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## **The Ethics of International Arbitrators**

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## Chapter \_\_

# THE ETHICS OF INTERNATIONAL ARBITRATORS

Catherine A. Rogers

## I. Introduction

International arbitrators almost universally share a sense of duty about what it means to perform their function.<sup>1</sup> Historically, this internal ethos was the only thing that guided arbitrators' conduct. Today, instead of being reserved to personal reflection, arbitrator ethics have become an important topic of public debate, and the subject of new rules and standards. Several trends in the international arbitration community account for this shift.

As international arbitration has become more popular, there has been a dramatic expansion in the pool of arbitrators, and a commensurate diversification of the cultural and legal traditions among them and among parties. Relatedly, both law firms and corporations have become larger and their structures more complex, raising new and more subtle questions about what might constitute a conflict of interest. This growth, increased complexity, and diversification have raised new challenges to the previous consensus among arbitrators and parties about what is right with regard to arbitrator conduct.

Parallel to these developments, there have also been changes in international arbitration practice. On the one hand, arbitral practice has become more transparent and subject to more specific rules. Historically, substantive decisionmaking was subject to flexible doctrines of *amiable compositeurs* and *ex aequo et bono*, as well as *lex mercatoria*. Today, parties most often prefer the predictability of national laws, while arbitral procedures have also become more transparent and regular. There has also been a significant increase in the number of challenges to arbitrators in recent years, which has focused attention on the standards used to evaluate arbitrator conduct.<sup>2</sup> Together, these trends have triggered an interest in standardizing arbitrator selection and conduct through clearer rules.

These various trends have led to a proliferation of specialized codes of ethics and rules intended to guide and govern arbitrators' conduct. In national

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<sup>1</sup> See Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. INT'L ARB. 13, 17 (1997).

<sup>2</sup> *Securing a Regime for Effective International Arbitrations*, Minutes from Delegation at the International Chamber of Commerce, at 4, January 26, 2005.

courts, where challenges to arbitrators and awards are brought, a growing number of decisions have also contributed to provide more concrete guidance (and occasionally some misdirection) about what the various standards mean and how they apply in practice.

In light of these developments, international arbitrators and parties must be aware of how arbitrator ethics affect arbitral proceedings and, consequently, their rights and obligations in those proceedings. This Chapter provides an overview of the essential considerations for arbitrators and parties.<sup>3</sup> It begins by providing an overview of the sources that define the obligations of arbitrators, and then outlines and discusses the various obligations, beginning with the most critical obligation of impartiality.

## **II. Sources of Arbitrators' Obligations and the Application**

The source of arbitrators' ethical obligations is itself a complex topic.<sup>4</sup> The modern trend is for groups whose members provide specialized and expert services to distill into written codes a collective expression of those obligations. For example, most associations of lawyers have written codes of ethics that guide and govern their members, as do other groups such as accountants, doctors and journalists. It is not surprising, therefore, that arbitrators' ethics have become the subject of increasingly detailed rules and codes in recent years. These codes of ethics have also been supplemented and expounded upon by the provisions of arbitral rules, the procedures for selection and challenge of arbitrators, the standards that apply to review of final awards, as well as applicable national criminal laws, such as those that prohibit money laundering or corruption. In other words, there are a range of sources that combine together to determine the ethical obligations of arbitrators.

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<sup>3</sup> It is not possible to address comprehensively all issues relating to arbitrators' ethics and conduct in the space permitted. Analysis of certain issues, such as the distinction between obligations of chairpersons and party-appointed arbitrators and duties pertaining to the conduct of proceedings, are addressed in other chapters in this volume and will not be repeated here. See Andreas F. Lowenfeld, *The Party-Appointed Arbitrator: Further Reflections*, Chapter \_\_; Allan Philip, *The Duties of an Arbitrator*, Chapter \_\_. More extensive analysis of the issues presented in this chapter is also available in Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 AM. U.J. INT'L L. 959 (2005), and Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. INT'L L. REV. 53 (2005).

<sup>4</sup> "Ethics" *per se* are often thought to be a matter of personal morality of individuals. The definition of the term "ethics" is itself subject to extensive debate, particularly in the context of the legal professions. See, e.g., Stephen Gillers, *Twenty Years of Legal Ethics: Past, Present and Future*, 20 GEO. J. LEGAL ETHICS 321, 322-23 (2007). I do not attempt to resolve or even weigh in on the academic debate here, but instead rely on informal and familiar understandings of the term.

Making matters even more complicated, the different sources of arbitrators' obligations apply at different stages of the arbitral proceedings and are applied by different entities for different purposes. The result is that even a presumptively static obligation, such as impartiality, may appear to shift or alter depending on the stage and context of its application. This section reviews the sources of arbitrators' obligations, providing a brief overview of how and when they apply to arbitrators. The following sections will take up the substance of these obligations.

### A. Ethical Codes

The first and most obvious source of ethical rules for international arbitrators is the profusion of ethical codes that have emerged. Several arbitration institutions have appended codes of ethics to their arbitral rules. The most extensive and detailed of these codes is the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, which was originally promulgated in 1977 and extensively reworked in 2004.<sup>5</sup> Other institutions have promulgated similar ethical codes, including the Milan Chamber of National and International Arbitration,<sup>6</sup> the Singapore International Arbitration Centre,<sup>7</sup> and the Cairo Regional Centre for International Commercial Arbitration.<sup>8</sup> Some of these institutions expressly condition appointment of arbitrators on compliance with their codes,<sup>9</sup> while others leave compliance as an implicit obligation.

In addition to those implemented by arbitration institutions, other organizations have also implemented codes of ethics. These codes may become applicable to arbitrators if they belong to an organization that has implemented

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<sup>5</sup> The Code of Ethics for Arbitrators in Commercial Disputes (Mar. 1, 2004), available at <http://www.adr.org/si.asp?id=1620> (last visited December 1, 2007).

<sup>6</sup> Milan Chamber of Commerce, *International Arbitration Rules: Code of Ethics of Arbitrators*, at <http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/a1> (last visited December 1, 2007);

<sup>7</sup> Singapore International Arbitration Centre, *Code of Practice: Code of Ethics for an Arbitrator*, at <http://www.siac.org.sg/codeofethics.htm> (last visited December 1, 2007).

<sup>8</sup> Cairo Regional Centre for International Commercial Arbitration, *Code of Ethics*, available at [http://www.crcica.org.eg/code\\_ethics.html](http://www.crcica.org.eg/code_ethics.html) (last visited November 18, 2007).

