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CLEARER ETHICS GUIDELINES AND COMPARATIVE STANDARDS FOR ARBITRATORS

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I. LEGAL AND REGULATORY IMPROVEMENTS TO ARBITRAL ETHICS

1. Arbitrator's commitment to ethical values

1. Throughout his long professional career, Bernardo Cremades has amply demonstrated great diligence in the discharge of his arbitral duty, including his scrupulous respect for the principles of independence and impartiality which are the essence of his calling⁹⁹¹. In addition to his outstanding work as an international arbitrator, Spain should be proud to have a jurist who, from the desert of the 1953 "anti-arbitration" law has energetically promoted in Spain the consolidation of this mechanism for resolving conflicts. I have had the good fortune to actively witness this impressive endeavour over several decades. May this paper, therefore, be a heartfelt tribute to a great Spanish master whose excellence in the field of arbitration has made him a universally respected figure.

The essential duty of an arbitrator is to facilitate dialogue between the parties, making it possible to reach an agreement by both individualising litigious issues and arriving at a fair solution based on the understanding that the ethical duties of an arbitrator start from the moment he accepts the appointment and persist throughout each stage of the arbitration process.

A good arbitrator is one who imposes his ethical values, fully aware that this will affect his reputation and that his professional future will be benefited by conducting himself according to these values and not bending to the demands of a particular case. For this reason, professional ethical standards, as moral principles, acquire particular relevance in services performed by arbitrators⁹⁹². It is no coincidence that professional

⁹⁹¹ Cass civ. March 16, 1999, *Rev. arb.*, 1999, pp. 193 *et seq.* note M. Henry, "Les obligations d'indépendance et d'information de l'arbitre à la lumière de la jurisprudence récente".

⁹⁹² F. N. Andrighi, "A ética como pilar de segurança da arbitragem", *Revista de Doutrina e Jurisprudência* (Brasília), n° 53, 1997, pp. 24-26; S.M. Ferreira Lemes, *Princípios da independência e da imparcialidade*, São

arbitration associations are particularly concerned with establishing ethical principles to serve as guidelines for arbitration activity⁹⁹³.

2. The differences between impartiality, independence and neutrality, because of their indeterminate and ambiguous nature, have given rise to long and sterile dogmatic debates which have often been a smoke screen to conceal their real meaning in the opinion of arbitrators⁹⁹⁴. In fact, impartiality and independence are actually two sides of the same coin: what matters is that both concepts describe a general expectation of the parties that their arbitral tribunal will be neutral as between the parties in performing its duties. Neutrality mainly relates to party appointed arbitrators who may be predisposed in favour of the party appointing them, although this circumstance must not prevail over their professional judgement if they consider that the other party is right⁹⁹⁵.

In *Rostock Poyectos, S.L. / Técnicas Reunidas, S.A.* the Provincial Court of Madrid stated the following:

“It has generally been understood that independence is an objective concept detected in the relationship between the arbitrator and the parties, while impartiality seems to be a necessarily subjective attitude to the situation of conflict on the part of the arbitrator. This should be understood fundamentally as an essential ethical duty of the arbitrator. Independence depends on past or present relationships with the parties that can be catalogued and verified, while impartiality is a mental attitude and, as such, harder to evaluate. However, the requirement of independence does not in itself guarantee the impartiality of the arbitrator, as even an independent arbitrator can be partial”⁹⁹⁶.

These notions have often been approached from a notably jurisdictional angle⁹⁹⁷, and this should be abandoned in favour of emphasising the characteristics of arbitration

Paulo, LTr, 2001; H. Gabriel and A.H. Raymond, “Ethic for Commercial Arbitrators: Basic Principles and Emerging Standards”, *Wyoming L. Rev.*, vol. 5, n° 2, 2005, pp. 453-470; R. Mullerat Balmaña, “Ethical Rules for Arbitrators”, *Anuario de Justicia Alternativa*, n° 6, 2005, pp. 77-117; C.A. Rogers, “The Ethic of International Arbitrators”, *The Leading Arbitrators’ Guide to International Arbitration* (L.W. Newman and R.D. Hill, eds.), 2nd ed., Juris Publishing, 2008 (Chap. 28); P. Mitchard, “Ethics in European Arbitration”, *The European & Middle Eastern Arbitration Review*, 2009. <http://www.globalarbitrationreview.com/reviews/14/sections/53/chapters/509/ethics-european-arbitration/>.

⁹⁹³ See B.M. Cremades, “Nuevo Código ético para los árbitros internacionales”, *Revista de la Corte Española de Arbitraje (RCEA)*, vol. IV, 1987, pp. 9-14.

⁹⁹⁴ X. de Mello, “Réflexion sur les règles déontologiques élaborées par l’*International Bar association* pour les arbitres internationaux”, *Rev. arb.*, 1988, pp. 339-348. P. Lalive, “Rapport de synthèse”, *La procédure arbitrale et l’indépendance des arbitres*, ICC Publications n° 472, 1991, p. 59.

⁹⁹⁵ A. Redfern and M. Hunter (with N. Blackaby and C. Partasides), *Law and Practice of International Commercial Arbitration*, 4th éd, London, Sweet&Maxwell, 2004, n° 4-54 and 4-46.

⁹⁹⁶ AP Madrid, Juin 13, 2007, *Arbitraje. Revista de Arbitraje Comercial y de Inversiones (Arbitraje)*, vol. I, n° 2, 2008, p. 547 *et seq.* note E. Vallindes García.

⁹⁹⁷ From the judge’s perspective see, *inter alia*: V. Angiolini, “Indipendenza della magistratura e verifiche di professionalità”, *Questione Giustizia*, 2000, n° 2, 315-329; P. Fernández-Viagas Bartolomé, *El Juez imparcial*, Granada, Comares, 1997; P. González Granda, *Indipendencia del juez y control de su actividad*, Valencia, Tirant Lo Blanch, 1993; R. Jiménez Asensio, *Imparcialidad judicial y derecho al juez imparcial*, Pamplona, Aranzadi, 2002; G. Masson, *Les juges et le pouvoir*, Paris, A. Moreau, 1977; J. Montero Aroca, *Indipendencia y responsabilidad del juez*, Madrid, Civitas, 1990; J.L. Requejo Pagés, *Jurisdicción e independencia judicial*, Madrid, CEC, 1989; R. Rodríguez Fernández, *La contaminación procesal: El derecho al juez imparcial. Causas*

itself, because the role of arbitrator, in contrast with that of a jurist, revolves around the wishes of the parties. Arbitrators are not judges⁹⁹⁸. Indeed, it is inconceivable that the laws of arbitration could establish formulas to guarantee the independence of arbitrators in the same way as those established for judges in jurisdictional rules. Neither is it possible to accept, however, that the notion of “impartiality” can only be applied to the judiciary⁹⁹⁹. However, there are several important similarities between the two roles, as the Sentence of the Provincial Court of Madrid of July 28, 2005 highlighted,

“[T]he requirement of the right to an impartial judge chosen by Law cannot be imposed exactly and precisely on arbitrators and arbitration service providers; the right to an impartial judge chosen by law involves a number of connotations derived from the limits of political power and the permanence of essential guarantees for citizens, which is not the case in other forms of justice. Nevertheless, if there is one thing that characterises arbitration, as a private, adjudicative body, it is the requirement of impartiality, a requirement that should be extended to all those taking part in arbitration activities; both arbitrators and arbitration service providers”¹⁰⁰⁰.

The Spanish Constitutional Court has confirmed the subjective right of parties presenting their disputes to the impartiality of an arbitrator, and that the conduct of arbitral proceedings should not be detrimental to their right to a fair hearing, being a right derived from the legal configuration of arbitration itself as an adjudicative approach to conflicts. Nevertheless, it considers that this right is specifically implemented in the sphere of ordinary legal practice, its protection being applied exclusively through the decision to vacate awards¹⁰⁰¹.

2. Ethical standards imposed by law and by arbitration centres

3. The ethical obligations to which arbitrators are subject, according to most arbitration legislation, and the regulations established by leading arbitration service providers are based on the aforementioned basic principles of impartiality and independence with, in some cases, the addition of neutrality. Although, *prima facie*, impartiality and independence are fundamental and necessary guarantees to ensure correct administration of justice, they should also be taken as guarantees for those seeking justice, i.e., as a right to be heard by an independent and impartial court. Article 12 of Uncitral Model Law (1985) establishes the arbitrator’s duty to remain independent and impartial during the arbitration process, a circumstance referred to in Article 17(1) of the Spanish Arbitration Act (2003). This duty starts from the moment the arbitrator is appointed and ends, barring termination in exceptional circumstances pursuant to Article 38(2), with the final award or, if applicable, the corresponding decision to request clarifica-

de abstención y recusación, Granada, Comares 2000; D. Simon, *La independencia del juez*, Barcelona, Ariel, 1985; R. Stevens, *The Independence of the Judiciary: the View from the Lord Chancellor’s Office*, Oxford, Clarendon Press, 1993.

⁹⁹⁸ H. Gabriel and A.H. Raymond, “Ethic for Commercial Arbitrators...”, *loc. cit.*, p. 453.

⁹⁹⁹ J.M^a Ruiz Moreno, “Nombramiento y aceptación de los árbitros. Imparcialidad, recusación y abstención”, *Estudios sobre arbitraje. Los temas clave* (J.L. González Montes, coord.), Madrid, La Ley, 2008, pp. 73-112, esp. p. 97.

¹⁰⁰⁰ JUR 2005\237326.

¹⁰⁰¹ Spanish Constitutional Court, 9/2005, January 17, 2005.

tion or correction or to issue a supplement to the award (Articles 38(1) and 39)¹⁰⁰². This conclusion, however, does not exempt arbitrators from their ethical commitment to arbitration. What it does involve is leaving a reasonable period of time before resuming personal, professional or commercial relations with parties, and abstaining from helping the losing party prepare their motion for setting aside the award.

4. The rules of arbitral institutions usually include the ethical principles of impartiality and independence in order to ensure that the appointed arbitrator is qualified to rule on the conflict heard before him fairly and impartially¹⁰⁰³. Nevertheless, the scope of these duties is different, giving rise to enormous variations which can often determine the choice of a particular service provider if these issues are not carefully regulated. An arbitrator may have no problem providing his services to one institution, and yet be rejected by another. With regard to regulations, a difference should be made between those which come from outside a particular arbitration service provider and those designed to comply with a particular institutional strategy, which evidently include a pre-established series of interests¹⁰⁰⁴.

i) Among the latter, we must refer to the Unictal Arbitration Rules (1976) which, in Article 9, establish that “(A) prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances”.

ii) Among the former we would refer to the provisions of the rules of leading arbitration institutions: Article 5(2) of the LCIA Arbitration Rules (1998)¹⁰⁰⁵, Article 14.1 of the ICSID Convention (1965)¹⁰⁰⁶, or the AAA International Dispute Resolution Procedures (2009), which, in addition to establishing in Article 7 that “Arbitrators acting under these Rules shall be impartial and independent”, in Section 2 state that:

¹⁰⁰² This Law currently in force eliminates the reference, with regard to challenges, in Article 17 of the old Arbitration Act/1988 to the same grounds as those applied to judges, reasoning that these are not always appropriate to arbitration and cannot be applied in all cases opting, therefore, for a general clause (Statement of Purposes IV).

¹⁰⁰³ An analysis of arbitration based on the rules imposed by arbitration institutions and national regulations, with particular regard to Mexican law, can be found in the study conducted by F. González de Cossío, “Independencia, imparcialidad y apariencia de imparcialidad de los árbitros”, *Jurídica, Revista del Departamento de Derecho de la Universidad Iberoamericana*, n° 32, 2002, pp. 459-479.

¹⁰⁰⁴ T. Giovannini, “Arbitres et institutions d’arbitrage: conflits d’intérêts”, *Rev. dr. aff. int.*, 2002, n° 6, pp. 629-641.

¹⁰⁰⁵ “All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute”.

¹⁰⁰⁶ “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators”.

“No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator”.

The ICC Rules of Arbitration (1998) provide a professional description strongly focused on the external dimension, e.g., on the independence of the arbitrator - Article 7(1); because of this, before confirming the appointment proposed by one party, the prospective arbitrator must sign a statement of independence¹⁰⁰⁷ in which he must disclose any reasons why this independence may be called into question; if the opposite party calls into question the independence of the arbitrator, the Court has the final word on whether or not the persons nominated by the parties are confirmed in their appointment - Article 9(2). Note that “impartiality” is not used as an objective concept alluding, generally speaking, to a state of mind which at times can be extremely difficult to ascertain when appointing an arbitrator. In contrast to US, English and Swedish arbitration laws, which prefer to use the concept of “impartiality”, the ICC deliberately chooses to limit its rules to the concept of “independence”¹⁰⁰⁸.

3. Code of ethics for arbitrators

5. Internationally renowned arbitration centres, in addition to leading international lawyers' associations, consider that arbitrators take on grave responsibilities, which include important ethical duties both to the public and the parties involved. These institutions have set the trend by asserting that ethics is particularly relevant not only for the parties involved in the arbitration, but also for society as a whole. The aim is to preserve the value of confidence in human intercourse, which enables commercial, cultural, etc. exchange to develop smoothly.

In view of the conduct of arbitration and the abuse of the same perpetrated by certain agents, it seems increasingly advisable to establish a code of ethics for arbitrators¹⁰⁰⁹. It is common practice for arbitration institutions to insert in their own regulations a series of rules regarding this issue, draw up their own code of ethics¹⁰¹⁰ or ad-

¹⁰⁰⁷ “(W)hether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information”. See R.S. Bond, “The Selection of ICC Arbitrators and the Requirement of Independence”, *Arb. Int'l*, vol. 4, 1988, pp. 300 ss.

¹⁰⁰⁸ Article 11(1). See the justification of this attitude in Y. Derains and E.A. Schwarz, *A Guide to the ICC Rules of Arbitration*, 2nd éd, La Haya, Kluwer Law International, 2005, ch. 4.

¹⁰⁰⁹ V.V. Veeder, “Is there any Need for a Code of Ethics for International Commercial Arbitrators?”, *Les arbitres internationaux: Colloque du 4 février 2005*, Paris, Centre Français de Droit Comparé, 8, 2005, pp. 187-194.

