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Challenging Arbitrators and the Importance of Dislosure: Recent Cases and Reflections

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FOREWORD

As all of its fifteen predecessors, the Sixteenth Volume of the Croatian Arbitration Yearbook contains a set of papers, which give a comprehensive and critical analysis of different issues in the field of arbitration and mediation.

The first section dedicated to arbitration is focused to arbitration and State courts and consists of four articles. The first elaborates on public policy as a ground for setting aside an arbitral award and submits that the notion of public policy in a setting aside procedure should be interpreted in the same manner as in the case of recognition and enforcement of foreign arbitral awards and not so as mean „all mandatory rules" of the annulment State. The second paper analyses whether party autonomy in international arbitration is capable of shaping judicial intervention in arbitral proceedings or at the stage of legal remedies against an arbitral award and emphasises that a balance between party autonomy and judicial intervention must be struck. The third paper also reflects the role of the judiciary in arbitral proceedings, however it focuses on legal assistance by State courts to arbitral tribunals and purports to define the most effective model of their legal assistance to arbitral tribunals. The fourth paper deals with the very concrete engagement of State courts and that is, the judicial review of arbitral awards under the Croatian Arbitration Act on the occasion of a claim for the annulment of an arbitral award, at the enforcement stage, as an incidental issue in separate civil proceedings and when declaring the enforceability of the domestic award as a specific form of its recognition.

The second section on arbitration presents selected issues of international arbitration. The first two papers explore the notion of arbitrability. The first paper examines on a comparative level and from the viewpoint of Croatian law, the arbitrability of disputes between investors and listed companies for the breach of duty to disclose information on the capital market. The second paper deals with public private partnerships in the Republic of Croatia and indicates the advantages of the settlement of disputes arising out of public private partnership contracts through arbitration. The third paper reflects on the very hot issue in contemporary arbitration – the challenge of arbitrators. The paper examines how to balance the parties' right to challenge an arbitrator and the arbitrators' duty of disclosure which are key to ensuring the integrity of arbitral proceedings. The fourth paper reveals the development of arbitration in the region and concerns the newest development in Slovene

arbitration law. A common denominator of the next three papers is that they focus on international conventions and arbitration – the CISG, BITs and the New York Convention. The first paper presents the application of Articles 1 and 10 of the UN Convention on Contracts for International Sale of Goods before tribunals organized under the Rules of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce. The second paper refers to provisions in Croatian BITs on jurisdiction of different bodies for the settlement of investment disputes, especially those provisions which prescribe prior mandatory mediation and subsequent elective jurisdictions of different bodies. The third paper analyses the recognition and enforcement of foreign arbitral awards and state succession and explores whether the bilateral agreement concluded in 1959 between the former Yugoslavia and Greece that covers the recognition and enforcement of arbitral awards remains applicable in the bilateral relations of Greece with successors States. The final paper addresses the activities of the Vienna International Arbitral Centre and puts emphasis on the implementation of co-operation agreements which the VIAC concluded with other arbitral institutions.

The block on mediation offers four articles. The first paper gives a concise analysis focused mainly on Croatian law, the main similarities and differences between the two principal methods of alternative resolution of private law disputes – mediation and arbitration. The second paper elaborates on some characteristics of mediation with a foreign element according to the Croatian Mediation Act of 2009, which amended the Act of 2003, and Directive 2008/52/EC of the European Parliament and the Council of Europe of 2009 on certain aspects of mediation in civil and commercial matters. The second paper brings an analysis of mediation in administrative cases in Slovenia and reviews a successful „Tenetiše“ environmental mediation case. The third paper explores how the use of mediation can change a negative perception of the legal profession and how it can improve the traditional system of dispute resolution.

The abovementioned contents show that this Volume remains faithful to the CAY's founding postulate – to cover arbitration and mediation at the national, regional and international level and thereby contribute to the critical analysis of different issues in focus in the field of arbitration and mediation.

GENERAL EDITOR

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Challenging Arbitrators and the Importance of Disclosure: Recent Cases and Reflections

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The last few years have seen a rise in challenges to arbitrators. It is argued that challenges are a tactic resorted to by parties and their counsel to cause delay and increase the costs of arbitration and, thus, undermine the parties' choice and the finality of awards. However, the right to challenge an arbitrator and the arbitrators' duty of disclosure are key to ensuring the integrity of the arbitral process.

This article examines how the balance is struck between these two objectives by looking at the nature and the scope of the right to challenge arbitrators and the duty to disclose under national laws and rules of arbitral institutions. After reviewing recent national court cases and arbitral decisions concerning challenge, the article calls for (i) the threshold for challenging arbitrators in investment arbitrations to be, at the very least, the same as in international commercial arbitrations; (ii) a neutral and independent body to be given the authority to review challenges under the ICSID system; and (ii) disclosure obligations to be imposed on counsel and the parties.

Key words: challenge of arbitrators, UNCITRAL Model Law on International Commercial Arbitration, Croatian Arbitration Act, English Arbitration Act. Rules of Arbitration of the Permanent Arbitration Court attached to the Croatian Chamber of Economy, ICC Rules of Arbitration, Convention on the Settlement of Investment Disputes between States and Nationals of Other States

I. Introduction

Arbitration is a voluntary and consensual mechanism for resolving disputes whereby parties agree to opt out of the judicial process. One of the key distinguishing features of arbitration is the ability of the parties to choose the arbitrators who will resolve their dispute. The parties' autonomy to select their arbitrators is one of the main advantages of international arbitration as compared to litigation[1]. A party will strive to select an arbitrator who has some inclination or predisposition to favour

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1 Mistelis L., *International Arbitration: Corporate Attitudes and Practices,* [2004] 15 American Review of International Arbitration 525. See also Bühring-Uhle, A survey on Arbitration and Settlement in International Business Disputes in Drahozal C., Naimark R., *Towards a Science of International Arbitration: Collected Empirical Research,* Kluwer International (2005), 25, at 33.

that party's side by, for example, sharing the same legal and/or cultural background or by holding doctrinal views that coincide with such party's case. International arbitration conventions[2], national laws[3] and institutional arbitration rules[4] on the whole accord parties broad autonomy in selecting arbitrators.

Such autonomy is, however, not unrestricted. As an adjudicatory process arbitration cannot be totally detached from "fundamental principles that underpin most domestic legal systems and ultimately reflect the rule of law"[5]. These principles are typically enshrined in the constitutions of states and form part of their procedural public policy rules. In particular, Article 6 of the European Convention of Human Rights ("ECHR") provides that the determination of civil rights and obligation must be "by an independent and impartial tribunal established by law". That arbitrations taking place in countries signatories to the ECHR must comply with the requirements of Article 6 is beyond doubt[6]. As a general rule, national laws and institutional rules provide that arbitral proceedings must meet the fundamental requirements of fairness and justice. Specifically, duties are imposed on arbitrators to act fairly and impartially and in accordance with due process, parties are accorded rights to challenge an arbitrator, as well as to challenge or deny recognition of awards on grounds of lack of due process.

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2 See for example Article IV(1)(b) of the 1961 European Convention on International Commercial Arbitration which provides that the parties "shall be free inter alia (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute...". The text of the European Convention is available at http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961. See also Articles II(3) and V(1)(d) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The fact that the "the composition of the arbitral authority ... was not in accordance with the agreement of the parties" is one of only eight grounds for refusing to enforce an arbitral award. The text of the New York Convention is available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

3 See for example Article 11(2) of the Model Law, Article 10 of the CAA and Section 16 of the EAA. A few countries impose nationality and/or religious requirements on the parties' choice of arbitrators. See for example paragraph 3 of the 1985 Rules for the Implementation of the Saudi Arabian Arbitration Regulation, which provides that: "the arbitrator shall be a Saudi national or Muslim expatriate from the free professional section or others...". For further discussion see Saleh S., *Commercial Arbitration in the Arab Middle East*, Hart Publishing, (2nd edition, 2006), at 300.

4 See for example Articles 5 to 8 of United Nations Convention on International Trade Law Arbitration Rules ("UNCITRAL Rules") and Articles 7 to 9 of the ICC Rules. A few institutional arbitration rules impose greater limitations on parties' autonomy to select arbitrators. See for example Article 21 of the China International Economic and Trade Arbitration Commission ("CIETAC") Arbitration Rules which requires arbitrators to be selected from a list maintained by CIETAC unless otherwise confirmed by the Chairman of CIETAC.