<sup>9</sup> See American Arbitration Association, *Failure to Disclose May Lead to Removal From the National Roster of Neutrals*, at <http://www.adr.org/sp.asp?id=22241> (last visited December 1, 2007); *Camera Arbitrale Nazionale e Internazionale Milano, Code of Ethics of Arbitrators*, art. 13 (noting that an arbitrator who doesn't apply with the Code of Ethics will be replaced and may also be refused participation in future proceedings because of the violation), at <http://www.camera-arbitrale.it/show.jsp?page=169945> (last visited December 1, 2007); *Singapore International Arbitration Centre, Code of Practice*, <http://www.siac.org.sg/cop.htm> (“[A]rbitrators appointed by the SIAC are required to abide by [the code of ethics] at times [*sic*]”) (last visited December 1, 2007).

the rules or if the parties contractually incorporate the rules into their arbitral agreement. For example, organizations such as the Chartered Institute of Arbitrators (the “CIArb”) and the Society of Maritime Arbitrators and U.S.-based AIDA Reinsurance and Insurance Arbitration Society (“ARIAS-US”) each have codes of ethics that apply to arbitrators who are members or (in the case of the CIArb and ARIAS-US) certified by them.<sup>10</sup> These organizations train members, set admission requirements and condition membership on adherence their rules of ethics. As discussed below, in some circumstances, these codes may also have implications for non-members.

In a similar vein, the International Bar Association (“IBA”) has also published the IBA Rules of Ethics for International Arbitrators (the “IBA Rules of Ethics”)<sup>11</sup> and in 2004 the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”).<sup>12</sup> Despite its name, the IBA does not license attorneys or arbitrators. As a result, these rules and guidelines are not generally applicable on arbitrators or in arbitral proceedings unless they are incorporated into parties’ arbitration agreements.<sup>13</sup> They may, however, be considered by courts or other institutions as trade or customary usages, which is also true of guidelines such as those of ARIAS-US and the CIArb. As will be discussed below,<sup>14</sup> unlike when they are part of an arbitral institution’s rules, these codes are not limited to interpretation and application of the arbitral institution. Thus, at least theoretically, they can be interpreted and applied by courts that are reviewing the conduct of arbitrators, either in proceedings challenging an arbitrator or challenging an award. To date, however, citation to and reliance on these codes by national courts has been rather limited and, at least in the United States, some courts have—with somewhat dubious reasoning—denied their relevance to judicial review even when expressly adopted by the parties.<sup>15</sup>

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<sup>10</sup> The CIArb has also developed a set of guidelines regarding the types of questions and conditions that are appropriate for pre-appointment interviews or “beauty pageants.” CIArb, *The Interviewing of Perspective Arbitrators*, Practice Direction 16 (2007).

<sup>11</sup> International Bar Association, [http://www.ibanet.org/publicprofinterest/Professional\\_Ethics.cfm#Int%20code%CC20of%20ethics](http://www.ibanet.org/publicprofinterest/Professional_Ethics.cfm#Int%20code%CC20of%20ethics) (last visited December 1, 2007).

<sup>12</sup> IBA Guidelines on Conflicts of Interest in International Arbitration (May 22, 2004), available at <http://www.ibanet.org/images/downloads/guidelines%20text.pdf> (last visited December 1, 2007).

<sup>13</sup> See, e.g., Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated into the arbitration agreement via reference to some national body of law).

<sup>14</sup> See *infra* notes 17-19, and accompanying text.

<sup>15</sup> See, e.g., *ANR Coal Co. v. Cogentrix of N.C.*, 173 F.3d 493 (4th Cir. 1999); *Delta Mine Holding Co. v. AFC Coal Properties*, 280 F.3d 815 (8th Cir. 2001). Other cases have held that the

## **B. Institutional Arbitration Rules**

While not all arbitral institutions have fully developed codes of ethics, they all have rules that impose certain obligations on arbitrators,<sup>16</sup> most significantly that they be impartial and/or independent and that they disclose certain information that may be relevant to these obligations. For example, Article 7 of the ICC Arbitral Rules provides that “every arbitrator must be and remain independent of the parties involved in the arbitration.” Similarly, Article 5(2) of the LCIA Rules provides that “all arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties[.]”

For the most part, ethical obligations and requirements that are contained in arbitral rules will be applied exclusively by arbitration institutions. For example, if an arbitrator is challenged for not being impartial or independent, the institution that is administering the arbitration will apply and interpret its own rules to determine if they have been violated. To the extent that a similar allegation is subsequently raised in national courts, either as part of a challenge to an arbitrator or to an arbitral award, courts will generally apply provisions of the applicable international convention or national law.<sup>17</sup> As a consequence, while some courts will attempt to interpret or (re-)apply the institution’s arbitral rules, most defer to the institutions’ rules, which almost always provide that the institution itself is the final interpreter of its own rules.<sup>18</sup> As a result, if an institution has already ruled on a challenge decision, courts reviewing a

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parties’ adoption of ethical rules is relevant to judicial analysis of allegations of bias. *See, e.g.,* Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617 (7th Cir. 2002).

<sup>16</sup> There are some questions, which will be discussed below, about the extent to which these requirements apply to party-nominated arbitrators. *See infra* notes 40-41, and accompanying text.

<sup>17</sup> *See AT&T Corporation v. Saudi Cable Co.*, 2 Lloyd’s Rep. 201 (Ct. App. 2000).

<sup>18</sup> *See, e.g.,* ICC Rules of Arbitration, Art 7(4) (“The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.”). Some countries, mostly from a civil law tradition, do not recognize such rules as precluding later judicial review of institutional decisions. Although the arbitral rules of the LCIA include provisions to make it the final interpreter of its own rules, *see* LCIA Arbitration Rules Art. 29.1, they also specifically recognize that some jurisdictions’ laws prevent waiver of such judicial review. *See* LCIA Arbitration Rules, Art. 29.2 (“If such appeals or review remain possible due to mandatory provisions of any applicable law, the LCIA Court shall, subject to the provisions of that applicable law, decide whether the arbitral proceedings are to continue, notwithstanding an appeal or review.”); *but see* AT&T Corp. v. Saudi Cable [2000] 2 Lloyd’s Rep. 127 (rejecting the view that “the finality provision means that the English courts have no power to review the decision of the ICC Court” in a challenge to an arbitrator and reasoning that in evaluating challenges “the court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court, but the English courts retain their jurisdiction to determine whether the ICC Rules have been breached when entertaining an application to remove for alleged misconduct”).

