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3. Another "Economic Reality"

Under the given circumstances, none of these theories and principles could be invoked to extend the arbitration agreement to Oracle. Therefore, the Second Circuit was not willing to ignore the principle of consensuality of arbitration and the separate legal personality of Oracle. Quite rightly, the Second Circuit held that the

"principal reason corporations form wholly owned foreign subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts" and that *"[t]he practice of dealing through a subsidiary is entirely appropriate and essential to [the U.S.]'s conduct of foreign trade."*[35]

This simply confirms another but more realistic "economic reality", namely that companies and groups of companies (and their advisers) are used to distinguishing between contracting and non-contracting parties and make deliberate choices as to who should be a party to a particular contract or not. Practitioners who not only sit as arbitrators but also negotiate transactions know that it is always a crucial issue as to which group company should be debtor and/or creditor of any rights and/or liabilities and whether or not the parent company should be a guarantor under a given contract or not. Arbitrators should not simply neglect the outcome of this – sometimes lengthy – bargaining process by pointing to a glossy doctrine which, in fact, does not reflect the result of the parties' negotiations.

III. Conclusion and Outlook

The *Dow Chemical* tribunal did not want to give parties a second chance to negotiate their arbitration agreement by allowing them to drag additional parties into an arbitration in contradiction to what had been agreed earlier. Nor did it invent this theory to spare future arbitrators the effort to carefully review and analyse the given facts in order to determine whether, under applicable national law and legal theory, an arbitration agreement could be extended to a non-signatory. Unfortunately, the doctrine has been abused in both directions. The "group of companies doctrine" has been invoked at times with the sole purpose of pressurising non-signatories, in particular companies listed at a stock exchange.[36] The decision in *Sarhank Group v. Oracle Corp.* shows that the doctrine has also been used as a shortcut by arbitral tribunals who considered it sufficient to argue that a subsidiary company should always be bound by the arbitration clause of other companies within the same group, either because such alleged rule is part of *lex mercatoria* or because this allegedly reflects *"economic reality"*. In fact, *"economic reality"* is rather reflected by the concept of separate legal entities and insulation from liability for the torts and contracts of other legal entities as quite rightly noted by the Second Circuit. At the very end, any blow against the principle of consent of each party as foundation for an arbitration[37] might even deter parties from choosing arbitration as a mechanism to solve disputes.[38] The very broad interpretation of the *Dow Chemical* award by practitioners who want to involve non-signatories in arbitration proceedings or by arbitral tribunals who do not want to deal with the identification of a legal basis for the extension of an arbitration agreement to a non-consenting non-signatory, may cause parties to avoid France as a place of arbitration[39] or ICC arbitration altogether, so as to avoid any risk that awkward ICC "case law" might lead to unpredictable consequences.[40] Maybe it would help if more often arbitral awards would be published which stipulate the seemingly obvious but sometimes forgotten principles,[41] namely that arbitration is based on consent and that separate legal entities may not be ignored without a very valid reason.

[35] *Sarhank Group v. Oracle Corporation* (Fn. 28), 11.

[36] *Wilske*, "Internationalisation of Law" in Arbitration – A Way to Escape Procedural Restrictions of National Law?, in: Vogt (ed.), Liber Amicorum for the 35th Anniversary of Bär & Karrer, 2004, 257, 262.

[37] *Lew/Mistelis/Kröll* (Fn. 3), 99, para. 6-1.

[38] *Cf. Wegen/Wilske* (Fn. 27), 77, 79.

[39] *Leadley/Williams* (Fn. 1), 111, 114; *Foyle/Singh* (Fn. 1), 54, 56.

[40] *Cf. Leadley/Williams* (Fn. 1), 111, 114. Such attitude would be extremely unfair vis-à-vis the ICC International Court of Arbitration which in recent years has in an increasing number of cases decided pursuant to Article 6(2) ICC Rules that an arbitration may not proceed with respect to individual non-signatories where the extension of the arbitration agreement to such non-signatories by claimant was clearly abusive and accordingly, the Court was not *prima facie* satisfied that an arbitration agreement under ICC Rules may exist. *Cf. Nater-Bass*, "Prima Facie" Zuständigkeitsentscheide in internationalen Schiedsgerichtsverfahren aus der Sicht der Parteien, ASA Bulletin 2002, 608-622.

[41] *Cf. Leadley/Williams* (Fn. 1), 111, 112, referring to *"undesirable uncertainty for lawyers trying to determine whether or not their clients' case is on all fours with the supposed ICC 'case law' ..."*; see also *Duve/Keller*, Privatisierung der Justiz, bleibt die Rechtsfortbildung auf der Strecke?, SchiedsVZ 2005, 169-178.

No Man Can Serve Two Masters:* The Challenge of Practicing Lawyers as Arbitrators in International Commercial Arbitration

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As the professional relationships entertained by practicing lawyers with their clients, partners, other lawyers and, last but not least, former partners become more and more complex, they affect the impartiality or independence required to

* The Gospel According to Matthew, 6:24.

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act as arbitrator. This article describes the rules established by case law, legal writers and institutions, notably the International Bar Association, addressing a lawyer's ability to act as arbitrator. It explores inter alia whether the professional rules designed to secure the independence of lawyers, such as the judgment of the German Federal Constitutional Court dealing with a migrating lawyer, help defining a lawyer's ability to act as arbitrator, whether the parties should be able to overcome a lawyer's inability to act as arbitrator by giving their consent and, absent such consent, whether the parties should be forced to accept an arbitrator if he proves the absence of impropriety, e.g. by setting up a screen.

I. Introduction

Selecting an arbitrator in international commercial arbitration is no easy task, particularly if a professional relationship exists between counsel to one of the parties in arbitration and an arbitrator. The existence of such a relationship may lead to a challenge to the selection of such arbitrator or, if the relevant facts become known after the award has been made, to an attempt by the other party to have the award set aside.

The task of selecting an arbitrator becomes more difficult if counsel to one or more parties in arbitration or the potential arbitrators are partners in a law firm. Does a conflict of interest arise if one of the partners decides to leave the law firm representing the claimant and to move to the law firm where the arbitrator selected by the respondent is a partner? Does it make a difference if the moving partner has no knowledge regarding the subject matter of the arbitration? What if the law firms enter into a cooperation agreement?

In this article, we will discuss how professional relationships of practicing lawyers in law firms affect their availability as arbitrators. In this article, "law firm" shall denote a lawyer or lawyers in a law partnership, professional corporation or other association authorized to practice law.