5 Qureshi K., *Arbitration and Article 6*, (2007) New L. J. 46, at 46.

6 Albeit that the jurisprudence of the European Court of Human Rights provides that special considerations apply in relation to arbitration. For further detail see Qureshi, Ibid.

This article aims to provide in Sections 1 and 2 an overview of the rules adopted by states and arbitral institutions concerning challenge to arbitrators and the corollary arbitrators' duty to make disclosure in the context of international commercial and investment arbitrations. The scope and operation of the waiver of the right to challenge is examined in Section 3. In Section 4 Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines")[7] adopted by the International Bar Association ("IBA") to clarify and harmonise these rules are analysed. A selected number of recent reported cases concerning challenge of arbitrators are reviewed in Section 5. By way of conclusion, in Section 6 emerging trends arising from the recent cases are highlighted and recommendations advanced.

Specifically, the article examines and compares the provisions of the 1985 United Nations Convention on International Trade Law Model Law on International Commercial Arbitration ("Model Law")[8], the national laws of Croatia and England, as well as the arbitration rules of the Croatian Chamber of Commerce ("CCC"), the International Chamber of Commerce ("ICC") and the International Centre for the Settlement of Investment Disputes ("ICSID"). Most countries in the world have used the Model Law as a template for drafting their national rules concerning arbitration. As such, the Model Law's rules concerning the challenge of arbitrators and the duty of disclosure are indicative of how these issues are addressed in contemporary arbitration legislation worldwide.

II. Challenging arbitrators

Recent years have seen a rise in the number of challenges to arbitrators. In this section the grounds and procedure for challenging arbitrators under the selected laws and institutional rules are examined in turn, highlighting differences in approach. In particular, the scope of the threshold requirements of "justifiable doubt" and "material lack" and the differences between the "impartiality" and "independence" standards are discussed.

a) Grounds of Challenge

Most national laws and rules of arbitral institutions allow parties to challenge arbitrators for bias, as well as on other grounds. In this section, the grounds for challenge enumerated under the Model Law, 2001 Croatian Arbitration Act ("CAA")[9],

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[7] IBA Guidelines are available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[8] A copy of the Model Law with amendments adopted as at 2006 is available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[9] The Law was published in Croatian Official Gazette 88/2001 of 11 October 2001 and came into force on 19 October 2001. The unofficial English translation of the Croatian Law on Arbitration

the 1996 English Arbitration Act ("EAA")[10], the arbitration rules of the CCC concerning international commercial arbitration[11] ("CCC Rules"), as well arbitration rules of the ICC[12] ("ICC Rules") and ICSID are analysed in turn.

i) UNCITRAL Model Law on International Commercial Arbitration

The Model Law provides in Article 12(2) that "[a]n 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". No details of the kind of circumstances which give rise to justifiable doubts are set in the Model Law.

According to Born to date there has been is "only limited judicial authority applying the Article 12(2) standard"[13]. One recent example is the 2007 decision of the German Court in Oberlandesgericht Frankfurt/Main in which the Court held that (i) the existence of a lease agreement between the chairman and the counsel for one of the parties; (ii) the close personal relationship between the chairman and the same counsel, evidenced by the fact that the counsel used the personal "du" rather than the impersonal "Sie" when addressing the chairman during the course of the arbitration, and (iii) the failure by the chairman to disclose any of these facts, "at least as a whole" (German: "*jedenfalls in ihrer Gesamtheit* ") gave rise to justifiable doubts as to the impartiality or independence of the chairman under s.1036(II) of the German Code of Civil Procedure (which parallels Article 12(2) of the Model Law)[14].

ii) Croatian Arbitration Act

Similarly, Article 12 of the CAA states that: "[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or if the arbitrator does not possess qualifications agreed to

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was prepared by Dr. Uzelac and is available at http://hgk.biznet.hr/hgk/fileovi/180.pdf.

10 The text of the EAA is available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1.

11 For details of the CCC Rules see "Rules for resolving arbitral disputes with an international element before the Permanent Court of Arbitration of the Croatian Chamber of Commerce", the version of the rules in Croatian can be found at http://www.hgk.hr/wps/portal/!ut/p/.cmd/cl/.l/hr?legacy WcmClippingUrl=http%3A%2F%2Fhgk.biznet.hr%2Fhgk%2Ftekst3.php%3Fa%3Db%26page%3Dtekst%26id%3D221%26kid%3D264.

12 The Rules of arbitration of the ICC in force as from 1 January 1998 are available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

13 Born G., *International Commercial Arbitration*, Volume 1, Wolters Kluwer (2009), at 1466.

14 Marenkov D., *Germany: standards applied by German courts in deciding on challenges to arbitrators*, (2009) Int. A.L.R N9.

by the parties or if he fails to fulfil his duties specified in Article 11, paragraph 2 of this Law". Article 11 paragraph 2 provides that "[a]n arbitrator must conduct the arbitration with due expeditiousness and undertake measures on time in order to avoid any delay of the proceedings".

As such, as compared to the Model Law, the CAA provides an additional ground for challenging arbitrators – the failure to conduct the arbitration expeditiously and without delay. As is the case with the Model Law, the CAA does not define the impartiality and independence standards or provide any guidance as to what amounts to justifiable doubt. It would seem that no challenge has been made pursuant to these rules to date.

iii) English Arbitration Act

Under Section 24 of the EAA the following grounds for challenging an arbitrator are listed: (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; (b) that he does not possess the qualifications required by the arbitration agreement; (c) that he is physically or mentally incapable of conducting the proceedings or that there are justifiable doubts as to his capacity to do so; and (d) that he has refused or failed (i) properly to conduct the proceedings or (ii) to use all reasonable despatch in conducting the proceedings or making an award. Therefore, under the EAA the incapacity of the arbitrator and his/her failure to properly conduct proceedings are additional grounds for challenge as compared to the Model Law and the CAA.

However, and importantly, Section 24 provides that a challenge will only be successful if the above grounds will cause or have caused "substantial injustice" to the applicant will[15]. Accordingly, the ability of parties to challenge arbitrators is more restricted under English law than under the Model Law or the CAA.

iv) Rules of Arbitration of the Permanent Arbitration Court attached to the Croatian Chamber of Economy

Adopting a similar approach as the CAA, Article 15 of the CCC Rules provides that an arbitrator can be challenged if circumstances exist which could give rise to justifiable doubts as to his impartiality or independence. No other grounds for challenge are listed.

[15] See final sentence of Section 24(1).

v) ICC Rules of Arbitration

Unlike the rules of most other arbitral institutions around the world[16], Article 7(1) of the ICC Rules does not specifically require an arbitrator to be impartial. Instead it requires the arbitrator to ‘‘be and remain independent of the parties involved in the arbitration’’[17]. Nevertheless, it can be argued that impartiality is a ground for challenge under the ICSID Rules. Since Article 15(2) expressly requires a tribunal to ‘‘act fairly and impartially’’[18] by implication it could be argued the term “otherwise” in Article 11, which provides that a challenge may be made for ‘‘lack of independence or otherwise”, includes impartiality as a ground for challenge.

vi) Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Parties to an investment arbitration[19] conducted under the ICSID system can challenge an arbitrator pursuant to Article 57 of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)[20] for “manifest lack of qualities required by paragraph (1) of Article 14...” or “...on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV”. Paragraph 1 of Article 14 requires the arbitrator to be of “high moral character”, have “recognised competence in the fields of law, commerce, industry or finance and “exercise independent judgment”. Section 2 of Chapter IV of the ICSID Convention sets out the requirements concerning the nationality of the arbitrators to be appointed to an ICSID tribunal.

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16 See for example Article 8(1) of the AAA International Arbitration Rules and Article 5(2) of the Arbitration Rules of the London Court of International Arbitrators.

17 Similarly Swiss law imposes on arbitrators only an obligation to be independent. For details see Section 180(1)(c) of the Swiss Private International Law Act. However, Malintoppi argues that the right to an impartial judge is guaranteed by the Swiss Constitution and has been consistently imposed on arbitrators by Swiss courts as a fundamental principle of public policy. See Malintoppi L. *Arbitrators' Independence and Impartiality* in Muchlinski P., Ortino F., and Schreuer C., *Oxford Handbook of International Investment Law*, Oxford University Press (2008) 789, at 819 and footnote 69 referred therein.