subsequent challenge to an arbitrator or an award will generally not attempt to determine whether an arbitrator complied with the requirements of a particular institution's rules.<sup>19</sup> Despite these finality provisions, a court may still consider compliance with an arbitral institution's rules if there has been no institutional decision, for example if the alleged transgression was discovered after the final award was rendered. In addition, on some occasions, courts have looked to an institution's ethical standards for guidance in evaluating parties' expectations regarding impartiality.<sup>20</sup>

### **C. National Law**

National arbitration laws also contribute to defining the ethical obligations of international arbitrators. National arbitration laws usually have specific provisions, discussed below,<sup>21</sup> which pertain either to challenges to arbitrators or to award review. In applying these standards, national courts have been developing an increasingly rich jurisprudence to help clarify arbitrator obligations, most specifically with regard to the nature of impartiality and/or independence, and the level of proof required to establish a violation. Most national systems also impose an obligation that potential arbitrators disclose information about any potential conflicts of interest and some systems also impose on candidates a duty to investigate potential conflicts.<sup>22</sup> National laws may also impose certain obligations on arbitrators when they are confronted with criminal wrongdoing by the parties,<sup>23</sup> and arbitrators' other obligations may be excused if performing them would require a violation of national criminal law.<sup>24</sup>

### **D. International Conventions**

Somewhat surprisingly, international arbitration conventions have no express provisions directly addressing arbitrators' obligations. As a result of the

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<sup>19</sup> See INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION 35 (1994) (noting that with challenges to international arbitrators, the decisions of the ICC Court of Arbitration "on all such questions are final and the reasons for the Court's decisions are not communicated").

<sup>20</sup> See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2nd Cir. Jul 09, 2007) (reasoning that "[i]t is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that will adhere to these standards."); see also *Barcon Associates, Inc. v. Tri-County Asphalt*, 430 A.2d 214 (N.J. 1981).

<sup>21</sup> See *infra* notes 30-38, and accompanying text.

<sup>22</sup> See *infra* notes 50-54, and accompanying text.

<sup>23</sup> Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 ARB. INT'L 95 (2006).

<sup>24</sup> See ABA/AAA Code of Ethics, Canon I(E) ("An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.").

lack of any express provisions, parties must argue that alleged arbitrator misconduct implicitly violates one of the exceptions for enforcement of an award. In the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), the two provisions most often invoked are that alleged arbitrator partiality or nondisclosure has meant that the tribunal was not constituted in accordance with the parties’ agreement or, failing agreement, the law of the arbitral seat (Article V(1)(d)), or that it violates the public policy of the enforcement jurisdiction (Article V(2)(b)). Parties could also argue that an arbitrator’s alleged partiality prevented it from presenting its case (Article V(1)(b)), and certain types of alleged abuses may also be framed as outside the scope of an arbitrator’s power (Article V(1)(b)). The most common ground, however, is that alleged arbitrator misconduct violates the public policy of the enforcement jurisdiction.

Theoretically, what constitutes a violation of public policy and what constitutes a violation of national arbitration law standards for impartiality are not coterminous. In practice, however, courts interpreting the New York Convention’s public policy exception often look to definitions of impartiality and independence in the domestic arbitration laws described above.

#### **E. National Bar Associations**

Finally, external to the international arbitration system and the rules that ordinarily govern its procedures and participants, a small but apparently growing number national bar associations are seeking to impose ethical obligations on attorneys who are licensed by them and act as arbitrators through codes that govern lawyer ethics. For example, Article 55 of the Italian *Codice Deontologico Forense* specifically requires, among other things, that Italian lawyers who serve as arbitrators remain independent, disclose certain information about relevant contacts and preserve the trust parties have placed them. Similarly, in the United States, there is a new proposed Model Rule for Lawyers Acting as Third Party Neutrals,<sup>25</sup> which has not yet been adopted by bar associations, but apparently has some support.

### **III. Substantive Obligations**

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<sup>25</sup> If adopted, the rule would be incorporated into the Model Rules of Professional Conduct. See CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), available at <http://www.cpradr.org/pdfs/CPRGeorge-ModelRule.pdf> (last visited November 15, 2007). Even adopted in the Model Rules, such a rule would not become binding on attorneys unless and until the Model Rule were adopted by individual state bar associations.



Despite the range of sources and the variations in their application, there is surprisingly broad agreement about the general nature of obligations to which arbitrators are subject, at least at the most abstract levels. The principal obligation of arbitrators is to be, and to behave in a manner that is, impartial and/or independent. While impartiality is the most fundamental of arbitrators' obligations, it is also the one that is most complex and hence subject to the most intense discussion and confusion. Other obligations, which will be discussed at the end of this Chapter, include the obligation to conduct hearings fairly, to act competently, to refrain from inappropriate *ex parte* contacts, to maintain the confidentiality of the proceedings, and to render an award in a timely fashion.

### **A. The Obligations of Impartiality and Independence**

The obligation of arbitrators to be impartial or independent is both obvious and imperative. Arbitrators, after all, take the place of judges and the act of adjudicating necessarily requires a neutral third-party decisionmaker. Moreover, the opposite of impartiality is bias or partiality, which is a form of misconduct that is unexpected and unacceptable among such decisionmakers. But the nature of impartiality is not nearly as simple as these maxims would suggest, particularly when it intertwines with notions of party preference and party autonomy.<sup>26</sup>

#### **1. “Independence” versus “Impartiality” versus “Neutrality”**

One complication in understanding arbitrator ethics is that, as previewed above, not all rules and standards apply the same terminology. Some sources, such as the 1996 English Arbitration Act refer to an arbitrator's duty to be “impartial.” The ICC Arbitration Rules and the Swiss Law on Private International Law, on the other hand, refer to “independence,” while others, such as the UNCITRAL Model Law, frame their standard in terms of both “independence” and “impartiality.” Still other sources refer to an obligation of arbitrators to be “neutral.”<sup>27</sup> Many commentators have sought to parse the meaning of and distinctions between these terms.<sup>28</sup> To the extent some logical or linguistic distinction can be made, however, in practical terms it appears to be a distinction without a difference. These terms are used more or less

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<sup>26</sup> Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 *UMKC L. REV.* 93, 94 (1998) (noting the “large debate among scholars concerning the meaning of [the] term” “impartiality”).

<sup>27</sup> See Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 *U. MIAMI L. REV.* 949, 949-951 (2002); James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for “Nonneutrals,”* 11 *AM. REV. INT'L ARB.* 295, 298- 99 (2000).

