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The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal

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I. INTRODUCTION

In some types of arbitrations there are three or more arbitrators. Often, each party will appoint an arbitrator ("party-appointed arbitrator") and those party-appointed arbitrators will choose the other arbitrator(s). Sometimes the non party-appointed arbitrator(s) will be chosen by an independent institution or other designated appointing authority.

Although more expensive, it is often considered desirable to have three arbitrators, two of whom are party-appointed, especially in large, complicated cases. Party-appointed arbitrators bring expanded knowledge and experience to the decision-making process. They should have knowledge of the laws, practices and customs of the nation or business of the parties who appoint them. Thus, party-appointed arbitrators can insure that positions and arguments of the parties that appointed them are considered and understood by the other arbitrators.

Party-appointed arbitrators can help in reducing the possibility that there will be major misunderstandings by the other arbitrators. Thus, they can therefore reduce the risk of an unjustified award that could

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be rendered by a sole arbitrator. This is important, as arbitral awards are infrequently subject to successful judicial attack for errors of fact or law. The presence of party-appointed arbitrators may make any aware more acceptable to a losing party. Different viewpoints can have a salutary effect, and more than one arbitrator can be helpful in resolving complicated cases in the time allotted for an arbitration.[1]

Diverse views exist regarding the duties, obligations and practices of arbitrators appointed by each of the parties when there is an arbitration panel consisting of three or more members. Thus, questions arise as to whether party-appointed arbitrators are to be independent of the parties that appointed them, whether they are to be impartial, whether they can engage in *ex parte* communications with the parties that appointed them, and as to the necessity and extent of the disclosure of their relationships. Practices relating to the role of such party-appointed arbitrators vary by the subject, place and type of arbitration involved.

More and more United States lawyers and arbitrators are engaging in international arbitration.[2] Based on their domestic experiences, United States practitioners may not be familiar with the standards applicable to party-appointed arbitrators in such international arbitrations.

International arbitrations—*i.e.*, for the most part, where the parties are from or are different states or the subject is transnational[3]—can be conducted pursuant to and under the supervision of a permanent institution or can be ad hoc. The American Arbitration Association provides for international arbitrations.[4] The International Chamber

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1. *See* M. Domke *Commercial Arbitration* § 20.03 (Wilner rev. ed. 1984).

2. *See* Lutz and Mosk, *International Commercial Arbitration*, 8 L.A. LAW. 58 (Dec. 1985); Aksen, *International Arbitration—Its Time Has Arrived*, 14 CASE W. RES. J. INT'L L. 247 (1982).

3. This shorthand definition is used for this article without attempting to resolve the complex issue of the definition of an international arbitration. In French law, an arbitration is considered to be international if it involves interests of international trade. Code de procédure Civile [C. PR. CIV]. art. 1492 (Fr.); *see UNCITRAL Model Law in International Commercial Arbitration, Art. 1(3)*, UNCITRAL Report of the Working Group on International Contract Practices on the Work of its Seventh Session 6 (March 1984), 24 U.N. Doc. A/CN.9/246 [hereinafter *UNCITRAL Model Law*]; Herrmann, *The UNCITRAL Model Law*, 1 ARB. INT'L 6 (1985) (reproducing and discussing the *UNCITRAL Model Law*).

4. American Arbitration Association (AAA), Supplementary Procedures for International Commercial Arbitration, *reprinted in* VIII COMMERCIAL ARBITRATION Y.B. (International Council for Commercial Arbitration) 195-96 [hereinafter COMMERCIAL ARBITRATION Y.B.]; AAA, Procedures for Cases under the UNCITRAL Arbitration Rules, *reprinted in* VIII COMMERCIAL ARBITRATION Y.B. at 196-98, *modified* XXII COMMERCIAL ARBITRATION Y.B. 196.

of Commerce is one of the oldest, permanent institutions dealing with international arbitration. In addition, international arbitral institutions are located in various cities around the world, including Los Angeles, London, Vancouver, and Hong Kong,[5] and there are specific institutions to handle arbitrations involving governments.[6]

A number of specialized arbitration associations exist which supervise international disputes and which often utilize professional arbitrators. For example, certain arbitration associations specialize in maritime, commodity, textile, motion picture, and labor arbitrations.[7]