¹⁰¹⁰ E.g. the code of ethics of the Society of Maritime Arbitrators, Inc. Nevertheless, regulations of this kind are usually very broad-based and do not generally enter into the details of individual cases and therefore always

here to a code of conduct drawn up by a professional or bar association with enabled to provide arbitration services¹⁰¹¹. In the case of the latter there are important contributions such as the IBA Guidelines on Conflicts of Interest in International Arbitration, the AAA–ABA Code of Ethics for Arbitrators in Commercial Disputes, or in Spain, the Recommendations on the Independence and Impartiality of Arbitrators Issued by the Spanish Arbitration Club.

6. The aim of the IBA Guidelines on Conflicts of Interest in International Arbitration, the latest version of which was approved in May 2004, thanks to the combined efforts of the ABA and the AAA¹⁰¹², is to help parties, lawyers, arbitrators and arbitration institutions on such relevant issues as impartiality and independence and other ethical arbitration duties including disclosure, communication, diligence, and confidentiality. The widespread acceptance of the IBA Rules of Ethics has played a decisive role in bringing global arbitration into line. The rules had a significant impact on the provisions adopted by the ICC in 1988 regarding the acceptance of arbitrators and compliance with the duty to inform in the event of a conflict of interests arising that could cast doubt on independence, neutrality or impartiality¹⁰¹³. Such texts carry a number of conduct guidelines aimed at achieving a just and effective ruling on the conflict, even though compliance, either by the parties or the arbitrators, is not compulsory unless a specific undertaking in this regard is reached¹⁰¹⁴. Based on these guidelines, the arbitrator has a threefold duty to perform: first, to the parties; second, to other arbitrators; and third, to the arbitration service provider. In the first case, the arbitrator must act with extreme caution to avoid the slightest doubt being cast on his impartiality and independence. The fact that at times arbitrators are appointed by one or other of the parties does not imply any link to that party, and the arbitrator must maintain the prescribed composure in dealings with both parties, to this end addressing both parties in a correct and polite way both during and outside the process¹⁰¹⁵. In the second case, the arbitrator must establish cordial relations with his colleagues, showing them respect and solidarity and avoid discrediting the known actions of other arbitrators in other proceedings. Finally, with regard to the arbitration service provider, the arbitrator must help to develop the quality of the arbitration services provided, defending the standards of quality demanded and obeying the institutional rules and ethics.

require prior interpretation. Certain institutions concerned with international commercial transactions have seen that progress must be made in the process of bringing international ethics for arbitrators into line.

¹⁰¹¹ C.A. Rogers, “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration”, *Michigan J. Int’l L.*, vol. 23, 2003, pp. 341 ss.

¹⁰¹² In 1956 it drew up a code of ethics for arbitrators acting in international disputes; this was substantially modified in 1987, and again in 2004. See *Business Law International at BLI*, vol. 5, n° 3, 2004, pp. 433-458; B.M. Cremades y W.L. Cairns, “El arbitraje en la encrucijada entre la globalización y sus detractores”, *RCEA*, vol. XVII, 2002, pp. 15-61 (31); Ph. Landolt, “The IBA Guidelines on Conflicts of Interest in International Arbitration: An Overview”, *J. Int’l Arb.*, vol. 22, n° 5, 2005, pp. 409-418.

¹⁰¹³ E. Helmer, “International Commercial Arbitration, Americanized, Civilized or Harmonized”, *Ohio State Journal on Dispute Resolution*, vol. 19, 2003, pp. 35-67.

¹⁰¹⁴ See B.H. Sheppard, “A New Era of Arbitrator Ethics for the United States The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes”, *Arb. Int’l*, vol. 21, n° 1, 2006, pp. 91 *et seq.*

¹⁰¹⁵ See *infra* n° 33-34.

7. The American Bar Association and the American Arbitration Association realized that it would be in the public interest to draft generally accepted rules of ethical behaviour to guide arbitrators and parties involved in commercial disputes, and to this end published in 1977 the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes¹⁰¹⁶, revised in 2004¹⁰¹⁷, confident that this would help maintain high standards and safeguard the trust placed in arbitration proceedings. Even though in practice there are not a significant number of cases involving lack of ethics on the part of commercial arbitrators, it is always useful to have a code that establishes generally accepted ethical standards designed to guide arbitrators and parties in commercial disputes in the hope of helping maintain high standards and confidence in the process of arbitration. In this regard it simply included generally accepted ethical standards to guide arbitrators and parties in commercial conflicts in order to consolidate confidence in arbitration itself, and to this end established the fundamental duty of the arbitrator to preserve the integrity and justice of the arbitration process. To this end it presumes that all arbitrators are neutral or, better still, independent and impartial, in compliance with the rules of arbitration agreed by the parties and any applicable laws; on these grounds it demands that all arbitrators appointed by the parties declare, at the earliest possible opportunity, whether or not they are neutral. According to these provisions, arbitrators are not in breach of the rule of neutrality if, by virtue of their experience or expertise, they express in scientific journals or the popular press, for example, opinions on certain general issues which would probably arise in the proceeding to which they are appointed.

8. The Spanish Arbitration Club was founded in 2005 with the main aim of promoting arbitration as a means of resolving conflicts, furthering Spain's position as an international centre for arbitration and developing arbitration in the Latin American arena. Among other activities, the Club has paid particular attention to issues surrounding the ethics of arbitrators, leading to the publication of the Recommendations on the Independence and Impartiality of Arbitrators (2008)¹⁰¹⁸, aimed at ensuring that users of arbitration, arbitrators, and the judges and courts that have to apply the Spanish Arbitration Act (2003), distinguish between circumstances requiring disclosure and those allowing challenge. These Recommendations constitute an important basis for the practice of arbitration in Spain, although it can be seen from their content that the sphere of action of arbitrators, from an ethical point of view, is much greater than that contemplated in the regulations discussed above¹⁰¹⁹.

II. ETHICAL ELEMENTS OF ACCESS TO ARBITRATION

¹⁰¹⁶ R. Coulson, "An American Critique of the IBA's Ethic for International Arbitrators", *J. Int'l. Arb.*, vol. 4, n° 2, 1987, pp. 103 ss.

¹⁰¹⁷ <http://www.finra.org/ArbitrationMediation/ResourcesforArbitratorsandMediators/p009525>. See B. Mayerson and J.M. Townsend, "Revised Code of Ethics for Commercial Arbitrators Explained", *Disp. Res. J.*, vol. 59, n° 1, 2004, http://findarticles.com/p/articles/mi_qa3923/is_200402/ai_n9392136.

¹⁰¹⁸ http://www.clubarbitraje.com/files/docs/recomendacion_independencia_arbitral_eng.pdf.

¹⁰¹⁹ See S. Álvarez González, *Arbitraje*, vol. II, n° 1, 2009, pp. 273-276 (275).

1. Disclosure of Conflicts of Interest

9. One of the most important mechanisms that help ensure full compliance with the principles of independence and impartiality in arbitration is the disclosure of conflicts of interest¹⁰²⁰. Legislation¹⁰²¹ and the rules of arbitration, generally stricter¹⁰²², establish the principle of law pursuant to which the arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence and shall do so without delay. The arbitrator also has a duty to disclose any past relationships with parties that may raise questions of bias¹⁰²³. The guideline is laid out in Article 12(1) of the Uncitral Model Law (1985): “When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him”. Here we have an obligation which is presented as a fundamental principle of arbitration both on a domestic and international scale, and which is a direct consequence of the overall principle of good faith. In each case, arbitrators have sufficient elements to determine what issues should be revealed to the parties so that they can decide whether or not they really affect their impartiality and independence, and in which cases they should abstain. Thus, disclosure has been described as the arbitration body's real “life insurance policy”¹⁰²⁴. Failure to comply can result in three sanctions: (1) setting aside the arbitration award, (2) challenge, and (3) liability for the arbitrator¹⁰²⁵. The principle is subject to some variation depending on different state systems.

10. In the U.S.A. there is a positive duty on arbitrators to investigate possible conflicts of interest, distinguishing between relationships likely to affect arbitrator's judgment and

¹⁰²⁰ L. Shore, “Disclosure and Impartiality: An Arbitrator's Responsibility vis-a-vis Legal Standards”, *Disp. Res. J.*, 2002. http://findarticles.com/p/articles/mi_qa3923/is_200202/ai_n9069935/.

¹⁰²¹ In the case of Switzerland, compliance is established as a legal decision. Subsequently, the LDIP provided in Article 180 that “An arbitrator may be challenged: (...) c. If circumstances exist that give rise to justifiable doubts as to his independence”. In the United States, claims against arbitrators for failure to disclose conflict of interest do not result in any loss of arbitral immunity. Under Section 14(c) of the Revised Uniform Arbitration Act 2000, an arbitrator's failure to make a disclosure required by Section 12 does not cause any loss of immunity under this section; the typical remedy for a failure to disclose of interest is *vacatur* under Section 23 of the act.

¹⁰²² AAA-ABA Code of Ethics, Canon II; IBA Guidelines, General Standard 2(b). The 2006 review of the ICSID Rules and Regulation was intended to increase guarantees concerning the independence and impartiality of arbitrators. In the statement that must be signed by all arbitrators when the court is convened, rule 6 includes the requirement that arbitrators must declare any circumstances which may lead one party to question their confidence in the impartial judgement of the arbitrator. See note I. Iruretagoiena Agirrezabalaga, *Arbitraje*, vol. I, n° 1, 2008, pp. 284-285.

¹⁰²³ A.K. Hoffmann, “Duty of Disclosure and Challenge of Arbitrators: the Standard Applicable under the New IBA Guidelines on Conflicts of Interests and the German Approach”, *Arb. Int'l*, vol. 21, n° 3, 2005, pp. 427-436.

¹⁰²⁴ Th. Clay, *L'arbitre*, Paris, Dalloz, 2001, p. 318.

¹⁰²⁵ Ch. Seraglini, *Droit du commerce international* (J. Béguin y M. Menjuncq, dirs.), Paris, Litec, 2005, pp. 980-988; Ph. Fouchard, “Le statut de l'arbitre dans la jurisprudence française”, *Rev. arb.*, 1996, pp. 325-372 (364).

relationships that are merely “trivial”¹⁰²⁶. Judge Posner, in the Seventh Circuit’s decision, *Merit Insurance Co. v. Leatherby Insurance Co.*, found: “the test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between Clifford and Stern was so intimate—personally, socially, professionally, or financially—as to cast serious doubt on Clifford’s impartiality”¹⁰²⁷. In *Commonwealth Coatings*, one arbitrator on a panel of three failed to disclose that he had engaged in periodic and significant business relationships with one of the parties to the arbitration over the previous five or six years¹⁰²⁸. The ruling in question is important because even though the arbitrator accredited that there were insufficient grounds for determining lack of independence or impartiality, the Supreme Court ruled that he had failed to comply with his obligation of disclosure. Since then, several federal courts have derived a variety of standards, some stricter than others, to determine whether a failure to disclose a relationship or conflict constitutes “evident partiality”.

In *Schmitz v. Zilveti*, the Court vacated an arbitration award where the arbitrator’s law firm had extensively represented the parent company of an entity involved in the arbitration and the arbitrator had run conflict check only on the subsidiary entity. The case arose under the National Association of Securities Dealers Rules, which specifically require the investigation of possible conflicts of interest. In that case, the Ninth Circuit found evident partiality where an arbitrator, who was also an attorney, did not investigate potential conflicts or disclose that his firm had performed legal work for one of the parties’ corporate parents¹⁰²⁹. Another court interpreting *Schmitz* suggests that a lawyer may have an independent duty to investigate conflicts in a potential arbitration by virtue of the lawyer’s duty to run conflict checks before representing new clients¹⁰³⁰. Other courts have declined to find such a generalized duty for attorney-arbitrators, and have held that conflicts of which the arbitrator was unaware, or which are marginal, do not constitute evident partiality such that vacatur of the award is appropriate¹⁰³¹.

11. In French law the obligation to disclose has its own provision in Article 1452(2) NCPC (“The arbitrator who shall consider himself open to being recused shall inform the parties. In that case, he may only agree to his assignment under the approval of the parties”). This precept is doubly subjective, in the sense that the arbitrator must reveal what he

¹⁰²⁶ A.R. Robertson and L.M. Brennan, “The Law on Overturning Arbitration Awards for Partiality Is Confused”, *The Committee on Commercial & Business Litigation*, vol. 10, n° 3, 2009 <http://www.cpradr.org/DesktopModules/iBN%20News%20Articles/Download.aspx?AttachmentID=147>.

¹⁰²⁷ 714 F.2d 679 (7th Cir. 1983). <http://openjurist.org/714/f2d/673>.

¹⁰²⁸ *Commonwealth Coatings Corp. v. Continental Cas.*, 393 U.S. 145, 151-52 (89 S.Ct. 337, 21 L.Ed.2d 301) (1968), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=393&invol=145>.

¹⁰²⁹ *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). <http://cases.justia.com/us-court-of-appeals/F3/20/1043/523107/>.

¹⁰³⁰ *HSMV Corp. v. ADI Ltd.*, 72 F.Supp.2d 1122 (C.D. Cal. 1999).

¹⁰³¹ In *Al-Harbi v. Citibank*, 85 F.3d 680 (D.C. Cir. 1996), the arbitrator had failed to disclose that his former law firm had represented one of the parties in matters unrelated to the underlying dispute. <http://openjurist.org/85/f3d/680/al-harbi-v-citibank-na-as>. See T. Weiner, “Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Arbitration”, *George Washington L. Rev.*, vol. 65, 1997, pp. 616 *et seq.*

thinks could be construed by the parties as grounds for a challenge, which calls for the arbitrator to engage in a “deliberation which tends to objectivise the situation”¹⁰³². The Paris Court of Appeal has on various occasions reiterated that independence is a fundamental part of the jurisdictional role of arbitrators as a result of their role as a judges *vis-à-vis* the parties to the arbitration. According to the Court, the arbitrator's duty to inform in order to allow the parties to exercise their rights to challenge, must be assessed both with respect to the notoriety of the contested situation and with its effect on the arbitrator's judgement¹⁰³³. French jurisprudence is rife with examples of sanctions imposed for breach of the obligation to inform.