<sup>28</sup> See, e.g., DAVID CARON, ET AL., *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 215 (2006). Generally speaking, “independence” is said to concern the external connections or relations of an arbitrator, while “impartiality” is said to concern his or her subjective state of mind.

interchangeably by institutions and courts, and their true meaning is determined more in their application than in their phraseology.

## **2. Judicial Impartiality versus Arbitrator Impartiality**

Arbitrator impartiality obligations are often framed in relation to concepts of judicial impartiality. The origins of this comparison are obvious since arbitrators perform a task that national court judges would otherwise perform in the absence of an arbitration agreement. Indeed, arbitrators are sometimes referred to as “private judges.”<sup>29</sup>

As described in greater detail below, some national standards for arbitrator impartiality are borrowed from judicial standards of conduct.<sup>30</sup> Moreover, in seeking to explicate the meaning of various statutory constructs, courts have often resorted to comparisons to judicial functions or judicial standards. In one of the most prominent examples, Justice Hugo Black of the U.S. Supreme Court reasoned that “we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges.”<sup>31</sup> In a purported concurrence on the merits in the same case, Justice Byron White reasoned that arbitrators should not “be held to the standards of judicial decorum of ... judges.... because they are men of affairs, not apart from but of the marketplace.”<sup>32</sup> As these differing views suggest, even if there are many attempts to compare arbitrators and judges, there is no consensus about how they compare.

Historically, there were several jurisdictions that permitted challenge to arbitrators on the same grounds that judges could be challenged.<sup>33</sup> Today, only a few jurisdictions continue rely expressly on judicial standards,<sup>34</sup> though reasoning by analogy continues to find favor among both courts and commentators. In France, until recent cases modified the approach, grounds for challenging arbitrators were the limited to those for challenging a judge under Article 341 of the New Code of Civil Procedure.<sup>35</sup> This position was reinforced in the language

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<sup>29</sup> Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 485 (1997).

<sup>30</sup> See *infra* notes 33-34, and accompanying text.

<sup>31</sup> *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148-49 (1968)

<sup>32</sup> *Id.* at 150 (White, J., concurring)

<sup>33</sup> For example, Indonesia and Japan formerly relied on judicial standards, but both jurisdictions have more recently adopted the UNCITRAL Model Law, and hence now rely on the “justifiable doubts” standard. Italy previously relied on a judicial standard, but recently revised it to provide for a list of conflicts that can lead to disqualification. See *Codice di Procedura Civile*, art. 815.

<sup>34</sup> Luxembourg Code of Civil Procedure, Art. 378; Portugal Article 10(1) of Law no. 31/86.

<sup>35</sup> See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1024, at 562-63 (Emmanuel Gaillard & John Savage, eds., 1999). For an extended analysis of this shift in French judicial decisions, see Loretta Malintoppi, *Independence, Impartiality and Duty of Disclosure In Investment Arbitration*, available at <http://www.ila->

of some earlier decisions, such as that of *Cour de Cassation* when it reasoned that “an independent mind is indispensable in the exercise of judicial power, [and it is] one of the essential qualities of an arbitrator.”<sup>36</sup> In England, the common law test for assessing allegations of arbitrator bias has also been described as being the same as for a judge.<sup>37</sup> Similarly, a leading Indian commentator has reasoned that arbitrators are bound by obligations that are “no less stringent than those demanded of judges,” and in fact they may be required to “behave a shade better since judges are institutionally insulated by the established court-system, their judgments being also subjected to the corrective scrutiny of an appeal.”<sup>38</sup>

Despite apparent similarities, analogies between arbitrators and judges can obscure differences that affect the nature and quality of an arbitrator’s obligation of impartiality. Arbitrators are often drawn from the ranks of active professionals and parties deliberately select individuals who are familiar with the general subject matter of their case. Particularly in the case of party-nominated arbitrators, the selection also focuses on identifying a decisionmaker who is presumed to be sensitive to, or even sympathetic to, a party’s position. To identify and ensure these qualities, parties often have an opportunity to meet with or at least converse with potential arbitrators. These practices stand in marked contrast to judicial decisionmakers. Judges are generally sequestered from the professional community, are randomly assigned to individual cases and, in most systems, any connection they have to a party or a case requires recusal, regardless of the parties’ willingness to consent.

Given all these differences, it is not particularly helpful to extrapolate an arbitrator’s ethical obligations from those of national court judges, in part because such comparisons often result in characterizations of arbitrators as less ethically rigorous than judges. This characterization is unsatisfactory for a number of reasons, including the fact that arbitration does not permit substantive appeal, making the consequences for potential ethical transgressions even more acute. Instead, the better view is to consider an arbitrator’s ethical obligations as uniquely designed to facilitate performance of the arbitrator’s functional role, a role that is similar to that of a judge, but also different in important respects that preclude direct comparison.<sup>39</sup> It is for this reason that many national laws have

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[hq.org/pdf/Foreign%20Investment/Paper%20on%20Independence%20of%20arbitrators\\_v1.pdf](http://hq.org/pdf/Foreign%20Investment/Paper%20on%20Independence%20of%20arbitrators_v1.pdf)  
(last visited December 1, 2007).

<sup>36</sup> *Judgment of 13 April 1972*, [JCP, Ed. G., Pt. II, No. 17,189 (Cour de cassation)].

<sup>37</sup> Hong-Lin Yu & Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators—U.S. and English Perspectives*, 52 INT’L & COMP. L.Q. 935 (2003).

<sup>38</sup> Fali S. Nariman, *Standards of Behaviour of Arbitrators*, 4 ARB. INT’L 311, 311-12 (1988).

<sup>39</sup> For further discussion on this topic, see Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. INT’L L. REV. 53.

shifted away from judicial analogy as the basis for defining arbitrators' obligations.

### **3. Party-Nominated Arbitrators versus Chairpersons**

Historically, there was a significant divergence between international practice of having all three arbitrators be “neutral,” and the traditional U.S. practice of “highly partisan” party-nominated arbitrators and a neutral chairperson. In the most extreme examples, a U.S. party-appointed arbitrator might be an officer or employee of the nominating party, and might communicate throughout the proceedings with the appointing party, even about such things as witness preparation and case strategy. Today, there is general understanding that the traditional U.S. practice is not appropriate in international arbitration, and even in domestic arbitrations in the United States, there is a general presumption against the practice of highly partisan party-appointed arbitrators. Other chapters in this volume discuss the role and obligations of party-appointed arbitrators in more detail.<sup>40</sup>

It is worth noting, however, that even when party-appointed arbitrators are required to be “neutral,” there remain some important differences. Party-appointed arbitrators are usually specifically selected by the appointing party, often times after an interview or other direct communication, and they are generally permitted to share the nationality of the party who appointed them.<sup>41</sup> Chairpersons, by contrast, are usually selected by the party-appointed arbitrators, and communicate only with them during the appointment process. Moreover, chairpersons are not generally permitted to share the nationality of any of the parties.