The Iran-United States Claims Tribunal, the largest international claims settlement program ever undertaken, exposed many lawyers and business executives to international arbitration. This experience may lead to the increased use of international arbitration as a dispute resolution mechanism. Also, the tribunal's practices and jurisprudence have been and will be instructive in the field of international arbitration.[8] Although much has been written about the Iran-United States Claims Tribunal and its proceedings,[9] there has been little analysis of what lessons should be derived from the Tribunal regarding the role of the party-appointed arbitrator in international arbitration. This article will briefy set forth some views of the role of the party-appointed arbitrator in domestic and international arbitration. The article will then deal with the position of the party-appointed arbitrator at the Iran-United States Claims Tribunal.[10]

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5. *See* AAA, SURVEY OF INTERNATIONAL ARBITRATION SITES (1984); Carter, *International Commercial Arbitration* in 163 PLI LITIGATION & ADMINISTRATIVE PRACTICE SERIES 239 (1980); Branson and Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 917 (1984); *See, e.g., List of Arbitral Institutions*, COMMERCIAL ARBITRATION Y.B.

6. Arbitrations involving governments are provided for, *inter alia*, by the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration at The Hague.

7. *See*, e.g., Van Delden, *English Commodity Arbitrations: A Foreigner Looking Around in London*, in THE ART OF ARBITRATION 95 (J. Schultsz & A.J. van den Berg eds. 1982).

8. Mosk, *Lessons From The Hague—An Update on the Iran-United States Claims Tribunal*, 14 PEPPERDINE L. REV. 819, 825 (1987).

9. *See, e.g.*, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 (R. Lillich ed. 1984); Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-1984*, 16 L. POL'Y INT'L BUS. 677 (1984); Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal*, 38 ARB. J. 14 (1983); Audit, *Le Tribunal des Differends Irano-Americains (1981-1984)*, 122 JOURNAL DU DROIT INTERNATIONAL 79 (1985); Tzu-Wen Lee, *The Iran-United States Claims Tribunal and the Questions of the Nationality of the Claimants and Compensation for Expropriation*, 4 CHINESE Y.B. INT'L L. & AFF. 129 (1984).

10. This article generally will refer to published material and not to deliberations and other matters presently considered confidential.

II. United States Practice

In the United States, arbitration is a contractual process. Thus, within limits, the parties are free to adopt any arbitral mechanism. As one court noted,

> As a general rule, since arbitration is a contractual method of settling disputes, whom the parties choose to act as an arbitrator is a matter of their own judgment. An interest in the dispute or a relationship with a party, if known to the parties to the agreement when the arbitrator is chosen, will not disqualify the arbitrator from acting.[11]

Despite this principle, there appear to be some limits on party autonomy. The United States Supreme Court in a labor context noted, "Congress has put its blessing on private dispute settlement arrangements . . . , but it was anticipated we are sure, the contractual machinery would operate within some minimum levels of integrity."[12]

Because of the belief in party autonomy in this country, the parties can establish an arbitral tribunal composed of party-appointed arbitrators who are not independent or impartial, at least when the neutral arbitrator is independent and impartial.

Nevertheless, there still remains some confusion over the role and obligations of the party-appointed arbitrator absent a clear expression by the parties in advance of the arbitration.

In some types of arbitration there is a long established practice that an arbitrator appointed by one party need not be impartial or independent. Thus, for example, in so called tripartite labor arbitrations in the United States, labor and management members of the arbitral body often are considered as partisans and act as advocates for their respective sides.[13] Indeed, the Code of Professional Responsibility for Arbitrators of Labor Management Disputes states in its Preamble that it "does not apply to partisan representatives on tripartite boards."[14]

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11. *In Re* Cross & Brown Company, 4 A.D.2d 501, 576, 167 N.Y.S. 2d 573 (1957).

12. Hines v. Anchor Motor Freight, 424 U.S. 554, 571 (1976); *see* Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 825, 171 Cal. Rptr. 604, 615 (1981) .

13. F. Elkouri & E. Elkouri, How Arbitration Works 129-31 (4th ed. 1985); O. Fairweather, Practice and Procedures in Labor Arbitration 86 (2nd ed. 1983); *see* Lesser, *Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration*, 5 Arb. J. 276 (1950).

