ARBITRATORS' CONFLICTS OF INTEREST: BIAS BY ANY NAME

This is an expanded version of a paper presented at the Regional Arbitration Conference in Kuala Lumpur in 2007. The theme discussed was whether a detailed code of ethics on arbitrator' conflicts of interest would promote uniformity. This paper submits that a code of ethics setting out general principles is desirable, but cautions against any attempt to prescribe detailed answers to particular scenarios.

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I. The pillars of natural justice

1 Archaic doctrines expressed in Latin are incongruous in the modern, transnational enterprise of arbitration. Nonetheless, there are two precepts of ancient pedigree upon which confidence in the arbitral process is rooted. These are what Lord Denning called the pillars of natural justice: *nemo judex in sua causa* (no person should be judge in his own cause), and *audi alteram partem* (everyone has a right to be heard).[1]

II. Independence and impartiality

2 *Nemo judex in causa sua* in its modern manifestation may be described as the doctrine of independence and impartiality. Impartiality and independence are related but different concepts. Clause 3.1 of the SIAC (Singapore International Arbitration Centre) Code of Ethics for an Arbitrator nicely distinguishes the two by the following explanation:

> The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator

1 Privy Council judgment in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322 at 337.

> and one of the parties, or with someone closely connected with one of the parties.

Strictly speaking, as was the view expressed in *ex parte* Pinochet[2] *nemo judex in sua causa* is more closely associated with the independence of the judge or tribunal. This means that the judge or tribunal must not be a party to the dispute, nor have a financial or proprietary interest in the outcome of the dispute.

3 Most arbitral rules, but not all, require both impartiality and independence.

4 Article 12 of the UNCITRAL Model Law on International Commercial Arbitration contains a rule which has either been directly adopted (for instance in Australia, India, Korea, Singapore and Malaysia) or finds parallel in other arbitral rules:

> Article 12 Grounds for challenge
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

5 The IBA Guidelines on Conflicts of Interest in International Arbitration opens with General Standard 1 ("general principle") which states that:

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

2 [2000] 1 AC 119 at 132.

6 The Rules of Arbitration of the Singapore Institute of Arbitrators (SIArb) stipulate that:

> Article 4 Independence and Impartiality of an Arbitrator
>
> 4.1 Any Arbitrator (whether or not appointed by the parties) conducting an arbitration under these Rules shall be and remain at all times independent and impartial, and shall not act as advocate for any party.
>
> 4.2 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.
>
> 4.3 An Arbitrator, once appointed or chosen, shall disclose any such circumstance (referred to in Article 4.2 above) to all parties, not already informed by him, of these circumstances."

7 The Singapore Law Society Code of Conduct for Arbitrators also highlights these twin requirements:

> 4. An arbitrator has an ongoing duty to disclose:
>
> Any interest or relationship, whether business, professional or personal, with any party, representative of the party or potential witness, that might give rise to a reasonable perception of partiality or bias;
>
> The extent of any prior knowledge he may have of the dispute; and
>
> c. Any other circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

8 The Rules of Arbitration of the Thai Arbitration Institute similarly permit a challenge to an arbitrator on the ground of justifiable doubts as to his impartiality or independence (rr 14-17).

9 In substance, the Indonesian Law No 30 of 1999 also provides for independence and freedom from bias. Article 22 of the Law stipulates that:

> Terhadap arbiter dapat diajukan tuntutan ingkar apabila terdapat cukup alasan and cukup bukti otentik yang menimbulkan keraguan bahwa arbiter akan melakukan tugasnya tidak secara bebas dan akan berpihak dalam mengambil putusan.
>
> Tuntutan ingkar terhadap seorang arbiter dapat pula dilaksanakan apabila terbukti adanya hubungan kekeluargaan, kenangan atau pekerjaan dengan salah satu pihak atau kuasanya.

10 Loosely and unofficially translated, para 1 says that an arbitrator may be challenged if there is reason and evidence to raise doubt that he will not perform his duty independently and will be bias in his decision. Paragraph 2 says that the challenge will be successful on proof of family, financial or work connections with one of the parties or its authorized representatives.