18 Malintoppi L., Ibid., 808.

19 A distinction is generally made between international commercial arbitrations and investment treaty arbitrations. Investment treaty arbitrations are arbitrations between states and investors in which regulatory acts of states are reviewed to determine whether there has been a breach of the rights granted to investors under *inter alia* bilateral investment treaties. International commercial arbitrations, on the other hand, are arbitrations whereunder commercial disputes are resolved. The majority of investment treaty disputes today are resolved under the ICSID system.

20 Terms of the ICSID Convention are available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

The ICSID Convention requires arbitrators to exercise independent judgement rather than be impartial and independent. There has been much discussion about the implications of this difference in terminology. According to Schreuer the ICSID requirement includes an implicit duty of impartiality and independence[21]. A review of the recent published decisions concerning the disqualification of arbitrators ("Disqualification Decisions") shows that these requirements have been used interchangeably by tribunals when analysing whether the particular circumstances in question triggered disqualification[22].

b) Impartiality versus independence

As the preceding discussion reveals, the provisions of the CAA and the Model Law require arbitrators to be both impartial and independent, whilst the EAA[23] requires them only to be impartial and the ICC only to be independent. However, a review of the decisions of national courts and legal writings shows that the standards of impartiality and independence are often used interchangeably when discussing the duties of arbitrators.

Although Born argues that undue importance should not be given to the distinction between the two standards[24], the decision to exclude "independence" from the EAA suggests that, at least, the Departmental Advisory Committee on Arbitration Law ("DAC") regarded the distinction as important. In its report DAC specifically considered the appropriateness of including both standards in the EAA. The DAC noted that it was not "persuaded ... that, in consensual arbitrations .... [the requirement of independence was] either required or desirable" and that "lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance" [25]. DAC's decision not to include the standard of "independence" in the EAA was guided largely by its concern to ensure that the common practice adopted in the UK for arbitrators and counsel to come from the

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21 As Schreuer notes, the original draftesmen of the ICSID Convention considered that the impartiality and independence of arbitrators was a given. See Schreuer C., *The ICSID Convention: A Commentary*, Cambridge University Press (2001) at 57.

22 See the approach taken by the tribunals in the Suez Case and Azurix Case discussed in Sections 5. The same approach was taken by tribunal in the Second Proposal for Disqualification in the *EDF* v. *The Argentine Republic,* ICSID ARB/03/23 on June 2008 (unreported).

23 England is not the only jurisdiction that has adopted this approach. Similarly, the 1999 Swedish Arbitration Act requires the arbitrator to be impartial only. Interestingly, paragraph 8 of the Act contains a list of examples of an arbitrator's partiality. For further discussion see Born, Supra Note 14, op.cit., at 1473.

24 Born, Ibid., at 1474.

25 See paragraph 101 of the Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996, reprinted in (1997) 13 Arb. Int'l 275.

same set of barristers' chambers would not be brought into question. On its view, a lack of independence of itself should not give rise to challenge and is only evidence of a lack of impartiality. So what is the difference between the two standards?

i) Independence

Independence is generally regarded as an objective and fact-based standard requiring the arbitrator to be free from outside influence and pressure[26]. In determining whether an arbitrator is independent the arbitrator's relationship, whether professional, business, familial or personal, with any of the arbitrating parties or any of their affiliates or counsel will be examined. Examples of professional relationships looked at include whether the arbitrator or a partner in the same law firm as the arbitrator has acted or is acting as counsel, an employee, an adviser or as a consultant on behalf of one party. Whether the arbitrator or partner in the same law firm holds an executive or non-executive directorship in one of the parties to the arbitration or owns shares in such party are examples of business relationships examined[27]. Familial relationship looked at include whether an arbitrator, partner or business associate is a spouse, parent, aunt, or cousin of one of the parties or counsels. Examples of personal relationship looked at include long-standing friendship between the arbitrator and a party or counsel[28].

However, the mere existence of a relationship between the arbitrator and one of the parties or the counsels does not necessarily lead to the existence of a relationship of dependency that would justify a challenge. The application of the independence standard across national courts and institutional rules is not uniform[29].

ii) Impartiality

By contrast to independence, impartiality is said to be a subjective standard concerned with the arbitrator's mental predisposition with respect to any of the arbitrating parties or the matter in dispute[30]. Partiality is typically established if there

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[26] See Lew J., Mistelis L., Kröll, S., *Comparative International Commercial Arbitration*, Kluwer Law International (2003), at 261.

[27] For a recent English case see *Locabail (UK) Ltd* v. *Bayfields Properties* [2000] 1 All ER 65. For ICC practice see Craig W., Park W., Paulsson J., *Guide to 1998 ICC Arbitration Rules with Commentary*, Oceana Publications (1999), para 13-05(iv).

[28] See German case referred to in Section 1.1.1.

[29] For further examples of different approaches taken by national courts and arbitral institutions see the recent cases discussed in Section 5. For details on IBA's attempts to harmonise the application of the standard of independence see Section 4.

[30] Trakman L., *The impartiality and independence of arbitrators reconsidered,* (2007) Int. ALR 124, at 126.

are justifiable doubts that the arbitrator will favour one party over the other for reasons that are unrelated to a reasoned decision on the merits of the case. These unrelated factors may include the relationships discussed in the paragraph above. It can also relate to statements made before or during the course of an arbitral proceeding which concerns the parties, the dispute in question or the legal issues raised in the proceedings or to conduct during proceedings[31].

c) The justifiable doubts requirement

Under the rules of most countries and arbitral institutions, including all of the ones reviewed in this article except those of ICSID, a challenge will only succeed if it is established that there are justifiable doubts as to the arbitrator's impartiality and/or independence[32]. The justifiable doubts requirement ensures that the parties do not make frivolous or vexatious challenges which would artificially prolong the arbitral proceedings undermining its efficacy. None of the rules examined defines what is meant by justifiable doubt. There are, therefore, significant ambiguities regarding the nature and scope of the requirement and its application varies from country to country and from one arbitral institution to another[33].

For example, it is not entirely clear whether justifiable doubt is distinguishable from reasonable doubt[34]. It can be argued that the justifiable doubts requirement contains both an objective and subjective element. Existence of doubt is to be assessed by reference to the particular party and the circumstances of the case (subjective element) to determine whether such doubt is justifiable to a reasonable person who finds themselves in such circumstances (objective element)[35]. In an attempt to standardise the application of this requirement Standard 2(c) of the IBA Guidelines (discussed in further detail in Section 4) provides that "[d]oubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by facts other than the merits of the case as presented by the parties in reaching his or her

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31 For example, the statement that "Portuguese people were liars" served as grounds to remove an arbitrator for partiality in *Arbitration between the Owners of the Steamship Catalina and the Owners of the Motor Vessel Norma, Re* (1938) 61 Lloyd's. Rep. 360.

32 As noted in Section 1.1.3, the EAA imposes an additional requirement of substantial injustice to the party making the challenge.

33 Some examples of how this requirement is applied in practice are examined in Section 5 by reference to recent cases on challenges.

34 Trackman, Supra Note 31, at 132. The English courts have held that the justifiable doubt requirement is an objective test. For further discussion on the most recent decision see Section 5.

35 This approach has, for example, been taken by English Courts. See *Porter* v. *Magill* [2002] 2 AC 357.

decision"[36]. In other words the IBA Guidelines take the view that there is no difference between the two requirements. As the cases reviewed in Section 5 reveal, English Courts and some ICSID tribunals have referred to the two requirements interchangeably.

Further, in England, for example there was until recently some debate about whether justifiable doubt requires there to be a risk or possibility of partiality, or actual certainty or probability thereof[37]. However, in *Porter* v. *Magill*[38] the House of Lords clarified that the test for impartiality is "whether, having regard to the relevant circumstances, as ascertained by the court a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". This test was applied in the ASM Shipping case discussed in Section 5.1.

d) The manifest lack requirement

As noted above, to challenge an arbitrator under the ICSID Convention it must be shown that he or she manifestly lacks the quality of exercising independent judgement. According to Schreuer the requirement that the lack of impartiality and/or independence must be manifest imposes a "relatively heavy burden on the party" making the proposal for disqualification[39].