In light of these differences, to say that all arbitrators are equally “neutral” is mostly a triumph of rhetoric, and perhaps not even a very helpful one. Parties expect party-appointed arbitrators to play a unique role to ensure that at least one member of the tribunal will comprehend and be sensitive to its cultural and legal background and, by extension, its legal arguments. These expectations are reinforced in arbitral rules that govern the selection process, which in turn suggest that terms like “neutral” or “impartial” as applied to party-appointed arbitrators mean something different than when those terms are applied to arbitral chairpersons.

### **4. Standards of Impartiality**

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<sup>40</sup> See Lowenfeld, *supra* note 4.

<sup>41</sup> See *infra* notes 58-64, and accompanying text.

Obligations of impartiality and/or independence are often embedded in broader standards, which determine how to establish and evaluate allegations of bias in the context of arbitral proceedings. As noted above, these tests are also variegated and apply at different stages and in different contexts. The UNCITRAL Model Law, which has been adopted by over sixty jurisdictions and has influenced the national legislation of many others, provides that arbitrators can be challenged if there are circumstances that give rise to “justifiable doubts” about their impartiality or independence. Meanwhile, Section 10(a)(2) of the U.S. Federal Arbitration Act permits challenge to an award when “there was evident partiality or corruption in the arbitrators, or either of them.” In England, recent caselaw has established that removal of an arbitrator requires a showing of a “real danger of bias.”<sup>42</sup>

Even with this variation, these standards share a few common elements. First, none of them require proof of actual bias, partiality or lack of independence by an arbitrator, but instead require some showing of risk, potential or appearance of bias. There are two reasons for this lower threshold of proof. On the one hand, because actual bias is a mental state, it is exceptionally difficult to prove, particularly with the types of circumstantial evidence that are usually available.<sup>43</sup> More importantly, however, parties’ satisfaction with and confidence in the arbitration process may be adversely affected by behavior that seems to indicate bias, or creates a real risk of bias, regardless of the arbitrator’s actual underlying mental state.

Another feature that these standards have in common is that their perimeters are not self-evident. Instead, the requirements of each has been fleshed out or elaborated through interpretation by national courts, though they have not always done so with the greatest clarity. For example, in the United States, there is a split among the various federal appellate courts about what the “evident partiality” test means. Following confusion created by a split and confused Supreme Court opinion that described above,<sup>44</sup> some courts have interpreted Section 10(a)(2) as being satisfied when there is a “mere appearance of bias,”<sup>45</sup> while courts have required clear proof of “so intimate [a relationship] as to cast serious doubt on the arbitrator’s impartiality.”<sup>46</sup> Meanwhile, still other courts have staked out something of a middle ground, holding that the test is

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<sup>42</sup> *AT&T Corporation v. Saudi Cable Co.*, 2 Lloyd’s Rep. 201, ADD (Ct. App. 2000).

<sup>43</sup> As one court reasoned, “Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how ‘proof’ [of bias] would be obtained.” *Morelite Construction Corp. v. N.Y.C. District Council Carpenters’ Benefit Funds*, 748 F.2d 79 (2d Cir. 1984).

<sup>44</sup> See *supra* notes \_\_\_-\_\_\_, and accompanying text.

<sup>45</sup> *Kern v. 303 East 57th Street Corp.*, 204 A.D.2d 152, 153 (N.Y. App. Div. 1994).

<sup>46</sup> *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (5th Cir. 1983) (Posner, J.).

satisfied with proof such that “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”<sup>47</sup>

In interpreting the “justifiable doubts” standard, courts in jurisdictions that have adopted the Model Law have also offered varied tests, but most courts and commentators agree that it is an objective test that requires something more than a mere appearance of partiality. With other jurisdictions, such as France, the standard is said to require an analysis of “any circumstance that may affect the arbitrator’s judgment and raise a reasonable doubt, in the mind of the parties, as to the arbitrator’s [independence and impartiality].”<sup>48</sup>

While these various judicial elaborations and interpretations provide some additional guidance, the real meaning even these judicial interpretations derives from application on a case-by-case basis. When these cases are aggregated, some of discernible categories have emerged, though often times even seemingly clear categories are subject to exceptions in particular factual contexts. These categories include some obvious types of misconduct, like direct financial stakes and business dealings with one of the parties, although even here the category is not absolute since minor shareholdings in one of the parties is generally not sufficient.<sup>49</sup> On the other hand, aggressive questioning of a witness or expressions of opinion during proceedings are generally not considered sufficient to support a challenge, but on occasion have contributed to findings of partiality.<sup>50</sup>

**a. The Duty to Disclose**

Part and parcel to the obligation of impartiality is the duty to disclose. Virtually all ethical codes, national laws and arbitral rules impose on arbitrators an obligation to disclose information as part of the arbitrator appointment process. The purpose of such obligations is twofold. At a practical level, they assure that parties and administering institutions have information that might be the basis for challenging or evaluating challenges regarding the ability of an arbitrator to serve. At a more abstract level, disclosures promote transparency and confidence in the process by ensuring that every participant in the process (the arbitrators,

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<sup>47</sup> *Morelite Construction Corp. v. N.Y.C. District Council Carpenters’ Benefit Funds*, 748 F.2d 79 (2d Cir. 1984).

<sup>48</sup> *Qatar v. Creighton Ltd.*, Court de Cassation, 16 March 1999.

<sup>49</sup> See *AT&T Corporation v. Saudi Cable Co.*, 2 Lloyd’s Rep. 127 (Ct. App. 2000).

<sup>50</sup> Compare *In Matter of Arbitration between Cole Publ’g Co., Inc. v. John Wiley & Sons, Inc.*, 1994 WL 532898, \*2 (S.D.N.Y. Sept. 29, 1994) (rejecting challenge to arbitral award that alleged arbitrator bias was evidenced by aggressive questioning of some witnesses and attempts to rehabilitate others, and that arbitrator acted more as an advocate than an impartial moderator); *with Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *aff’d in part, rev’d in part on other grounds*, 514 F.2d 285 (2d Cir. 1975) (finding bias and vacating arbitral award based on arbitrator’s “badgering” the complaining party at the time of the proceedings).

attorneys, parties and arbitral institution, if any) is aware of contacts, experiences and relationships that may materially affect the actual or perceived decisionmaking impartiality of the arbitrator.