12. Article 17(2) of the Spanish Arbitration Act (2003) echoes the meaning of Article 12(1) of the Uncitral Model Law, presenting it as an obligation to be complied with by the arbitrator before accepting the appointment. Rule 11(1) of the recommendations of Spanish Arbitration Club also establishes that arbitrators must “disclose any circumstances that could give rise to justifiable doubts as to his impartiality or independence (“Circumstances of Disclosure”). Good faith and the duty of transparency require candidates to disclose any circumstances that could, potentially, from the parties’ standpoint, give rise to doubts as to their independence and impartiality”¹⁰³⁴. Spanish practice maintains this position. In *Skoda Power, S.A. / Abener Energia–El Sauz, S.A. of C.V.* the Provincial Court of Madrid stated that the arbitrator should, in compliance with his

“... duty to impartiality and independence, reveal to the parties and to the Court's secretariat any facts or circumstances arising during the arbitration proceedings that could affect said independence or impartiality, calling for an analysis of the extent of the arbitrator's duty to inform or disclose, being obliged, if applicable, to communicate any circumstance that could give rise to justified doubts regarding said impartiality, doubts that could arise in the arbitrator not only from a subjective point of view, but also from an objective point of view, and which could lead the parties to call into question said impartiality or independence”¹⁰³⁵.

13. In arbitration clauses opting for *ad hoc* arbitration one rarely find negative guidelines establishing impediments and obligations applied to the arbitrator to prevent conflictive situations, above all those that are not clearly taken to be grounds for implication or challenge. The possibility, however, of establishing in the arbitration agreement, or in institutional arbitration rules, that arbitrators must submit a signed statement of interests as a guarantee of their professional suitability to serve, cannot be ruled out. The truth is that the obligation we shall analyse is fully effective in institutional arbitration due to the existence of an arbitration center capable of acting as a controlling body due to its empowerment to decide on any challenge arising. This has even been claimed to be one of the main virtues of institutional arbitration. Together with the aim of preserving the prestige of the arbitration service provider the aforementioned control would aim to prevent, as far as possible,

¹⁰³² See Ph. Fouchard, “Le statut de l’arbitre...”, pp. 347-348.

¹⁰³³ *Inter alia*, CA Paris (1^{re} Ch. suppl), June 2, 1989 (*Société Gemanco / S.A.E.P.A. et S.I.A.P.E.*), June, 28, 1991 (*KFTCIC / Icori Estero*) and June 30, 1995 (*B / Société Annahold BV et autres*), *Rev. arb.*, 1991, pp. 87 *et seq.*; 1992, pp. 568 *et seq.* note P. Bellet and 1996, pp. 496-502.

¹⁰³⁴ See Rule 11(2) Rules of Court of Arbitration of the Madrid Chamber of Commerce (2009), *Arbitraje*, vol. II, n° 3, 2009, p. 909.

¹⁰³⁵ AP Madrid, May 5, 2008, *Arbitraje*, vol. II, n° 2, 2009, pp. 554 *et seq.* note C. Martín Brañas.

any possible claim for damages arising from civil suits brought on the grounds of arbitral negligence, above all in certain arbitration systems increasingly exposed to these issues.

It is obvious that if it is indispensable to approach a judge to appoint arbitrators, national laws could facilitate the judge's decision, essential for setting arbitration in motion, by not including special circumstances that could allow parties to bring delaying tactics to bear which could jeopardize the arbitration process itself, and become a cancer on the same¹⁰³⁶. From this, one could infer that the arbitrator's duty of diligence is the best antidote to counteract the bad will of a party intending to delay the process. This is the case with legislation that includes objective criteria such as the independence of the arbitrator which could give rise to forced challenges based on the apparent impartiality of the arbitrator¹⁰³⁷.

14. The parties to arbitration, duly informed, take control, as arbitrators may issue incomplete, ambiguous or erroneous statements in detriment to the self-imposed thoroughness and strictness when dictating their statement of independence¹⁰³⁸. Arbitrators are under the obligation to reveal to the parties any circumstance that could affect their decision and that could cause “*dans l'esprit des parties un doute raisonnable sur ses qualités d'impartialité et d'indépendance, qui sont l'essence même de la fonction arbitrale*”¹⁰³⁹, e.g., generic information regarding a possible conflict of interests on the part of the president of the arbitral tribunal who works for a company advising the controlling company of one of the parties to the conflict. Because of this, if the arbitrator reveals any circumstance that could affect his actions the parties must determine the issue, if they deem fit, within a short time limit, usually established by the rules of arbitration; if no grounds for abstention or challenge are presented before this deadline the arbitrator may freely exercise his duties.

It is interesting, however, to emphasize the content of the statement, which must be clear enough to enable the parties to judge, from their own viewpoint, if it can be used as a basis for disqualifying the arbitrator even when the undisclosed facts or circumstances do not in themselves provide grounds for said disqualification. Here it is useful to remember the words of the opinion in *Commonwealth Corp*, where it was held to be better to make the relationship public from the start, when the parties, acquainted with the relationship, are at liberty to reject or accept the arbitrator. At the same time, it must be acknowledged that an arbitrator may have a number of commercial and personal relations. In light of this, an arbitrator cannot be expected “to provide the parties with his complete and unexpurgated business biography”, requiring that if the arbitrator “has done more than trivial business with a party, that fact must be disclosed”¹⁰⁴⁰, to the point of arriving at such absurd situations as disclosing a passing encounter in the street. This releases the arbitrator from mak-

¹⁰³⁶ B.M^a Cremades, “El arbitraje comercial internacional en una economía globalizada”, *Revista Jurídica Española La Ley*, 1998, 5, D-233, pp. 1535-1537.

¹⁰³⁷ E. Gaillard, “Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international”, *Rev. arb.*, 1990, pp. 759-796 (761); A. Fré, “Delaying Tactics in Arbitration”, *Disp. Res. J.*, vol. 59, n° 4, 2004-2005.

¹⁰³⁸ Th. Clay, *L'arbitre*, *op. cit.*, n°s 378-395.

¹⁰³⁹ CA Paris (1^{ère} Ch. Sec. C) February 12, 2009, S.A. *J&P Avax S.A. / Société Tecnimont SPA*, *Rev. arb.*, 2009, pp. 186 *et seq.* note Th. Clay.

¹⁰⁴⁰ U.S. Supreme Court, *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145 (1968) 393 U.S. 145 (Mr. Justice White with whom Mr. Justice Marshall, joins, concurring).

ing a detailed statement, as long as the disclosure is sufficiently accurate and indicates the nature of the relationship (friendly, academic, professional, etc.) maintained by the arbitrator with all those involved in the arbitration proceedings.

Some of the issues that should be mentioned in the statement are, by way of example, business relationships which the arbitrator maintains, directly or indirectly, with either of the parties; academic relations; strong, on-going, social and professional relations that may arise between the arbitrator and either party; and business relations, either direct or indirect, with any of the corporations competing with either party. Any on-going, direct or indirect, business relationship arising between the arbitrator and either party, or between the arbitrator and any person who might be called as a key witness in the case, will normally provide sufficient grounds for questioning the impartiality or independence of the proposed arbitrator. Likewise, any other circumstance or fact that could provide justifiable grounds for the independence or impartiality of the arbitrator to be questioned should be revealed. The scope of the latter is particularly relevant when the appointed arbitrator belongs to a law firm involved in defending the interests of one of the parties, even if this takes place in a different country from where the proposed arbitration is to be held.

15. As can be expected in arbitration rules, the arbitrator's duty to inform is usually thoroughly regulated. One only has to refer to Article 9 of the Uncitral Arbitration Rules (1976) which provides that: "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances". And Article 10, which adds that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence", although it also adds the following temporal requirement: "a party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made".

Arbitration centers usually pay particular attention to statements made by arbitrators, making it compulsory for the appointed arbitrators to submit to the arbitration service provider a written declaration detailing the facts or circumstances which could, from the point of view of the parties, raise doubts about their independence. The institutions then relay said information to the parties, setting a time limit for the latter to make their opinion known. One only need cite the subjectivism evident in Articles 7(2) of the ICC Arbitration Rules: "Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them".

Aside from regulatory provisions, certain codes of ethics abound in references to the arbitrator's duty to inform. One such code which must be mentioned is that of the International Bar Association (IBA), which establishes the different situations in which the conduct of the arbitrator could be seen as partial or biased. Canon II of the AAA-ABA ethical code deals with this issue at greater length, referring to the need to disclose any financial, commercial, professional, family or social relationship, past or

present, that the arbitrator may have with either party or their legal advisers or with any other person who they have been told could be called as a witness, and that could affect the impartiality of the arbitrator or that could give the appearance of one-sidedness; it is also compulsory to disclose any existing relationship that could compromise their family members or current employees, business or silent partners. By way of an example from maritime arbitration we need only refer to n. 4 of the ethical code of the Society of Maritime Arbitrators, Inc.:

“Before accepting appointment an arbitrator may only inquire as to the general nature of the dispute and the names of the parties and their affiliates involved. A member shall not act as an Arbitrator in any proceeding in which he, his associates, or his relatives have a financial interest, or where his association with either the parties, counsel or other Arbitrators may give rise to an inference of bias without making a full disclosure of the relationship. A member shall not participate in a proceeding in which he has allowed others to inform him of details of the case before him prior to the first hearing”.

16. The duty to inform referred to here starts from the moment the arbitrator is appointed or proposed, and as such is not a one-off obligation but remains in force until the arbitration award is announced - for example, an arbitrator who is appointed to the bench of a constitutional court, or an in-house lawyer belonging to a particular company. Compliance takes the form of a written statement of possible conflicts of interest.

Said conflicts mainly involve current or past circumstances which could place the arbitrator in a position more favorable to one party, and this is why arbitration institutions demand that, prior to their appointment, candidates fill out a series of *ad hoc* questionnaires designed to eliminate any shadow of doubt that may hang over said circumstances, above all in the case of international arbitration, where it is harder to specify any possible link between the arbitrator and the dispute. As mentioned above, this duty to disclose remains in force throughout the arbitration process, therefore, any communications between arbitrators and the parties or their lawyers must be immediately made known to the other parties and members of the arbitral tribunal. In fact, the appointed arbitrator must reveal any economic, commercial, professional, family or social relationship, past or present, which could affect his impartiality or which might reasonably create an appearance of partiality or bias. These relationships are not only confined to the parties and their lawyers, but to any person who might be called as a witness. Likewise, the arbitrator must disclose any relationship of this kind existing with any member of his family or with his current employees, partners or business partners.

Common law systems are particularly sensitive to these issues, and it is better to err on the side of caution, above all during the stage at which the parties can accept or reject the arbitrator.

2. Requirement of transparency

2.1. Impartiality

17. Impartiality is an essential quality for any judge or arbitrator; however, the difficulty of providing objective proof makes it necessary to resort to objective situations¹⁰⁴¹. Arbitration assumes that arbitrators must maintain an equidistant position with respect to the positions of the parties expressed at the start of proceedings. As impartiality is a subjective issue, the criteria used by third parties to view it are based on analyzing external facts through which impartiality, or the absence of it, is usually manifest. Generally, said assessment is made from the perspective of an objective party with regard to the position of the party challenging the arbitrator. Impartiality must be absolute for all members of an arbitral tribunal, and no distinctions can be made with respect to the standard of impartiality among the members of an arbitral tribunal, whatever the procedure used for their appointment¹⁰⁴².

This situation can only be verified in practice, e.g., ties with one of the parties can provide grounds for calling into question the principle of impartiality by which any arbitrator must abide to ensure a fair hearing¹⁰⁴³. Modern arbitration laws are increasingly aware of the need to guarantee the premise we are analyzing, and international constraints applied to the regulation of these issues can clearly be seen¹⁰⁴⁵. The maximum effectiveness of said guarantee is applied when an award suspected of being biased is challenged¹⁰⁴⁶; . It has also been claimed that any breach of the requirement of impartiality on the part of the arbitrator is a clear breach of public policy¹⁰⁴⁷, or that it should be viewed from a “quasi-judicial” standpoint¹⁰⁴⁸.

Once arbitration is under way, biased conduct can be observed when the arbitrator, without providing arguments, favours the arguments of one of the parties even in the face of incontrovertible legal evidence to the contrary, or when a certain fact is considered to have been proved when it has not even been proved circumstantially.

When viewed in this light, impartiality becomes a subjective concept, very difficult to pinpoint as it has to do with a certain mental attitude which demonstrates the absence of bias towards one of the parties or towards a particular issue. Here, we must make a distinction between two words: sympathy and partiality. Sympathy means favouring one person, without

¹⁰⁴¹ E. Verdera y Tuells, “Algunas consideraciones en torno al arbitraje comercial”, *RCEA*, vol. X, 1994, pp. 137-177 (174).

¹⁰⁴² M. Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration”, *Int'l & Comp. L. Q.*, vol. 38, 1989, pp. 26 *et seq.* (45)

¹⁰⁴³ D. Bishop and L. Reed, “Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration”, *Arb. Int'l*, vol. 14, n° 4, 1998, pp. 407-423.

¹⁰⁴⁵ E.g. the new Article 815 *c.p.c.* italiano. See C. Consolo, “La ricsuzione dell'árbitro”, *Riv. arb.*, vol. VIII, 1998, pp. 17-31; *id.*, “Imparcialita degli arbitri. Ricsuzione”, *Riv. arb.*, vol. XV, 2005, pp. 727-743.

¹⁰⁴⁶ E. Fazzalari, “Ancora sulla imparcialità dell'árbitro”, *Riv. arb.*, vol. VIII, 1998, pp. 3-4.

¹⁰⁴⁷ C. Giovannucci Orlandi, “Ethics for International Arbitrators”, *University of Missouri-Kansas City L. Rev.*, vol. 67, 1998, pp. 93 *et seq.* (109).