This burden seems significantly higher than the "justifiable doubt" requirement previously discussed. For example the Disqualification Decision in *Amco Asia Corp. v. Indonesia*[40] held that the "mere appearance of partiality was not a sufficient ground for disqualification of the arbitrator. The challenging party had to prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable', not just 'possible' or 'quasi-certain'"[41]. Accordingly, it would seem that it is more difficult for a party to challenge an arbitrator in an investment treaty arbitration than in an international commercial arbitration. The implications of this will be explored further in Section 6.

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36 See IBA Guidelines, Supra Note 8, at 10.

37 For example in *Laker Airways Inc* v. *FLS Aerospace Ltd* [2000] 1 WLR 113 Rix J, applying the House of Lords test in *R* v. *Gough* [1993] 2 All E.R. 724, at 732, held that what was required was there to be a "real danger of bias". Lord Wolf applied the same test in *AT& T Corporation and Lucent Technologies Ltd* v. *Saudi Cable Company* [2000] 2 All E.R. (Comm) 625.

38 [2002] 2 AC 357.

39 Schreuer, Supra Note 22, op. cit., at 1200.

40 ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator, 24 June 1982 ("Amco Decision") (unreported). Referred to in Tupman M., *Challenge and Disqualification of Arbitrators in International Commercial Arsitration,* (1989) 38 Int. & Comp. L.Q. 44, at 44. The case is also referred to in Schreuer C., Supra Note 22, op. cit., at 1200.

41 See Amco Decision, at 8.

e) Procedure for challenge

There are a number of possible remedies available to a party once it is aware of circumstances giving rise to justifiable doubts as to an arbitrator's impartiality and/or independence. First, the party can commence proceedings to remove or disqualify an arbitrator. Second, the award itself may be challenged in the seat of the arbitration, which, if successful, would result in the award being set aside. Finally, the party can resist enforcement of the award at the enforcement stage. This article only analyses this first procedure.

The procedure for challenging an arbitrator is governed by the law of the country of the seat of the arbitration and the rules of the arbitration that have been adopted by the parties[42]. This section compares the procedures for challenge under the various institutional rules and national laws enumerated above.

i) UNCITRAL Model Law on International Commercial Arbitration

Under the Model Law, the parties are free to agree a procedure for challenging an arbitrator. Failing such agreement, Article 13(2) stipulates that a party who intends to challenge an arbitrator must send a written statement of reasons for the challenge to the arbitral tribunal. In circumstances where the arbitrator who has been challenged does not withdraw after the challenge is made, the Model Law provides that it is the arbitral tribunal who will decide upon the challenge. There is no mention of the challenged arbitrator not participating in the decision of the tribunal.

A party is accorded a further right under Article 13(3) to require the national court to decide on the challenge after the arbitral tribunal has ruled on the matter. The Model Law provides that such decision by the court is not subject to appeal. A party is given thirty days from the date it receives notice from the arbitral tribunal rejecting the challenge to commence proceedings in court. It should be noted that the court proceedings will be *de novo* proceedings rather than a review of the decision of the arbitral tribunal.

In order to ensure the efficacy of arbitral proceedings, Article 13(3) permits the arbitral tribunal to continue the proceedings, and even make an award whilst the challenge is pending before the national courts.

In a further attempt to minimise delay to the proceedings and ensure that challenge is not used for tactical reasons to challenge only unfavourable awards, strict time limits for challenge are imposed under the Model Law. In particular, a party is required to make a challenge within fifteen days of becoming aware of the

[42] For a discussion regarding the extent to which parties can override or amend the institutional rules concerning challenge see Born, Supra Note 14, op. cit., at 1508*ff.*

constitution of the tribunal or of any circumstances which give rise to justifiable doubts as to the arbitrator's impartiality or independence[43]. The Model Law does not expressly provide that a failure of the party to commence a challenge within this strict time period operates as a waiver. For further discussion on the issue of waiver see Section 3.

ii) Croatian Arbitration Act

The process for challenge under the CAA is substantially the same as under the Model Law. The same strict time limits for challenge before the tribunal and the national court are provided for in Article 11. Pursuant to Article 43(3), the President of the Commercial Court in Zagreb or a judge authorised by the President will rule on the challenge.

iii) English Arbitration Act

Under English law an application to the court for removal of an arbitrator may only be made after recourse to an arbitral institution or person, if so provided by the parties, has been exhausted by the applicant[44]. So for example, if the parties have opted for arbitration pursuant to ICC Rules, an application for removal will first need to be made to the ICC Secretariat and only if such application is unsuccessful will the court review the matter. Section 24(5) of the EAA expressly provides that the challenged arbitrator is "entitled to appear and be heard by the court before it makes its" decision concerning challenge, thereby ensuring that the right to due process is also accorded to the arbitrator.

The default procedure under the EAA is different to that under the Model Law and the CAA. EAA's approach is to be preferred, for the following two reasons. First, under the default procedure under the Model Law and the CAA the arbitrator whose independence and impartiality is being challenged is (it seems) permitted to take part in the deliberations on that very issue. Second, from the administration of justice perspective it is better for the issue of challenge to be determined by national courts who have no interest in the way the matter is resolved[45].

As under the CAA and Model Law, Section 24(3) permits the tribunal to "continue the arbitral proceedings and make an award while an application to the court […]

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43 See Article 13.2.

44 See Section 24(2) of the EAA.

45 Since the default procedure operates only in the absence of the parties' agreement and as a general rule most parties incorporate institutional arbitration rules in their arbitration agreements (all of which contain procedure for challenge), the instances in which the default procedure will operate in Croatia or any other Model Law country will be very rare in practice.

is pending", therefore minimising any delay to the arbitration proceedings arising as a result of the challenge. However, unlike the CAA and the Model Law, EAA allows for an appeal to be made (with the permission of the court) in respect of a decision of the court of first instance.

Moreover, and importantly, the EAA does not set strict time limits for commencing a challenge before national courts. English case law, however, is clear that a party will be deemed to have waived its right to challenge unless it has done so promptly[46]. Specifically, Section 73 of the EAA provides that a party will lose its right to object unless it can show that "at the time he took part ...in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

iv) Rules of Arbitration of the Permanent Arbitration Court attached to the Croatian Chamber of Economy

Pursuant to Article 16 of the CCC Rules a party wishing to remove an arbitrator must submit its request in writing together with reasons to the Permanent Court of the CCC within fifteen days of the confirmation of the arbitrator or of becoming aware of the circumstances which may give rise to justifiable doubt. Article 16(2) of the CCC Rules requires the other side and all members of the tribunal to be informed of the request. It is not, however, clear whether such obligation to inform rests on the Permanent Court or the party.

In a departure from the rules of other arbitral institutions, Article 17 provides that the decision concerning the removal of an arbitrator will be taken by the authority which the parties had previously agreed would appoint the arbitrators or, if no such authority had been agreed, by the President of the Permanent Court of the CCC.

v) ICC Rules of Arbitration

Pursuant to Article 11(1) of the ICC Rules a party wishing to challenge an arbitrator must submit a written statement to the ICC Secretariat specifying the facts and circumstances on which the challenge is based.

Slightly longer time limits for challenge are set under the ICC Rules. To be admissible such statement must be sent within thirty days of receipt of notification of the appointment or confirmation of the arbitrator or within thirty days from the date such party is informed of the facts and circumstances on which the challenge is based[47]. As such, slightly longer time limits for challenge are set under the ICC Rules as compared to the Model Law and CAA.

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[46] See further discussion in Section 4 and cases referred to footnote 63.

[47] See paragraph 2 of Article 11 of the ICC Rules.

The ICC Court of Arbitration is given the power under Article 11(3) to decide on the admissibility and the merits of the challenge. Any such decision can only be rendered after the Secretariat has afforded the arbitrator, the other party and other members of the tribunal the opportunity to comment in writing on the challenge "within a suitable period of time". Such comments must be communicated to all the parties and to the arbitrators.

vi) Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The procedure for the disqualification of an arbitrator in an ICSID arbitration is set in Article 58 of the ICSID Convention and Article 9 of Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("ICSID Rules")[48]. In particular, a party must file a proposal for disqualification, together with reasons, to the Secretary General of ICSID. The proposal is then transmitted to all members of the arbitral tribunal and the opposing party. If the challenge is directed at a sole arbitrator or the majority of arbitrators, the proposal is submitted to the Chairman of the Administrative Council of ICSID ("Chairman") to decide on the challenge. The arbitrator whose position is challenged may "without delay upon transmittal of the proposal, furnish explanations to the tribunal or Chairman, as the case may be"[49]. If the challenge is directed against one of the arbitrators of a three member arbitral tribunal, the decision concerning the disqualification ("Disqualification Decision") is taken by the other two arbitrators "promptly … in the absence of the" challenged arbitrator[50].