11 One will not find the Anglo-Saxon terminology of "independence and impartiality" in Chinese law or rules of arbitration, but the principle should be recognized there. The Arbitration Law of the People's Republic of China of 1995 stipulates the circumstances for challenge of an arbitrator. These focus on the arbitrator's relationship with a party or material interest in the case. The Rules of the China International Economic and Trade Arbitration Commission ("CIETAC") also disqualify an arbitrator who has a personal interest in the case.

12 England has chosen to uphold impartiality, but not independence, as the key ingredient against bias. The Arbitration Act 1996 speaks only of "justifiable doubts as to his impartiality". The omission of "independence" was deliberate. England decided not to have lack of independence as an additional ground for removal on top of lack of impartiality because it could give rise to endless arguments about how independent an arbitrator must be and "there may well be situations in which the parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent."[3] The decision may be influenced by the fact that in England, leading arbitrators are often members of a set of barristers' chambers, where the barristers are sole practitioners and do commonly act against each other. Sometimes, a dispute is entirely contained in one set of chambers, with both counsel and the tribunal coming from the same chambers.

13 In contrast, Art 7 of the ICC Rules of Arbitration refers only to the independence of the arbitrator:

> 1. Every arbitrator must be and remain independent of the parties involved in the arbitration.
>
> 2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature

3 Departmental Advisory Committee on Arbitration Law ("DAC") Report, February 1996, paras 101-103.

> as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
>
> 3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration…

14 Although disclosure is on matters that potentially affect the arbitrator's independence in the eyes of the parties (this is not an objective test, unlike that in many other rules or statutes), a challenge can be mounted on not just lack of independence but any other credible basis (Art 11(1) allows challenges "whether for an alleged lack of independence or otherwise").

15 For the most part, the distinction between independence and impartiality is not crucial in practice because case law predominantly considers impartiality and independence in the same pot, under the test of apparent bias.

16 Actual bias will of course disqualify any judge or tribunal. Actual bias is hard to prove, so a party with grievance against the tribunal will usually assert apparent bias.

III. Judges and arbitrators

17 Freedom from apparent bias is as important to a judge as it is to an arbitrator. A judge, however, is not embedded in the business community the way that an arbitrator is. He does not work for potential disputants nor is he part of the community of counsel who might one day argue a case before him. An arbitrator is very much part of the business and legal fraternity. For this reason, it is often of concern whether the arbitrator has reason to be partial towards one of the parties.

18 The social or business context aside, there should be no real difference between the impartiality required of a judge and that required of an arbitrator.

19 In Japan, for instance, s 792(1) of the Law Regarding the Procedure for Public Notice and the Procedure for Arbitration provides that an arbitrator may be challenged on the same grounds as a challenge of a judge.

20 In Singapore, the same test has been applied to both judges and arbitrators. In *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong)*

Ltd[4], Chao Hick Tin JC (as he then was) held that the test for determining bias of an arbitrator was that propounded in *Ex p. Topping*:[5] Would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible? A few years later, the Singapore Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*[6] applied the same test of "reasonable suspicion" in determining whether there was apparent bias of a judge.

21 In England, the House of Lords in *R v Gough*[7] held that the test is one of a "real danger" of bias, whether one is talking of judges, arbitrators or other tribunals. *R v Gough* considered whether there was a real danger of a juror being biased, but Lord Goff pointed out that "the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators." In *AT & T Corp v Saudi Cable Co*[8], the English Court of Appeal positively ruled that the test for bias against an arbitrator is the same as that for a judge, it is one of "a real danger of bias", not merely "a reasonable suspicion of bias". English case law has since moved to another test, as will be seen below.

22 In the US, there is no clear majority view. The US Supreme Court in *Commonwealth Coatings Corp v Continental Casualty Co*[9] is sometimes cited for the view that an arbitrator should be not judged by the same standards as a judge, but there were mixed messages from the judges. In that case, one of the three arbitrators was an engineering consultant whose services had been used sporadically by one of the parties, earning US$12,000 over a period of four to five years. This was not revealed until after the award was made. A majority of the Supreme Court held that the award should be set aside for non-disclosure on the ground that there was "evident partiality … in the arbitrators", which is a statutory ground for challenging an award under the US Federal Arbitration Act. Justice White recognized the difference in the circumstances of a judge and an arbitrator:

4 [1988] SLR 532 at [71]-[72].
5 [1983] 1 All ER 490.
6 [1992] 2 SLR 310 at [83].
7 [1993] AC 646.
8 [2000] 2 Lloyd's Rep 127 at [43].
9 393 US 145 (1968).

