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IMPARTIALITY AND INDEPENDENCE OF INTERNATIONAL ARBITRATORS

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One of the most basic rules and underlying considerations in every arbitration, particularly international arbitration, is the impartiality and independence of the arbitrators and, even more importantly, the appearance of their impartiality and independence. For the same reason, it is obvious that as the authority of the arbitrators increases by their position as presiding arbitrator or by accepting multimillion dollar cases or highly sensitive disputes between sovereign States, so does the degree of impartiality and independence required from them.

It is a fundamental right of every arbitrating party that its

case be decided by a fair, impartial and independent arbitrator[1] and, for that reason, a party has a fundamental right to seek the disqualification of an arbitrator if there exist circumstances that give rise to justifiable doubts as to his impartiality or independence.[2] The requirement of impartiality and independence of arbitrators is a mandatory one, from which the parties may not derogate. It is also recognized as mandatory under the 1985 UNCITRAL Model Law Article 12 (2) that allows a party to seek disqualification of an arbitrator lacking such qualities, and Article 4 that does not allow waiver of a provision of the Model Law from which the parties may not derogate.[3]

1. *Member, Iran-United States Claims Tribunal.*
"In the determination of his civil rights and obligation ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6(1), European Convention on Human Rights, (emphasis added). This provision has been held applicable to arbitral tribunals, having their place of arbitration in a State party to the Convention. Ivan Milutinuvic PIM v. Deutsche Babcock AG, Swiss Federal Tribunal, First Civil Section, 30 April 1991, BGE 117 la 166, involving an ICC award; see also cases cited in: Matscher, L'arbitrage et la Convention, in Pettiti-Decaux-Imbert. LA CONVENTION EUROPEENE DES DROITS DE L'HOMME, pp. 282-287 (Paris 1995); Moitry, Right to a Fair Trial and The European Convention on Human Rights, 6 J. Int. Arb., No. 2 (1989), pp.115-122.

2. *See Matscher, n. 1, supra. It also follows that the identity of the individual arbitrator must be known to the parties from the outset of the arbitral proceeding so that either party be able to exercise its right of challenge if in its view circumstances exist giving rise to justifiable doubts about the arbitrator. If the individual arbitrator has not been so identified in the course of the arbitral proceeding, a party may successfully seek to nullify the award. This may occur in cases where a juridical person, partnership or association has acted as arbitrator, even if generally authorized by the arbitration statute, (such as Iran's recent International Commercial Arbitration Act 1997 (Article 1 (a)), or agreement of the parties (such as in the fields of insurance, maritime or commodity trading), unless the individual arbitrator acting for the collective body has been identified at the outset of the arbitral proceeding.*

3. *Fourth Working Group Report, A/CN.9/245, para. 178: "Another suggestion was to limit the waiver rule to non-compliance with non-mandatory provisions. The Working Group adopted this suggestion" in order to "soften" the effect of the implied-waiver rule in Article 4 of the Model Law. 15 UNCITRAL Yearbook 1984, p. 174; see also, H. Holtzmann and J. Neuhaus, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, 409 & N. 13 (Kluwer, Deventer 1989).*

Non-observance of impartiality and independence of an arbitrator may result in annulment or non-enforcement of the award rendered by the arbitral tribunal. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Article V (1) (d) provides for refusal to recognize and enforce an award when "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." The UNCITRAL Model Law in addition to this provision in Article 36 has also provided a somewhat similar and yet stranger provision for annulment or "setting aside" of the award in Article 34 (2) (iv), stating that "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law."

Under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of the other States, which to date has been ratified by 131 States, an arbitral award may be annulled on five separate grounds, three of which are relevant to the requirement of impartiality and independence of arbitrators. Under Article 52 of the Convention, an ad hoc committee may annul an award if the arbitral "Tribunal was not properly constituted, there was corruption on the part of a member of the Tribunal" or "there has been a serious departure from a fundamental rule of procedure." These grounds for annulment have also been recognized under the 1953 International Law Commission Model Rules on Arbitral Procedure, Article 35.