Unlike other rules, ICSID Rules provide that where other members of the tribunal cannot reach a Disqualification Decision the decision will be taken by the Chairman[51]. Moreover, unlike the other rules, ICSID Rules impose a duty on the Chairman to "use his best efforts to take [a] decision within 30 days after he has received the proposal" and a duty on the other two arbitrators to take a decision "promptly"[52]. In addition, under the ICSID system the arbitral proceedings must be suspended whilst the decision concerning the challenge is pending[53].

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48 The ICSID Rules were last amended in 2006. The text of the ICSID Rules is available at http://www. worldbank.org/icsid.

49 See Rule 9(3) of the ICSID Rules.

50 See Rule 9(4) of the ICSID Rules.

51 See Article 58 of the ICSID Convention and Rule 9(5) of the ICSID Rules.

52 See Rules 9(4) and 9(5) of the ICSID Rules.

53 See Rule 9(6) of the ICSID Rules.

Finally, instead of prescribing a set period of days for the filing of a proposal for disqualification, Rule 9(1) requires that the proposal be made "promptly, and in any event before the proceedings is declared closed". The term "promptly" is not defined under the ICSID Rules. According to Schreuer "promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification".[54] For further discussion regarding the scope of the term "promptly" see the approach taken by the tribunal in the Suez Case which is discussed in Section 5.3.2.

f) Conclusion

The analysis in this Section reveals that the grounds and procedure for challenging arbitrators are not uniform. Most startlingly, the rules concerning challenge of arbitrators in respect of investment arbitrations under ICSID are different as compared to those in respect of international commercial arbitrations, with the threshold for triggering challenge seemingly significantly higher under the ICSID system.

III. Arbitrators' duty to disclose

In order to reduce the risk of a challenge, and to ensure that arbitration meets the fundamental requirements of fairness and justice, most institutional rules and national laws impose a duty on an arbitrator to disclose any conflicts of interest. In this section the nature and the scope of the duty to disclose will be examined under the above-mentioned rules and national laws.

a) UNCITRAL Model Law on International Commercial Arbitration and Croatian Arbitration Act

Both the CAA and the Model Law provide in their respective Article 12(1) that "[w]hen 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 independence or impartiality. 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 been previously informed of them by him".

As such, the duty to disclose is a continuing one requiring an arbitrator to continuously review any circumstances which may arise during the course of the proceedings to determine whether they are likely to give rise to justifiable doubts. The same justifiable doubts threshold requirement for challenge is used as the basis for disclosure.

[54] Schreuer, Supra Note 22, at 1198.

b) English Arbitration Act

There is no express obligation to disclose conflicts of interest under the EAA. However, English Courts, applying the same standards of impartiality to judges and arbitrators, have held that arbitrators have a duty to disclose any matter which may give rise to a "real possibility of bias"[55]. Interestingly, English Courts have noted that the level of disclosure which is appropriate depends on the stage in the proceedings, with more disclosure being required earlier on in the proceedings[56]. No such distinction is made under the other rules examined herein. Moreover, the IBA Guidelines recommend "that disclosure or disqualification … should not depend on the particular stage in the proceedings"[57].

c) Rules of Arbitration of the Permanent Arbitration Court attached to the Croatian Chamber of Economy

In line with Article 12 of the CAA, Article 14 of the CCC Rules imposes a duty on a person approached with possible appointment as an arbitrator to disclose all circumstances likely to give rise to justifiable doubt as to his independence or impartiality. However, the rules do not provide that such duty is a continuing one.

d) ICC Rules of Arbitration

Pursuant to Article 7(2) of the ICC Rules a prospective arbitrator is required to sign a statement of independence and disclose in writing to the Secretariat of the ICC "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". Accordingly (and importantly), unlike the other rules, the ICC imposes a subjective standard of disclosure. The arbitrator is required to disclose any facts or circumstance which the parties, rather than a reasonable person, may consider are likely to call into question the arbitrator's independence. An arbitrator taking part in ICC proceedings when considering what to disclose is, in other words, required to review the specific circumstances of the arbitration in question including, for example the cultural or legal background of the parties. This ought to mean, for example, that if one of the parties is not familiar with the operations of the English bar, the arbitrator in an ICC arbitration would disclose if he/she is a member of the same barristers' chambers as one of the counsel of the parties or one of the other arbitrators.

In addition, it should be noted that the trigger for the duty to disclose under the ICC Rules is not the same as for challenging an arbitrator. Specifically, an arbitra-

[55] See for example ASM Shipping case discussed in detail in Section 5.1.

[56] See for example *Locabail (UK) Ltd* v. *Byfield* [2000] All ER 65.

[57] See paragraph (d) of the Explanation to General Standard 3 of the IBA Guidelines.

tor's duty is broader and requires disclosure of facts and circumstances that might call into question his independence in the eyes of the parties whereas, an objective standard is used to determine whether he actually lacks independence.

Importantly, under the ICC system the ICC Court of Arbitration is given the additional role of confirming arbitrators nominated by the parties. It does so based on the information provided by the arbitrator in his statement of independence and disclosure. The parties are given the right to comment on the information provided by the arbitrator before he/she is confirmed pursuant to Article 7(2) of the ICC Rules. As such, ICC arbitrators are effectively vetted before the arbitration commences, thereby minimising delay and cost.

As under the other rules, the duty to disclose under the ICC Rules is a continuing one. Article 7(3) provides that "[a]n 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".

e) Convention on the Settlement of Investment Disputes between States and Nationals of Other States

In response to criticism as to lack of transparency and accountability under the ICSID system, the rules concerning disclosure were amended in 2006. Rule 6(2) of the ICSID Rules now provides that nominee arbitrators in an ICSID arbitration must sign a declaration that they shall "judge fairly as between the parties" and attach a statement of "(a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party". As in the case of other rules discussed, the obligation to disclose such relationships and circumstances is a continuing one under the ICSID system.

It should be noted that Rule 6 does not adopt the justifiable doubts requirement of the Model Law. The ICSID Secretariat noted in its Discussion Paper on possible improvements to the ICSID system that Rule 6(2) "would expand the scope of disclosure of arbitrators to include any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgement"[58]. However, the actual text of Rule 6 does not refer to justifiable doubts.

In addition, Rule 6 seems to impose a broader duty to disclose on an arbitrator than the Model Law, the EAA or the ICC Rules. First, under Rule 6(a) an arbitrator is

[58] See ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper*, 22 October 2004, paras 16-17, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf.

required to disclose past and present professional business and other relationships with the parties, irrespective of whether or not they might cause the reliability of his independent judgment to be questioned by the party. Accordingly, it would seem that all past relationships with the parties have to be disclosed with no *de minimis* exception applying. Second, the "reliability for independent judgement" test in Rule 6(b) for disclosure with respect to "other circumstances" is not only broader than the "manifest lack" requirement for triggering challenge under ICSID, but also seems broader than the justifiable doubts disclosure requirement under the Model Law.

Malintoppi has criticised the new disclosure standard as "vague" and as possibly widening "excessively the scope of the obligation to disclose" in respect of investment treaty arbitrations[59]. There has not been to date a case which has explored the nature and scope of the new duty to disclose. What is, however, clear, is that Rule 6 has raised the bar and expanded the duty of disclosure, introducing a threshold lower than has been applied by ICSID tribunals in the past, and arguably imposed a stricter duty to disclose than exists in the practice of international commercial arbitration today.

IV. Waiver

The ability of parties to waive a conflict is the subject of much debate. The right to waive the right to challenge an arbitrator is seen an aspect of party autonomy and as essential for promoting the efficacy and finality of arbitration. In particular, it is argued that a right to challenge which is not susceptible to waiver may result in parties keeping objections up their sleeves and using them only in the event of an unfavourable award, thereby undermining the arbitral process. At the same time, however, arbitration proceedings must be conducted in a way that meets the requirements of fairness and justice. As discussed in Section 1, the right to an impartial tribunal is enshrined in Article 6 of the ECHR and is regarded as a key rule of public policy by most countries in the world. Goudkamp has argued that certain conflicts, in particular instances of actual bias, cannot be waived since this would undermine the public confidence in the administration of justice[60]. Endorsing this view the IBA Guidelines distinguish between situations which can be waived and those that cannot be waived and which no disclosure can cure[61]. The doctrine of waiver and deemed waiver of the right to challenge should, thus, operate so as to

[59] Malintoppi, Supra Note 18, at 826.