In Part II, we will consider the question from the point of view of arbitration law, i.e. the body of law relating specifically to arbitration proceedings. We will draw the preliminary conclusion that any relationship of a kind that has been the subject of disputes may affect the independence and impartiality of the arbitrator concerned. However, the guidance provided by arbitration law proper is not always sufficient. In Part III, we will attempt to fill the gap by studying certain ethics rules governing the legal profession and dealing with the independence of lawyers.

II. Arbitration Law

Does arbitration law provide reliable guidelines for the selection of an arbitrator? First, we will identify the legal bases for a challenge and introduce the notions of independence, impartiality and bias. Thereafter, we will explore the meaning of these terms based on general definitions proposed by legal scholars and case law.

1. Legal Bases

A large number of countries have enacted legislation based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law").[1] Under the Model Law, a prospective arbitrator must "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence"[2] and may be challenged if "circumstances exist that give rise to justifiable doubts as to his impartiality or independence" (Art. 12).

Among the countries which have not adopted the Model Law, the United Kingdom and France merit particular attention. The U.K. Arbitration Act 1996 provides for an objective test, namely whether circumstances exist that give rise to "justifiable doubts as to the arbitrator's impartiality" (Section 24). This test mirrors the test established by English common law based on three principles: actual bias as an automatic disqualification for a judge, no judge can sit for his own cause, and a judge is disqualified if there is a real danger that he is biased.[3] The *Nouveau Code de Procédure Civile* ("NCPC") provides that arbitrators must disclose any event which could lead to the challenge of a judge in national court proceedings.[4] These include situations where the judge has known the matter before, acted as counsel to one of the parties or has a personal interest in the outcome of the matter (Art. 341 nos. 5 and 1 NCPC).

Various arbitral institutions have promulgated standards in their arbitration rules. The Code of Ethics of the American Arbitration Association ("AAA") requires disclosure of "any direct or indirect financial or personal interest in the outcome of the arbitration" as well as "any existing or past financial, business, professional, family or social relationships which might reasonably create an appearance of partiality or bias".[5] The Rules of Ethics for International Arbitrators promulgated by the International Bar Association ("IBA") in their Art. 7 and the 1998 Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce ("ICC") in their Article 7.1 require "independence". The 1998 Arbitration Rules of the German Institution of Arbitration (DIS) demand that "each" arbitrator must be independent and impartial (Art. 15). The general principle of independence may be implied even in arbitration rules that do not expressly provide for such independence.[6]

them on page 192. The authors are indebted to *Karin Wolfe*, Esq., for improving the manuscript.

1 The countries where the Model Law has been adopted are listed at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. For an exhaustive discussion of an arbitrator's independence and impartiality s. *Schlosser*, ZZP 1980, p. 121 and for an overview of the challenge of arbitrators in German law s. *Kröll*, ZZP 2003, p. 195 and *Mankowski*, SchiedsVZ 2004, p. 304.

2 As a notable exception, German law requires disclosure "in case of doubt", not only "justifiable doubt", § 1036 (1) of the German Code of Civil Procedure (*ZPO*).

3 *Brown*, JIA 2001, p. 123 at 124.

4 See Articles 1452 § 2 and 341 of the NCPC, also C. Cass., 2e civ., 14 November 1990, Bull. Civ. II, n° 230.

5 AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon II, A. The arbitrator should make a "reasonable effort" to inform himself of any such interest or relationship, Introductory Note to Canon II, B.

6 See U.S. District Court for the Southern District of Ohio, *Fertilizer*

To conclude, the relevant laws and regulations are rather general. They do not provide guidance in any of the situations outlined in the introductory paragraphs. However, these laws and regulations are sufficiently similar to permit a consolidated review of the legal writing and the case law on the issue.[7]

The IBA has summarized the case law described below and many other rules regarding conflicts of interest in the Guidelines on the Conflict of Interest in International Arbitration (the "IBA Guidelines") published in 2004.[8] The IBA Guidelines contain a number of General Standards in Part I, the first of which evokes the principle of impartiality and independence. General Standard 6 deals specifically with law firms. It essentially provides that the "activities of an arbitrator's law firm", rather than "automatically" being deemed to constitute a conflict of interest, should "be reasonably considered" if they "involve one of the parties" or an affiliate of a party (so-called "rule of reason"[9]). The explanations given by the IBA Working Group who drafted the IBA Guidelines state that, while "an arbitrator must in principle be considered identical to his or her firm", the activities of the firm should nevertheless not automatically constitute a conflict of interest. Rather, nature, timing and scope of such activities should be considered. The more lenient approach taken in the first draft of the Guidelines that "the arbitrator's shall not be considered to be an equivalent of his or her firm's activities"[10] was rejected by the working group. Part II of the IBA Guidelines contains more specific, but less than exhaustive rules in the form of three lists:

- a Red List of "specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence", divided in those that are considered waivable by an express declaration of the parties and those that are not;
- an Orange List of "specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality and independence" and are considered waivable by the parties expressly or by implication; and
- a Green List of "specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view" and neither disclosure nor a waiver are required.

2. General Definitions in Legal Literature

Many legal scholars have made attempts to narrow down the concepts of "independence" and "impartiality". For example, *Berger* defines "independence" as referring to the relationship between the parties and the arbitrator and "impartiality" as relating to the substance of the dispute before the panel, such that "independence" is of an objective and "impartiality" of a subjective nature.[11] According to *Redfern/Hunter,* the concept of "dependence" refers exclusively to issues arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise, while the concept of "partiality" refers to the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute.[12] According to *Craig/Park/Paulsson,* an arbitrator is partial if he could be influenced by facts outside the arbitration in relation to one of the parties or the matter in dispute.[13]

"Bias" as a superordinate concept is generally defined as a predisposition to decide a cause in a certain way, which does not leave the mind perfectly open to conviction, or as a mental attitude or predisposition toward a party and not to any views that may be entertained regarding the subject of the matter involved.[14] Legal scholars do not seem to provide any more guidance as to the situations outlined in the introductory paragraphs above than the relevant laws and regulations, aside from the observation that there is no bright-line distinction between independence and impartiality.