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function … This does not mean that the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.[10]

23 Justice Black took a different view, and held that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."[11] The difference in opinion means that we do not have a black-and-white pronouncement from the US Supreme Court on the point. Both judges, however, were with the majority in finding that, even though the arbitrator may have been fair and impartial in his conduct, the tribunal must not only be unbiased but must avoid even the appearance of bias. Failure to disclose the arbitrator's substantial interest in a firm which had done more than trivial business with a party led to the conclusion that there was evident partiality in the arbitrator. Three dissenting justices disagreed with the setting aside of the award, as the arbitrator was innocent of any actual partiality, or bias, or improper motive and there was no intentional concealment.

IV. Case law

A. England

24 England took a very long time to decide on the test applicable for apparent bias.

10 *Id*, at p 50.

11 *Id*, at p 49. In *Sphere Drake Insurance Ltd v All American Life Insurance Co* 307 F 3d 617 (7th Cir, 2002), Judge Easterbrook of the US Court of Appeals for the Seventh Circuit preferred Justice White's view that an arbitrator should not be held to the same standards as a judge.

25 If one is interested in numbers, one can count at least four different permutations applied by the English courts through the years.

26 First, there is the "real likelihood of bias" test propounded in *R v Camborne Justices, ex p Pearce*[12].

27 Secondly, there is the "reasonable suspicion of bias" test expressed by Ackner LJ in *R v Liverpool City Justices, ex p Topping*[13], as follows:

> Would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?

28 It is even possible to find in one decision supporters of both tests. Lord Denning MR, in *Metropolitan Properties v Lannon*, supported the "real likelihood" test:

> In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.[14]

29 Edmund-Davies LJ, supported the "reasonable suspicion" test:

> With profound respect to those who have propounded the 'real likelihood' test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by *R v Barnsley Licensing Justices* itself, as Devlin LJ made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body.[15]

12 [1955] 1 QB 41 at [51].
13 [1983] 1 All ER 490 at 494.
14 [1969] 1 QB 577 at 599.
15 *Id,* at p 606.

30 The House of Lords stepped into the fray in 1993 to offer a third turn of phrase. For ten years or so, the authoritative test was a "real danger" of bias as promulgated in *R v Gough*[16]. This raises the threshold required to disqualify an arbitrator, although many judges, whether within or outside England, have taken the practical view that semantical differences in the various tests will seldom result in a different conclusion.

31 Finally (that is, for now), in *Porter v Magill*[17], the House of Lords reviewed the English test and decided that it should be brought in line with the test applied by the European Court of Justice, the Scottish and most common law courts. The test applicable in England now is no longer the "real danger" test, but the "real possibility" test, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is meant to be no different from the "apprehension of bias" test.[18]

B. Singapore

32 In Singapore, Chao Hick Tin JC (as he then was) held in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd*[19], that the test for determining bias of an arbitrator was that propounded in *Ex p. Topping* (above): would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible? Chao JC noted that there was an alternative formulation in England at that time, which was that there must be a "real likelihood" of bias, and not merely a "reasonable suspicion" of bias. Chao JC preferred the "reasonable suspicion" test, but found that the arbitrator in *Turner v Builders Federal* had not only conducted himself so as to create a reasonable suspicion of bias, but had shown a real likelihood of bias in this case. This is one of the rare cases where an arbitrator was removed for bias.

33 Andrew Phang JC, as he then was, gave a comprehensive summary of the battles of semantics in *Tang Kin Hwa v TCM*

16 [1993] AC 646.
17 [2002] 2 AC 357.
18 *Id,* per Lord Bingham at [100].
19 [1988] SLR 532.