Some sources mistakenly treat disclosure standards and disqualification standards as synonymous, but their distinct purposes reveal the better view. In contrast to the above-described purposes of disclosure, the purpose of disqualification is to remove an arbitrator who not sufficiently impartial to serve. Given the broader purposes of the duty to disclose, it follows that the body of information that must be disclosed should be understood as broader than the information that can constitute a basis for disqualification of an arbitrator. In other words, not every disclosure that is made should necessarily result in a disqualification, while the fact that information would not be sufficient to disqualify an arbitrator does not suggest that it need not be disclosed.

This distinction is reflected in the UNCITRAL Model Law, which requires in Article 12(1) disclosure of facts that are “likely to give rise to justifiable doubts” as to the arbitrator’s impartiality or independence, but provides in Article 12(2) for disqualification only when circumstances “give rise to justifiable doubts” about an arbitrator’s to impartiality and independence. A broad, cautious approach to disclosure also has the benefit of reducing reactions to information that seems benign if timely disclosed, but can raise suspicions if inadvertently discovered later (particularly after an adverse decision by the tribunal).

Notably, under some authorities, a failure to disclose information can in itself be evidence of partiality or improper intent. For example, Article 4.1 of the IBA Rules of Ethics state that “Failure to make such [a required] disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.” Some national courts have also reasoned that a non-disclosure “is itself an act suggestive of bias,”<sup>51</sup> while other courts have refused to consider the act of non-disclosure independently from the content of the underlying information.

With regard to their substance, over the years disclosure obligations have evolved significantly. The historical reliance on a subjective standard is illustrated in the 1975 ICC Arbitration Rules, which required only that arbitrators disclose circumstances that, “in their opinion,” might call into question their independence “in the eyes of the parties.”<sup>52</sup> Over the years, the subjective

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<sup>51</sup>*Forest Elec. Corp. v. HCB Contractors*, 1995 WL 37586 (E.D.Pa. 1995).

<sup>52</sup>W. LAWRENCE CRAIG *ET AL.*, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.04, at 214 & n.26 (3d ed. 2000).

judgment of arbitrators gave way to the objective standards that now prevail in most arbitral rules and national laws. For example, the contemporary ICC disclosure standard in Article 7(2) of the ICC Arbitration Rules requires disclosure of “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.”<sup>53</sup> In addition to shifting to an objective standard, use of the term “might” also suggests a broadening of the disclosure obligation. Even still, however, this standard and others like it end up as a practical matter leaving arbitrators considerable room for discretion in deciding what types of information to disclose.<sup>54</sup>

In the wake of increased challenges and the related need for more specific direction, there has been a move from objective but qualitative disclosure and disqualification standards to objective categorical descriptions of the specific content that must be disclosed. For example, instead of simply requiring that arbitrators disclose information that “may give rise to justifiable doubts,” the newly revised AAA/ABA Rules and the IBA Guidelines describe specific relationships and circumstances. In formulating these categories, a number drafts were extensively discussed and commented on, but the IBA Guidelines have still been criticized on several grounds.<sup>55</sup> Whatever else might be said, they do offer the distinct advantage of reducing arbitrator discretion in evaluating whether specific information fits within a qualitative disclosure obligation. In this respect, categorical descriptions may reduce the risk that an institution or national court will in a challenge action reach a different conclusion than the arbitrator did during the appointment process.

Categorical descriptions of information to be disclosed may also reduce an internal conflict of interest that prospective arbitrators arguably face when they are deciding whether to disclose information. On the one hand, at least in the short-term, candidates may have an interest in securing an appointment, and disclosing a potential conflict might jeopardize that interest. In the longer term, of course, arbitrators have a much greater interest in avoiding challenges and resulting damage to their reputation. When prospective arbitrators confront situations that are either not addressed by, or are apparently permitted by the various rules but nevertheless seem capable of raising concerns about impartiality, most sources wisely encourage them to err on the side of disclosing possibly relevant information.

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<sup>53</sup> ICC Arbitration Rules, Art. 7(2) (emphasis added).

<sup>54</sup> For further discussion on this point, see Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. INT’L L. REV. 53 (2005) (also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=622482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622482)).

<sup>55</sup> See, e.g., Markham Ball, *Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 21 ARB. INT’L 323 (2005).



## **b. The Duty to Investigate**

Related to the question of disclosure is the question of whether arbitrators have a duty to investigate potential conflicts of interest as part of their disclosure obligations. Judicial authority, particularly in the United States, is mixed regarding the effect of an arbitrator's lack of knowledge.<sup>56</sup> Some courts have found that if an arbitrator cannot be biased if he or she does not know about an alleged conflict, and therefore has no duty to investigate unknown facts,<sup>57</sup> while other courts have reasoned that, since the standards for impartiality are framed to also prevent perceptions of bias, potential arbitrators must investigate potential conflicts.<sup>58</sup>

## **c. Nationality and Other Group Affiliations**

Nationality and arbitrator impartiality have a somewhat strange relationship. As one commentator has noted, “[i]t is both the peculiarity and the essence of the arbitration method that allow – in the very same setting – national commonality to perpetuate and nationalistic favoritism to be neutralized.”<sup>59</sup> On the one hand, international arbitration exists primarily to ensure that parties will not be subject to the presumed bias of their opponents' national courts. On the other hand, parties often nominate arbitrators who share their nationality, on the assumption that common cultural and legal backgrounds will ensure that their perspectives are understood by the tribunal.<sup>60</sup>

Even if parties can and do choose to nominate party arbitrators who share their nationality, however, there is a general presumption against a chairperson or sole arbitrator sharing the nationality of one of the parties (absent contrary agreement). This presumption is reflected in the rules of various institutions, such

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<sup>56</sup> Compare *Betz v. Pankow*, 31 Cal. App.4<sup>th</sup> 1503 (1995) (relying on arbitrator's lack of knowledge of former firm's conflict to find no impression of possible bias); *Lifecare Int'l Inc. v. CD Medical, Inc.*, 68 F.3d 429 (11th Cir. 1995) (rejecting the notion that arbitrators have a duty to investigate past contacts and defining “evident partiality” to mean that arbitrator had *actual knowledge* of that information was not disclosed); *Al- Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C.Cir. 1996) (finding “no source for any such generalized duty” to investigate). *with Wheeler v. St. Joseph's Hospital*, 63 Cal.App.3d 345 (1976) (requiring vacation of award notwithstanding fact that arbitrator from reputable firm did not know of conflict).