14. Promulgated by a Committee of the American Arbitration Association, National Academy of Arbitrators and by representatives of the Federal Mediation and Conciliation Service, approved 1975; last amended May 29, 1985.

It has been suggested that in normal commercial cases party-appointed arbitrators need not be impartial.[15] Section 12 of the Uniform Arbitration Act provides for vacating an award in case of evident partiality "by an arbitrator appointed as neutral," but does not so provide with respect to a party-appointed arbitrator. Thus, it has been said that the Act "recognizes that party-designated arbitrators represent their nominators and may act as advocates."[16]

The New York Court of Appeals stated:

> Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be "neutral," at least in the sense that the third arbitrator or a judge is. And, as might be expected, the literature is replete with references both to arbitrators who are "neutrals" and those who are "partial," "partisan" or "interested" and to arbitration boards composed entirely of "neutrals" and those contrastingly denominated "tripartite in their membership." (citations omitted)
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> In short, usage and experience indicate that, in the type of tripartite arbitration envisaged by the contract before us, each party's arbitrator "is not individually expected to be neutral."[17]

A federal court has stated with respect to the arbitration proceeding before it that party-appointed arbitrators "are partisans once removed from the actual controversy."[18] Other courts have indicated with respect to the arbitration clauses before them that, "[a]n arbitrator selected by one of the contesting parties is effectively an advocate of such party."[19] There are even cases which suggest that a party-appointed arbitrator can be an attorney for his nominator and need not make a disclosure of his relationship with a party or subject.[20]

There are, however, different views as to the position of the party-appointed arbitrator. Judge Pound of the New York Court of Appeal long ago stated,

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15. *Washington Foreign Law Society Committee on the UNCITRAL Model Law on International Commercial Arbitration*, app. F. at 7, *reprinted in* 2 INT'L ARB. REP. 779, 820 (Nov. 1987).

16. Note, *Party-Designated Arbitrators and the Duty to Disclose in Tripartite Commercial Arbitration: Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 4 CARDOZO L. REV. 173, 180 (1982); *see* Pirsig, *The New Uniform Arbitration Act*, 11 BUS. LAW. 44, 48 (1956).

17. Astoria Medical Group v. Health Ins. Plan of Greater. N.Y., 11 N.Y. 2d 128, 136, 182 N.E. 2d 85, 87, 227 N.Y.S.2d 401, 404-05 (1962); *see also* Tipton v. Systron Donner Corp., 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303, 305 (1979) ("There is no statutory requirement that the arbitrators appointed by the parties must be neutral or impartial.").

18. Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

19. Johnson v. Jahncke Service, Inc., 147 So. 2d 247, 248 (La. Ct. App. 1962).

20. *See* Tipton v. Systron Donner Corp., 99 Cal. App. 3d 501, 160 Cal. Rptr. 303 (1979).

> [T]he practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator . . . . He must lay aside all bias, and approach the cause with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor.[21]

And more recently, in vacating an award because of the partiality of a party-appointed arbitrator, the Supreme Court of New Jersey, in a 4-3 decision, endorsed Judge Pound's statement, and although noting that, "standards pertaining to the requisite impartiality of the party-designated arbitrators are not susceptible to precise formulation in the abstract," the court stated that the "parties may agree to any form of dispute resolution that they wish, but they must not seek the backing of the courts for private actions that, while substituting for the judicial function, are fraught with the appearance of bias."[22]

A federal court, in referring to the Federal Arbitration Act[23] stated:

> The view that Congress contemplated when enacting the Act that the parties would appoint partisan arbitrators is rebutted by the express language of 10(b). That section provides that the court shall vacate the award, "Where there was evident partiality or corruption in the arbitrators, or *either of them.*" . . . This underlined language directs that the evident partiality test should apply to every member of the panel.[24]

In 1977, a Joint Committee consisting of a Special Committee of the American Arbitration Association and a Special Committee of the American Bar Association (AAA-ABA Committee) promulgated a Code of Ethics for Arbitrators in commercial disputes.[25] In the

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21. American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398, 405, 148 N.E. 562, 564 (1925).