Practitioners Board[20]. He did not see much difference in substance between the "reasonable suspicion" test and the "real likelihood" test.[21]

34 In *Re Shankar Alan s/o Anant*, Menon JC observed that there was indeed a real difference between this test and other tests like the "real likelihood of bias" test, even if in practice, the evidence presented might lead to the same conclusion either way. Menon JC opined that in the "real likelihood test", the court must satisfy itself whether there is a sufficient degree of possibility of bias. In the "reasonable suspicion" test, the court asks itself whether a reasonable member of the public would harbour a reasonable suspicion of bias even if the court itself considers there is no real danger of bias. Be that as it may, Menon JC affirmed that the test in Singapore was the "reasonable suspicion" test.[22]

35 A few years after *Turner*, the Singapore Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* applied the same test of "reasonable suspicion" in determining whether there was apparent bias of a judge.[23]

36 In 1998, after the House of Lords came up with a "real danger of bias" test in *R v Gough*, the Singapore Court of Appeal acknowledged this alternative formulation in *Tang Liang Hong v Lee Kuan Yew*,[24] but decided to stick to the "reasonable suspicion" test. Indeed, counsel for both parties did not consider the difference to be crucial in application.

37 On the whole, the Singapore judges have shown tremendous foresight in not playing word games, and in this instance, stuck to a test which England eventually came back to after decades of wordcraft.

C. Australia

38 In Australia, the test is closer to that applied in Singapore. In *Ebner v Australia and New Zealand Banking Group Ltd*, the Federal Court of Australia pronounced the test as follows:

> [A] judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the

20 [2005] 4 SLR 604, at [34]-[45].
21 *Id*, at [39].
22 [2006] SGHC 194, at [74]-[75].
23 [1992] 2 SLR 310.
24 [1998] 1 SLR 97.

> resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle … The question is one of possibility (real and not remote), not probability.[25]

D. Canada

39 In Canada, the test is expressed as one of a "reasonable apprehension of bias": *Bank of Montreal v the AG.*[26] In substance, it should be no different from the test applied in Singapore or Australia.

E. Hong Kong SAR

40 Hong Kong SAR has kept track of the changes in England. In *Deacons v White & Case*,[27] the Court of Final Appeal noted that both counsel as well as the Court of Appeal had considered the applicable test in Hong Kong to be the "reasonable apprehension of bias" test. However, as of this year, it seems that Hong Kong SAR, perhaps inadvertently, was still citing the "real danger" test: *Suen Wah Ling v China Harbour Engineering Co.*[28]

F. United States

41 The US applies a test of "evident partiality", as enunciated in the US Federal Arbitration Act. This has not been interpreted consistently, not even among the Justices of the Supreme Court in *Commonwealth Coatings Corp v Continental Casualty Co.*[29] Although Justice Black required disclosure of any dealings that might create an "impression of possible bias", the lack of a clear consensus in the Supreme Court carried over to a number of decisions of the Circuit Courts of Appeal after *Commonwealth Coatings Corp*.[30]

25 [2000] HCA 63, at [6]-[7].
26 (2006) FC 503.
27 [2003] HKEC 1001.
28 [2007] HKEC 742, at [13]-[14].
29 *Supra,* n 9.
30 An account of this confusion is given in Finizio, "The Partial Arbitrator: US Developments Relating to Arbitrator Bias" Int ALR 2004, 7(3), 88-95.

G. New Zealand

42 New Zealand adopted the "real danger of bias" test from *R v Gough* and has not abandoned this in favour of the more widely-accepted "real possibility" test. In *Man O'War Station Ltd v Auckland City Council,*[31] the Privy Council declined to adjust the test in *Gough* to the one in *Porter v Magill*, as the Board was not persuaded that it would be right for it to restate the law for New Zealand. An important factor for the board was that the distinction between the tests was a fine one, and the difference on the facts of that case would not influence the outcome.

H. Malaysia

43 In Malaysia, the Federal Court has consistently rejected attempts by the lower courts to apply any test other than the "real danger of bias" test. In *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, the Federal Court considered whether the *R v Gough* test should be modified in line with the House of Lords judgment in *Porter v Magill*. Abdul Hamid Mohamad FCJ, with whom the other two members of the bench concurred, took the view that English courts were required to take into account Strasbourg jurisprudence, but this reason was not relevant in Malaysia. He declined to adjust the test because he did think that the old test would lead to an injustice or that the new test would lead to more justice."[32] Even so, although the Federal Court held that the Court of Appeal should not have rejected the "real danger of bias" test in favour of the "real suspicion of bias" test, the Federal Court agreed with the conclusion of the Court of Appeal that the judge, who was being challenged, should have recused herself in the circumstances of the case.