3. Case Law

The decisions of courts and tribunals deciding such matters, as in other areas of law, are more fertile ground for guidance, although they are not always consistent.

a) Examples of Challenges to Independence and Impartiality

What circumstances have given rise to successful challenges to arbitrators? The professional relationships we are concerned with give rise to issues of "justifiable doubt" in two cases in particular, namely if the arbitrator benefits directly or indirectly from the outcome of the arbitration and if the arbitrator has access to confidential information relevant to the arbitration.

aa) Financial Interest

In its landmark 1968 decision, *Commonwealth Coatings*, the U.S. Supreme Court held that an award should be set aside where there is "the slightest pecuniary interest" on the part of the arbitrator, such as where the arbitrator's law firm expects to represent and advise a party again in the future. In that case, the chairman of the panel had received contracts for engineering services from one of the parties worth US$ 12,000 over the preceding five years.[15]

Corporation of India et al. v. IDI Management, Inc., 530 F. Supp. 542 (1982) with regard to the 1955 ICC rules. For further examples of ethical standards see *Lawson*, ASA Bulletin 2005, p. 22 at 28 and especially a Comparison Chart of Arbitrators' Standards of Conduct at www.dcbar.org/for_lawyers/selections/international_law/conduct.cfm.

7 *Schlosser*, ZZP 93 (1980), p. 121.

8 http://www.ibanet.org/images/downloads/guidelines%20text.pdf. For further information on the IBA Guidelines see *Landolt*, JIA 2005, p. 409; *Lawson*, ASA Bulletin 2005, p. 23; *Voser*, SchiedsVZ 2003, p. 59; *Wilske/Stock*, ASA Bulletin 2005, p. 45.

9 *Landolt*, JIA 2005, p. 409 at 417.

10 *de Witt Wijnen* et al., Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration, Business Law International, 2004, p. 433 at 445.

11 *Berger*, International Economic Arbitration, 1993, p. 243.

12 *Redfern/Hunter*, Law and Practice of International Commercial Arbitration, 4th ed. 1999, p. 201.

13 *Craig/Park/Paulsson*, International Commercial Arbitration, 1997, p. 233.

14 *Black*, Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, 5th ed., p. 147. For a recent attempt to define the notions see *Lawson*, ASA Bulletin 2005, p. 23 at 39-40.

15 The court expressly rejected the argument that the compensation involved was "so small that it is not to be regarded as likely to influence

In contrast, in the 2000 *AT&T Corporation v. Saudi Cable*[16] decision, the English Court of Appeals refused to set aside an award where one of the arbitrators was a non-executive director and shareholder of a third-party competitor of the claimant. The competitor had previously and unsuccessfully participated in the bidding for the contract from the defendant, which the claimant had ultimately won and which gave rise to the dispute. The court found that the potential benefit to be gained from an unfavourable decision against the claimant would have been negligible.[17] The arbitrator concerned had failed to disclose these circumstances. The Court of Appeals applied the "real danger of bias" test (or *Gough* test, see infra 2) and denied the existence of such a danger. Even under the "real danger of bias" standard, the AT&T decision is very liberal. One factor contributing to the court's ruling might have been the fact that the challenge occurred at a late stage of the proceedings, when the Tribunal had rendered three partial awards.

These decisions constitute the two extremes of how a small financial interest can be construed as relevant or not relevant. *Schlosser* (also) regards the case where an arbitrator is a small shareholder in a party or an interested third party as generally harmless.[18] The Higher Regional Court of Naumburg recently rejected a challenge where the sole arbitrator had previously held an interest in a limited partnership whose managing partner was now the managing director of the respondent. The court considered that the other party had not provided sufficient proof of an economic interest on the part of the arbitrator.[19] The Swiss Federal Court, however, interpreted a similar set of circumstances as sufficient ground for challenge.[20] In ICC practice, parties have asserted objections where one of the partners of the arbitrator was the director of a foundation aimed at promoting the commercial interests of an interested third party.[21] On the other hand, in ICC practice, the fact that the law firms in which the arbitrator and counsel to the nominating party are partners have established an economic interest grouping or a similar cooperation vehicle is generally considered acceptable, provided that this is disclosed.[22]

Past business relations become relevant as a basis for a financial interest if it appears that the arbitrator might have a reason to render a decision benefiting one party in order to induce that party to steer business to his firm in the future. The German Federal Court found an arbitrator to be dependent if his law firm constantly advised one party.[23] The same is true where the arbitrator's law firm represents the party in arbitration,[24] where the arbitrator has given legal advice to an interested third party or translated submissions or completed technical studies on behalf of the nominating party.[25] Where another office or branch of a law firm to which the arbitrator belongs has given advice to a party before, some[26] presume dependence while others[27] do not. The test apparently is whether the arbitrator is likely to succumb to the temptation of flattering a client. If the services provided by the arbitrator's law firm to a party or an interested third party concern minor, unrelated matters, ICC practice tends to consider the arbitrator independent.[28]

The IBA Guidelines propose in their Part II that having a significant financial interest in one of the parties or in the outcome of the case and being a director or a member of the supervisory board of a party are non-waivable Red List obstacles to being an arbitrator. On the other hand, representing a party or its lawyer, being in the same law firm as counsel to one of the parties, having a significant commercial relationship with a party or an affiliate, holding shares in a party or having a family member that has a significant financial interest in the outcome of the dispute and the financial benefits associated therewith would all constitute waivable Red List obstacles. In contrast, holding an insubstantial amount of shares in a party or an affiliate is on the Green List, provided the party or affiliate is publicly listed.

bb) Access to Confidential Information

Possible access to confidential information about the case or the parties other than by way of the arbitral proceedings also affects the arbitrator's neutrality.

This is evident where the arbitrator's wife belongs to the law firm representing the nominating party.[29] On the other hand, bias has been found neither where the arbitrator has signed an arbitration award on the subject matter in a dispute between the parties to the arbitration if the award is being reviewed by the state courts nor where the arbitrator has pronounced a judgment or an arbitration award on the subject matter in another dispute between one of the parties to the arbitration and a third party.[30] However, the arbitrator can be challenged where he has pronounced a judgment or an arbitration award on the subject matter in a dispute between one party to the arbitration and a third party against the other

improperly" a judicial officer, *Tumey*, 273 U.S. 524, quoted in *Commonwealth Coatings Corp. v. Continental Casualty Co. et al.*, U.S.S.C., 18 November 1968, 393 U.S. 145. The Supreme Court considered that the circumstances gave rise to "evident partiality", Section 10 (b) FAA. Recently, this strict view has been attenuated by the Fourth Circuit. In the 1999 *ANR Coal Co., Inc., v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999), decision it was decided that an undisclosed arbitrator's law firm's past representation of one of the arbitration parties does not necessarily lead to "evident partiality". The court underlined that this decision did not violate the teaching of *Commonwealth Coatings* (ibid, at 499).