The general practice of appointment of the presiding arbitrator of neutral nationality that has been recommend by The UNCITRAL Arbitration Rules, Article 6 (4) and required by The ICC Rules, Article 9 (5) and the Washington Convention, Article 38, is not simply a nationality other than that of the parties. This prevailing practice in international arbitration is indicative of the required importance of the appearance as well as the reality of absolute impartiality and independence of presiding arbitrators.[4] This neutrality is not limited to simply a third nationality, but also includes religion, politics, economic ideology and social environment that may form an arbitrator's way of thinking and thereby sub silentio affect the decision making process or give that appearance.

In fact, third nationality alone will be misleading for the purpose it has been devised, as ideology has no boundary, in that persons with the same nationality might have quite divergent political, economic, social and religious views. What neutrality is intended to bring with the presiding arbitrator is open-mindedness and a balanced approach to the conduct and resolution of the case, a balanced approach which does not have to be dismissed or moderated by both party appointed arbitrators, or worse by one

4. *P. Lalive, On the Nationality of the Arbitrator and the Place of Arbitration, in SWISS ESSAYS ON INTERNATIONAL ARBITRATION, 23, 24 & 27 (1984); P. Lalive, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SWISSE, 339 (1989); P. Lalive, Conclusions, in THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS, ICC Publication No. 472 (1991), pp. 119, 121; H.A. Grigera Naón, Factors to Consider in Choosing an Efficient Arbitrator, in IMPROVING THE EFFICIENCY OF ARBITRAL AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 286, 288-290, ICCA Congress Series NO. 9 (1999); W. Michael Reisman, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS, 499-500 (Yale, New Haven 1971).*

who, as some argue, is expected to agree with the basic position of the appointing State, where the proposed approach is in favor of that State.[5] Of course, lack of open-mindedness or a balanced approach is not partiality, but it may in certain circumstances amount to lack of fitness for the post of a neutral presiding arbitrator. Such a predisposition or misbehaviour on the part of an arbitrator usually takes shelter in the confidentiality rule of the deliberations,[6] which is most dangerous to the arbitral process and its fairness, as it cannot be cured from either within or without. "If it manifests itself in the course of the process of arbitration, even for a relatively minor matter, then it exceeds its bounds and is corrupt behaviour," as put by Reisman.[7]

The requirement of impartiality and independence of arbitrators emanates from a fundamental principle of natural justice recognized in almost every legal system that one may not be a judge of his own cause (nemo judex in sua causa) and the famous maxim, coined by Lord Hewart, and that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[8] The application of these principles have also recently resulted in setting

5. See, E. Lauterpacht, The Role of Ad Hoc Judges and Commentary thereto, in *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, 370-385, (C. Peck & R. Lee eds, Martinus Nijhoff, The Hague 1997).*

6. *However, in a proceeding to vacate an award for evident partiality and misconduct, court swill not adhere to this confidentiality rule of the arbitration and seek arbitrators' testimonies.* See, *e.g., section 10 of the U.S. Arbitration Act and cases cited in Reilly,* The Court's Power to Invade the Arbitrators' Deliberation Chamber, *9 J. Int'l Arb. 27 (1992).*

7. See Reisman, supra, n. 4 at 503.

8. *Rex v. Sussex, Justices, Ex parte McCarthy [1924], K.B. 256, 259; Metropolitan Properties Co. Ltd. v. Lannon [1969] Q.B. 577 at p. 599, per Lord Denning. As to both nemo judex in sua causa and the maxim that justice should be seen to be done, see also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, 279-289 (1953, re-print Grotious, Cambridge 1987).*

aside of a landmark judgment of the British House of Lords concerning extradition of General Pinochet, which involved important issues of crimes against humanity and immunities of a former Head of State under international law.[9] A committee of the House of Lords set aside the original judgment because one of the judges, Lord Hoffman, was found to have an interest, though non-pecuniary, in the outcome of the case, in promoting the same cause as a party to the appeal (Amnesty International) and being an alter ego thereof, hence application of the rule that a man may not sit as a judge of his own cause and the maxim it that is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done, resulting in automatic disqualification of the judge unless he has made sufficient disclosure.