44 In fact, while the distinction between these various tests has created volumes of legal submissions and articles, no judge is likely to find that a tribunal has failed under one test but not the other.

45 Whichever formulation is preferred, the common law test for apparent bias is an objective one, that of a reasonable third party having knowledge of the relevant facts.

31 [2002] UKPC 28, at [10].
32 *Id*, at [301].

V. Automatic disqualification

46 In *Locabail (UK) Ltd v Bayfield Properties Ltd*[33], the English Court of Appeal spoke of automatic disqualification, where "the judge is shown to have an interest in the outcome of the case which he is to decide or has decided." This is more a question of independence than impartiality. The automatic disqualification rule applies to cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation, as well as a limited class of non-financial interests, such as the promotion of a cause in which the judge is involved together with one of the parties. The automatic disqualification approach was applied in *ex parte Pinochet*, where Lord Browne-Wilkinson said:

> In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias.[34]

47 The English court has thus introduced an additional dimension to apparent bias.

48 But this "automatic disqualification" rule is not accepted in Australia. In *Ebner v Australia and New Zealand Banking Group Ltd*, the Federal Court of Australia refused such an inflexible rule:

> Issues such as the present are best addressed by a search for, and the application of, a general principle rather than a set of bright line rules which seek to distinguish between the indistinguishable, and which were formulated to meet conditions and problems of earlier times. Furthermore, the brightness of the lines drawn by such rules sometimes dims over time, as circumstances change, or issues are raised in different forms.[35]
>
> At para 54:
>
> Having regard to the current state of the common law in Australia on the subject of disqualification for apprehended bias, we do not accept the submission that there is a separate and free-standing rule of automatic disqualification which applies where a judge has a direct

33 [2000] QB 451, at 472.
34 [2000] 1 AC 119, at 133.
35 [2000] HCA 63, at [32].

> pecuniary interest, however small, in the outcome of the case over which the judge is presiding.

49 The Federal Court preferred to use the general test to determine if there would be apparent bias:

> For reasons already given, we accept that, in the practical application of the general test to be applied in cases of apprehended bias, economic conflicts of interest are likely to be of particular significance, and that, allowing for the imprecision of the concept, the circumstance that a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation will ordinarily result in disqualification.[36]

50 The Australian response to the automatic disqualification rule is a sensible one. It is not desirable to have layers of fixed rules on the question of disqualification of a tribunal on the ground of apparent bias. More than one judge has reminded us to be guided by broad common sense.

51 Furthermore, it is slightly inconsistent for the English legislature to have rejected lack of independence as a criterion for disqualification whereas its judiciary makes a rule for automatic disqualification based on a perceived lack of independence.

VI. Disclosure

52 Most statutes and institutional rules make disclosure a continuous process, as seen in some of the provisions cited above. An arbitrator must disclose facts likely to give rise to justifiable doubts about his impartiality and independence when first appointed, and must do so during the course of the arbitration. For example, the SIAC Code of Ethics provides that:

> 2. Disclosure
>
> 2.1 A prospective arbitrator shall disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence, such duty to continue throughout the arbitral proceedings with regard to new facts and circumstances.
>
> 2.2 A prospective arbitrator shall disclose to the Registrar and any party who approaches him for a possible appointment:

36 *Id*, at [58].

> (a) any past or present close personal relationship or business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration;
>
> (b) the extent of any prior knowledge he may have of the dispute.

53 It is generally accepted that an arbitrator should disclose when in doubt as to whether the facts are likely to give rise to justifiable doubts about his impartiality and independence. Disclosure is not an admission that the facts *will in fact* give rise to such justifiable doubts (see, for example, General Standard 3 of IBA Guidelines on Conflicts of Interest). It has sometimes been said that it is not lack of disclosure, but the facts not disclosed that should determine whether there is justifiable doubt. On the other hand, failure to disclose relevant facts will not reflect well on the arbitrator and might influence the Court adversely against him. A fine balance has to be struck between disclosing on the side of caution and avoiding disclosing unnecessary facts which do not give rise to justifiable doubts, but might alarm one of the parties by the mere fact of disclosure.