16 *AT&T Corporation and another v. Saudi Cable Co.*, English Court of Appeal (Civil Division), 15 May 2000, [2000] 2 Lloyd's Rep 127. The underlying arbitration was conducted pursuant to the 1988 ICC Rules of Conciliation and Arbitration. For a more detailed evaluation of the *AT&T* case see *Yu/Shore*, ICLQ Vol. 52, October 2003, p. 935 at 939-942.

17 See *Blake*, Whether interest can lead to bias, Estates Gazette 2000, p. 136.

18 *Schlosser*, in: Stein/Jonas, ZPO, 22. Aufl., § 1036, note 20.

19 Oberlandesgericht Naumburg, 19 December 2001, SchiedsVZ 2003, p. 134.

20 Schweizerisches Bundesgericht, BGE 111, Ia 74.

21 *Hascher*, ICC Bulletin 1995, No. 2, p. 7.

22 *Hascher*, ICC Bulletin 1995, No. 2, p. 8.

23 Bundesgerichtshof, NJW 1999, p. 2370. This view corresponds with ICC practice, see *Hascher*, ICC Bulletin 1995, No. 2, p. 7.

24 LG Bautzen, BB 1996 Beil. Nr. 5, p. 29.

25 *Hascher*, ICC Bulletin 1995, No. 2, p. 7.

26 *Craig/Park/Paulsson* (fn. 13), p. 230.

27 *Hascher*, ICC Bulletin 1995, No. 2, p. 8; *Schlosser* (fn. 18), note 20.

28 *Hascher*, ICC Bulletin 1995, No. 2, p. 8.

29 Swiss Federal Court (Schweizerisches Bundesgericht), SchwBGE 92 I 271. Crit. *Schlosser* (fn. 18), No. 19. The same is true where the arbitrator has a spouse, brother or cousin in the law firm representing the party that nominated him, see *Hascher*, ICC Bulletin 1995, No. 2, p. 8.

30 *Hascher*, ICC Bulletin 1995, No. 2, p. 8.

party to the arbitration.[31] In ICC practice, the fact that the arbitrator has been an acquaintance, a fellow student or a fellow professor of the nominating party's lawyer has not been found sufficient for a challenge, but there has been a case where the arbitrator was disqualified because he had known the nominating party's lawyer for forty years.[32]

An arbitrator has been considered dependent if he has given advice to a party on a related matter.[33] If a partner in the arbitrator's law firm has advised a party before an award rendered under the DIS rules the arbitrator's independence is affected, irrespective of the arbitrator's knowledge.[34]

An arbitrator cannot generally be challenged if he and counsel to the other party are members of the same chamber of barristers,[35] but only if this is disclosed.[36]

Preliminary contacts between the party and the arbitrator in the arbitration, according to ICC practice, do not constitute sufficient ground for challenge if they are limited to the minimum required in the context of selecting the arbitrator, but they do if the arbitrator has received fifty hours of preparation.[37]

The IBA Guidelines propose in Part II that having given legal advice or provided an expert opinion on the dispute to a party or an affiliate or having a previous involvement in the case both are waivable Red List obstacles. Representing or advising a party, an affiliate or the lawyer representing a party, being a lawyer – regardless of status, partner or associate – in the same firm as counsel to one of the parties and regularly advising the appointing party or an affiliate, without deriving substantial financial income there from, are also waivable Red List obstacles. Other services provided within the last three years constitute waivable Orange List obstacles, services provided more than three years prior to the arbitration would be regarded as innocuous. Current services for one of the parties, relationships between two arbitrators, such as two arbitrators being partners in a law firm, and being a member of a firm that is acting against a party, would also constitute waivable Orange List obstacles. A law firm which is in association or in alliance with the arbitrator's firm but without sharing revenues or profits rendering services to a party or an affiliate in an unrelated matter and membership in professional organizations or having served jointly as arbitrators or counsel are on the Green List.

b) Justifiable Doubt, Appearance of Bias or Actual Bias?

The laws based on the Model Law ask whether there are "justifiable doubts" as to an arbitrator's impartiality or independence. The "justifiable doubts" test rests on objective grounds capable of raising rational doubt that the arbitrator is predisposed towards the matter or the parties, but not whether the arbitrator is or considers himself partial or dependent.[38]

Using a similar standard, the Swiss Federal Court held that "accusations must be based on solid, reasonable and objective facts and not on subjective feelings of mistrust".[39] The IBA Guidelines refer to a "reasonable third person's point of view" (General Rule 2 (b)) and thus also set an objective standard.

Lord Hewart C. J. coined the famous aphorism that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[40]

In *Friedman v. Friedman*, the court found that "[n]othing should be permitted to throw suspicion even upon the entire impartiality of arbitrators".[41] The idea of appearance of bias was solidified in the judgment *Petroleum Cargo Carriers*, according to which an arbitrator must be free of actual bias both in fact and in appearance.[42] To determine whether there is "evident partiality", based on an arbitrator's failure to disclose a prior business relationship with a party, its counsel or witnesses, U.S. courts have adopted the "impression of possible bias" standard first articulated by the Supreme Court in *Commonwealth Coatings*.[43]

English courts have applied the so-called "Gough test", according to which an arbitrator is not allowed to serve on the tribunal where there is "a real likelihood, in the sense of a real possibility, of bias".[44] The Gough test was applied as recently as 1999 by Justice Rix in *Laker Airways*.[45] On the other hand, Scotland, Australia and South Africa have adhered to the reasonable suspicion or "reasonable apprehension" test,[46] which corresponds to the approach adopted by two judges in the case of *Halifax Building Society*.[47] In

31 *Société anonyme Setec Bâtiment (S.E.T. E.C.) c/société industrielle et commerciale des charbonnages (S.I.C. C.A.) et X*, TGI de Paris, 13 January 1986; *Hascher*, ICC Bulletin 1995, No. 2, p. 10.

32 *Hascher*, ICC Bulletin 1995, No. 2, p. 8.

33 *Consorts Ury v. Galéries Lafayette*, C. Cass., 2e civ., 13 April 1972, Revue de l'arbitrage 1975, p. 235., based on Article 1006, 1008 of the (old) Code de procédure civile; *Re Polites et al.; ex parte The Hoyts Corporation Pty Ltd. et al.*, High Court of Australia, 20 June 1991, 100 A.L.R. 634.