<sup>57</sup> *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993).

<sup>58</sup> *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). An interesting recent U.S. case in this regard is *Applied Industrial Materials Corp. v. Ovalarmakine Ticaret Ve Sanayi*, 492 F.3d 132 (2nd Cir. 2007), which held that an arbitrator may not simply construct a so-called Chinese Wall, but instead is obliged to investigate and disclose information regarding the potential conflict.

<sup>59</sup> Ilhyung Lee, *Practice and Predicament: Nationalism, Nationality, and National-Affiliation in International Commercial Arbitration*, 31 *FORDHAM INT'L L. J.* \_\_ (2007) (forthcoming).

<sup>60</sup> This view was expressed by certain delegates in the drafting of the ICSID Convention. See CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 498 (2001).

as Article 9(5) of the ICC Arbitration Rules, which provides that a sole arbitrator or chairperson appointed by the ICC “shall be of a nationality other than those of the parties.” Notably, the Rules also provide for an exception “in suitable circumstances” and when neither party objects.<sup>61</sup>

In investment arbitration, concerns about nationality have led to more restrictive rules and practices.<sup>62</sup> For example, the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Rules”) provide that “[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute[.]” Application of this rule means that in a typical two-party arbitration with a tripartite panel, all three of the arbitrators must be from States different from those of the parties. The ICSID Rules allow the parties to override this provision by agreement, but some investment arbitration provisions, such as those in the *Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America*, completely disallow any member of the tribunal to be a citizen or resident of the same country as one of the parties.<sup>63</sup>

In a globalized world, and especially among a group as internationally mobile and cross-cultural as international arbitrators, nationality and residency are not always an accurate proxy for cultural or political empathies. Particularly in disputes involving parties from certain regions or nations with historical enmities, ethnic or religious affiliations may be more important than national identity.<sup>64</sup> This distinction is acknowledged in the ICC Arbitration Rules, which provide that in addition to nationality, in making confirmations or appointments, the ICC Court will consider not only nationality, but also “residence and *other relationships* with the countries of which the parties or the other arbitrators are nationals.”<sup>65</sup> In fact, ICC national committees and other appointing authorities routinely consider such “other relationships” when making appointments involving parties from regions or backgrounds that may trigger sensibilities. Potential arbitrators themselves should also consider both whether aspects of their background may actually interfere with their ability to act impartially, or may interfere with perceptions of their impartiality.

#### **d. Parties’ Obligations Regarding Arbitrator Challenges**

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<sup>61</sup> ICC Rules of Arbitration, Art. 9(5).

<sup>62</sup> See Omar E. García-Bolívar, *Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes*, 60-JAN Disp. Resol. J. 76 (2006).

<sup>63</sup> *Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America*, Article XIV, para. 8.

<sup>64</sup> See Lee, *supra* note 59.

<sup>65</sup> ICC Rules, Article 9(1) (emphasis added).

In most settings, parties must raise a challenge to an arbitrator as soon as the relevant information is known to them. It is not possible, therefore, for a party to hold onto information about a potential conflict of interest as an insurance policy, asserting it only if the award is unfavorable. If a party fails to raise a challenge within a reasonable time after the learning of the relevant information, that party may be deemed to have waived the alleged conflict.<sup>66</sup> This approach to waiver may be seen as a natural extension of party autonomy.<sup>67</sup>

A few courts have gone further, however, to suggest that parties themselves may have an affirmative duty to investigate potential conflicts, and may be charged with actual knowledge if information of the conflict was readily discoverable.<sup>68</sup> This apparent extension of the concept of waiver seems troubling because parties should be entitled to rely on the completeness of information that arbitrators have legal and ethical obligations to disclose.

## **B. Other Ethical Obligations**

While the duty to act impartially is the most frequently discussed ethical obligation of arbitrators, they also have a range of other obligations that are implied through selection and challenge procedures, and award challenge standards.

### **1. Obligation to Conduct Arbitration in Accordance with the Arbitration Agreement**

International arbitrators have a duty to conduct the arbitral proceedings in accordance with the parties' arbitration agreement (and any subsequent

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<sup>66</sup> *Ilios Shipping & Trading Corp., S.A. v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698, 700 (S.D.N.Y.), *affirmed*, 245 F.2d 873 (2d Cir.1957) (“Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.”); *AAOT Foreign Econ. Ass’n (VO) Technostroyexport v. International Dev. and Trade Serv., Inc.*, 139 F.3d 980 (2d Cir.1998) (where party had knowledge of facts indicating that arbitration tribunal was corrupt prior to commencement of arbitration hearings but remained silent until adverse award was rendered, party waived its objection); *Judgment of 9 February 1998*, 17 ASA Bull. 634, 646 (1998) (Swiss Federal Tribunal) (a party loses right to challenge an arbitrator if the party unduly delays).

<sup>67</sup> *Rios v. Tri-State Ins. Co.*, 714 So.2d 547, 551 (Fla. Ct. App. 1998) (“When parties, with knowledge of a person’s interests and relationships, nevertheless desire that individual to serve as an arbitrator, that person may properly serve.”).

<sup>68</sup> *See, e.g., Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982) (considering and ultimately rejecting claim that company should have knowledge of conflict imputed to it because it possessed, but did not know about, the conflicts at issue).

procedural agreements between the parties). This obligation is made express in some ethical rules and national laws.<sup>69</sup>

For example, Article 18 of the UNCITRAL Model Law provides that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” In rare instances, arbitrators must make delicate ethical decisions in deciding whether and when it is appropriate to disregard the parties’ agreement, either because enforcing it would require a violation of international public policy or render any resulting award unenforceable in the relevant national courts.

Arbitrators also have an obligation to complete their mandate (including by not resigning unjustifiably prior to rendering a final award), by deciding all of the issues presented to them.<sup>70</sup> Conversely, arbitrators are obligated to respect the limits of their own jurisdiction and the parties’ agreement.<sup>71</sup> Some ethical codes spell out this obligation specifically, though it may be subject to countervailing obligations to observe applicable mandatory law.

## **2. Obligations of Competence and Diligence**

Arbitrators also have general obligations of competence and diligence, which are specified in some ethical rules.<sup>72</sup> An arbitrator should not accept an appointment unless actually possessing the requisite skills, such as language, and unless able to accommodate the arbitration in his or her schedule. This obligation of diligence also extends to issuance of the final award.