54 In many statutes and rules, such as the UNCITRAL Model Law, the test for disclosure is an objective one.

55 The ICC Rules of Arbitration, as seen in Art 7 above, introduces a subjective element by requiring disclosure of facts which might call into question the arbitrator's independence *in the eyes of the parties*. The ICC International Court of Arbitration may prefer not to confirm the appointment if, at the outset, there are reasonable grounds in the eyes of the parties to question the arbitrator's independence. The ICC Court does not prescribe detailed guidelines, nor does it give reasons for its decisions on challenges. However, the ICC Court will take into account the stage reached in the procedure when a challenge is mounted after the commencement of arbitration.[37]

56 The IBA Guidelines on Conflicts of Interest follows the ICC Rules in using a slightly subjective approach for disclosure. General Standard 3 states that the arbitrator must disclose facts which "in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality and independence." But the test for whether or not an arbitrator is actually

37 Anne Marie Whitesell, "*Conflicts of Interest from the ICC Point of View*" *in Conflicts of Interests in International Commercial Arbitration* (Pierre A. Karrer ed) (Association suisse de l'arbitrage, 2001) 57, at p 61.

conflicted remains an objective one, for General Standard 2(b) requires disclosure of matters that "from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence", unless the parties have waived the conflict of interest.

57 Apart from introducing the automatic disqualification rule, the English Court of Appeal also refined the disclosure obligations of the tribunal in *Locabail (UK) Ltd v Bayfield Properties Ltd*. It held that the duty of enquiry depends on the stage that the proceedings are in:

> What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view inquire into the full facts, so far as they are ascertainable, in order to make disclosure in light of them. But if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows ... If, of course, he does make further inquiry and learns additional facts not known to him before, then he must make disclosure of those facts also. It is however generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.[38]

58 This refinement is not reflected in the statutes and rules discussed. In fact, the IBA Guidelines on Conflicts of Interest refrained from setting different standards of disclosure at different stages of the proceedings. General Standard 3(d) expressly provides that:

> When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.

59 Explanation (d) to General Standard 3 elaborates:

> The Working Group has concluded that disclosure or disqualification (as set out in General Standard 2) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act or whether a challenge by a party should be successful, the facts and circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. As a practical matter, institutions make a distinction between the commencement of an arbitration proceeding and a later stage. Also, courts tend to apply

38 [2000] QB 451 at 481.

> different standards. Nevertheless, the Working Group believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of arbitration would be inconsistent with the General Standards.

60 General Standard 7(d) refers to an arbitrator's "duty to make reasonable enquiries to investigate any potential conflict of interest." No variation of this duty is made in relation to the stage of the proceedings.

61 That the courts do sometimes consider the stage of the proceedings when a challenge is launched is illustrated by *AT & T Corp v Saudi Cable Co*.[39] In that case, the chairman of an ICC tribunal had a non-executive directorship in Nortel, a competitor of one of the parties, AT & T Corp. This was no disclosed and the tribunal issued two partial awards before AT & T discovered the fact and challenged the chairman's lack of independence. The challenge was rejected on the ground that there was no "real danger" of bias. But L J May indicated that there was a reasonably persuasive general case that his non-executive directorship might call into question his independence in the eyes of one of the parties. If AT&T had known and challenged the chairman at the outset, the challenge would probably have been regarded as reasonable and would have been sustained. But considering all the facts and the unanimous awards already issued, L J May agreed that the challenge should fail.

VII. Would a detailed code achieve uniformity?

62 Despite differences in wordings in different jurisdictions and different rules of arbitration, there is on the whole a common understanding on what apparent bias is. It is an objective test, guided by the maxim that justice must not only be done, but must be seen to be done. There may be differences in the application of the standard, but this is inevitable given that "an objective reasonable man" is a Platonian ideal applied by subjective individual judges. Would it help to prescribe uniform conclusions to specific scenarios?