34 Arbitration proceeding DIS-SV-217/02, IDR 2003, pp. 24-26, with note by *Häberlein*, IDR 2003, pp. 7-10.

35 *Laker Airways Inc. v. FLS Aerospace Ltd. and Burnton*, Q.B.D. Commercial Court, 20 April 1999, 1 WLR 113 (2000); see also *Brown*, fn 3.

36 *Hascher*, ICC Bulletin 1995, No. 2, p. 9; *Kendall*, Arb. Int. 1992, Vol. 8, No. 3 p. 28.

37 *Hascher*, ICC Bulletin 1995, No. 2, p. 7.

38 For German law see Oberlandesgericht Naumburg, SchiedsVZ 2003, p. 134. For the advantages of the objective approach see *Häberlein*, IDR 2003, p. 7 at 8.

39 *D. v. A.*, Swiss Fed. Tribunal, 11 May 1992; see also *York Hannover Holding AG v. A.A.A.*, U.S. District Court S.D.N. Y., 22 June 1992, 794 F. Supp. 118.

40 *R. v. Sussex Justices ex parte McCarthy*, [1924] 1 256 at p 259.

41 *Harry P. Friedman v. Morris A. Friedman*, Supreme Court of New York, Appellate Division, First Department, 15 January 1926, 215 A. D. 130.

42 *Petroleum Cargo Carriers, Ltd. v. Unitas, Inc. (Southern Seas Inc.)*, Supreme Court of New York, Special Term, New York County, 8 September 1961, 31 Misc. 2d 222.

43 *Commonwealth Coatings* (fn. 15); *Betz v. Pankow*, 31 Cal. App. 4th 1503, 38 Cal. Rptr. 2d 107, 110 (Ct. App. 1995); *Neaman v. Kaiser Found. Hosp.*, 9 Cal. App. 4th 1170, 11 Cal. Rptr. 2d 879, 883 (Ct. App. 1992); *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, United States Court of Appeals for the 9th Circuit, 6 September 1996, 94 F. 3d 1346.

44 This formula has been developed by Lord Goff of Chieveley in *R v. Gough*, [1993] AC 646.

45 The court held that doubts, if justifiable, were sufficient to disqualify an arbitrator and that it was not necessary to prove actual bias, see *Laker Airways Inc. v. FLS Aerospace Ltd. and Burnton* (fn. 35).

46 For Scotland see *Doherty v. McGlennan*, 1997 SLT 444. For Australia see *Webb v. R.*, (1994) 181 CLR 41. For South Africa see *Moch v. Nedtravel (Pty) Ltd.*, 1996 (3) SA 1.

47 *Lord Hewart CJ in Sussex* and *Woolf J* in *Halifax Building Society v. The Secretary of State for the Environment and Another*, Queen's Bench Division, Crown Office List, 22 April 1983, 267 EG 681, [1983] JPL 816.

AT&T, the judges neither used nor dismissed the Gough test. They made, however, an attempt to harmonize the different tests by showing that their application would produce the same outcome.[48]

c) Duty of Disclosure

This leads to the issue as to whether or not failure to disclose offensive circumstances as such permits to challenge an arbitrator.[49]

On the one hand it is argued that an arbitrator who intentionally fails to disclose relevant circumstances establishes a presumption of dependence or partiality and thereby supports a prima *facie claim* of bias.[50] The arbitrator's subjective belief that these circumstances are insubstantial and that revealing them would incorrectly suggest that he is biased does not relieve him of the duty to disclose. Rather, since the law requires disclosure, no such imputation can arise.[51] Early disclosure removes the risk that a party displeased with the award can seize on the arbitrator's lapse as a pretext for challenging the award. Nevertheless, it remains a judgment call for the arbitrator concerned because he need not submit an "unexpurgated business biography".[52]

On the other hand, in *AT&T*[53] the court considered the non-disclosure innocuous because the arbitrator failed to disclose his directorship and interest in the competitor of the claimant due to an error and also because he had satisfactorily shown that he attached little weight to the directorship.[54] Even in the absence of such an error, non-disclosure was also judged inoffensive where the circumstances the arbitrator failed to disclose could not constitute sufficient ground for challenge.[55]

In this respect, the IBA Guidelines set a subjective standard, referring to "facts or circumstances that may, in the eyes of the parties, give rise to doubts".[56]

d) Borrowing Standards

Another attempt at defining independence and impartiality is to consider whether the standards applying to judges should apply also to arbitrators or whether arbitrators should be subject to lower or perhaps even higher standard than judges.

There are a number of arguments for requiring a lower standard of independence and impartiality from arbitrators. First, there are only a limited number of experienced arbitrators. Law firms of international size merge and expand increasingly in size and geographical scope.[57] Exaggerated standards thus considerably restrict the availability of competent lawyers to act as arbitrators.[58] Second, the relationship between a party and the party-appointed arbitrator is balanced by the other party's right to choose its own arbitrator. Third, arbitrators are professionals if not experts in the area of dispute and are, therefore, necessarily closer to the business at hand and its players than judges.[59] Finally, while the judge is a servant of the State and has responsibilities flowing from public policy, the arbitrator's responsibilities may be determined by the parties or by an arbitral institution.[60]

However, the more persuasive arguments speak for a higher standard of neutrality for arbitrators.[61] At least, the standard for arbitrators should not be lower than that for judges.[62] First, arbitral awards are final, while the decision of a judge is normally subject to appeal. As Justice Black said in *Commonwealth Coatings*, "arbitrators cannot sever all their ties with the business world [...] but we should, if anything, 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".[63]

It follows that the parties forfeit their right to an appeal on the condition that the principles of fair process be observed. Independence and impartiality are central tenets of fairness. They also ensure transparency and legitimacy of arbitration as an institution. These goals cannot be discarded where law firms are involved.

It might also be argued that party-appointed arbitrators should not be bound to the same standards as the third arbitrator, the chairman. U.S. doctrine has developed the term "non-neutral arbitrator".[64] This is justified by a "long-established practice" in some types of arbitration that an arbitrator appointed by one party is "expected to serve many, but not all of the same ethical standards" as the neutral third arbitrator.[65] "Non-neutral arbitrators" may be "partisan", but not "dishonest".[66] In other words, they need not refrain from hav-

[48] *AT & T Corporation and another v. Saudi Cable Co.*, (fn. 16). Similarly, Lord Browne-Wilkinson held that in "the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome", *Locabail (UK) Ltd. v. Bayfield Properties Ltd. et al.; Locabail (UK) Ltd. et al. v. Waldorf Investment Corp. et al.; Timmins v. Gormley; Williams v. HM Inspector of Taxes et al.; R. v. Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan*, Court of Appeal (Civil Division), 17 November 1999, [2000] QB 451.