## **3. Obligation of Confidentiality**

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<sup>69</sup> See ABA/AAA Code of Ethics, Canon I(E) (“where the agreement of the parties set forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator’s judgment would be inconsistent with this Code.”). Most arbitration rules also include provisions that imply such an obligation. For example, Article 15(1) of the ICC Arbitration Rules permits arbitrators to select procedures to apply only in the absence of party agreement on the subject. See also UNCITRAL Model Law, Arts. 19(1), 19(2); ICSID Rules, Rule 20(2).

<sup>70</sup> See ABA/AAA Code of Ethics, Canon I(H) (“Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.”). See JULIAN LEW, ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶12-15 (2003).

<sup>71</sup> Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59 (2005)

<sup>72</sup> IBA Rules of Ethics, Introductory Note (“International arbitrators should be impartial, independent, competent, diligent and discreet”).

Another obligation that is rarely discussed, but potentially very important to the parties, is an arbitrator's obligation to maintain confidentiality. Among the leading arbitration institutions, only a few actually impose a duty on arbitrators to maintain confidentiality.

Article 46 of Stockholm Chamber of Commerce Arbitration Rules imposes such an obligation. Similarly, Article 34 of the AAA/ICDR's International Arbitration Rules requires arbitrators to maintain the confidentiality of "confidential information disclosed during the proceedings by the parties or by witnesses ..." and "all matters relating to the arbitration or the award." Article 9 of the IBA Rules of Ethics also requires that arbitrators maintain "in perpetuity" deliberations of the tribunal and the contents of the award, and Canon VI of the AAA/ABA Code of Ethics obliges arbitrators to "keep confidential all matters relating to the arbitration proceedings and decision." Some national laws also impose obligations to maintain as confidential information they obtain in performance of professional duties.

In many cases, none of these rules will directly apply. Still, parties invariably have a sense that arbitrators will not, unless required by law, publicly reveal information about the proceedings or its outcome. Thus, confidentiality may be considered one area where formal ethical regulation remains underdeveloped, but parties' have pronounced and precise expectations. For this reason, confidentiality may be one area where the personal integrity and ethical discretion of individual arbitrators provides the most important protection.

#### **4. Obligation to Propose (or Not to Propose) Settlement**

There is little consensus with respect to an arbitrator's obligation to propose settlement or to refrain from pressing settlement, and parties from different systems may have significantly different assumptions. On the one hand, in some legal systems, judges are legally required to aid the parties in attempting to reach settlement,<sup>73</sup> and international arbitrators are arguably in a unique position to be able to encourage settlement.<sup>74</sup> On the other hand, the process of encouraging settlement, particularly to the extent it may involve *ex parte* communications with parties, may compromise an arbitrator's obligations of impartiality, which is why some legal traditions and arbitration rules prohibit this intersection of roles.<sup>75</sup> Article 8 of the IBA Rules of Ethics permits arbitrators,

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<sup>73</sup> Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 127 (1996) (noting that the Chinese Civil Procedure Law requires judges to conduct mediation if the parties do not object).

<sup>74</sup> Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1, 2 (1999).

<sup>75</sup> For example, Rule 1(4) of the ICSID Rules disqualifies anyone who has previously served as a mediator in the same dispute from acting as an arbitrator.

with the consent of the parties, to assist in settlement efforts, but it also requires that they warn parties about the risks of *ex parte* settlement communications. To the extent it can be considered an obligation, any duty to promote settlement is best understood as an obligation for arbitrators to propose that, in appropriate circumstances,<sup>76</sup> the parties consider settlement.<sup>77</sup>

## V. Conclusion

A comprehensive analysis of this collection of overlapping and sometimes ill-defined standards would require more space than is permitted here. Nevertheless, there are some overarching themes and conclusions that emerge from this survey.

First, some eminent authorities continue to question the need for, or utility of, the increasing number of rules, standards and formulae, suggesting that arbitrators' personal ethical convictions are effective guides for their conduct.<sup>78</sup> In light of the complex and overlapping network of rules and standards, however, arbitrators no longer have the luxury of relying exclusively on their own personal sense of right and wrong. They must inform themselves about what standards their conduct will be measured by and conform to those standards.

Second, even as they expand and become increasingly detailed, challenge and disqualification standards are flexible, fact-intensive tests that must be applied on a case-by-case basis. The reason is that they are designed to strike a balance between protecting the integrity of the process, on the one hand, and avoiding unnecessary or intentionally obstructionist costs and delays on the other hand. This balance would be thrown off if arbitrators were to systematically fail to live up to their disclosure obligations, but it can also be thrown off if (as some argue is currently the case) losing parties were to launch unfounded attacks on arbitrators as a substitute for substantive appeal. In other words, just as arbitrators must abide by the applicable ethical rules, so too parties must respect the proper function of such rules.

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<sup>76</sup> Christian Hausmaninger, *Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint*, in ICC, *The Status of the Arbitrator* 45 (ICC Publication No. 564 1995).

<sup>77</sup> Michael Collins, *Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 ARB. INT'L 333 (2003).

<sup>78</sup> For one of the most forceful commentators on this subject, see V.V. Veeder, *Is There Any Need for a Code of Ethics for International Arbitrators?*, in *Les arbitres internationaux* 187, 192 (J. Rosell ed. 2007) ("My answer [to questions about the need for arbitrator ethical rules], for the time being at least, is to do nothing"). See also Huang Yanming, *The Ethics of Arbitrators in CIETAC Arbitration*, 12 J. INT'L ARB. 5 (1995) (suggesting an arbitrator's "self-discipline" and reputation are sufficient to safeguard the integrity of the process).

A final, and related, observation is that arbitrators' conduct and integrity are critical to the legitimacy, both real and perceived, of the international arbitration system. As Professor Judith Resnik points out, in public adjudicatory systems, majestic courthouses, judicial robes, ceremonial procedures and other symbols provide "an appearance of 'correctness,' and thus legitimate the decisions rendered."<sup>79</sup> As a system that is built on private contractual relations and that exists without any direct link to a particular national system, the authority and legitimacy of international arbitration rests instead on the wisdom, efficacy and ethics of its arbitrators. The arbitrator, in other words, both personifies the promise of neutral decisionmaking and provides the only tangible indicia of decisional legitimacy.

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<sup>79</sup> Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 854 (1984). Recently, Professor Resnik has expanded on the insight of images of justice, and even physical courthouses, contribute to perceptions of justice and, consequently. Perhaps most interestingly, she illustrates how important aspects of these images and metaphors transcend cultures and time. See Judith Resnik and Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 PROCED. AM. PHIL. SOC. 139 (2007).