22. Barcon Associates v. Tri-County Asphalt Corp., 86 N.J. 179, 430 A.2d 214, 219 (1981).

23. 9 U.S.C. § 10(b) (1982).

24. Standard Tankers (Bahamas) Co. v. Motor Tank Vessel, Akti, 438 F. Supp. 153, 159 (E.D.N.C. 1977).

25. *See* Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 BUS. LAW. 309 (1977).

preamble it is stated with respect to three member arbitral tribunals which include two party-appointed arbitrators, the "sponsors of this Code believe that it is preferable for parties to agree that all arbitrators shall comply with the same ethical standards"—*i.e.*, act as neutrals. The Code, in Canon VII, recognizes, however, that there are different practices and notes,

> In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral.

Those arbitrators referred to as "non-neutral" arbitrators, according to the Canon, may be "predisposed" toward the party who appointed them, but in all other respects are obligated to act in good faith and with integrity and fairness. They are to disclose all interests and relationships required to be disclosed. They are not to have *ex parte* communications with a party, except in connection with the appointment of the neutral arbitrator. If they have, or intend to have, such *ex parte* communications, they are to disclose to the other arbitrators and the parties any such communications prior to their appointment and their intention, if they have any, to engage in such communications after appointment. They are not to delay or disrupt the proceedings. In reaching this ethical rule, the AAA-ABA Committee sought to embody in its Code of Ethics the concept expressed by the court in *Astoria Medical Group v. Health Insurance Plan of Greater New York*,[26] which said,

> Our decision that an arbitrator may not be disqualified solely because of a relationship to his nominator or to the subject matter of the controversy does not, however, mean that he may be deaf to the testimony or blind to the evidence presented. Partisan he may be, but not dishonest.

The AAA-ABA Committee in its Code of Ethics provides for either neutral or nonneutral party-appointed arbitrators, depending upon the choice of the parties.

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26. 11 N.Y.2d 128, 135, 182 N.E.2d 85, 89, 227 N.Y.S.2d 401, 404-05 (1962).

III. International Commercial Arbitration

There seems to be a tendency towards requiring party-appointed arbitrators to be independent and impartial in international commercial arbitration. Indeed, as the AAA-ABA Committee stated in Canon VII of its Code of Ethics "It should be noted that in cases where the arbitration is conducted outside the United States the applicable law *may require* that all arbitrators be neutral."[27] It has been said that in "European practice, failure of the entire tribunal, including the party-appointed arbitrators, to conform to strict standards of independence and impartiality may constitute a professional fault, a serious procedural defect affecting the validity of the award."[28]

One authoritative work on International Chamber of Commerce (ICC) arbitrations stated, "According to the general European concept of arbitration, such a nominee [party-appointed] should not be or act as the nominating party's agent or representative."[29] Another writer noted,

> There is a question whether a party-appointed arbitrator should be "impartial and independent." The general custom in Europe is so to consider a party-appointed arbitrator . . . . Some international lawyers in the United States prefer that party-appointed arbitrators not be required to be independent, particularly in cases that bridge differing cultures such as East-West or U.S.-China disputes. Other experienced lawyers are prepared in international cases to follow the more general international practice under which party-appointed arbitrators are elected to be independent of those who appoint them.[30]

Most rules for institutional international arbitrations and European arbitration laws make no distinctions between party-appointed and non party-appointed arbitrators for purposes of their independence and impartiality.[31] This is also true of the recent UNCITRAL Model Arbitration Law.

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27. AAA-ABA Committee Code of Ethics, Canon VII (emphasis added).
28. de Vries, *International Commercial Arbitration: A Transnational View*, 1 J. Int'l Arb. 7, 13 (1984).
29. W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration pt. III 31 (1985) [hereinafter Craig].
30. Strauss, *The Growing Consensus on International Commercial Arbitration*, 68 Am. J. Int'l L. 709, 714 (1974).
31. *See* International Chamber of Commerce Arbitration Rules art. 2(4) [hereinafter ICC Rules]; The Netherlands Arbitration Act of 1986, 4 Code of Civil Procedure arts. 1020-76 (1838), *reprinted in* 12 Commercial Arbitration Y.B. 370-87.