[49] For the scope of the duty of disclosure see *Häberlein*, IDR 2003, p. 7 at 8, and *Yu/Shore*, ICLQ Vol. 52, October 2003, p. 935 at 938.

[50] *Commonwealth Coatings* (fn. 15).

[51] The IBA Guidelines specifically state that an arbitrator making a disclosure considers himself impartial and independent, because otherwise he would not have accepted the appointment in the first place, s. General Rule 3 (b).

[52] See *AT & T* (fn. 16) at p. 151.

[53] Ibid.

[54] Ibid., at p. 127.

[55] Oberlandesgericht Naumburg, SchiedsVZ 2003, p. 134 at 137.

[56] See General Rule 3 (a), crit. *Landolt*, JIA 2005, p. 409 at 415-416. S. also the German rule which requires disclosure "in case of doubt", not only "justifiable doubt", § 1036 (1) of the German Code of Civil Procedure (*ZPO*).

[57] *Craig/Park/Paulsson* (fn. 13), p. 228.

[58] *Lionett*, Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit, 2nd ed. 2001, p. 189.

[59] *Kröll*, ZZP 2003, p. 195 at 206.

[60] *Redfern/Hunter* (fn. 12), p. 233.

[61] For a recent decision see Arbitration proceeding DIS-SV-217/02, IDR 2003, p. 24 at 25.

[62] *See* fn. 16 above, where at nt. 40. Lord Woolfe stated: "If there are two standards, I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties".

[63] *Commonwealth Coatings* (fn. 15), at 148 et seq.; also emphasizing this aspect *Friedman* (fn. 41).

[64] *Schlosser* (fn. 18), note 16, see *Commonwealth Coatings* (fn. 15). See also General Standard 5 of the IBA Guidelines, which states that the IBA Guidelines do not apply to non-neutral arbitrators where such concept is permitted by applicable rules or laws.

[65] See the explanation of this practice (and the recommendation to abandon it) in AAA Code of Ethics for Arbitrators in Commercial Disputes, Introductory Note to Canon VII.

[66] *Schlosser* (fn. 18), note 16.

ing financial, business, professional, family or social relationships with a party, but they should refrain from delaying tactics, harassment of any party or witness and may not knowingly make untrue or misleading statements to the other arbitrators.[67] It was held that "the very reason" each of the parties contracts for the choice of its own arbitrator is to make certain that its "side" will be represented on the tribunal.[68]

The concept of the non-neutral arbitrator, however, may not serve as a model for the rest of the world[69] and generally seems to be on the decline.[70] Various arbitration rules anticipate a certain inclination of the party-appointed arbitrator towards the party that appointed him, but this inclination may not be founded on financial or business interests. If party-appointed arbitrators were biased they would have no reasonable function on the tribunal since their opposing votes would cancel each other out. A number of arbitration rules therefore impose identical standards for party-appointed and other arbitrators: The DIS-Rules in Section 15 state that "each" arbitrator must be independent and impartial, the ICC Rules of Arbitration in Article 7.1 require "every" arbitrator to be independent, the SIAC Rules in Rule 12.1 provide that "any" arbitrator may be challenged if there are justifiable doubts as to his independence or impartiality.

An intermediate approach is espoused by *Schlosser,* who regards it as illusionary to demand complete neutrality from party-appointed arbitrators, arguing that the mere fact that one party appoints a certain arbitrator gives rise to justifiable doubts regarding bias. It is therefore preferable to accept a certain inclination of the party-appointed arbitrators towards the nominating party, as long as the tribunal as a whole is neutral.[71]

4. Preliminary Conclusion

The case law shows that a financial or pecuniary interest, even if remote, can be a ground for challenging an arbitrator. Therefore, whenever a counsel proposes an arbitrator who has a financial interest in the outcome of the arbitration, professional caution should warn him that he runs the risk of a challenge because even "the slightest pecuniary interest"[72] provides a basis for the appearance of bias. Also, there is no guidance as to when disclosure of confidential information to the arbitrator may be an issue, except for barristers.[73] Again, therefore, if counsel proposes an arbitrator who has access to confidential information, he runs the risk of a challenge.

If circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence are present, but the arbitrator is not prepared to step down, arbitration law should offer guidance as to whether the parties' consent would permit the arbitrator to accept the nomination after all. The IBA Guidelines address this issue.[74]

If the parties are not prepared to consent or if such consent is not regarded as admissible arbitration law should offer guidance as to whether the arbitrator should be permitted to prove that there is in fact no risk. Such proof could include screening a lawyer. "Screened", as used here, means the isolation of a lawyer from any participation in a matter through procedures within a law firm to protect confidential information.[75] In other words, the screen consists of assurances by a lawyer that he "will not work on a matter or talk about it with other lawyers in the firm". It remains to be seen whether a party is satisfied with such an arrangement, because "[t]he temptations are still there, violations are usually impossible to police, and the plaintiff's ability to prove a violation is essentially nil".[76]

III. Professional Rules

Most jurisdictions have professional rules designed to secure the independence of lawyers. These rules are particularly well-developed in countries that have a tradition of large law firms, namely the United States and the United Kingdom. In Germany, the professional rules were redefined by the Federal Constitutional Court in 2003.

Broadly speaking, the professional rules require lawyers to refrain from accepting a client if they already represent the opponent or another party whose interests may be adverse to those of the prospective client. The professional rules have recently come closer to the arbitration rules. In some countries the traditional view that a lawyer only represents one party has been called into question as no longer reflecting the modern practice of law.[77] This brings arbitration into the ambit of the professional rules: The lawyer serving as arbitrator does not represent one party against another. Rather, he serves both parties to the arbitration[78] and thereby also arbitration as an institution.

Thus, the professional rules could help when dealing with a challenge to the independence or impartiality of an arbitrator because, at least in certain jurisdictions, they contain certain refinements that may be useful for arbitration cases. Most importantly, some professional rules permit a lawyer to prove that an apparent conflict of interest does in fact not exist. Some of these rules also define informed consent and

[67] AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII. A. 2.

[68] *Astoria Medical Group et al. v. Health Insurance Plan of Greater New York,* Court of Appeals of New York, 23 January 1962, 11 N. Y. 2d 128. The choice of an arbitrator is a "valuable" contractual right not lightly to be disregarded: *Isidore Lipschutz et al. v. Albert Gutwirth,* Court of Appeals of New York, 17 April 1952, 304 N.Y. 58.