In a case where an arbitrator is shown to have an interest in the subject matter or outcome of the case, his disqualification may be considered absolute or automatic and thus needless of a further inquiry of whether he was actually biased or there was a suspicion that he was not impartial. The first category includes employment and close family relationship with a party, his representatives, counsel, their spouses, or potential important witnesses. The second application of these principles is where in some other way the arbitrator's conduct or behavior may give rise to a likelihood or

9. *In re-Pinochet, [1999] H.L.--, Oral Judgment of 17 December 1998 and Reasons of 15 January 1999 (per Lord Browne-Wilkinson), reprinted in 38 I.L.M. 432 (1990); The House of Lords'original judgement of 25 November 1998 that save for the annulment has made a significant contribution to the development of international law may be found in 37 I.L.M. 1302 (1998). The third judgement by another committee of the House of Lords in a sharply watered down scope reaffirming the original judgment also may be found in 38 I.L.M.581 (1999). Our reference in the present paper is to the 17 December 1998/15 January 1999 judgement and reasons.*

suspicion of bias, demanding investigation, and thus the disqualification thereunder may be called relative. In either situation, non-disclosure of the matter will help establish the disqualification, and it is perhaps more decisive in the first category than in the second.

There is no exhaustive list of circumstances that would give rise to justifiable doubts as to impartiality or independence of an international arbitrator. And this is so for good reason, as circumstances vary considerably. To be able to discharge his duties without bias and the appearance of bias, an international arbitrator must remain impartial and independent not only from the arbitrating parties, their counsel and representatives, but also from their potential witnesses and experts[10] as well as from the experts appointed by the tribunal. Likewise, international arbitrators must be free from any prejudgment or prejudice as to the factual and legal issues arisen or likely to arise in the case. Also necessary is the arbitrator's observance of fairness, impartiality and independence in the conduct of the arbitral proceedings, as a matter of his foremost professional standard[11], the disregard for which invariably described as misconduct has resulted in disqualification of the arbitrator.[12] The circumstances implicating impartiality and independence of arbitrators include,

10. *See, e.g., the 1987 International Bar Association Rules of Ethics, Article 3.3 and 1990 Chartered Institute of Arbitrators, Guidelines of Good Practice for Arbitrators, para. 3.3.*

11. *Id. Article 1. "Professional Standard. An arbitrator shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias."*

12. *Faure, Fairclough Ltd v. Premier Oil and Cake Mills Ltd [1968] 1 Lloyd's Rep. 237 at 240; judgment by Diplock LJ in London Export Corps Ltd v. Jubilee Coffee Roasting Co Ltd [1958] 1 Lloyd's Rpt 197; judgment by Donaldson in Thomas Borthwick (Glasgow) Ltd v. Faure Fairclough Ltd [1968] 1 Lloyd's Rep 16 at 29.*

though not limited to, "financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent."[13]

Impartiality and independence have not been distinguished in the drafting of the 1976 UNCITRAL Arbitration Rules. They have been used to signify the same concept, often with the conjunctive or between the two terms. However it is not difficult to discern that partiality arises when an arbitrator favors one of the parties, or when he is prejudiced in relation to the subject matter of the dispute, while dependence arises from relationships between the arbitrator and one of the parties, or with someone closely connected with one of the parties.[14]

While, it may be argued that all members of an international arbitral tribunal should observe the qualities mentioned above in the conduct of the arbitration, it is axiomatic that the presiding arbitrator must observe them meticulously and transparently, especially as to his appearance, whether or not the arbitral tribunal includes party appointed arbitrators. It is obvious that such a test becomes all the more compelling for the presiding arbitrator in tribunals with party appointed arbitrators. The reason is clear; while national, ad hoc or party appointed arbitrators/judges play an important role in the process of decision making, it is the neutral member, in particular, the president, who in the balance will tip the decision in one direction or the other. The presiding arbitrator also has the ancillary task of overseeing the observance of this rule by

13. *6 UNCITRAL Yearbook 1975, p. 171.*
14. *See the 1987 International Bar Association Rules of Ethics for International Arbitrators, Article 3.1 and the 1990 Chartered Institute of Arbitrators Guidelines of Good Practice for Arbitrators, paragraph 3.1.*

his colleagues in protecting the integrity of the process, as recognized in Article 24, paragraph 2 of the Statute of the International Court, and so his own conduct would be exemplary for other members of the arbitral tribunal and in relation with the parties, so that he can inspire confidence and respect in his colleagues and more importantly, the parties, a quality which is the corner stone of any successful arbitration.