A Canadian court stated,

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and *a fortiori* of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair-minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.[32]

In ICC arbitrations, a party "nominated" arbitrator is required to disclose to the court any interest or fact bearing on the nominee's independence. The court then "appoints" the nominee.[33] The ICC has the authority to disapprove a party-appointed arbitrator on the basis of lack of independence, but the parties may agree to waive the requirement of independence of the party-appointed arbitrators. Such express agreements are "rare in ICC practice,"[34] which could reflect the fact that impartiality of party appointed arbitrators may be required by local law. Of course there are instances where, after disclosure, none of the parties challenge a party-appointed arbitrator who may not be independent.

The Code of Ethics for International Arbitrators promulgated by the International Bar Association provides strict rules for independence and impartiality of arbitrators, and makes no distinction between party-appointed or non party-appointed arbitrators.[35]

Some have attempted to delineate the borders of impartiality. As is stated in one work,

> A party is clearly entitled to (and often does) choose an arbitrator having that party's nationality. The nationality may also come from a similar economic, political and social *milieu*, and may therefore be expected to be sympathetic to positions taken by that party. He may also embrace legal doctrines that the nominating party feels

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32. Szilard v. Szasz 1 D.L.R. 370, 371 (Can. 1955); R. McLAREN AND E. PALMER, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 47 (1982).

33. ICC Rules art. 2(4) (Jan. 1, 1988).

34. CRAIG, *supra* note 29, pt. III, at 31.

35. IBA Ethics for International Arbitration, *reprinted in* 2 INT'L ARB. REP. 287 (April 1987) [hereinafter IBA Ethics]. *See* Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103, 104-05 (1987) (raises question as to whether there is a worldwide "consensus" that party-appointed arbitrators are impartial). It should be noted that the IBA Code of Ethics uses the term "bias" as being equivalent to lack of "impartiality and independence." IBA Ethics, *supra*, rule 3.1.

> are favorable to its case. It is in this limited sense that the party-nominated arbitrators need not be "neutral."[36]

There are indications that those in the United States, including United States courts, may not recognize any distinction between domestic and international arbitrations with respect to party-appointed arbitrators—at least in cases subject to United States law. In a case involving an international arbitration the court stated that "[g]enerally, partisan arbitrators are permissible."[37] A practitioner of international arbitration has noted, "Many clients assume that the arbitrator they name will favor their case, will be an advocate for them within the tribunal, and will persuade a least the third arbitrator to support their case."[38] The author added, however, "This assumption is seldom correct . . . particularly in arbitrations under rules requiring the party arbitrator to be as objective as the third arbitrator."[39]

Others are not so certain that European practice is so impeccable. They refer to the notion that party-appointed arbitrators are independent as a "pretense" and state, "European practitioners and arbitrators, however, cling to the theory, if not in the practice, of demanding quasi-judicial 'independence,' thus increasing the risk of confusion and hesitation where not only the attorneys but the three arbitrators come from differing legal systems."[40] Indeed, one of the difficult problems is what a party-appointed arbitrator who intends to be impartial is to do when the other party-appointed arbitrator acts in a partisan fashion.

On the other hand, Professor Lowenfeld has indicated that such confusion does not exist, for he asserts that many international arbitration awards are unanimous. He states, "The suspicion, in other words, that the chairperson decides and the other two arbitrators are simply other kinds of advocates is not borne out in the practice I have seen in the international commercial arena."[41]

Regardless of the various views, parties, practitioners and arbitrators must be careful that they are in compliance with the applicable

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36. CRAIG, *supra* note 29, pt. III, at 32.

37. ASTA of California, Inc. v. Continental Ins. Co., 754 F.2d 1394, 1395 (9th Cir. 1985) (modifying and quoting ASTA of California, Inc. v. Continental Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983)).

38. Goekjian, *ICC Arbitration From a Practitioner's Perspective*, 14 J. INT'L L. & ECON. 407, 410 (1980).

39. *Id.*

40. Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1043-44 (1980).

41. Lowenfeld, Book Review, 42 ARB. J. 53 (Dec. 1987).

laws and to the extent there are no controlling laws on the subject, they spell out in advance what is expected of the party-appointed arbitrators.