¹⁰⁴⁸ In the U.K. courts: *Wessanen's Koninklijke Fabrieken N.V. v. Isaac Modiano, Brother & Sons, Ltd.*, 2 Lloyd's Rep.257 (1960).

regard to another; partiality means favouring one person at the expense of another¹⁰⁴⁹. Arbitrators do not represent the interests of any of the parties. Impartiality does not mean not being part of something; it is a certain kind of motivation consistent with the statement or decision based on the desire to tell the truth, to pass judgement precisely, to rule justly or legally. The arbitrator, like the judge, must set aside any subjective considerations, and forget his own personality - it is to the emotional sphere what objectivity is to the intellect. Common law authors define impartiality as acting without pressure, which means giving a fair ruling on the issue. As in the case of judges and magistrates, the impartiality of an arbitrator is something that is presumed, and proof of its absence should be based on solid facts and not on mere personal appreciations dictated by circumstances¹⁰⁵⁰. With regard to this, certain "social indicators" such as belonging to a certain religion, profession, or political party are not generally considered circumstances conducive to partiality, neither is the frequent appearance in scientific circles such as, for example, a teaching or research institute or a periodical.

The above is particularly relevant in international commercial arbitration due to the frequent coexistence of diverse legal cultures which could lead to misunderstandings, above all when people from the common law world and the sphere of written law are present in the proceedings. What, for some, may constitute a partial attitude, for others may not¹⁰⁵¹.

2.2. Independence

18. It has been said, correctly, that independence is not only a virtue but also a condition inherent to the freedom to judge, implying that this freedom is beyond any ideological, political, or professional consideration¹⁰⁵². The principle of independence in commercial arbitration is an objective and material empowering criterion with respect to the parties and arbitration as a profession. It implies an objective assessment with the purpose of determining whether or not the arbitrator and one of the parties are acting in kinship - whether they have, for example, business or financial relations. The aim of said assessment is to verify the appearance of bias, not its actual presence¹⁰⁵³. If impartiality is a spiritual attitude, independence is an objective situation which is far easier to define¹⁰⁵⁴ as it can be appreciated in the existence of links between the arbitrators and the parties or with persons closely linked to the latter or with the conflict, be they personal, social, economic, financial relations, or of any other kind¹⁰⁵⁵. In this

¹⁰⁴⁹ D.J. Branson, "American Party-Appointed Arbitrators -Not the Three Monkeys", *University of Dayton L. Rev.*, vol. 30, n° 1, 2004, pp. 1-62 (51).

¹⁰⁵⁰ ECHR Juin 23, 1981, *Le Compte, Van Leuven y De Meyer*, ECHR 1981, 2, serie A, n° 43, p. 25, ap. 58.

¹⁰⁵¹ L. Salvaneschi, "Sull'imparzialità dell'arbitro", *Riv. dir. proc.*, vol. 59, pp. 409-434.

¹⁰⁵² See J.D. Bredin, "Qu'est-ce que l'indépendance du juge?", *Justices*, n° 3, janvier-juin, 1996, p. 165.

¹⁰⁵³ S. Donahy, "The Independence and Neutrality of Arbitrators", *J. Int'l Arb.*, vol. 9, 1992, p. 31.

¹⁰⁵⁴ En el Derecho inglés se insiste en la nota de imparcialidad respecto a la de independencia, e.g. Sections 24 and 33 English Arbitration Act (1996).

¹⁰⁵⁵ With respect to the arbitrator's requirement of independence, see the interesting and thought-provoking article by M. Henry, *Le devoir d'indépendance de l'arbitre*, Paris, LGDJ, 2001; see also, N. Alam, "Independence and Imparciality in International Arbitration . As Assessment", *Trasnational Dispute Management*, vol. I, n° 2, 2004. http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article205b.htm#_ftn21; L. Trakman, "The Impartiality and Independence of Arbitrators Recosidered", *Int'l Arb'n L.Rev.*, vol. 10, n° 4, 2007, pp. 124-134.

case, assessment implies not the appearance of bias, but its actual presence, derived from the circumstances surrounding the exercise of arbitration in a specific case. There are two reasons for guaranteeing the independence of the arbitrator: (1) to ensure the transparency required for the parties, which they would not otherwise receive, and (2) to ensure the integrity of the proceedings, as the silence of one party on a relevant fact known by that party over a short period of time is sanctioned with the loss of the right to protest or challenge once said period has expired.

An analysis of these ties shows whether the arbitrator is, or is not, independent. The problem is employing this to show lack of independence, using criteria such as proximity, continuity or of a recent nature which, well understood, should be duly accredited. English jurisprudence considers independence to be “an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties, which might lead the arbitrator to favour the party concerned”¹⁰⁵⁶. An important case is that of *Laker Airways Incorporated v. FLS Aerospace Ltd and another*¹⁰⁵⁷. In this case, an arbitrator practiced from the same chambers as the counsel for the appointing party. The court ruled that the test for removal of an arbitrator under Section 24 of the Arbitration Act of 1996 was objective in at least two respects. First, the court had to find that circumstances existed, and were not merely believed to exist, although it was possible that a belief could be a circumstance. Secondly, the circumstances found by the court had to justify doubts as to the arbitrator's impartiality. An unjustifiable or, perhaps, an unreasonable doubt was not sufficient.

19. It should be clear that the independence of the arbitrator must not only be applied with regard to the parties, but also to their representatives, to other arbitrators or to arbitration as a profession. Jurisprudence views these situations with a degree of severity, considering as a lack of independence the fact, for example, that the daughter of the arbitrator works as a lawyer in the office responsible for proposing said arbitrator, and the arbitrator in question fails to disclose this circumstance¹⁰⁵⁸.

It seems that the number of times an arbitrator has been put forward as arbitrator or president of the arbitral tribunal by the arbitration centre are inversely proportional to the presumption of independence. The presumption of independence disappears when the same legal firm persistently uses a particular “independent arbitrator”, as these are grounds for suspecting a tendency to favour their own interests. Thus, it is advisable that the arbitrator, if he is proposed by one of the parties, should mention in his state-

¹⁰⁵⁶ England's Court of Appeal, *AT&T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625. See Ph. Sarraillhé, “L'impartialité et l'indépendance de l'arbitre devant les juges anglais”, *Rev. arb.*, 2001, pp. 211-227.

¹⁰⁵⁷ (England and Wales) High Court (Queen's Bench Division, Commercial Court), Rix J., 20th April 1999 [2000] 1 WLR 113; 1999] 2 Lloyd's Rep 45.

¹⁰⁵⁸ CA Paris, December 18, 2008 (*SARL Avelines Conseils*): “En l'espèce, force est de constater qu'il n'a pas été satisfait à cette obligation d'information, la société A. ayant été laissée dans l'ignorance du lien professionnel étroit existant entre la fille de l'un des arbitres et le conseil [de l'autre partie, qui l'avait choisi]”.

ment of independence the number of times he has been proposed by the lawyers of the party proposing his appointment. Viewing the sphere of arbitral independence in this light, there is no doubt that a different situation can exist with regard to lawyers from large firms acting as arbitrators, as these are more liable to have conflicts of interests. For this reason there is a certain tendency for jurists specialising in arbitration to leave law firms and establish themselves in private practice under the rather pompous title of “independent arbitrators” (equivalent to the term “brave soldier”), as if they were the only ones meeting such requirements¹⁰⁵⁹.

3. Party appointed arbitrators

20. The so called party-appointed arbitrator comes principally from international arbitration, although it is now also applied in domestic arbitration. Based on the same, the parties are enabled to unilaterally designate one of the arbitrators in a multi-member tribunal. The existence of this kind of arbitrator has benefitted from the contractual concept of arbitration prevalent in certain systems, where the intervention of these third parties is used to supplement the interpretation of an act or contract more than to resolve a conflict in normal courts.

Following the *Ury / Galeries Lafayette* case¹⁰⁶⁰, French jurisprudence has flatly refused to accept that the mission of the arbitrator derives from a management contract that ties him to the proposing party, and therefore rejects the very concept of the *arbitre-partie*. This has had important repercussions with regard to the responsibility inherent in the exercise of his duty and in relation to perceiving his fees¹⁰⁶¹. For this reason, the presence of party-appointed arbitrators is for them a moral and psychological guarantee that their point of view will be understood, even if it is not the one which prevails in the end¹⁰⁶².

In *Hitachi* counsel to a party regularly recommended a particular arbitrator, also a practicing attorney, to clients for appellate cases and vice-versa. The Swiss Federal Tribunal emphasized that a party-appointed arbitrator should leave clearly defined his professional relationship and his duty of neutrality. A higher degree of independence is required for the presiding arbitrator than for a party-appointed arbitrator. An arbitrator would lose independence if a party is in a position to influence his judgment. But a practicing attorney acting as arbitrator can be expected to discriminate between judicial independence and friendly professional relations¹⁰⁶³. In the *I.S.A. v. V* case, the party-appointed arbitrator had a law partner who represented a third party acting against an affiliate of a party in the arbitration. The aforementioned court confirmed that a party-

¹⁰⁵⁹ See P.F. Schlosser, “L’impartialité et l’indépendance de l’arbitre en droit allemand”, *Riv. arb.*, vol. XV, 2005, pp. 1-15.

¹⁰⁶⁰ Cass. civ. 2^{ème}, April 13, 1972, *Rev. arb.*, 1975, pp. 235 *et seq.* note E. Loquin.

¹⁰⁶¹ Cass. civ. 2^{ème}, July 3, 1996 (*Société méridionale d’équipements sanitaires et sociaux (Somes) / de Saint-Rapt et autres*), *Rev. arb.*, 1996, pp. 405 *et seq.*; see Ph. Fouchard, “Le statut de l’arbitre...”, *loc. cit.*, p. 330.

¹⁰⁶² CA Paris, January 16, 2003 (*Société des télécommunications internationales du Cameroun (Intelcam) / SA France Télécom*), *Rev. arb.*, 2004, pp. 369 *et seq.* note L. Jaeger.

¹⁰⁶³ ATF, June 30, 1994, *Hitachi Ltd SMS Schloemann*, *Bull. ASA*, vol. 15, 1997, pp. 99-107.

appointed arbitrator does not lose his independence just because one of his partners is acting against an affiliate of one of the parties¹⁰⁶⁴.

21. In the U.S., party-appointed arbitrators have spawned copious amounts of legal literature and received great attention from the courts¹⁰⁶⁵. Party-appointed arbitrators are traditionally not obliged to meet the same levels of independence and impartiality imposed on other arbitrators. In its original version, Canon VII of the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes allows these arbitrators to be “predisposed” in favour of the party appointing them, and to communicate with said party, being only subject to a general requirement of integrity and good faith. The same position is taken by a jurisprudential trend illustrated by the decision of the Court of Appeals of New York, March 28, 1962, which expressly stated that this kind of arbitrator may be “partisan . . . but not dishonest”¹⁰⁶⁶, accepting the appointment of an arbitrator who was also a member of the board of directors of one of the parties.

Nevertheless, in 2004 the ABA and the AAA revised their Code in order to bring it into line with international tradition and practice, establishing from that moment the presumption of neutrality for all arbitrators, including party appointed arbitrators, and demanding of them all, in the same measure, absolute independence and impartiality¹⁰⁶⁷. The Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve neutrally or not.

It should be noted that the revised Code subjects the principle of neutrality to the parties, the law or regulations applicable to the arbitration in question establishing the contrary. In short, the principle of neutrality is negotiable. The ethical obligation established in the 2004 Code distinguishes between those applicable to arbitrators in general and those prescribed for party-appointed arbitrators. In this respect, this kind of arbitrator is allowed to be predisposed towards the parties appointing him, and even to maintain conversations with them outside the court of arbitration. The principle of neutrality applied to party-appointed arbitrators has prevailed in arbitration doctrine and practice, but ethical problems are constantly arising and are no less threatening to the impartiality and independence of arbitrators. Perhaps because of this, the Code at the same time emphasizes that arbitrators must act in good faith, with integrity and fairness. Said

¹⁰⁶⁴ ATF, February 9, 1998, *I.S.A. v V*, *Bull. ASA*, vol. 16, 1999, pp. 634 *et seq.*

¹⁰⁶⁵ M. Hunter and J. Paulsson, “A Code of Ethics for Arbitrators in International Commercial Arbitration”, *Arbitration*, vol. 13, 1985, pp. 153 *et seq.*; P. Bellet, “Des arbitres neutres et non neutres”, *Études de droit international en l’honneur del Pierre Lalive*, Bâle/Frankfurt Main, Helbing & Lichtenhahn, 1993, pp. 399-409; L.S. Murray, “Impartiality of the Party – Appointed Arbitrator”, *Arb. Int’l*, vol. 6, 1990, pp. 320-322; D.A. Kennedy, “Predisposed With Integrity: The Elusive Quest for Justice in Tripartite Arbitrations”, *Georgetown. J. Legal Ethics*, vol. 8, 1995, pp. 749 *et seq.*; J.H. Carter, “Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice”, *Am. Rev. Intl. Arb.*, vol. 3, 1992, pp. 153 *et seq.*; *id.*, “Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for ‘Non Neutrals’”, *Am. Rev. Intl. Arb.*, vol. 11, 2000, pp. 295 *et seq.*

¹⁰⁶⁶ *Matter of Astoria Medical Group (Health Ins. Plan)*, 11 NY 2nd; 182 N.E. 2d 85(1962).

¹⁰⁶⁷ D.J. Branson, “American Party-Appointed Arbitrators...”, *loc. cit.*, pp. 1-62.

dependence does not exonerate them, however, from being subject to ethical standards which promote the integrity and fairness of the arbitration process, including, though not limited to not engaging in delaying tactics; and not making statements to the other arbitrators knowing them to be false or misleading.

22. From a theoretical point of view, it is understood that an arbitrator's appointment should not undermine his freedom, although in practice the method of appointment can distort the exercise of arbitration because of all the factors involved in the loss of independence and impartiality and the risk that the third party called in to resolve the dispute becomes an agent of the party, thus detracting from his original mission¹⁰⁶⁸. The practice, in fact, gradually tended toward appointing persons who felt close to the parties as co-arbitrators, acting practically as representatives of the latter, and considering the impartiality of the third arbitrator, acting as president of the arbitral tribunal¹⁰⁶⁹, to be sufficient, to the extent that it has been said that the presence of party-appointed arbitrators are a moral or psychological guarantee to the parties that their point of view will be heard, although it might not prevail in the end¹⁰⁷⁰. Nevertheless, a certain sector of arbitration professionals wonders why an arbitrator should be used to defend the party when they have lawyers to supply this need. The problem is aggravated by the fact that in certain arbitrations there are not many arbitrators to choose from and the parties tend to appoint an arbitrator in order to further their claim¹⁰⁷¹.