To safeguard the basic rule of impartiality and independence, there is a continuing obligation of disclosure by the arbitrator of any circumstances likely to give rise to justifiable doubts as to the lack of such qualities not only at the time a prospective arbitrator is approached, or at the time he accepts the appointment and signs a declaration of independence, but also at any time in the course of the arbitral proceeding before the award is finally rendered and for a reasonable period thereafter. Lack of disclosure of a questionable circumstance may, by itself, establish the existence of justifiable doubt. Similarly, if a party has become aware of the situation and yet proceeded with the arbitration may have no cause to complain in the arbitral process, unless perhaps for cumulative effect of repetitive situations, even though he may still have a case against the award in an annulment or enforcement proceeding.

Any disregard for the basic rule and fundamental right of a party to an impartial and independent arbitrator will result in the disqualification and removal of the arbitrator through a challenge procedure if the violation is discovered in the course of the arbitral proceeding. If, however, the compromising circumstance is discovered after the award has been delivered, the sanction may be

limited to the setting aside, nullity or non-recognition and non-enforcement of the arbitral award.

The UNCITRAL Arbitration Rules, Article 9, provides that "[a] prospective arbitrator shall disclose to those who approach him with possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" and "once appointed or chosen shall" do so "to the parties". The UNCITRAL Model Law, Article 12 (1) incorporating this provision also adds the continuity of this obligation: "An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties". The obligatory nature of timely disclosure of any circumstances likely to give rise to justifiable doubts about an arbitrator's impartiality or independence results in disqualification of the arbitrator concerned. Under the IBA Rules, where this disclosure is exhortatory, Article 4 provides that "[a] prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence", adding that "[f]ailure to make such disclosure creates an appearance of bias, and may of itself be ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification." Emphasis added. United States and English courts have held that the mere appearance of bias is sufficient to disqualify an arbitrator,[15] and non-disclosure thereof is sufficient to establish apparent partiality and become a basis to set aside the award,

15. *Commonwealth Coating Corp. v. Continental Casualty Co., 393 US 145, 150 (1968); Woods v. Saturn Distribution Corp., 78 F. 3d 424, 427 - 428 (9th Cir. 1996); Metropolitan Properties Co. Ltd., v. Lannon, [1969] Q.B. 577, at p. 599 (per Lord Denning).*

because it involves the integrity of the arbitral process including the arbitrator's eligibility for appointment, while in actual bias cases the integrity of his decision will be directly at issue.

Objectivity is the test in appearance of bias as well as in justifiable doubt, both under Article 9 or 10 of the UNCITRAL Arbitration Rules and its progeny in UNCITRAL Model Law, Article 12, paragraphs 1 or 2, and that test is met by any circumstance which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that the arbitrator is not impartial or independent. It rules out any subjective consideration of the arbitrator's lack of malice, good intention or prominence of his personality and character, which might be examined if the test was evident partiality or actual bias. The objectivity test of justifiable doubt or appearance of partiality is also necessary to ensure and maintain confidence in the arbitrator. As stated before, because an arbitrator is not a State judge and takes his legitimacy only from the parties' agreement to arbitrate their dispute, it is crucial that a party's confidence is maintained throughout the arbitral process. The fact that arbitration is the last resort in the determination of the parties' disputes, in the sense that there is no appeal from the arbitrator's final and binding award to another court and the possibilities of annulment and non-enforcement proceedings are limited or practically not available in inter-State arbitrations, the observance of these qualities by the arbitrator and their application by those who decide them must aim at the integrity of the process instead of concern for the individual arbitrator.

In many cases, evidence of bias is difficult to obtain and hence the resort to challenge, even if unsuccessful, is expected at least to caution the challenged arbitrator and call on his colleagues to remedy the imbalance. It would be disturbing to the integrity of the arbitral process if the challenged arbitrator were even emboldened in his misbehaviour against the challenging party, where the challenge has been denied.