[60] Goudkamp J., *The rule against bias and the doctrine of waiver*, [2007] Civil Justice Quarterly 310.

[61] For further details see Section 4 below.

strike the right balance between party autonomy and finality on the one hand, and justice and fairness on the other hand.

The discussion in Section 1 shows that most national laws and institutional rules limit the parties' right to challenge an arbitrator. In particular, specific time limits within which a challenge must be mounted are set in the Model Law, the CAA and the ICC Rules. A failure to commence proceedings within such specific time period bars challenge. According to Blackaby and Partasides it is not certain that such a procedural bar amounts to a waiver prohibiting a party from raising the issue of a challenge of an arbitrator to challenge the award or in enforcement proceedings[62].

There is no such uncertainty under the ICSID system. Although not prescribing a specific time period for challenge, the ICSID system requires the party to file a proposal for disqualification "promptly" and a failure to do so is deemed, under Rule 27 of the ICSID Rules, a waiver by such party of its right to object. There have been a number of cases in which ICSID tribunals have dismissed challenges on this ground, most recently in the Azurix Case discussed in Section 5.3.3.

Similarly, English Courts have confirmed that a party is required to make a challenge prompty even though the EAA does not expressly provide time limits for mounting a challenge[63]. As to the operation of Section 73 of the EAA, the English Courts have confirmed that a party is deemed to have waived its right to make a challenge at a later date if it fails to make a challenge promptly.

Importantly, English case law makes clear that to be valid a waiver must be voluntary, informed and unequivocal. The leading authority on the requirement of voluntariness is *Smith* v. *Kvaerner Cementation*[64]. In this case the Court of Appeal held that the waiver had not been made freely. The claimant's counsels' vigorous endorsement of the qualities of the judge coupled with the fact that the claimant was not given any information as to when his proceedings would be heard if an application for recusal was successfully made the Court of Appeal found had unduly burdened the claimant's decision not to challenge[65]. The European Court of Human Rights held in *Pfeifer v. Austria*[66] *that, in the light of the fundamental nature of the right to an impartial tribunal, a waiver must be unequivocal and*

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62 Blackaby N., Partasides C., *Redfern and Hunter on International Arbitration*, Oxford University Press (5th edition, 2009), at 286.

63 See *Rustal Trading Ltd* v. *Gill & Duffus SA* [2000] 1 Lloyd's Rep 14, at 19, confirmed in ASM Shipping case discussed in Section 5.1.

64 [2006] EWCA Civ 242, [2006] All ER (D) 313.

65 See paras. 37 and 38. For further discussion of this case see Qureshi K., *Passing the bias test*, (2006) New L J 744.

66 (1992) 14 E.H.R.R. 692 at 712.

that, in the absence of an express affirmation by a party that no objection will be taken, the longer the time period between the time such party became aware of the basis for making an objection and the point at which the objection is ultimately made the more likely is it that the party will be held to have intended to waive the right to object.

V. Guidelines on challenge and disclosure

As the discussion in the above Sections reveals, though national laws and arbitration rules provide standards concerning disclosure, challenge and waiver in case of conflict of interest these are not detailed enough. Moreover, there is little uniformity regarding the interpretation and application of these standards by tribunals, national courts and arbitral institutions.

A number of professional associations have sought to achieve greater consistency in the application of these rules. The IBA has adopted a code of best practice for disclosure and challenge in cases of conflicts of interest[67]. It should be noted that IBA Guidelines are recommendations only and do not override any applicable national law or arbitral rules chosen by the parties.

a) Duty of Disclosure and grounds for challenge

The IBA Guidelines endorse the "in the eyes of the parties" subjective test for disclosure adopted by the ICC[68] and the Model Law objective "justifiable doubt" requirement as a basis for challenge[69]. Importantly, the IBA Guidelines have sought to clarify the interplay between the subjective duty to disclose and the objective test for challenge. The Working Group noted that "some objective threshold to the subjective test for disclosure should be added" as there are some situations that should never lead to disqualification under the objective test[70]. The IBA Guidelines contain a colour coded list of specific situations that do or do not warrant disclosure or disqualification of an arbitrator.

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67 The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes also provide a useful guideline regarding duty to disclosure and challenge of arbitrators. The text of the AAA/ABA Code as revised in 2004 is available at http://www.abanet.org/intlaw/policy/civillitigation/codeofethicsarbitrators2004.pdf.

68 See General Standard 3(a) of the IBA Guidelines. The Explanation to General Standard 3(a) of the IBA Guidelines provides that "[i]n determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, *including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals".*

69 See General Standard 2 of the IBA Guidelines.

70 See paragraph 9 in Part II of the IBA Guidelines.

b) Green List

The Green List lists situations which do not have to be disclosed including that (i) the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (provided this opinion is not focused on the case that is being arbitrated); (ii) the arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator; (iii) the arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization; (iv) the arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel; (v) the arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, provided this contact was limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute; and (vi) the arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.

c) Orange List

The Orange List lists specific situations in which the parties might reasonably have doubts about the arbitrator's impartiality or independence including that (i) the arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, provided that the arbitrator and the party or the affiliate of the party have no ongoing relationship; (ii) the arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter; (iii) the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties; (iv) the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator; (v) the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties; (vi) the arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator; (vii) the arbitrator and another arbitrator are lawyers in the same law firm; (viii) the arbitrator and another arbitrator or the counsel for one of the

parties are members of the same barristers' chambers; and (ix) the arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

Two general observations should be made. First, that in the explanatory notes to the IBA Guidelines the Working Group noted that the "three year cut-off period is a rule of thumb only and that individual circumstances may warrant a shorter or a longer period of time[71]. Second, that according to the IBA Guidelines the fact that the activities of the arbitrator's law firm involve one of the parties does not "automatically give rise to a source of conflict or a reason for the arbitrator to make a disclosure. The nature, timing and scope of the work undertaken by a law firm, should be reasonably considered in each individual case"[72].

d) Red List

Finally, the Red List contains a list of situations which give rise to doubt as to an arbitrator's impartiality and independence. This list is divided into situations with respect to which challenge cannot be waived by the parties and those in respect of which it can be waived.

Importantly, a challenge in respect of the following situations cannot be waived: (i) where there is "identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration; (ii) the arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties; (iii) the arbitrator has a significant financial interest in one of the parties or the outcome of the case; (iv) the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom"[73].

The waivable Red List includes the following situations: (i) the arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held; (ii) a close family member of the arbitrator has a significant financial interest in the outcome of the dispute; (iii) the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties; (iv) the arbitrator is a lawyer in the same law firm as the counsel to one of the parties; and (v) the arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

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71 See paragraph 7 in Part II of the IBA Guidelines.

72 See paragraph (a) of the Explanation to General Standard 6 of the IBA Guidelines.

73 See page 20 of the IBA Guidelines.

e) Waiver

The IBA Guidelines imposes a duty on an arbitrator to disclose all situations referred to in the Orange and Red Lists. It also provides that parties can waive and, unless the challenge is made within the strict time periods prescribed in national law and/or institutional rules, will be deemed to have waived the right to challenge if circumstances listed in Orange and waivable Red List are disclosed by the arbitrator. The situations listed in the non-waiveable Red List cannot be waived, no disclosure can cure them and no time limits for challenge apply to them.

f) Conclusion

IBA Guidelines have been the subject of much discussion and criticism for not covering, for example, non-executive directorships, adopting a relatively lax approach to disclosure of relationships between counsel and arbitrators and between co-arbitrators, as well as for a failure to impose a duty of disclosure on counsel[74]. However, it must be observed that IBA Guidelines never sought to provide an exhaustive list of situations which may give rise to conflict and duty to disclose, or to serve as a substitute for scrutiny of the facts in question.