23. As a direct result of Article 12(2) of the LMU most legislation includes the requirement that "all" arbitrators should remain independent and impartial¹⁰⁷². Spanish legislation from 2003 imposes this requirement on arbitrators "irrespective of who appointed them" (Statement of Purposes).

Selecting an arbitrator is perhaps one of the most delicate aspects of arbitration¹⁰⁷³. Evidently, when choosing an arbitrator, the parties seek, among other factors¹⁰⁷⁴, maximum predisposition in their favour and the least hostility, e.g., a combination of

¹⁰⁶⁸ L. Laudisa, "Árbitro nominato dalla parte o árbitro di parte?", *Riv. arb.*, vol. IX, 1999, pp. 363-374; J. Dolinger, "O Árbitro da Parte – Considerações Éticas e Práticas", *Revista Brasileira de Arbitragem*, n° 6, 2005, pp. 29-44.

¹⁰⁶⁹ C. Consolo, "Arbitri di parte 'non neutrale'", *Riv. arb.*, vol. XI, 2001, pp. 9-17.

¹⁰⁷⁰ D. Hascher, "Principes et pratiques de procedure dans l'arbitrage commercial international", *R. des C.*, t. 279, 1999, pp. 51-193 (141).

¹⁰⁷¹ R.D. Taichert, "Why not Provide for Neutral Party-Appointed Arbitrators?", *Disp. Res. J.*, vol. 57, n° 4, 2002-2003.

¹⁰⁷² E. Fazzalari, "L'etica dell'arbitro", *Riv. arb.*, vol. II, 1992, pp. 1-6 (3-4).

¹⁰⁷³ T.E. Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreement", *Vanderbilt J. Trans'l L.*, vol. 36, 2003, pp. 1189 *et seq.* (1209).

¹⁰⁷⁴ L. Kopelmanas, "La rédaction des clauses d'arbitrage et le choix des arbitres", *Hommage à Frédéric Eismann*, Paris, ICC Services Sarl, 1978, pp. 23-30; E. Robine, "Le choix del arbitres", *Rev. arb.*, 1990, pp. 315-336; J.H. Carter, "The Selection of Arbitrators", *Am. Rev. Int'l Arb.*, vol. 5, 1994, pp. 84-96; D. Bishop and L. Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration", *Arb. Int'l*, vol. 14, 1998, pp. 395 *et seq.*; P. Lalive, "Le choix de l'arbitre", *Mélanges Jacques Robert, "Libertés"*, Paris, Montchrestien, 1998, pp. 353-363; C.T. Salomon, "Selecting in International Arbitrator: Five Factor To Considerer", *Mealey's International Arbitration Report*, vol. 17, n° 10, 2002, pp. 25-28. <http://www.arbitralwomen.org/files/publication/0405202743129.pdf>.

judge and lawyer acting for the party appointing him, which can be summed up in the phrase “my arbitrator”¹⁰⁷⁵. To achieve this, the party needs copious information about the candidate, sometimes even resorting to the incorrect practice of subjecting him to an interview to interrogate him about his attitude to the case. Despite these disreputable practices to which candidate should not lend themselves, there is nothing irregular in proposing a candidate as a party-appointed arbitrator¹⁰⁷⁶, although the arbitrator thus appointed usually undertakes to ensure that the case presented by the party appointing him will be correctly heard and understood by all members of the arbitral tribunal. Independence does not imply indifference, and even the hostility, on the part of the appointed arbitrator¹⁰⁷⁷.

The arbitrator has no duty to the party appointing him, and in no way are they his clients. He should always act impartially and independently with respect to all parties to the arbitration, ensuring that all issues raised are resolved and that the arguments and evidence put forward by all parties are considered. Said duties prevent this kind of arbitrator from communicating with the party appointing him on issues relevant to the case as this would violate the right of all parties to equal treatment and also prevent the arbitrator from feeling compelled to disclose how he voted if the award is not favourable to the party appointing him.

It is a serious error to consider that the arbitrator should protect the interests of the party appointing him, and this takes us back to the subject of “truncated arbitration proceedings”: a situation could occur in which the arbitrator appointed by one of the parties damaged by this value judgement, forgetting the neutrality which should dictate his actions at all times, leaves the court in order to hinder or delay the foreseeable results of the process.

4. Disqualification of arbitrators due to breach of the requirement of transparency

4.1. Different cases

24. There is no single model for obtaining disqualifying arbitrators and, in spite of conventional wisdom, the continental tradition is only seemingly more restrictive than that of *common law* countries¹⁰⁷⁸. In comparative law there are two technical options which range from applying to arbitrators the same grounds provided for ordinary judges, or to establishing a more flexible system with generic grounds; this has been

¹⁰⁷⁵ Ph. Grandjean, *Rev. arb.*, 2000, p. 310.

¹⁰⁷⁶ See la práctica en U.S.A. en A. Lowenfeld, “The Party-Appointed Arbitrator in International controversies: Some Reflections”, *Tex. Int’l L. J.*, vol. 30, 1995, pp. 59-69.

¹⁰⁷⁷ Se apunta en tal sentido a que no resulta aceptable que el árbitro mantenga una actitud de desconocimiento absoluto hacia la parte que lo ha seleccionado: A. Beyly, “The Manager and Arbitration”, *J. Int’l Arb’n*, vol. 3, nº 7, 1986, pp. 7 *et seq.*

¹⁰⁷⁸ L. Dittrich, “L’imparzialità dell’árbitro nell’arbitrato interno ed internazionale”, *Riv. dir. proc.*, vol. L, 1995, p. 160.

gaining ground in different national systems due to the influence of the Uncitral Model Law¹⁰⁷⁹.

An arbitrator can be challenged when it is reasonable to assume a lack of impartiality, the existence of partiality or some degree of interest on the part of the arbitrator in the arbitration award. This interest or partiality can be direct, true and reasonably verified instead of being something distant or speculative. There are many circumstances which can lead to an arbitrator being challenged on grounds of partiality, although it is customary to accredit that the arbitrator maintains an attitude of “personal partiality” with respect to one of the parties¹⁰⁸⁰. Without going into a detailed analysis, lack of transparency can derive from:

i) Personal relationships, e.g. maintaining, or having maintained, family ties through blood or marriage with one of the parties, their lawyers or witnesses¹⁰⁸¹, or being a member of the family, commercial company or the guarantor or insurer of the debentures of one of the parties, or holding bonds or shares in a party who is a company.

ii) A hostile attitude towards one of the parties, their lawyers or witnesses, such as having brought proceedings against one of the parties or having been accused by one of them in another case, started or settled, in recent years. In Canadian jurisprudence, the grounds for challenging one of the arbitrators, established in the *Société de transport de la Rive-Sud de Montréal c. Syndicat canadien de la fonction publique, S.L.*, is based on manifest hatred between the arbitrator and one of the parties: “*La récusation peut aussi être accordée s’il y a inimitié capitale entre les arbitres et une partie. L’inimitié est plus forte que la partialité*”¹⁰⁸².

iii) Prior knowledge on the part of the arbitrator of certain facts related to the dispute which could condition his future ruling. This can lead to vacating the award, or to partial vacation on the grounds of lack of independence¹⁰⁸³.

iv) The arbitrator being a member of the board of the arbitration service provider charged with appointing the arbitrators; or being a member of an arbitration association to which other actors in the arbitration process also belong. Nevertheless, in *Red Eléctrica de España, S.A. / Iberdrola Distribución Eléctrica, S.A.* the Provincial Court of Madrid considered that the fact that the president of the arbitral tribunal and one of the appointed arbitrators were both vice-chairmen of an arbitration association of which the lawyer of one of the parties was secretary was not a violation of the principles of independence and impartiality established in Article 17(1) of the Spanish Arbitration Act (2003)¹⁰⁸⁴.

¹⁰⁷⁹ C. Consolo, “La ricasazione dell’arbitro”, *Riv. arb.*, vol. 8, 1998, pp. 17-32.

¹⁰⁸⁰ H. Van Houtte, “Les critères de récusation de l’arbitre”, *Les arbitres internationaux: Colloque du 4 février 2005*, Paris, Centre Français de Droit Comparé, 8, 2005, pp. 95-100.

¹⁰⁸¹ ATF, September 16, 1988, *Société Ligier et Société Diffusia / Société Alfa Lancia Industriale*, *Rev. arb.*, 1989, pp. 505 ss.

¹⁰⁸² [2001] 3333, IJCan 11369 (QC A.G.).

¹⁰⁸³ P. Lalive, J.-F. Poudret and C. Raymond, *Le droit de l’arbitrage interne et international en Suisse*, Lausanne, Payot, 1989, p. 440; C.A. Paris, December 4, 1979, *Cornú / Comptoir commercial André & Cie*, *Rev. arb.*, 1981, p. 146 note J. Rubellin-Devichi.

¹⁰⁸⁴ AP Madrid, February 15, 2008, *Arbitraje*, vol. II, n° 1, 2009, pp. 269 et seq. note S. Álvarez González.

v) The existence of an academic relationship or membership of a particular state administrative body. This circumstance is not usually accepted. An interesting example is the judgement of the First Chamber of the Supreme Court of Justice of Costa Rica on 3 May, 2002 (*Scott Paper Company, S.A. / Dario Express R. Castro e hijos, S.A.*), in relation to a group of lecturers from the *Escuela Libre de Derecho*, which states that “the fact that two lawyers are lecturers at the same teaching institute does not necessarily raise doubts about the impartiality of the arbitrators appointed to settle the dispute. Because of the special features of this particular type of subordinate relationship, by virtue of the principles of academic freedom . . . we consider that this situation is far removed from ordinary friendship or loyalty among colleagues”¹⁰⁸⁵. An example of the second case is the *Minas de Almadén y Arrayanes, S.A. / Normaluminium, S.A.* case, where the Provincial Court of Madrid found it absolutely absurd to consider that membership of the corps of national legal advisors of Spain could give rise to such strong ties with government institutions and bodies “that its members, even when they are in a situation of voluntary leave of absence from their post or have lost their membership through resignation of for other causes, continue to be surrounded by an aura of bias which prevents them from acting as arbitrators in disputes in which public entities or companies are involved”¹⁰⁸⁶.

25. An arbitrator’s religion, ethnic or national origin, gender, age, class, means or sexual orientations cannot ordinarily form a sound basis as an objection. However, there have been cases surrounded by a certain aura of “conflict of civilizations”. In *Westland Helicopters* the defendant, an Egyptian company, called into question the legality of the composition of the arbitral tribunal, consisting of a Swedish, French and Swiss nationals, on the grounds that it did not include any national from a developing country. This issue cannot be ignored, above all, when dealing with arbitrations with Arab countries with regard to the religious persuasion of the arbitrator. In this case, the grounds for challenging the arbitrators were based on strange reasons of locality, their nationality being linked to that of the arbitration court; as was the case of an ICC arbitration where Geneva was chosen as the site of the arbitration court and an arbitrator from the city was appointed, a circumstance which was challenged on the grounds that it was an EU member state (*sic*), and upon being apprised of the error, refused to back down on the grounds that the city of Geneva is too close to, and thus purportedly under the influence of France¹⁰⁸⁷.

A different question is that of determining the possibility of being appointed arbitrator in two different disputes (heard before different institutions) by the same party. The first consideration is that the confidence which one party has in a particular professional does not constitute impartiality, but rather a belief in the good judgement of the arbitrator. In the U.S., the AAA examines this circumstance in its table of ethics for international arbitrators. An arbitrator's past or current participation in a connected

¹⁰⁸⁵ http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=196342&strTipM=T&lResultado=9&strLib=LIB.

¹⁰⁸⁶ AP Madrid, September 15, 2008, <http://audiencias.vlex.es/vid/51238484>.

¹⁰⁸⁷ P. Lalive, “Sur des dimensions culturelles de l’arbitrage international”, *Theory of International Law at the threshold of the 21 st. Century. Essays in honor of Krzysztof Skubiszewski*, La Haya, Kluwer Law International, La Haya, 1996, p. 771; *id.*, “Dérives arbitrales (II)”, *Bull. ASA*, vol. 24, n° 1, 2006, p. 4.

dispute has led to a certain degree of controversy in French doctrine, which has come down in favour of the inexistence of lack of independence or of impartiality. In *Ben Nasser et autre / BNP et Crédit Lyonnais* the *Cour de appel* stated that if the arbitrator has acted in parallel disputes, he could be influenced when the time comes to deliver his verdict on the second case. However, there is “*ni prévention ni préjugé lorsque l’arbitre est appelé à se prononcer sur une situation de fait proche de celle examinée antérieurement, mais entre parties différentes*”¹⁰⁸⁸.

Within the circumstances discussed above, recent practice emphasises two situations in which the impartiality of the arbitrator can be seen to be compromised: (1) his links with the parties or with the laws firms to which their lawyers belong, and (2) his membership of a particular arbitration organization to which said lawyers and/or other arbitrators also belong.

4.2. Relations between arbitrators and the parties and/or their representatives

26. The existence of a relationship between the arbitrators and the parties and/or their representatives does not always lead to a situation of partiality, providing grounds for challenging the arbitrator¹⁰⁸⁹. Arbitration circles are small enough to accept the possibility that arbitrators have, or could have had, some professional contact with the parties. On the other hand, some disputes require such a depth of specialization and knowledge of the disputed issue that the circle of professionals is further reduced or leads to a small number of jurists constantly appearing in different roles (arbitrators, legal representatives, corporate representatives, experts, etc.). This situation, and the frequent interaction of arbitration positions held by the same person, frequently challenges the principle of neutrality¹⁰⁹⁰. Bearing these observations in mind, arbitration has gone through many changes.