An international arbitrator must also avoid any dispute or conflict of interest with an arbitrating party outside the arbitral proceeding, when it is in progress. It is also obvious that loss of qualifications impinging on the arbitrator's character at large may similarly constitute a cause for his disqualification. This could include involvement in criminal conduct, whether violent or white collar, other conducts contrary to public order or good morals (bonos mores), that would give rise to justifiable doubts on the confidence that a party has placed in him, especially arbitrations involving public authorities, such as inter-State arbitrations or arbitrations with State agencies. In other words, circumstances giving rise to justifiable doubts as to impartiality or independence of an international arbitrator go beyond proscription of the conflict of interest. While this principle has under the 1976 UNCITRAL Arbitration Rules been subsumed partly as impartiality and independence in Article 10 and partly as de jure or de facto inability to act in Article 13, the 1985 UNCITRAL Model Law on International Commercial Arbitration has also included lack of qualifications agreed upon by the parties in Article 12 or agreement of the parties on the termination of an arbitrator's mandate in Article 14 as grounds for removal of an arbitrator. Similarly, the 1998 ICC Arbitration Rules, Article 11, have

employed the term "lack of independence or otherwise" for challenging an arbitrator, so that the language of the provision would not be a limitation to an otherwise valid ground for removal of an arbitrator, who might in one way or another have compromised the confidence of an arbitrating party.

Likewise, under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, Article 57, if an arbitrator manifestly lacks high moral character, recognized competence in the field of law, is not in a situation to be relied upon to exercise independent judgment, or is found to have been ineligible for appointment to the arbitral tribunal, such as having nationality of one of the parties absent their agreement at the time of his appointment, the arbitrator will be disqualified. Similarly, in accordance with the Arbitration Rules of the International Centre for Settlement of Investment Disputes ("ICSID"), established under the Washington Convention, an arbitrator shall be disqualified if he becomes "incapacitated or unable to perform the duties of his office." He shall also be deemed to have resigned if an arbitrator does not sign a declaration by the end of the first session of the Tribunal that inter alia would state that "to the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal," and "I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention ..... and Rules made pursuant thereto", and would enclose a statement of his "past and present professional, business and other relationships (if any) with the parties." The incapacity of arbitrators has also been

contemplated for vacating their position in the International Law Commission's Model Rules of Arbitral Procedure Article 5.

While international arbitrators are not full time judges of a court whose proceedings and judgments are public such as in the case of the International Court of Justice, it may be helpful to note here that the Statute of the International Court in Article 16 (1) provides that:

> No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature,

in Article 17 that (1)

> No member of the Court may act as agent, counsel, or advocate in any case.

and that (2)

> No member of the Court may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.

As to the standards for impartiality and independence of arbitrators, it will be also useful to consult the International Bar Association Rules of Ethics for International Arbitrators, the Chartered Institute of Arbitrators' Guidelines of Good Practice for

Arbitrators, and the American Bar Association/American Arbitration Code of Ethics for Arbitrators. Study of the case law will, as always, give insight into the consideration of the grounds, applicable tests and timeliness of the challenge as well as appealability of the decision thereon.

As to the timelines of the challenge, the UNCITRAL Arbitration Rules, Article 11 (1), and the UNCITRAL Model Law, Article 13 (2), provide an unrealistically short period of 15 days to a party within which to submit its statement of the reasons for challenging an arbitrator after the implicating circumstance has become "known" to that party. The rationale for this is said to have been avoidance of a potential delay and disruption of the arbitral proceeding occasioned by the challenge, that, if successful, would result in appointment of a substitute arbitrator and possible repetition of a hearing and therefore it would be desirable that challenges be made at the earliest possible stage.[16] But it must be clear that such a desire should not take away a fundamental right of a party. After all, the circumstance could have been disclosed or avoided by the arbitrator concerned, unless one were to proceed with the premise that every challenge is an abuse of the process unless proven otherwise.

The ICC Arbitration Rules, 1998, Article 11 (2) provides for 30 days from the date when the party making the challenge was "informed" of the facts and circumstances on which the challenge is based. The Permanent Court of Arbitration Steering Committee, of which I have been a member, in adopting the

16. *UNCITRAL Doc. A/CN.9/112/Add.1 (1975), 7 UNCITRAL Yearbook 1976, at 170: A/CN.9/IX/CRP.1. para. 63 id at 71.*