Despite their shortcomings, the IBA Guidelines have achieved a measure of acceptance and are a useful aide for arbitrators faced with issues of pre-appointment disclosure, as well as to national courts and tribunals dealing with challenges of arbitrators. In fact, as will be discussed in Section 5, the IBA Guidelines have been referred to by national courts and tribunals in some recent cases.

VI. Recent cases of challenge

The last few years have seen a significant rise in the number of challenges brought against arbitrators. In this section recent reported cases concerning challenge in a few selected countries, as well as under the ICSID system, are reviewed to see how the above rules for disclosure and challenge are applied in practice at present.

a) England: ASM Shipping Ltd of India v. TTMI Ltd of England[75]

The facts before the English Court in this case where as follows. Before the hearing in the arbitration, but after certain preliminary issues had been decided, the claimant's principal witness told their solicitors that the chairman of the tribunal had a close connection with the other side's solicitors including in a case in which serious allegations relating to disclosure were made against that witness. It also transpired

[74] Veeder is quoted by Trackman as saying that the IBA Guidelines are encouraging the "malign practice" of new tactical challenges to arbitrators. See Trakman, Supra Note 31, op. cit., at 126.

[75] [2005] EWHC 2238 (Comm), [2005] All ER (D) 271.

that some seven months before the hearing the chairman had been involved in a disclosure exercise against the claimant in the matter in which he now found himself sitting as an arbitrator. The claimant objected to the chairman continuing to sit as an arbitrator. However, after the arbitrator refused to recuse himself the claimant did not apply to the English Court to remove him pursuant to Section 24 of the EAA. It was only after the tribunal issued an unfavourable interim award that the claimant sought to set aside the award on the grounds of the chairman's lack of impartiality.

Mr Justice Morison applied the House of Lords "real possibility" test in *Porter* v. *Magill*[76] and held that the chairman should have recused himself. Since the arbitral proceedings were still on-going his Lordship ordered the chairman not to continue sitting as an arbitrator even though no specific application had been made to remove him. His Lordship, however, refused to set aside the interim award on the basis that the claimant had waived its right to object to the chairman's past participation in the arbitral proceedings by failing to challenge the chairman after he had refused to recuse himself.

It should be noted that this is the first case in which the English Court referred to the IBA Guidelines. However, it did not find them helpful in determining whether or not the particular relationship in question crossed the real possibility of bias threshold and noted that the lists contained therein were not comprehensive.

Shortly after the judgment was handed down by Mr Justice Morison the claimant applied to the Court challenging the other two members of the tribunal pursuant to Section 24[77]. The claimant argued that when one member of a tribunal is found to be partial, it automatically follows that the whole tribunal is similarly affected. Accepting for the sake of argument that the witness would have been an important witness for the claimant in the remainder of the arbitration, Mr Justice Smith held that any objection to the two remaining arbitrators could only be made on the basis that there was a risk that they would be other than impartial because they had been influenced by discussions with the chairman concerning that witness. Based on the chairman's evidence that he could not recall anything relating to the previous case in which he had acted as counsel, his Lordship found that it could not be accepted that a fair-minded and informed observer would conclude that there was any real possibility that there had been discussions between the chairman and the other arbitrators that might improperly influence their assessment of the evidence tendered by the witness. In any event, his Lordship held that the claimant had waived its right to challenge the other arbitrators.

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[76] For further detail see discussion in Section 1.3.

[77] [2007] EWHC 1513 (Comm).

b) Belgium: Eureko v The Republic of Poland[78]

This recent decision of the Belgium Court of Appeal has been widely reported since it concerned a challenge to the former president of the International Court of Justice. The challenge was brought before the Belgium Court, since Belgium was the seat of the arbitration. As in the case of the Model Law and the CAA, Section 1690 of the Belgian Judiciary Code provides that an arbitrator can be challenged when circumstances raise justifiable doubts concerning the arbitrator's impartiality or independence. In mounting its challenge, Poland asserted that Judge Schwebel was, together with a law firm, acting as counsel for an unrelated company ("A") in another arbitration against Poland.

In reaching its decision, the Court of Appeal noted that: (i) although Schwebel had worked alongside the law firm in a number of unrelated cases, it was not established that he had acted as counsel to A; (ii) although other members of the law firm acted as counsel to A in an arbitration against Poland, it did not consider that the disposition these members may have had against Poland transferred to Schwebel; and (iii) Schwebel was not a member of the law firm even though he shared their offices. In view of the above, the Court of Appeal held that it was immaterial that Schwebel failed to disclose his relationship with the law firm, and concluded that there were insufficient grounds to raise justifiable doubts about his impartiality.

c) ICSID Cases

In this section three recent published cases concerning challenges under the ICSID system are reviewed: (i) *Hrvatska Elektroprivreda d.d.* v. *The Republic of Slovenia*[79] ("HEP Case"); (ii) *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A.* v. *The Argentine Republic*[80] ("Suez Case") and (iii) *Azurix Corp.* v. *The Argentine Republic*[81]("Azurix Case").

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78 Brussels Court of Appeal of 29 October 2007, R.G. 2007/AR/70.

79 ISCID Case No ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69.

80 ICSID Case No. ARB/03/17, *AWG Group* v. *The Argentine Republic* (UNCITRAL), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC689_En&caseId=C18.

81 ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, dated 1 September 2009, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5.

i) HEP Case

A week before the hearing on the merits in this case, Slovenia's lawyers provided the secretary of the tribunal with a list of persons who would be attending the hearing. The list included an English barrister from the same chambers as the chairman of the tribunal. Immediately following such disclosure the claimant, pointing to the IBA Guidelines, sought information concerning the relationship between Slovenia's barrister counsel and the chairman, insisting it be told when the barrister had been engaged and what his role would be at the hearing. The claimant emphasised that "had [it] known at the outset that the lawyer proposed to be Chairman and one of Slovenia's lawyers were members of the same Chambers, [it] would not have consented to that lawyer's appointment as [Chairman]"[82]. Slovenia declined to provide any information, asserting that it owed no such duty of disclosure. Moreover, the respondent, echoing the position adopted by DAC and discussed in Section 1.2, asserted that the fact that the counsel and the chairman were members of the same English barristers' chambers could not cause justified concern as to the chairman's independence and impartiality since such practice is common and permissible under English standards of professional ethics.

Notably the claimant did not submit a proposal for the disqualification of the chairman pursuant to Article 58 of the ICSID Convention[83]. Had it done so, the proposal would have been considered by the two remaining arbitrators without the participation of the chairman. During the proceedings both parties agreed that they did not wish the chairman to resign, and asked the tribunal to make its ruling taking this into account. The cost and delay implications of such resignation seem to have borne heavily on everyone's mind.

Referring extensively to the IBA Guidelines, the tribunal held that the combined effect of (i) the counsel for one party being from the same chambers in which the chairman was a door tenant; (ii) the claimant's unfamiliarity with English barristers' chambers as it was a Croatian company; (iii) Slovenia's conscious decision not to disclose the involvement of the barrister as soon as he was engaged; (iv) the tardiness of its disclosure (just a week before the hearing); and (v) the insistent refusal to provide further information, endangered the legitimacy of arbitral process and created distrust[84].

The tribunal emphasised the fact that the arbitrator and counsel are from the same barristers chambers was amongst the situations which fell within the Orange List

[82] See HEP Case, Supra Note 80, para 6.

[83] For discussion of the grounds and procedure for disqualification under ICSID Convention see Section 1.5.6.

[84] See HEP Case, Supra Note 80, op. cit., para.25-30.

and, therefore, had to be disclosed by the party or the arbitrator[85]. However, the tribunal sought to down play the significance of its decision by noting that as a general rule barristers from the same chambers are not precluded from being involved as counsel and arbitrator in the same matter, and that much will turn on the specific facts of the case in question[86].

ii) Suez Case

This is one of several ICSID cases in which Argentina has challenged the independent judgement of the same arbitrator[87]. In this case Argentina sought to disqualify one of the arbitrators on the basis that she had been a member of the ICSID tribunal in the Compañía Case which had rendered an award against Argentina. It claimed that the decision in that case was "so flawed, particularly in its findings of fact and its appraisal of the evidence, that [the arbitrator's] very participation in that decision … reveals a prima facie lack of impartiality of the above mentioned arbitrator"[88].

