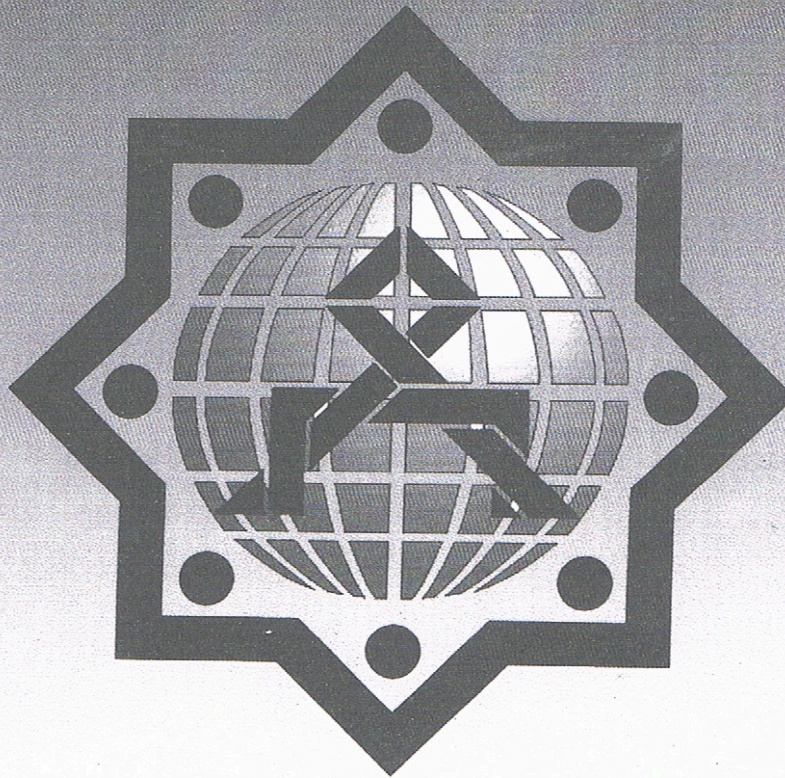


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**IMPARTIALITY AND INDEPENDENCE
OF
INTERNATIONAL ARBITRATORS**

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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 arbitrator¹ 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 Milutinovic 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 *Petit-Ducaux-Imbert. LA CONVENTION EUROPEENNE 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 recommended 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 iudex 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 will 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 iudex 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 Grotius, 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 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.