UNCITRAL Arbitration Rules for its four separate sets of Optional Rules, in recognition of the impracticability of the 15 day period for submission of the challenge statement extended it to 30 days in Article 11 (1) of each set of the Rules.[17] In contrast with the rules referred to above, the ICSID Arbitration Rules do not provide for any number of days from a particular time for the disqualification statement to be submitted by the proposing party, but require that the party "shall promptly, and in any event before the proceeding is declared closed, file its proposal" for disqualification of an arbitrator, "stating its reasons therefor." Rule 9. This provision also noticeably does not have the complication of proof or disproof of the date the circumstance or fact on which the challenge is based, has become know to, or a series of events has become ripe for, the proposing party, the so-called cumulative effect, and this provision of Rule 9 has not given rise to any noticeable complication that the drafters of the UNCITRAl provisions were to have intended to avoid. The ICSID Arbitration Rules have been in operation since 1 January 1968 and their 1984 revision has not affected Rule 9, discussed above. As to appealability of the challenge decision, it should be recalled that the ICC Arbitration Rules, 1998, Article 7(4) provide that the ICC decision "shall be final". French courts that have considered this point have ruled that the ICC Court's function in this respect is "administrative" and therefore not subject to their judicial review, unless when dealing with annulment or enforcement proceeding

17. *The four sets of PCA Optional Rules are as follows: (1) Optional Rules for Arbitrating Disputes between two States (1992), (2) Optional Rules for Arbitrating Disputes between two Parties of which only one is a State (1993) (3) Optional Rules for Arbitration Involving International Organizations and States (1996), and (4) Optional Rules for Arbitration between International Organizations and Private Parties (1996).*

against the award.[18] The London Court of International Arbitration Rules, 1998, Article 29, provide that such a decision by the LCIA Court "shall be conclusive and binding" and "to be treated as administrative in nature", unless the law of the place of arbitration or mandatory provision of any applicable law does not allow such a waiver of any right of appeal or review to any state court or other judicial authority. In contrast, the UNCITRAL Model Law, Article 13(3) provides that "[i]f 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" of the place of arbitration "to decide on the challenge, which decision shall be subject to no appeal". Similarly, the UNCITRAL Arbitration Rules not only lack a finality provision for a challenge decision in contrast with the one for the award, Article 32 (2), but also their drafting history indicates that a proposed provision to that effect was rejected because the challenge decision is appealable to judicial authorities under the law of a number of countries including Germany and Austria.[19] Under the Netherlands arbitration law, decision by an arbitral institution or appointing authority on the basis of the parties' prior agreement does not affect the unsuccessful party's right to seek decision of the

18. *See, cases noted in 1985 Rev. Arb. 141; but see also PIM v. Deutsche Babcock, AG, n. 1 supra and AT & T Corp. et al v. Saudi Cable Co. 1999 Folio No. 572, Eng. Comm. Q.B.D.*

19. *6 UNCITRAL Yearbook 1975, 9, 34, paras. 87-88.*

President of the District Court on the challenge.[20] The ICSID Arbitration Rules also lack a finality provision for decisions as to disqualification of arbitrators.[21] But whether revision of a challenge decision by the same or a substitute appointing authority would be available under the UNCITRAL Arbitration Rules calls for another opportunity to examine.

However, more importantly, a final and at the same time primary consideration is whether resort to the challenge would increase, let alone secure, the prospect for an impartial and independent arbitration even if not successful in removing the challenged arbitrator, or whether, if not invoking the challenge procedure in the course of the arbitral proceeding, the party has available to it a right to annulment or non-enforcement proceeding against the eventual award, including the opportunity to raise the challenge issue. A question relevant to the consideration here may be also the character of the authority who has been entrusted with the task of deciding on the challenge, even though he must decide the challenge objectively. If he is as partial or prejudicial as the challenged arbitrator, does not disclose his relations with the challenged arbitrator or the opposing party so that he could be asked to withdraw, while a fortiori he should be bound by even

20. *The Netherlands Arbitration Act of 1986, Article 1035, Note 31 by P. Sanders and A.J. van den Berg (Kluwer, Deventer 1987); INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, National Reports, The Netherlands, (by A. van den Berg). p. 10; "The parties may also agree that the challenge be brought before a third person. Accordingly, arbitration rules may provide that the arbitration institute decides on the challenge (e.g., Art. 19 of the NAI Rules). Such agreement may be useful in that, if the arbitration institute has rejected the challenge, it is unlikely that the President of the District Court will uphold the challenge. However, such agreement cannot have the effect of excluding the President with respect to the challenge of arbitrators."*

21. *See, Amco Asia Corp., v. Indonesia, ICSID ARB/81/8. Decision on Disqualification (24 June 1982).*

stricter standard of neutrality, or does not establish a meaningful and transparent procedure to deal with the challenge, the arbitration would become a perilous affair, especially if there is no prospect of a review of the challenge decision or the eventual award.

