d) of the New York Convention.

[26] Convention on the Settlement of Investments Disputes between States and Nationals of Other States, Washington, March 18, 1965, T.I.A.S. 6090; 575 U.N.T.S.159.

[27] Art. 57 of the ICSID Convention:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

[28] As of June 2002, the Convention was in force in 134 states (*see* <www.worldbank.org/icsid/constate/c-states-en.htm>).

[29] AAA Commercial Arbitration Rules:

> *R-15: Appointment of Neutral Arbitrator by Party-Appointed Arbitrators or Parties* (a) If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as provided in Section R-14, and the parties have authorized them to appoint a neutral arbitrator within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint a neutral arbitrator, who shall act as chairperson

[30] A. A. de Fina, *The Party Appointed Arbitrator in International Arbitrations: Role and Selection*, 15(4) Arb. Int'l 381–92 (1999); Philippe Fouchard, *Le statut de l'arbitre dans la jurisprudence française*, 3 Revue de l'arbitrage 325–72 (1996); *see also* Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party Appointed Arbitrators in International Commercial Arbitration*, 14(4) Arb. Int'l 395–430 (1998); Rosabel E. Goodman Everard, *Cultural Diversity in International Arbitration: A Challenge for Decision-Makers and Decision-Making*, 7(2) Arb. Int'l 155–64 (1991).

[31] Appendix 1 *infra* contains the challenge provisions of the following Rules: AAA International, DIS, ICC, ICSID, LCIA and UNCITRAL. Appendix 2 *infra* contains the provisions governing challenges of the following national arbitration laws: UNCITRAL Model Law; English Arbitration Act 1996; Swiss Private International Law Act; U.S. Federal Arbitration Act.

[32] Art. 11.1 ICC Rules; art. 8.2 AAA Int. Rules; art. 10.4 LCIA Rules; art. 9.1 ICSID Rules; art. 25 WIPO Rules; art. 11.1 and 11.2 UNCITRAL Rules.

[33] Art. 8.3 AAA Int. Rules; art. 10.4 LCIA Rules; art. 28 WIPO Rules.

[34] Art. 8.1 AAA Int. Rules; art. 11.2 ICC Rules; art. 11.1 UNCITRAL Rules; art. 14.4 LCIA Rules; art. 18.2 DIS Rules.

[35] Art. 9.1 ICSID Rules.

[36] UNCITRAL challenge decision of January 11, 1995, XXII Y.B. Com. Arb. 227–42 (1997).

[37] Section 24(5) of the English Arbitration Act 1996 does allow the arbitrator to appear and be heard before the court.

[38] Dominique Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6(2) ICC International Court of Arbitration Bulletin 4.

[39] Art. 18.2 DIS Rules.

[40] Art. 5 of the ICSID Convention.

[41] Art. 9(4) ICSID Rules.

[42] Art. 6.2 UNCITRAL Rules.

[43] Art. 13(2) and (3) Model Law.

[44] 9 U.S.C. §§ 1–14 (2001).

[45] *See* Appendix 2 *infra*.

[46] U.S. District Court, Northern District of Illinois, Eastern Division, August 7, 1997, Nos. 97 C 3638, 97 C 3640 and 97 C 3643, XXIII Y.B. Com. Arb. 1046–50 (1998).

[47] Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l Comp. L.Q. 26 (1989) (cited in Derains & Schwartz, *supra* note 23).

[48] Art. 13.3 GCCI Arbitration Rules.

[49] *cf.* Appendix 1 *infra*.

[50] English Arbitration Act 1996, § 24(3).

[51] *cf. supra* note 43.

[52] Art. 10 AAA Int. Rules.

[53] Art. 2.12 ICC Rules (1988); art. 15.1 CCIG Rules.

[54] There have been cases, usually involving governments as parties, in which the government obtained anti-arbitration injunctions from its own state courts. This made it impossible for the arbitrator from that country to attend arbitral meetings or hearings without violating the court order. In such situations, institutions with discretionary powers of appointment can appoint an arbitrator from another country who would not be bound by the injunction.

[55] Art. 11.1 LCIA Rules; art. 12.4 ICC Rules (1998).

[56] Art. 18 Zurich Chamber of Commerce Arbitration Rules:

> *Replacement of an Arbitrator*
> … If the party fails to nominate a new arbitrator and in all other cases, *in particular if an arbitrator was successfully challenged or removed, the President of the Chamber of Commerce appoints the new arbitrator.* (emphasis added)

The arbitration continues with the new arbitrator where his or her predecessor left it.

[57] Similarly art.11.2 AAA Int. Rules.

[58] Art. 15.2 CCIG Rules; art. 18.3 ZCC Rules.

[59] *cf.* art. 15 of the Greek Law on International Commercial Arbitration (Law 2735/1999) which added to the text of the UNCITRAL Model Law the following: "The newly constituted arbitral tribunal shall decide *unanimously* whether the proceedings will continue from the point where they were interrupted due to the termination of the mandate of the replaced arbitrator, unless the parties decide otherwise." (emphasis added)

[60] Antonias Dimolitsa, *Les points de divergence entre la nouvelle loi grecque sur l'arbitrage et la loi-type CNUDCI*, 2 Revue de l'arbitrage 227–46 (2000).

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