[69] *Craig/Park/Paulsson* (fn. 13), p. 227 et seq.; *Redfern/Hunter* (fn. 12), p. 219, also *Fouchard/Gaillard/Goldman,* Traité de l'arbitrage commercial international, Paris 1996, p. 573.

[70] *de Witt Wijnen* et al. (fn. 10), at 443.

[71] *Schlosser* (fn. 18), note 16; *id.,* ZZP 93 (1980), 121, 135 ff.; *id.,* Das Recht der internationalen Schiedsgerichtsbarkeit, 2nd ed. 1989, nos. 519 et seq.

[72] Fn. 15 (*Tumey*).

[73] Fn. 35 (*Laker Airways Inc.*).

[74] General Standards 4 and 2 (d), also the non-waivable Red List.

[75] See the definition in sec. 1.0 (k) of the MRCP. Other terms used in this context are *Chinese wall, ethical wall, cone of silence* and *insulation wall.*

[76] *Freedman,* The Ethical Illusion of Screening, LEGAL TIMES, 20 November 1995, at 24.

[77] For Germany, see § 1 (3) of the Regulation Governing the Lawyers' Professional Conduct ("*BORA*") promulgated by the German Federal Bar Association (*Bundesrechtsanwaltskammer*) on 7 November 2002, published *inter alia* in *Kleine-Cosack,* BRAO, 4th ed., 2003, Anhang p. 729 et seq; *Schlosser,* NJW 2002, 1376, 1377.

[78] *Schlosser,* NJW 2002, 1376, 1377.

address whether law firms may screen a lawyer. On the other hand, it may not be possible to apply the professional rules at face value because they primarily relate to the traditional and prevalent field reserved for lawyers, which is the representation of their clients' interests, rather than to decision making.

Describing the details of each system regulating lawyers is beyond the scope of this article. The professional rules will be reviewed only to the extent that they could serve as a model for solving independence, impartiality or bias questions in international commercial arbitration.

1. The United Kingdom

In the United Kingdom, the professional rules are concerned primarily with the protection of relevant confidential information, defined as information which had been disclosed to the lawyer concerned in confidence, still is confidential, the lawyer concerned is reasonably likely to remember and may be relevant to the new matter at hand.[79] An individual lawyer, who possesses relevant confidential information, whether from an ongoing matter or a closed matter, may not accept the new matter. A law firm may accept a new matter even if certain lawyers in the firm possess relevant confidential information unless, based on the concrete situation at hand, there is a risk that the lawyers possessing the relevant confidential information would disclose it to those lawyers who are working on the new matter. As a rule of thumb, under English law a lawyer is disqualified if there is a "probability of real mischief".[80]

Where there is doubt as to whether the lawyer or the firm have relevant confidential information, the lawyer or the firm bears the burden of showing that they do not, in fact, have such relevant confidential information. English courts are particularly concerned with the "accidental, inadvertent or negligent" disclosure of relevant confidential information.[81]

Screens are admissible, provided there are strict rules to prevent compromising the screen, including accidental, inadvertent or negligent disclosure of relevant confidential information, special supervisors, who are not working on either matter, have been appointed to supervise the observation of such rules, and the rules provide for appropriate sanctions.[82]

2. United States of America

The ABA Model Rules of Professional Conduct ("MRCP") prohibit in Secs. 1.6 (a) and 1.8 (b) the revelation of confidential information except if the client gives "informed consent". "Informed consent", as defined in Sec. 1.0 (e) of the MRCP, denotes agreement "to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of action". Pursuant to Sec. 1.7 (a) of the MRCP, lawyers may not represent a client "if the representation involves a concurrent conflict of interest". If a matter has been completed, the lawyer may not pursuant to Sec. 1.9 (a) of the MRCP accept another client with "materially adverse" interests in the same or a "substantially related" matter. The client's informed consent per se does not eradicate the conflict of interest (Sec. 1.7 (b), but see Sec. 1.9 (b) of the MRCP). In the event that one lawyer in a firm is disqualified, the entire firm is deemed disqualified under Sec. 1.10 of the MRCP: "If one lawyer is out, the firm is out." This is also referred to as *imputed disqualification*.

It is not entirely clear to what extent the new firm may rebut *imputed disqualification* by providing evidence to the effect that the lawyer concerned did not obtain any information on a substantially related matter. Some courts have held that no such proof should be admitted because it is nearly impossible to prove that a particular lawyer was not privy to certain information, since the only witnesses with knowledge are the lawyers themselves.[83] Other courts accept that a firm may rebut the presumption, even in the event that a partner changes firms during litigation, particularly by establishing a screen.[84] If so, a screen is acceptable only if there is no conflict of interest and the "screening measures [are] adequate to prevent disclosure of the confidential information and to prevent involvement by [the moving partner] in the representation; and timely and adequate notice of the screening has been provided to all affected clients."[85]

3. Germany

Under German law, lawyers are required to safeguard confidential information disclosed to them[86] and to refrain from serving "conflicting interests"[87]. A regulation[88] amended the statute by stating that if one lawyer is disqualified, the entire firm is disqualified, regardless of the legal structure of the firm.[89] The regulation makes no exemption with respect to lawyers in the firm, who do not possess relevant confidential information, which leads to the conclusion that a screen is not permitted under German law.

Until 2003, it appeared that Germany would not permit a lawyer to prove that an apparent conflict of interest was, in

[79] *Rakusen vs. Ellis, Munday and Clarke* [1912], 1 Ch. 831; In *re a Firm of Solicitors* [1992] Q. B. 959 = [1992] 2 W.L.R. 809 = [1992] 1 All E. R. 353; In *re a Firm of Solicitors* [1997] Ch. 1.

[80] *Re Schuppan (a bankrupt)* [1996], 2 All ER 665; *Bolkiah vs. KPMG*, [1999] 2 W.L.R. 215; *Kilian*, Die Globalisierung der Rechtsberatung – Interessenkonflikte und Chinese Walls, WM 2000, p. 1366 at 1371.

[81] *Bolkiah v. KPMG*, fn. 80; *In re a Firm of Solicitors* [1997] Ch. 1.

[82] *Kilian*, l. c., 1374.

[83] See *Laskey Brothers of West Virginia, Inc., v. Warner Brothers Pictures, Inc.*, 224 F. 2d 824 (2nd Cir. 1955), also *Hamilton/Coan*, Are We are Profession or Merely a Business?: The Erosion of the Conflicts Rules through the Increased Use of Ethical Walls, Hofstra Law Review, Vol. 27 at 57-108 (1998).