The Permanent Court of Arbitration Expert Group in 1992 considered alternatives to the Appointing Authority under Article 6 of the UNCITRAL Arbitration Rules for inclusion in the PCA Optional Rules for Arbitrating Disputes between two States or between two Parties of which only one is a State. It was considered that one alternative to the appointing authority could be the establishment of a "panel of persons" representing all legal and economic systems, not dissimilar to the ICC Court of Arbitration, whose plenary, drawn from all parts of the world, deals with challenge requests. It was also considered that the President of the International Court of Justice be given such authority, as he is often designated as the appointing authority in disputes between States, international organizations or States and private persons, as regularly noted in the ICJ Yearbooks since the Court's establishment in 1946.[22] By such long experience, including those under Article 24(2) of the Court's Statute, referred to above[23], the office of the President of the Court would contribute to the viability of the arbitral process. Further, the three year term of office of a Court President is much longer than the one year term of office of president of a number of arbitral institutions, who act as appointing authority under their rules, such as president of the Chartered Institute of Arbitrators (1988 Rules,

22. See, *e.g. International Court of Justice, Yearbook 1996-1997, pp. 162-163.*
23. See, supra, *p. 6.*

Article 2) or London Court of International Arbitration (1998 Rules, Article 3). It was also suggested that the high sensitivity of office of the appointing authority, even in the traditional commercial East-West disputes, has resulted in agreements, setting an alternative to the unknown person whom the Secretary-General of the Permanent Court of Arbitration might designate in their future disputes, if a situation were to arise for a party under the UNCITRAL Arbitration Rules.[24] In the end, the Expert Group was only able to name the President of the ICJ as apossible candidate over whom the parties could agree.[25] However, this has encouraged the advantageous practice for some arbitrating parties to select the ICC Court as the appointing authority and to adopt the UNCITRAL Arbitration Rules for the conduct of their arbitral proceeding, as a more reliable and less costly method.

In conclusion, if international arbitrators observe the fundamental rule of impartiality and independence and fair play as discussed above, rarely may a party find it necessary to challenge an arbitrator and thereby to risk its relationship with the

24. *At least 6 contracting States of the 1899 or 1907 Convention on the Settlement of International Disputes (Hungary, Bulgaria, Poland, Czechoslovakia, Austria and the United States) in adopting the UNCITRAL Arbitration Rules for the arbitration of their East-West commercial disputes designated the Austrian Federal Economic Chamber as their appointing authority. Moreover, where the disputes involved Austrian and Czechoslovak parties, the chamber of commerce of the country of the respondent was designated as the appointing authority, while where the dispute involved a party from either of the two countries and a party from any third party country, the chamber of commerce of either of the two countries not involved in the dispute was designated as the appointing authority. See for these agreements, YEARBOOK COMMERCIAL ARBITRATION as to U.S.A. - Hungary - Austria, vol. X (1985) pp. 141 - 144, U.S.A. - Bulgaria - Austria, vol. XII (1987) pp. 197-98; U.S.A. - Poland - Austria, vol. XIV (1989) pp. 284-89; U.S.A. - Czechoslovakia - Austria vol. XV (1990) pp. 186-92; and Austria - Czechoslovakia, vol. XV (1990) p. 151.*

25. See, PCA Summary of Views of the Expert Group, para. 20.

challenged arbitrator and his colleagues. If, however, a challenge is made and the challenged arbitrator does not find any truth in it, he should more than ever avoid confrontation with the complaining party and be rather reassuring of his impartiality and independence to it, explain the facts and let the appointing authority decide the matter in consultation with other arbitrators, in case the opposing party does not agree with the challenge. In other words, wisdom and moderation in dealing with the challenge will be required by all concerned and will contribute more to the furtherance of the arbitration and its ultimate goal, i.e. fair resolution of the dispute regardless of whether it ends in the substitution of the challenged arbitrator.