63 One should do not more than set out the general principles in any rules or code of ethics, bearing in mind that these statements must

39 [2000] 2 Lloyd's Rep 127.

exist within the framework of the curial law in which they operate. They cannot purport to displace the law. Most codes of ethics, *eg*, those of the SIArb, the Singapore Law Society Arbitration Scheme ("LSAS") and the CIArb, do not seek to prescribe detailed solutions. The SIAC Code of Ethics is slightly more detailed, having three articles on disclosure, bias and communications but these do not encroach on the tests laid down by statutes, or the power of the court to decide whether there is a conflict of interest in the particular circumstances before it.

64 There is danger in arbitral institutes trying to formulate more detailed or quantitative guidelines on what may or may not amount to justifiable doubts. Writing an essay on conflicts of interest is one thing. Prescribing in advance what may or may not amount to a conflict of interest is an entirely bold venture.

65 Usually, the question cannot be decided in a vacuum, nor is it a quantitative issue. It is not just a question of whether the arbitrator has acted as counsel for one of the parties more than twice five years ago, or whether he has found in favour of one of them four times out of five in the last five years. If arbitral institutes promulgate detailed guidelines, they run the risk of creating confusion and even inconsistencies with court decisions. For example, in *Locabail*, the English Court of Appeal laid down some guiding principles, but cautioned at the same time that:

> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.[40]

66 Likewise, the Federal Court of Australia in *Ebner* had disapproved of drawing "a set of bright line rules".[41]

67 Should arbitral institutes try to extract and paraphrase principles from a judgment? Anything other than general principles is unwise in a common law context. Feeding words to a common law practitioner is like pouring wine for a bacchant – it can lead to a revelry of excess. Two words can result in twenty judgments. The Court of Appeal in *Locabail* observed that the court, personifying the reasonable man, should take an approach which is based on broad common sense. The same sentiments

40 [2000] QB 451 at p 480.
41 [2000] HCA 63 at [32].

had been expressed in *Tang Kin Hwa v TCM Practitioners Board*.[42] A detailed black letter code is antithetical to the versatility of common sense.

68 Furthermore, lengthy codes purporting to pronounce detailed principles are outdated the moment another landmark, comprehensive judgment is rendered by a strong judiciary.

69 There is also the risk that detailed guidelines from different arbitral institutes will clash with each other. Many arbitrators sit on the panel of more than one institute. Arbitration practitioners have to keep track of small but potentially important differences in the rules of different institutes. There is no need to add to the confusion by having competing codes on conflicts of interest. We have already seen that, even at the most general level, some institutes refer to impartiality and independence, while others refer to independence. The English Arbitration Act 1996 opted for impartiality and not independence. The ICC opted for independence and not impartiality. Case law in different jurisdictions cannot agree on the wordings of the tests: "reasonable suspicion", "real likelihood" or "real danger of bias".

70 Some might say the answer then is in having a uniform convention on conflicts of interest. There are two short answers to that. First, conventions promoting uniformity will succeed if they contain principles of general applications. They will fail if they try to micro-prescribe solutions to every anticipated scenario. Secondly, there is already an attempt at a global, detailed standard: the IBA Guidelines on Conflicts of Interest is seen as an ambitious undertaking with this purpose in mind.

VIII. The IBA Guidelines

71 The IBA Guidelines are the product of a Working Group comprising nineteen practitioners from fourteen countries, approved by the IBA Council on 22 May 2004. The Working Group was of the view that "existing standards lack sufficient clarity and uniformity in their application." It therefore set out some General Standards and

42 [2005] 4 SLR 604.

Explanations, but went further to provide lists of specific situations that do or do not warrant disclosure or disqualification.[43]

72 The IBA Guidelines are in two parts. The first part sets out seven general principles, called General Standards, and detailed explanations of each standard. The General Standards may not raise so many questions, even if they, taken with the explanatory notes, are more detailed than what most codes of ethics dare to be. They also differ in a few respects from the position taken in some national laws or institutional codes, for example, on disclosure as discussed above.

73 The second part is revolutionary and the most ambitious aspect of the Guidelines. It is divided into three colour coded lists of specific situations:

74 The Red List contains a non-waivable Red List and a waivable Red List. The situations in either Red List will disqualify the arbitrator, unless the conflict is waived by the parties if it is one under the waivable Red List.