French jurisprudence showed signs of great flexibility in the *Philipp Brothers* case, rejecting the possibility that one professional could challenge *en masse* all the other professionals around him¹⁰⁹¹, insisting that membership of a large legal firm with divisions and multiple specializations does not necessarily involve an “association of interests” which justifies such a challenge¹⁰⁹². Having established this point, practice increasingly shows greater individualization of circumstances in which a challenge brought against an arbitrator on the grounds of lack of independence is accepted.

¹⁰⁸⁸ CA Paris, October 14, 1993, *Rev. arb.*, 1994, pp. 380 *et seq.* note P. Bellet; C. Raymond, “Des connaissances personnelles de l’arbitre à son information privilégiée”, *Rev. arb.*, 1991, pp. 3-18.

¹⁰⁸⁹ J. Robert, “Influence sur la validité de l’arbitrage des rapports antérieurs des arbitres avec les parties”, *Rev. arb.*, 1969, pp. 43-55; Ph. Fouchard, E. Gaillard and B. Goldman, *Traité d’arbitrage commercial international*, Paris, Litec, 1999, pp. 584; J.L. Delvolvé, J. Roche and G.H. Pointon, *French Arbitration. Law and Practice*, The Hague, Kluwer Law International, 2003, pp. 97 *et seq.*

¹⁰⁹⁰ For a comprehensive review of the position, see P. Lalive, “Sur l’irresponsabilité arbitrale”, *Etudes de Procédure et d’arbitrage en l’honneur de J.-F. Poudret*, Faculté de Droit de l’Université de Lausanne, 1999, pp. 419-435.

¹⁰⁹¹ TGI Paris, October 28, 1988 and 29 Juin 29, 1989, *Rev. arb.*, 1990, p. 497.

¹⁰⁹² CA, Paris Juin 28, 1992 (*KFTCIC / Icori Estero*), *Rev. arb.*, 1992, pp. 568 *et seq.* note P. Bellet.

The English courts sustain that the mere appearance of partiality is sufficient to disqualify an arbitrator¹⁰⁹³. An interesting precedent is *Veritas Shipping Corp. v. Anglo-Canadian Cement, Ltd.*, in which a London court removed the arbitrator appointed by one of the parties in a dispute because he referred to himself as the arbitrator of the defendant. In another case, the arbitrator was disqualified because of the fact that there was a close connection between him and one of the parties as he was a present or past managing director of that party. The grounds given by the London court was that arbitrators should not only act fairly and impartially, but should also be seen to do so¹⁰⁹⁴.

27. Several decisions arising in the context of ICSID arbitration have been given on this issue, although not enough to extract a consolidated doctrine, as presumed conflicts of interests have led to different decisions regarding the eligibility of the arbitrator. In *Holiday Inns v. Morocco*, the applicant's arbitrator had to abandon the dispute when he revealed that four years previously he had been the director of one of the applicants¹⁰⁹⁵. Likewise, in *Amco v. Indonesia*, the defendant challenged the arbitrator appointed by the applicant because before his appointment he had personally given tax advice to the main shareholder of the applicant company, and his firm of lawyers had also had, before the start of the arbitration, a utility distribution arrangement with the applicants' lawyers, even though at the time of said arrangement neither the shareholder nor the applicant had been clients of either of the law firms. Although the concern of the challenging party was reasonable, the proposal to disqualify was rejected on the grounds that it was insufficiently important in the circumstances of the case¹⁰⁹⁶.

In the *Zhinvali* case, the challenge was based on the existence of occasional, purely social, contacts between the arbitrator in question and an executive playing a key part in the investment made by the applicant. The other two arbitrators remarked on the absence of any professional or business relationship between the arbitrator and the person involved, and rejected the challenge, concluding that suggesting that occasional personal contact could significantly affect an arbitrator's judgement, in the absence of additional facts, was pure speculation¹⁰⁹⁷. Finally, in the *Vivendi* case, the challenged arbitrator had disclosed that one of his law partners had been engaged as a tax advisor by the investment company's predecessor, and that he had not taken part in said activity. In this case, the arbitrators ruling on the challenge

¹⁰⁹³ *Metropolitan Properties Co. Ltd. v. Lannon* [1969] QB 577 (599) (per Lord Denning). M. Tupman, "Challenge and Disqualification of Arbitrators...", *loc. cit.*, p. 50.

¹⁰⁹⁴ [1966] 1 Lloyd's L. Rep. 76 (Q.B. 1965).

¹⁰⁹⁵ In a case dealing with the consequences of the attempted resignation of an arbitrator who sought to condition his resignation to the fact that the Claimant, who appointed him in the first place, be allowed to appoint his successor, in what came to be known as "The Incident of Sir John Foster, 19" the two other members of the Arbitral Tribunal decided to disregard the condition attached to the resignation, the vacancy having been filled pursuant to Article 56(3) of the ICSID Convention by the Administrative Council of the ICSID", *Holiday Inns S.A. and others v. Morocco* (Case No. ARB/72/1), *ICSID Ann.Rep.*, 1977, pp. 32 *et seq.*.

¹⁰⁹⁶ ICSID Case No. ARB/81/1, *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982), unpublished.

¹⁰⁹⁷ ICSID Case No. ARB/00/1, *Zhinvali Development Ltd. c. Republica de Georgia*, Decision on the Proposal to Disqualify an Arbitrator, January 19, 2001, unpublished).

considered that the continuing relationship between the partner and the company was not sufficiently significant for these effects, and rejected the challenge¹⁰⁹⁸.

28. Fatal employer–employee relationships sometimes arise when arbitrators have previously worked for governments and international organizations that are parties to an arbitration. The results are not always easy to predict, although one is comforted by the fact that no two arbitrations are alike. For example, the arbitration did not proceed in the *Buraimi Oasis Arbitration* (1955) between Great Britain and Saudi Arabia when it was established that one arbitrator had previously served as a Saudi Arabian government official and was in charge of arbitration there¹⁰⁹⁹. In contrast, an arbitrator who had previously advised the US government on issues related to the arbitration in question was unsuccessfully challenged¹¹⁰⁰.

29. Following *Promotora Industrial Balear, S:A. / Alba Balear Motor, S.A.*, where the arbitral award was vacated because it was proven that the arbitrator had professional ties with the majority shareholder of one of the companies involved in the dispute¹¹⁰¹, Spanish jurisprudence has been prone to flexible interpretations when ascertaining the relationship between the arbitrator and the party proposing him. To this end it rejects the interpretation that the same grounds for removing and challenging judges can be applied to arbitrators. This was illustrated in *Rostock Poyectos, S.L. / Técnicas Reunidas, S.A.*, in which the Provincial Court of Madrid held that the link between the arbitrator and an important law firm representing one of the parties had not been proven¹¹⁰². Later, in *Skoda Power, S.A. / Abener Energia–El Sauz, S.A. de C.V.*, the same Provincial Court stated that the fact that at the time of delivering his award the president of the arbitral tribunal was a member of a firm of lawyers negotiating a merger (which was successful) with the law firm representing one of the parties was not detrimental to the principle of equality and independence¹¹⁰³. In such cases, Spanish courts have had to take sides in a “battle of evidence” potentially compromising the impartiality of the arbitrator, opposed by other, contrary, evidence which for the time being has prevailed.

4.3. *Membership of the arbitrator or the secretary of the arbitral tribunal of the committee of an arbitration institution*

30. The complex nature of the duties of an arbitration institution calls for serious questions to be raised about what should be done when a member of an arbitration institution is a party to the arbitration it administers against another party who has no relationship with the institution. In this case there is clearly a position of privilege with

¹⁰⁹⁸ ICSID Case No. ARB/97/3, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal c. República Argentina*, Decision on the challenge to the President of the Committee, *ICSID Review—Foreign Investment Law Journal*, pp. 182-196.

¹⁰⁹⁹ 1955 U.N.Y.B. 339-340; (1953) I.L.C.Y.B. 51.52.

¹¹⁰⁰ A.J. van den Berg, “Justifiable Doubts as to the Arbitrator’s Impartiality or Independence”, *Leiden J. Int’l L.*, vol. 10, 1997, pp. 509-519; P. Lalive, “Cultural Differences and International Arbitration”, *Euromoney*, vol. 9, 1995, pp. 13-15.

¹¹⁰¹ AP Baleares, February 4, 1997, AC\1977\318.

¹¹⁰² See *supra*, note 6.

¹¹⁰³ See *supra* note 45.

respect to the appointment of the arbitrators, raising doubts on the impartiality needed in any arbitration¹¹⁰⁴. Because of this, more firmly consolidated arbitration institutions take firm action on these issues by preventing their arbitrators from acting as arbitrators in disputes administered by the institution in question. In this respect, Article 2 of Appendix II of the ICC Rules (“Internal Rules”) assumes complete incompatibility, albeit accepting certain changes, showing a degree of corporate protection. This article provides that:

1. The Chairman and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration.
2. The Court shall not appoint Vice-Chairmen or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.
3. When the Chairman, a Vice-Chairman or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.
4. Such person must refrain from participating in the discussions or in the decisions of the Court concerning the proceedings and must be absent from the courtroom whenever the matter is considered.
5. Such person will not receive any material documentation or information pertaining to such proceedings.

This incompatibility is frequently found in the rules of arbitration applied in leading institutions¹¹⁰⁵. It can also be found in some national systems, as is the case of Italy, in Article 932 *c.p.c.* when regulating arbitration administered in compliance with pre-established rules, and which could affect international arbitration proceedings choosing Italy as their venue¹¹⁰⁶. From an ethical standpoint, a situation of obvious incompatibility would also arise if a member of an arbitration institution should advise on the drafting of a document which includes the arbitration agreement, as he could have an interest in the validity of said agreement, or even, indirectly, in favouring the interests that, at that time, he defended on behalf of the party for whom he acted as adviser. The same situation would arise if a member of the arbitration institution should, during the arbitration, act as consultant to one of the parties to the dispute, as there is a chance of him participating either in the pre-arbitration decisions which condition the intervention of the arbitrator, or in the control of the arbitrators, a function inherent to the administration of arbitration.

Some ethical codes are not usually very strict in this sense, and simply warn arbitration institutions to refrain from appointing as arbitrators any person holding an administrative or management post, who is a member of their governing body, or who is on their staff, unless the parties jointly agree to appoint such a person, or the rules allow this kind of ap-

¹¹⁰⁴ See J.C. Fernández Rozas, “Luces y sombras del arbitraje internacional en los litigios internacionales”, *RCEA*, vol. XXIII, 2008, pp. 71-104 (85-86).

¹¹⁰⁵ Article 2(2) Arbitration Rules of the Chamber of Commerce of Geneva that provides that members of Committee cannot be arbitrators of counsel in the arbitrations of the Chamber.

¹¹⁰⁶ Article 832.3º: “*Le istituzioni di carattere associativo e quelle costituite per la rappresentanza degli interessi di categorie professionale non possono nominare arbitri nelle controversie che contrappongono i propri associati o appartenenti alla categoria professionale a terzi*”. See A. Briguglio, “La dimensione transnazionale dell’arbitrato”, *Riv. arb.*, vol. 15, 2005, pp. 679-709 (699).

pointment, and provide that in such circumstances appointment should be limited to the post of single arbitrator or president of the arbitration panel.

The trend towards this practice is even more flexible in Spain, as can be seen in *Comsa, S.A. y Emte, S.A. Ingeniería y Promociones Eólicas, S.L. e Índalo Eólica, S.L.*, where the Provincial Court of Madrid rejected a challenge on the grounds of lack of independence and impartiality in spite of the fact that the arbitrators were, respectively, chairman and vice-chairman of the Court of Arbitration appointing them¹¹⁰⁷.

31. Provided the secretary of the arbitral tribunal performs merely organisational duties, his presence in the proceedings should not give rise to any problems. The limit is reached, however, if the secretary encroaches on tasks which only concern the arbitrators and their duties - incidentally, these may never extend to decision-making duties. Discrepancies arise, however, when they take on legal tasks which go beyond simply assisting the panel, or which have a certain relationship of dependency with the arbitral institution provider¹¹⁰⁸. In the first case, the task of contributing doctrinal or case-law documents and drawing up summaries of the same, preparing certain draft resolutions related to the proceedings, writing factual summaries of the arbitration award, is perfectly permissible. In the second case, although some arbitration rules confirm that the secretary of the arbitral tribunal should be a member of staff of the arbitration institution and accept and even encourage the presence of a secretary who is a staff member, the answer should be otherwise, as this constitutes a breach of the required independence which should be maintained by the arbitral tribunal with respect to the arbitration service provider.

III. ETHICAL ELEMENTS OF THE ARBITRAL SERVICE

1. Availability

32. Professionals charged with serving as arbitrators take on an extremely complex and delicate task, as they are called to settle a dispute setting the parties against each other, and because of this, the discharge of their duties must comply with certain principles and standards which guarantee the suitability of the decision they reach, e.g., strictly adhering to a number of ethical aspects related to arbitration. Based on these, there is a combination of specialities, from university lecturers to trial lawyers, usually with a practical training in *common law*.

Notwithstanding the greater or lesser advantages of this latter choice, a basic characteristic of arbitration is availability, which should be strictly ascertained by the arbitration service provider if opting for institutional arbitration. The institution should, indeed, guarantee that the arbitrators will have enough time to analyze and evaluate to a reasonable extent all the allegations of the parties and avoid appointing arbitrators with excessive work loads. Indeed, one of the arguments put forward against the practice followed in certain arbitra-

¹¹⁰⁷ AP Madrid, November 25, 2008, JUR 2009\182094.

¹¹⁰⁸ J.C. Fernández Rozas, *Tratado de arbitraje comercial internacional en América Latina*, Madrid, Iustel, 2008, pp. 571-573.

tion circles is that arbitrators devote little time to the case brought before them due to overwork¹¹⁰⁹. An arbitrator may be an excellent professional, but he must have time to devote to the dispute with which he is entrusted, and at times may not be the right professional to settle a particular case in a reasonable time. Practice has shown that arbitrators much sought after for their quality excessively prolong settlement of the dispute to the detriment of the proposing parties¹¹¹⁰. For example, Section 33(1) (b) English Arbitration Act (1996) provides that an arbitrator who fails to proceed with reasonable speed in conducting an arbitration and making his award, may be removed by a competent court. Availability is discussed in the rules of arbitration, and accompanies the statement of independence. We need go no further than Article 20(1) of the ICC Rule, which provides that “[w]hen a hearing is to be held, the Arbitral Tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it”. The same is established in Canon IV of the AAA–ABA Code of Ethics, which provides that an arbitrator must discharge his duties with diligence and settle the dispute in the shortest possible time permitted by the circumstances of the case.