[84] *Schiessle v. Stephens*, 717 F. 2d 417 (7th Cir. 1983). See also ABA Commission on Ethics and Professional Responsibility, Formal Opinion 342 (1975) and Sec. 1.10 (b) of the Minnesota Rules of Professional Conduct as an example of State Rules of Professional Conduct which expressly permit screening.

[85] Sec. 1.10 (b) of the Minnesota Rules of Professional Conduct, see also *Martyn*, Conflicts about Conflicts: The Controversy Regarding Law Firm Screens, 46 Oklahoma Law Review 53.

[86] See § 43a (2) of the Federal Lawyers Regulation (*Bundesrechtsanwaltsordnung – „BRAO"*) which despite its name is a code.

[87] In German: *„widerstreitende Interessen"*, see § 43a (4) of the BRAO, see also § 356 of the German Criminal Code (Strafgesetzbuch).

[88] Known as BORA, see fn. 77, also *Kleine-Cosack* (Fn. 77), l. c., *passim*.

[89] § 3 (2) of the BORA.

fact, no conflict. The Federal Court[90] held that a lateral move of an associate lawyer from one firm (the "old" firm) to another (the "new" firm) would bar the new firm from representing any of its clients in matters where the old firm represented the opponent, even though the lawyer concerned had not worked on any of these matters, neither in the old nor in the new firm. In the case at issue, all clients concerned of both the old and the new firm had been advised of the lateral move and agreed that their representation be continued as before. Nevertheless, the local bar association had enjoined the new firm from working on any of these matters and the Federal Court confirmed the injunction.

The Federal Constitutional Court reversed the injunction and declared the relevant subsection of the Federal Lawyers' Regulation (BORA) unconstitutional,[91] arguing that the freedom to exercise a profession was protected by the German constitution.[92] The court concluded that, where a lateral move places confidential information or generally the "straight forward representation of interests"[93] at risk, the clients should decide whether they want to continue the professional relationship. If the clients consent, the lawyer cannot be enjoined from continued representation of the client unless the consent was tainted by less than frank disclosure of the relevant facts.[94] If the clients do not consent, the statute[95] would enjoin the lawyer concerned, but also his new partners[96] from continued representation, unless the lawyers concerned can dispel any concerns through a screen or otherwise. The decision of the Federal Constitutional Court suggests that such proof should be admitted because otherwise the freedom to exercise a profession would be unduly restricted.[97] This, it is submitted, is an important step in German law and practice; it may lead to the conclusion that screens should be admitted in the context of the German professional rules.

IV. Conclusion

Each of the potential hazards to an arbitration proceeding evoked in Part II above should trigger disclosure under arbitration law. Without disclosure, the parties are not in a position to assess whether the professional relationship at issue could potentially harm their interests.

If there is any doubt as to whether a particular professional relationship could be construed as prejudicial, the arbitration law summarized in Part II above should be searched for similar situations and, if the situation at hand cannot be safely distinguished from one in which such behaviour or an event has been held to be prejudicial, the relationship concerned should be disclosed. No such doubt should be dismissed simply because arbitrator and counsel belong to different firms which, without being formally affiliated, cooperate on the basis of a formal agreement or an informal understanding or best-friends relationship, because any such cooperation may be the basis for a financial interest or significantly increases the risk that confidential information is shared.

If both parties consent, the arbitration should be allowed to go forward. Such consent should be based on full and frank disclosure of the relevant facts. If the parties are satisfied that a screen will work, there should be no need to second-guess their decision.

In certain severe cases,[98] such as those listed in the non-waivable Red List, it is submitted that, as an exception, the parties' consent should be disregarded to protect the trust of the general (commercial) public in arbitration.

No party should be forced to accept an arbitrator, even if the applicable professional rules permit the arbitrator to prove the absence of impropriety, i.e. that there is neither a financial interest nor a relationship conducive to the intentional or inadvertent sharing of confidential information. In particular, an arbitrator should not have the right to force a screen upon a party, assuming the relevant professional rules permit screening. Under the professional rules, screens are, if at all, permitted because "[u]nqualified imputation of conflicts would radically limit the opportunity for attorneys to move from one practice setting to another and the opportunity for clients to change counsel".[99] Under German law, a screen may have to be set up on constitutional grounds in order to prevent a lawyer from being unduly restricted in the exercise of his profession. These arguments appear reasonable in the context of professional rules, where the government imposes limits on the exercise of a lawyer's profession. However, in commercial arbitration these arguments are not convincing, because lawyers have ample opportunity to work and make a living in the field of representing their clients' interests.

An exception may apply with respect to arbitrators who focus their professional activity on acting as arbitrators.

Even if one admitted in principle that an arbitrator may force a screen upon a party or otherwise insist on proving the absence of impropriety, no such proof should be admitted unless the nominating party expressly insists on nomination of its candidate and time is not of the essence, since the process of proving the absence of impropriety is time consuming.

Failure to disclose a potential conflict of interest should always lead to removal of the arbitrator or, if the award has been made, to the award being set aside. This should be so even where, such as in the *AT&T* case, failure to disclose was an error or if the arbitrator attached little weight to an offensive relationship. Justice would not "manifestly and undoubtedly be seen to be done" if the parties feel that the arbitrators have business behind the their backs. Arbitration as such would suffer if this were permitted.

[90] *Bundesgerichtshof („BGH")*, see decision dated 6 November 2000, NJW 2001, 1572.

[91] *Bundesverfassungsgericht („BVerfG")*, decision dated July 3, 2003, NJW 2003, 2520, against a number of authorities including the decision of the *BGH* cited immediately above, see citations at *Kleine-Cosack* (Fn. 77), l. c., § 43a BRAO, Anm. 118 ff.

[92] Article 12 (1) of the *Grundgesetz*.

[93] *„Geradlinige Interessenvertretung"*, *BVerfG*, l. c., p. 2521.

[94] *BVerfG*, l. c., p. 2522.

[95] § 43a (4) of the BRAO.

[96] *Kleine-Cosack*, NJW 33/2003, Editorial.

[97] *BVerfG*, l. c., p. 2521, right column.

[98] See Supreme Court of Canada, *MacDonald Estate v. Martin*, [1990] 3 S.C.R 1235, now commonly known as *Martin v. Gray*; *Schlosser*, NJW 2002, 1376 and the IBA Guidelines, General Standard 4 (b).

[99] *Shaw*, Avoiding Imputed Disqualification Through Screening, Minnesota Lawyer, 3 January 2005.