75 The Orange List sets out situations that correspond to the duty of disclosure under General Standard 3(a), *ie*, in the eyes of the parties, they may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Disclosure does not automatically disqualify the arbitrator. That depends on the objective, reasonable third person's point of view.

76 The Green List contains situations which do not give rise to any apparent or actual conflict of interest, and no disclosure is needed.

77 None of the lists are exhaustive. The IBA Guidelines are of uneasy status. They are not law. The IBA Guidelines are not a Convention, nor are they rules of an arbitral institute. Strictly, IBA is not in a position to prescribe solutions. Their Guidelines "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. But it would belittle the Guidelines and the distinguished members of the Working Group to say that they are merely the equivalent of papers published in legal journals. The Working Group hopes that these Guidelines will find general acceptance within the international arbitration community", as they "reflect the Working Group's

43 Para 3 Introduction.

understanding of the best current international practice firmly rooted in the principles expressed in the General Standards".[44] Perhaps one way to treat the IBA Guidelines is to consider them as a legal opinion of a high order, enjoying the formal approval of a respected international organization. That is not to say it enjoys the unanimous agreement of all members of IBA. That is impossible in an undertaking of such scale, and the Working Group acknowledged that there were some points of criticism made in comments received by it.[45]

78 Time will tell whether the IBA Guidelines will achieve its aim of uniformity of application. That is not easy to gauge. There is not much case law applying the Guidelines in the three years since its launch.

79 In *Applied Industrial Materials v Ovalar Marine*[46], the US District Court did refer to General Standard 7(c) of the IBA Guidelines, together with Canon II of the American Arbitration Association Code of Ethics, in deciding that the Chairman of a tribunal who purposely closed his eyes to a business deal between his company and one of the parties, had failed in his duty of disclosure and fell foul of the rule against apparent bias. The award was vacated.

80 On the facts of *Applied Industrial Materials*, it is likely that the general test of "a reasonable apprehension or impression of bias" would have yielded the same result. In a number of other cases, the IBA Guidelines were cited without any apparent influence on the Court's decisions:

81 In the English case of *ASM Shipping Ltd v TTMI Ltd*, ASM challenged one of the arbitrators on the basis that he had been counsel instructed by the same solicitors now representing TTMI in another arbitration in which serious allegations were made against ASM's principal witness. TTMI counsel argued that this was not a conflict situation under any of the lists in the IBA Guidelines. Morison J rejected this argument (at para 39(4)):

> The IBA guidelines do not purport to be comprehensive and as the Working Party added "nor could they be". The Guidelines are to be "applied with robust common sense and without pedantic and unduly

44 Paras 4, 8 Introduction.
45 Para 4 Introduction.
46 (2006) WL 1816383 (S.D.N.Y.).

> formulaic interpretation". I am not impressed by the points Mr Croall made on these lists.[47]

82 In summary, the IBA Guidelines can be a useful point of reference. We should not ignore the opinions of learned practitioners from 19 jurisdictions. But they are not binding declarations. The Working Group intends the Guidelines to be "applied with robust common sense and without pedantic and unduly formalistic interpretation."[48]

83 Certainly, a national court will not be bound by the declarations in the IBA Guidelines, though it may be persuaded that these are persuasive yardsticks. A court will make a decision on a multitude of factors, and in common law countries, case law takes precedence over the IBA or other arbitral institutes' guidelines.

84 Whatever one may feel about the utility of the IBA Guidelines, it would be counter-productive for any organization to put up a competing set of detailed declarations on what would or would not amount to a conflict of interest. One should not assume to proclaim in stone what the court may decide from the study of actual cases.

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47 [2005] EWHC 2238, at para 39(4). Morison J held, however, that ASM had waived the apparent bias by not applying to have the arbitrator removed before taking up the award. ASM's application for leave to appeal was dismissed by Morison J, and its appeal on the leave issue was dismissed by the Court of Appeal, [2006] EWCA Civ 1341. ASM proceeded to challenge the two remaining arbitrators on the ground of justifiable doubts about their impartiality, and this challenge was dismissed by Andrew Smith J, [2007] EWHC 1513.

48 Para 6 Introduction.