Likewise, arbitrators must be willing to tackle the legal difficulties arising in the discharge of their service, and if they are part of an arbitral tribunal they must be on a par with the other arbitrators in order to take part in their discussions on an equal footing. In this way, a party appointed arbitrator may press the interests of said party without overstepping the limits of independence and impartiality. Naturally, said competence extends to familiarity with the language chosen for the arbitration¹¹¹¹.

2. Relations of the arbitrators with those involved in the arbitration process

33. The ethical conduct of arbitrators prevents them from engaging in any kind of direct or indirect communication on matters related to the arbitration with any of the parties, the witnesses, the experts, or with other persons associated with or holding an interest in the dispute, without the presence of the other party. Should such communication be established, the arbitrator must immediately inform the other party and the other arbitrators of all the details of the communication, under penalty of removal. Expressed differently, in the discharge of his duties, the arbitrator must relay to any of the parties the suggestions, proposals or written documents submitted by the other party, and shall abstain from discussing or dealing with issues related to the arbitration, individually and in private, with one of the parties. Furthermore, should it come to the notice of an arbitrator that another arbitrator has maintained wrongful contact with one of the parties, he can, and should, notify the other members of the arbitral tribunal, who will then decide what measures should be taken.

Despite the fact that in this sense frequent mention is made of the aphorism “like Caesar's wife, they must not only be virtuous but must appear to be virtuous”, it is obvious that no arbitrator can, directly or indirectly, accept favours, gifts or lavish hospitality from any

¹¹⁰⁹ Cf. P. Lalive, “Dérives arbitrales (I)”, *Bloc. loc. cit.*, p. 590.

¹¹¹⁰ Ch.J. Moxley, “Selecting the Ideal Arbitrator”, *Disp. Res. J.*, vol. 60, n° 3, 2005.

¹¹¹¹ S.R. Bond, “The International Arbitrator: From the Perspective of the ICC International Court of Arbitration”, *Nw. J. Int'l. L. & Bus.*, vol. 12, 1991, pp. 1 *et seq.*

party to the arbitration¹¹¹². This is why arbitrators must be particularly meticulous in avoiding significant contact, be it social or professional, with any of the parties to the arbitration without the presence of the other party. After accepting appointment, and while serving as an arbitrator, a person should avoid entering into any business, professional or personal relationship, or acquiring any financial or personal interest which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of the case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they have been influenced in the arbitration by the anticipation or expectation of friendship or other interests (Canon I.C Code of Ethics AAA-ABA).

34. Ethical codes include a series of rules applicable to the actions of arbitrators. The latter should act with disinterest and deal with the parties impartially and fairly at each stage of the proceeding, which means being patient and polite to the parties, their lawyers and the witnesses. This fair treatment includes the requirement of not yielding to outside pressure, public opinion, fear of criticism or self-interest. It also includes not harassing the parties or other kinds of abuse or disturbance in the course of the hearing. A further requirement of conduct prevents arbitrators from communicating their decision to third parties before making them known to the parties. If arbitration is paid and an arbitration service provider is not involved in remunerating arbitrators for their services, they must adhere to standards of integrity and fairness and scrupulously avoid entering into any kind of negotiation with the parties regarding said payment or engage in any kind of communication regarding said payments which could give the appearance of coercion. These requirements continue to apply after delivery of the award with respect to collaborating in the post-arbitration phase, particularly in the case of a party-appointed arbitrator who has voted in a particular way being charged with leading vacatur proceedings, or assisting in such a task.

3. Confidentiality

5.1. Scope

35. Confidentiality is the requirement that arbitrators and parties not divulge the content of the proceedings, particularly documents produced during the same, including the arbitration award¹¹¹³. Aside from very few systems, like that of Spain, which consider confidentiality to be a legal requirement (Article 24.2 of the Spanish Arbitration Act), this requirement derives directly from the so-called “arbitration contract”¹¹¹⁴ and extends to persons not connected with the processes (unless authorized by the arbitral tribunal), the parties, and to documents generated during the proceedings, which could include commercial or industrial secrets. To this effect, arbitration rules usually furnish arbitrators with instru-

¹¹¹² A. Redfern and M. Hunter (with N. Blackaby and C. Partasides), *op. cit.*, pp. 200-201.

¹¹¹³ See for a comprehensive review J.C. Fernández Rozas, “Trayectoria y contornos del mito de la confidencialidad en el arbitraje comercial”, *Arbitraje*, vol. II, n° 2, 2009, pp. 335-378.

¹¹¹⁴ Th. Clay, *L'arbitre*, *op. cit.*, p. 708.

ments to guarantee confidentiality, e.g., Article 20(7) ICC Rules. Its corollary, secrecy of proceedings, by itself usually justifies the parties' desires to avoid potentially negative or damaging publicity, which is usually part and parcel of ordinary legal hearings¹¹¹⁵.

State laws are not unanimous with respect to the degree of confidentiality which should be held by those taking part in the arbitration. Some are silent on the issue while others raise arbitrators' duty to respect the confidentiality of their discussions¹¹¹⁶. This individuality can be detrimental to the right to a fair hearing of one of the parties in the case of said party not foreseeing this circumstance, i.e., that national structures acknowledge an implicit requirement of confidentiality, or give different interpretations to the scope of confidentiality to be expected.

This requirement can be enforced through two different channels. First, simply by accepting rules of arbitration which are very strict in this regard. Second, the parties themselves, or with the help of the arbitration panel, can reach an *ad hoc* agreement on confidentiality specifying such issues as specific documentation or information which should remain confidential, the period of validity of this clause, measures applied to safeguard the confidentiality of the information or hearings, or the consequences of the non-disclosure requirement including liability and compensation to be paid for damages. The UNCITRAL Notes on Organizing Arbitral Proceedings (1996) specifies in some detail the elements of a "confidentiality agreement":

32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body)".

Logically, the deliberations of the arbitration panel and the content of the award should remain confidential indefinitely, unless the parties release the arbitrators from this requirement. The arbitrator should not take part in any proceedings aimed at judging the award, nor should he disclose any information aimed at facilitating said judgement, unless he considers it his duty to disclose the incorrect or fraudulent conduct of any of his fellow arbitrators. Likewise, the option of the precautionary measure being taken by an arbitrator, as the person with the most information on the advisability of adopting the measure, being familiar with the main issue, and in a position to rapidly ascertain the best course of action, not only circumvents the inevitable delaying tactics being placed before the judge and significantly reduces the cost of the proceedings, but also preserves the principle of confidentiality¹¹¹⁷.

¹¹¹⁵ Y.L. Fortier, "The Occasionally Unwarranted Assumption of Confidentiality", *Arb. Int'l.*, vol. 15, 1999, pp. 131–130, esp. p. 131.

¹¹¹⁶ As was understood, interpreting Article 1469 NCP, CA Rouen April 16, 1986, *Rev. arb.*, 1988, pp. 327 note M. de Boissésou. See J.P. Beraudo, "La confidentialité et le délibéré", *Les arbitres internationaux: Colloque du 4 février 2005*, Paris, 2005, pp. 101–123

¹¹¹⁷ J.C. Fernández Rozas, "Arbitraje y justicia cautelar", *RCEA*, vol. XXII, 2007, pp. 44 y 49.

For all the above reasons, the confidentiality of arbitrators during their service is one of the essential principles of arbitration and is included in most arbitration rules and codes of ethics.

36. Strictly speaking, the arbitrator should consider all aspects of the arbitration to be confidential. This means that he cannot give minutes of the arbitration hearing to third parties who are not part of the process. Neither can he use the information to which he has had access during the arbitration proceedings to obtain personal advantage or to the advantage or disadvantage third parties. This requirement remains valid even after the dispute has been settled¹¹¹⁸.

In compliance with the rules of each arbitration service provider, certain awards passed down are open to the public, although the arbitrator may not publish them or make them known. This confidentiality requirement is applicable only to the arbitrator, not the parties. This should not be taken to mean that none of these provisions imposes a blanket of silence on the parties to the arbitration or prevents arbitrators from issuing confidentiality order concerning certain documents or information exchanged between the parties during the course of the proceedings. In the absence of an agreement or an order to the contrary, the parties are generally free to reveal the details of their own process as they deem fit, provided they do so by mutual agreement¹¹¹⁹. Any documentary or other kind of proof submitted by one party or witness to the arbitration must be considered confidential. Should such evidence contain information which is not public, no party having access to this information as a result of their participation in the arbitration may use or divulge said information under any circumstances without the consent of the parties or unless ordered to do so by a competent court.

5.2. Secrecy of deliberations

37. The deliberations of the arbitrators are fundamental to arbitration proceedings¹¹²⁰ and in some systems are included in the concept of public policy¹¹²¹. This rule is linked to another which determines the secrecy of discussions. This premise has a long tradition in judicial practice¹¹²² and has significant impact on arbitration. The premise in question has

¹¹¹⁸ Code of Ethic AAA-ABA: "An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another"; arbitrator "hould keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound" (canon VI).

¹¹¹⁹ J.B. Lee, "O princípio da confidencialidade na arbitragem comercial internacional", *O direito internacional e o direito brasileiro: homenagen a José Francisco Rezek*, Ijuí, Univ. Unijui, 2004, pp. 732-740.

¹¹²⁰ L.Y. Fortier, "The Tribunal's Deliberations", *The Leading Arbitrators' Guide to International Arbitration...*, *op. cit.* (Chap. 22).

¹¹²¹ CA Paris, January 16, 2003 (*Société des télécommunications internationales du Cameroun - Intelcam- / SA France Télécom*), see *supra* note 72. This practice "garantie la nature juridictionnelle de la décision à laquelle parvient le tribunal arbitral, le principe de collégialité supposant que chaque arbitre ait la faculté de débattre de toute la décision avec les autres" (CA Paris, 1^{ère} ch. C, November 27, 2008, *SA GFI Informatique c. Sté Engineering Ingegneria Informatica SPA*).

¹¹²² Y. Lécuyer, "Le secret du délibéré, les opinions séparées et la transparence", *Rev. trim. des droits de l'homme*, vol. 15, n° 57, 2003, pp. 197-223.

two dimensions. On the one hand, it obliges arbitrators to hold their deliberations in private, out of earshot of the parties and their lawyers, and on the other, it strictly prohibits divulgence at any future date of the content of these deliberations and the opinions maintained by other arbitrators. In the case of a multi-member arbitration panel, the arbitrator must not disclose the content of the deliberations to the other arbitrators who will take the final decision¹¹²³. This requirement can also be found in the IBA Rules of Ethics, which in Article 9 establish that the deliberations of the arbitral tribunal must remain confidential. The same is established, with some reservations, in Article 30.2 of the LCIA Rules.

It is not possible here to describe the provisions regulating the secrecy of judge's deliberations in ordinary courts because arbitration is different and is not conditioned by the requirements inherent to judicial service regulated, in this regard, by Article 139 Spanish Procedural Law (2000), which establishes that “[t]he deliberations of multi-member courts are secret, as are the results of votes taken, notwithstanding the provisions of the law on revealing private votes”. Furthermore, there is another important differentiating element derived from the flexibility inherent in arbitration: the deliberations of the arbitrators do not have to comply with strict rules for the physical, and concurrent presence of the arbitrators in their debates. Such discussions may be conducted over the phone, by e-mail, telex or fax - this should not be confused with “oral discussions”¹¹²⁴. This argument is strengthened by the fact that national and institutional rules determine the empowerment of the arbitrator to organise the proceedings.

Another matter is if the arbitrator shows his disagreement in his dissenting opinion¹¹²⁵, or refuses to sign the award. Nevertheless, the relationship between private and secret vote continues to cause problems, to the point of considering that the mere existence of an opinion of this kind not only calls into question the efficacy of majority decisions and raises serious doubts regarding the independence and impartiality of the arbitrators when their vote benefits the pretensions of the parties appointing them¹¹²⁶, but is also a direct attack on the secrecy of arbitral deliberations¹¹²⁷. This is not the place to take sides in the debate on the merits and

¹¹²³ Sobre esta materia puede consultarse el interesante artículo de J. Paulsson y N Rawding, “The Trouble with Confidentiality”, *Arb. Int'l*, vol 11, 1995, nº 3, pp. 303 ss.

¹¹²⁴ J.D. Bredin, “Le secret de délibéré arbitral”, *Études offertes à Pierre Bellet*, París, Litec, 1991, pp. 71-81 (73).

¹¹²⁵ En ciertos sistemas existen importantes reticencias frente a las opiniones disidentes en las decisiones judiciales, pero tal reticencia no se extiende a la eventual anulación de los arbitral awards. En Francia e.g. se considera que “l’existence d’une opinion dissidente en l’espèce n’est pas de nature à heurter la conception française de l’ordre public international dès lors que le principe de la collégialité du délibéré a bien été respecté” (CA Paris, 1^{ère} Ch. C, de 7 de october de 2008: *SAS Merial / Klocke Verpackung-Service GMBH*). Debe recordarse que en determinados círculos arbitrales las opiniones disidentes registran una valoración muy negativa. See por todos, L. Levy, “Dissenting Opinions in International Arbitration in Switzerland”, *Arb. Int'l*, vol. 5, 1989, pp. 35-42; J.-F. Poudret and S. Besson, *Droit comparé de l’arbitrage commercial international*, Schulthess, 2003; J.-F. Poudret, “Légitimité et opportunité de l’opinion dissidente dans le silence de la loi? Poursuite d’un debat amical”, *Liber amicorum Claude Reymond: autour d’arbitrage*, Paris, Litec, 2004, pp. 243-254..