Referring to their duty to consider Argentina's proposal for disqualification "promptly" as per Rule 9(4) of the ICSID Rules and having given the arbitrator and the other side an opportunity to make submissions, the other two members ("Members") of the tribunal issued a Disqualification Decision ten days after Argentina submitted its proposal.

The Members rejected Argentina's proposal on the basis that it was untimely and that Argentina was deemed to have waived its right to challenge as per Rule 27 of the ICSID Rules. Acknowledging that the ICSID Rules do not "specify a definite, quantifiable deadline beyond which a challenge is not to be considered", the Members held that the requirement of Rule 9(1) to file the proposal "promptly" means that the proposal must be made as soon as the party concerned learns of

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85 Paragraph 4.5 of the Background Information issued by the Working Group clarifies that barristers' chambers should be treated in the same way as law firms. Paragraph 3.3.2 of the Orange List lists "an arbitrator and counsel for one of the parties are from the same law firm" as one of the situations which may give rise to justifiable doubt as to impendence or impartiality of an arbitrator.

86 For further discussion of the case see Qureshi K., *A double Act*, New Law Journal, May 2009, available at http://www.newlaw journal.co.uk/nlj/content/double-act.

87 The other cases include *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008 (not published). All of the challenges to date have been unsuccessful. At the time of writing this article the Annulment Proceedings in respect of *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, ICSID Case no ARB/97/3 ("Compañia Case") were still pending.

88 See Suez Case, Supra Note 81, para. 13.

the grounds for a possible disqualification[89]. Accordingly, the Members held that "Argentina's delay of fifty-three days in submitting its Proposal, a document of just 23 pages, does not constitute acting promptly given the nature of the case, and the fact that hearings on the merits were scheduled to take place within two weeks of of the submission of its proposal"[90].

Having dismissed Argentina's proposal on procedural grounds, the Members went on to consider the substance of Argentina's proposal. In particular, the Members held that the "the concepts of independence and impartiality, though related, are often seen as distinct" and noted that "independence relates to the lack of relations with a party that might influence an arbitrator's decision" whilst impartiality "concerns the absence of a bias or predisposition toward one of the parties"[91]. The Members noted that the grounds of challenge were unusual and, having reviewed the award in the Compañía Case, held that there is "no evidence from its text of a lack of impartiality or independence" by the arbitrator[92]. The fact that the award was unanimous and had been rendered by three distinguished arbitrators, including one appointed by Argentina, was underlined as an important factor in the Members' reasoning.

In conclusion, the Members held that the fact that the same arbitrator had made a determination in one case against a party did not mean that she could not decide another case impartially, even though both cases arose out of the privatisation of Argentina's sewage and water systems[93].

iii) Azurix Case

This case is the first case in which an Ad Hoc Committee ruled on whether an ICSID award can be annulled on the basis of an arbitrator's manifest lack of independent judgement.

In this case Argentina had submitted a proposal for the disqualification of the president of the tribunal on the following grounds: (i) the president was employed as a consultant to the law firm which was representing a party in another case where the law firm had appointed as arbitrator one of the counsel of the claimant; (ii) the president had been part of the laws firm's team in that case; (iii) the law firm in which the president was employed had advised the claimant on other matters; and

89 Ibid., para. 23.

90 Ibid., para. 26.

91 Ibid., para. 29.

92 Ibid., para.34.

93 Ibid., para. 37.

(iv) the law firm, but not the president, advised several parties in matters against the claimant's parent company.

The Ad Hoc Committee reviewed the Disqualification Decision of the unchallenged members of the tribunal and found that Argentina's proposal had been rejected on two counts: (i) that Argentina failed to promptly state its objections as required by Rule 27 of the ICSID Rules (Argentina had not proposed disqualification until some eight months after it became aware of the facts on which it based its proposal for disqualification); and (ii) in any event, that the fact that the arbitrator was a member of the law firm which appointed one of the counsel of the claimant in an unrelated arbitration was not enough to establish manifest lack of independent judgement[94].

The Ad Hoc Committee noted that at the time of his appointment the president had disclosed that the law firm in which he was an advisor was representing parties against the claimant's parent company and that neither party objected. It further noted that the counsel of the claimant had informed Argentina that he had been appointed as arbitrator in an unrelated case by the law firm in which the president was a member and that the president had been, but had since then ceased to be, part of the law firm's legal team in this case.

Furthermore, the Ad Hoc Committee held that annulment proceedings do not allow Argentina a *de novo* review of its challenge to the arbitrator[95]. The Committee stated that Article 52 of the ICSID Convention required it to review the Disqualification Decision only for manifest error, and held that no there was no basis for concluding that such error had been made.

VII. Concluding remarks

By way of conclusion, the following remarks and observations are made concerning the challenge of arbitrators and related duties to disclose.

First, it would seem, as confirmed by the three recent ICSID cases reviewed in Section 5, that the threshold for a challenge of an arbitrator is higher in respect of an investment treaty arbitration than an international commercial arbitration. It can be argued that public interest concerns mandate that the threshold for challenge in respect of investment arbitrations should be, at the very least, the same as in respect of international commercial arbitrations, if not lower. Unlike other forms of international arbitrations, investment arbitration is a method of public law adjudication whereby arbitrators adjudicate on disputes between individuals and states

[94] Azurix Case, Supra Note 81, para. 35 and 26.

[95] Ibid, para. 273.

regarding the legality of regulatory and sovereign acts of states[96]. As such, there is an even greater need to ensure the integrity and transparency of such arbitrations. There must exist a robust system of challenge in place which puts the impartiality and independence of the arbitrators beyond doubt.

Second, it is of concern that ICSID arbitral tribunals are more reluctant to disqualify arbitrators than national courts. Moreover, given the public law nature of ICSID arbitrations, its procedure for challenge (whereby the unchallenged arbitrators decide upon the challenge of their fellow arbitrator) is wholly inappropriate. The fact that under the ICSID system parties are not permitted recourse to national courts for a *de novo* hearing regarding the challenge (as is the case with respect to international commercial arbitrations) is another reason for the ICSID disqualification procedure to be changed. In this respect the decision of the AD Hoc Committee in the Azurix Case not to examine the merits of the challenge claim but simply review the Disqualification Decision for manifest error is of particular concern. For these reasons, it would be preferable if a neutral institution or an *ad hoc* body was made responsible for the disqualification process, and for the members of such body not to be permitted to appear either as counsels or arbitrators in ICSID cases.

Third, as the discussion in this article has shown, the national laws and institutional rules at present only impose a duty to disclose on arbitrators. The IBA Guidelines go a step further by recommending that the duty to disclose also be imposed on the parties. However, the decision in the HEP Case highlights the need for such a duty to be imposed on counsel as well. In that case, the arbitrator was not aware of the conflict of interest until Slovenia's counsel submitted the list of counsel which would take part in the hearing. Slovenia's counsel, however, had known of the potential conflict for some time but asserted that no duty of disclosure rested on the counsel or the party under the ICSID Rules. Calls for codes of conduct for arbitrators and counsel in arbitrations to be adopted must be heeded in order to reinforce the legitimacy of the international arbitration system.

Fourth, the time may have come for the standards of independence and impartiality to be defined "specifically for the international arbitration context and independent of the national judicial standards"[97]. Virtually all countries apply the same standards for judges and arbitrator. Some exceptions are Sweden, which defines arbitrator standards as stricter than that of judges, and Germany, which permits more contact between arbitrators and parties than is allowed between parties and judges[98]. Rogers argues that the standards of independence and impartiality of

[96] Van Harten G., *Investment Arbitration and Public Law,* Oxford University Press (2007), at

[97] Rogers C., *Regulating International Arbitrators*, (2005) 41 Stanford J. Of Int. Law, 53, at 57.

[98] Rogers, Ibid.

arbitrators should reflect the specific features of the role of arbitrators rather than simply being "a watered-down version of the mythological "impartial" judge" and proposes a framework for devising such standards[99].

Finally, the rise in the number of challenges should be seen by the international arbitral community as an opportunity to address the concerns of the public that the world of international arbitration is an exclusive club where the interests of the members take priority over those of the parties and the society at large[100]. The future of international arbitration depends on ensuring the integrity of the process. The quality of justice that arbitration affords to parties must not be inferior to that accorded by national courts.

[99] Rogers, op. cit., at 59.

[100] Dezalay Y., Garth B., *Dealing in Virtue*, The University of Chicago Press (1996), Chapter 1.