¹¹²⁶ A. Redfern, “Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly”, *Arbitration Insights : twenty Years of the Annual Lecture of the School of International Arbitration* (J.D.M. Lew and L.A. Mistelis, eds.), Alphen ann den Rijn, Kluwer Law International, 2007, pp. 367-392.

¹¹²⁷ J.D. Bredin, “Retour au délibéré arbitral”, *Liber amicorum Claude Reymond: autour d’arbitrage*, Paris, Litec, 2004, pp.43-51; H. Smit, “Dissenting Opinions in Arbitration”, *Bull. CI Arb. CCI / ICC ICArb. Bull.*, vol.

scope of the dissenting opinion in arbitration, although it should be emphasised that it is not a breach of the principle of confidentiality if the same does not reveal details of the discussions held between the arbitrators prior to drawing up the arbitral award¹¹²⁸.

IV. EFFECT ON THE ARBITRAL AWARD OF A VIOLATION OF ETHICAL VALUES

1. Breach of the requirement of transparency

38. The appearance of partiality can be taken as grounds for vacatur if the arbitrator has failed in his duty to disclose, and said grounds are further reinforced if his partiality has been reliably shown. The Uncitral Model Law (1985) does not discuss this individually, and although it is not infrequently found in some national systems it could be added both to the grounds of manifest impairment of the right to a fair hearing because, for example, if the arbitrators ignore their duty to disclose the circumstances which have given rise to justified doubts regarding their impartiality or independence they are violating the minimum rule of due process, specifically the principle of equality, and the public policy exception. This basis for opposing an award arises when circumstances are discovered concerning the arbitrators which at the time could have been used as grounds to challenge and which were not known by the parties during the arbitration because the persons involved did not disclose them in their statement of independence. This practice is quite varied and we frequently come across it when there is a professional relationship between the arbitrator and the representatives of one of the parties. A good example of this can be found in Spanish jurisprudence in the Ruling of the Provincial Court of Navarre of 21 February 2000, which accepted the application to vacate on the grounds that the essential guarantees of the proceedings had been breached:

“[I]n the light of the profession relationship which must be assumed from the fact that the lawyer of one of the parties and the lawyer appointed as arbitrator in said process have worked in the same law firm for more than 6 years at least, a circumstance which does not allow the arbitrator to be objective, at least to guarantee that her decision commands the required confidence of third parties and the parties in the sense that it is the result of a fully committed and impartial decision”¹¹²⁹.

The above case involves the arbitrator's neglect to inform the parties previously of the basic elements of arbitration service: independence, impartiality and availability.

39. In the U.S.A., Article 10(2) of the Federal Arbitration Act (1925) provides fertile ground for the argument that an arbitrator's failure to disclose certain information may require the award to be vacated. Jurisprudence is firm on this point, as illustrated in *Commonwealth Coatings Corp. v. Continental*. Although the objecting party had not been damaged in any way by the arbitrator's failure to inform, the court set the precedent that al-

15, n° 1, 2004, pp. 37-41; P.J. Rees and P. Rohn, “Dissenting Opinions Can They Fulfil a Beneficial Role?”, *Arb. Int'l.*, vol. 25, n° 3, 2009, pp. 329-346.

¹¹²⁸ G. Born, *International Commercial Arbitration*, 2nd éd., Alphen aan den Rijn, Kluwer Law International, 2009, pp. 2467 *et seq.*

¹¹²⁹ JUR 2000\113772.

though arbitrators are independent and impartial, failure to comply strictly with the requirement to disclose will result in the award being vacated. A federal district court in Texas examined the “evident partiality” standard and noted: “In a failure to disclose case, the integrity of the process by which arbitrators are chosen is at issue; in an actual bias case, the integrity of the arbitrator’s decision is at issue. . . . Thus, the standard a court uses to evaluate a claim of evident partiality varies depending on whether the parties seeking to vacate the award argue non-disclosure or actual bias”¹¹³⁰. Furthermore, in *New Regency Productions, Inc. / Nippon Herald Films, Inc.*, the Ninth Circuit Court of Appeals vacated an award given by an arbitrator who had not disclosed his work negotiations and subsequent acquisition of a job with a subsidiary of one of the companies involved in the dispute while he was acting as an arbitrator¹¹³¹.

40. French jurisprudence has a long tradition confirming the effect of the statute on arbitral awards. The Court of Cassation expressly stated that “l’ignorance par l’une des parties d’une circonstance de nature à porter atteinte à cette qualité vicie le consentement donné par elle à la convention d’arbitrage et en entraîne la nullité”¹¹³². In the Judgement of the Tribunal de Grande Instance de Paris (1^{re} Ch., 1^{re} Sect.) May 12, 1993 (*Société Raoul Duval / V.*)¹¹³³ the chairman of the arbitral tribunal started working for one of the parties the day after the award was rendered and failed to disclose this fact to the parties. The same statute was adopted in the judgement of the Paris Court of Appeal (1^{re} Ch. Civ.) June, 30, 1995 (*B / Société Annahold BV et autres*)¹¹³⁴ and by the judgement of the Paris Court of Appeal (1^{re} Ch.c) of November 30, 1999 (*Marteau / CIGP*) due to the fact that the arbitrator had not at any time disclosed that he belonged to a law firm with professional and economic links to companies belonging to the group of the body appointing him¹¹³⁵. Moreover, the Court of Cassation (2^{ème} Ch. Civ.) December 6, 2001 (*Fremarc / ITM Entreprises*) even vacated a judgement passed by the Paris Court of Appeal in relation to an arbitrator and lecturer in law who had the unseemly ability of systematically managing to be appointed by the same type of party and in the same kind of arbitration, and who had neglected to disclose this circumstance. The Court of Appeal¹¹³⁶ considered that this attitude, while reprehensible, was not significant enough to show a lack of independence and impartiality, and much less to justify vacating the award. Nevertheless, this transfer was vacated on the grounds of contradiction, which led to vacating the award in spite of the fact that failure to disclose was not included in the grounds of Article 1484 NCPC. French law has debated this practice, considering that it grants autonomy to non-regulated grounds for vacating and that failure to disclose should be added to the general grounds for incorrect composition of the arbitral tribunal; nevertheless, this position has not been unanimous,

¹¹³⁰ *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2006 WL 2583183 (N.D.Tex Sept. 1, 2006).

¹¹³¹ United States Court of Appeals for the Ninth Circuit September 4, 2007, *Arbitraje*, vol. I, n° 1, 2008, pp. 265 ss note E. Artuch Iriberrí; C.T. Salomon y Q.C. Smith, “Arbitrators Have Duty to Investigate Possible Conflicts Arising from New Employment”, *DLA Piper*, 5 November 2007, http://www.dlapiper.com/arbitrators_have_duty_to_investigate/.

¹¹³² *Ury / Galeries Lafayette*, see *supra*

¹¹³³ *Rev. arb.*, 1996, pp. 411-418; confirmed by Paris Court of Appeal October 12, 1995, *ibid.*, 1999, pp. 324 ss, and *Cass. civ.*, December 16, 1997, *ibid.*, 1999, pp. 253 ss.

¹¹³⁴ *Ibid.*, 1996, pp. 496-502.

¹¹³⁵ *Rev. arb.*, 2000, pp. 299 *et seq.* note Ph. Grandjean.

¹¹³⁶ CA Paris, October 28, 1999, *Rev. arb.*, pp. 299 *et seq.* note Ph. Grandjean.

pointing out that the vacating judge should sanction not the mere existence of a risk (due to incomplete disclosure), but the actual act of non-disclosure¹¹³⁷.

41. In Finland, Arbitration Act 967/1992 (amendments up to 460/1999 included) sets strict standards for the independence and impartiality of all arbitrators, even party-nominated arbitrators, and aims at the protection of the arbitral proceedings. The act stipulates that an arbitrator must be impartial and independent. This is because the office is comparable with that of a judge. Under no circumstances is the arbitrator to function as an advocate or attorney for the nominating party. To secure that this requirement is met, an arbitrator is obliged to disclose any circumstances that are likely to compromise his or her impartiality or independence. If there is any reasonable doubt to this, an arbitrator should not assume the duties unless the parties are aware of these and explicitly consent to his or her appointment. In *Urho, Sirkka and Jukka Ruola / Professor X* the plaintiff had successfully annulled the arbitral award in a prior action in which he challenged the award on the ground of bias. In this subsequent action before the Finnish Supreme Court, the plaintiff sued the arbitrator directly for the cost and expenses of the arbitration. The arbitrator had failed to disclose the fact that he had given several legal opinions to the defendant company and financial institutions who were intervening parties in the arbitration. The Finnish Supreme Court held that the arbitrator's non disclosure constituted a breach of contract and awarded the plaintiff the cost and expenses of the arbitration¹¹³⁸.

2. Violation of the requirement of confidentiality

42. In order to guarantee the effectiveness of commercial arbitration there must be ample public confidence in the integrity and justice of the process, because arbitration is not based exclusively on confidence but also on legal safety¹¹³⁹. The requirement of responsibility implies, from this point of view, a guarantee by which the parties ensure that the arbitrators discharge the duty of judging which has been taken away from judges. This is the main statute governing the sector. As a general rule, violations of the requirement of confidentiality by one or more arbitrators does not affect the validity of the arbitral award and comparative jurisprudence considers that this circumstance cannot be included in the grounds supporting vacatur.

French jurisprudence, before entry into force of the *NCPN*, was not in favour of admitting such drastic consequences. With respect to the judgement of the Paris Court of Appeal (*1^{ère} Ch. suppl.*) March 11, 1981 (*Daniel Barre / Société los Solidaires*), it stated that as a general rule the premise of secrecy of deliberations is imposed equally on arbitrators and judges, but “*sa violation n’est pas sanctionnée par la nullité, qui serait d’ailleurs dangereuse en matière d’arbitrage*”¹¹⁴⁰. This approach was maintained after the reform, as can be seen in the judgement of the Paris Court of Appeal (*1^{ère} Ch. C*) October 7, 2008 (*SAS*

¹¹³⁷ *Rev. arb.*, 2003, pp. 1231 *et seq.* and note de E. Gaillard.

¹¹³⁸ Finnish Supreme Court, n° 2005: 14, 31 January, 2005, *Int'l Disp. Res.*, vol. 18, n° 1, 2995, pp. 4-6.

¹¹³⁹ S. Riegler, “Arbitrators’ Liability”, *Austrian Arbitration Yearb.*, 2007, pp. 105–124.

¹¹⁴⁰ *Rev. arb.*, 1982, pp. 84–90 note J. Viatte.

Merial / Klocke Verpackung–Service GMBH) which reiterates that violations of the secrecy of deliberations do not provide grounds for vacating arbitral awards. The Court concluded that the claimant was therefore prevented from arguing that the arbitral tribunal had violated its right to due process and failed to comply with the arbitration agreement and terms of reference¹¹⁴¹.

This drastic attitude in favor of vacatur should be contrasted with the current trend observed in certain legal systems to widen the scope of the grounds for vacating the award. Undoubtedly, if violations of secrecy adversely affect the right to a fair hearing of one of the parties – Article 41(1) (b) Spanish Arbitration Act – this circumstance could prosper, above all in Spanish law, which includes the requirement of confidentiality in Article 24, which accepts the principles of hearing, equality and contradiction. Greater difficulty would be had by the public policy ground - Article 41(1) (f) - as the scope of this basis for setting aside an arbitral award before state courts is limited and must be interpreted restrictively, justifying violation of fundamental public rights and freedom guaranteed under the constitution, both with regard to legal guarantees and essential procedural guarantees and principles.

V. FINAL CONSIDERATIONS

43. Arbitrators are under a number of obligations rooted in the ethical framework of arbitration. The most essential are competence and diligence, confidentiality, and duties in relation to parallel and subsequent proceedings. Likewise, the appointed arbitrator undertakes to be neutral, available, and at the same time, to discharge his duty with diligence. The first involves impartiality and independence: partiality occurs when an arbitrator favors one of the parties, or when he shows himself to be predisposed towards certain aspects of the issue in dispute. Dependence stems from the relationship between the arbitrator and one of the parties or a person closely linked to the latter. The second involves the arbitrators devoting the time and attention reasonably demanded by the parties, depending on the circumstances of the case, directing his efforts at conducting the arbitration in such a way as to prevent costs from rising irrationally with respect to the issue in dispute. It also means that arbitrators must conduct themselves equally as to all parties, not yielding to outside pressure, public opinion, fear of criticism or self-interest. It makes no sense that some rules of arbitration, recognized in international practice, neglect to pay sufficient attention to the above extremes and simply insist on the need for arbitral independence, relegating principles of impartiality and availability to ethical codes, whose content is much more effective.

Arbitration requires a neutral and impartial climate, one in which the parties may conduct themselves in complete freedom and with the total confidence that their positions will receive a fair hearing. However, these elements can only be achieved if all doubt regarding the integrity of the arbitrators has been dispelled. Confidence in arbi-

¹¹⁴¹ *Rev. arb.*, 2009, pp. 352, nota Betto y Canivet. See Ch. von Krause, “Paris Court of Appeal Confirms Importance of Estoppel in International Arbitration”, <http://kluerarbitrationblog.com/blog/2009/02/25/paris-court-of-appeal-confirms-importance-of-estoppel-in-international-arbitration/#more-364>.

trators increases from the moment they admit that respect for certain professional ethical standards is a normal attitude. An arbitration service which has fully and unreservedly accepted a code of ethics is an essential element in three respects: (1) professional prestige of arbitrators themselves, (2) that of the arbitration service provider which may have intervened in their appointment and, (3) the future of arbitration itself in a particular country which aims to become an efficient centre of international arbitration. For this reason these codes should not minimize the content concerning comparative standards for arbitrators which can be gleaned from established arbitral tools such as the IBA Guidelines on Conflicts of Interest in International Arbitration, or the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes.

It is one thing to assume the honor, availability, impartiality, readiness and independence of an arbitrator's actions and another to suppose that in principle (armor-plating arbitrators) that these precepts can be violated during the arbitration proceedings. For this reason it is essential to have an effective system with which to control respect for arbitral ethics and correct many irregularities seen in recent arbitration practices described here. Said attitude of defending the required legal safety of the parties, far from calling into doubt the important role played by arbitration in modern society, will strengthen its viability and confirm its future.