In international public arbitrations in the past, when a nation appointed its own arbitrators—sometimes referred to as "national judges" or "national commissioners"—they were often expected to be partisan. Any ambiguity as to their role might be traced to the question as to whether a public international arbitration is in reality a diplomatic process.[42] After reviewing many authorities, an older note in the Harvard Law Review concluded as follows:

> As a rule, the national commissioner will consider himself bound to vote for his government in addition to supporting its position at the executive session only when the dispute involves matters of fundamental national policy or raises issues not governed by well-established principles of international law.[43]

The issue as to the role of the government-appointed arbitrator has arisen in case of the so called "truncated tribunal"—*i.e.,* when a government-appointed arbitrator resigns—generally after an instruction from his government—thereby attempting to prevent an award.

Recently, Judge Schwebel of the International Court of Justice, in concluding that a withdrawing arbitrator should not be able to frustrate the proceeding, viewed an arbitration among states as based on a "judicial" model of arbitration rather than on a diplomatic model.[44]

It is difficult to imagine that nationals from certain authoritarian or sectarian states can be truly independent or unbiased when appointed by the state or an entity of that state. Nevertheless, international arbitral bodies adhere to the notion of independence and impartiality and rationalize this position by suggesting that coming from the same "economic, political and social milieu" as the nominating party does not in itself suggest non-neutrality.

To attempt to adhere to and enforce a firm rule of independence and impartiality in international arbitration would, in effect, inhibit international arbitration involving a number of countries. Flexibility appears to be the best policy so long as the parties and the arbitrators are aware of and accept the ground rules.

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42. Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293, 325-39 (1954); Rosenzweig, *International Arbitration as Viewed by a Student of Labor Arbitration*, 5 ARB. J. 212, 221 (1950); S. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 144-54 (1987).

43. Note, *supra* note 42, at 337.

44. S. Schwebel, *supra* note 42, at 151; Lowenfeld, *supra* note 41, at 53.

IV. The Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal is an international arbitration mechanism that is a hybrid body involving, on the one hand, commercial and non public international law issues and, on the other hand, intergovernmental disputes and other disputes which call for the application of public international law. The Tribunal was established pursuant to the 1981 Algiers Declarations in order to adjudicate various claims between nationals of the United States against Iran, nationals of Iran against the United States and the two governments against each other. The Claims Settlement Declaration[45] established the Tribunal and provided that it was to consist of nine members—three designated by the United States, three designated by Iran and three chosen by the six-government appointed arbitrators.[46]

The Claims Settlement Declaration specifies that,

> Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.[47]

Article 7 of the UNCITRAL rules provides that if "three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as to the presiding arbitrators of the Tribunal." In the event the two party-appointed arbitrators fail to appoint the third arbitrator, an appointing authority may upon request select the third arbitrator. If the parties have not selected an appointing authority, the party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority.

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45. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 Jan. 1981, 81 Dep't St. Bull 3 (Feb. 1981), *reprinted in* 20 Int'l Legal Materials 230-33 (1981) [hereinafter Claims Settlement Declaration]. This Claims Settlement Declaration is part of three other documents: A General Declaration, an Undertakings Agreement and an Escrow Agreement. *See* 81 Dep't St. Bull. 1 (Feb. 1981) *reprinted in* 20 Int'l Legal Materials 224-40 (1981).

46. Claims Settlement Declaration, *supra* note 45, art. III, ¶ 1.

47. *Id.* ¶ 2.

At the Tribunal, the government designated arbitrators initially agreed upon the third country arbitrators. Thereafter, on occasion, the appointing authority, the Chief Justice of The Netherlands Supreme Court, selected the third country arbitrators.

Article 9 of the UNCITRAL Rules provides:

> A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10 provides:

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

The Tribunal modified the UNCITRAL Rules in adopting its own final rules. These rules incorporate in large part the UNCITRAL Rules.[48] In connection with the appointment of arbitrators, it was made clear that the term "parties" refers to the governments. Thus, although there are claimants that are non governmental parties, only the governments designated "party-appointed" arbitrators.

Article 9 of the UNCITRAL Rules was maintained unchanged, except that the following language was added:

> When any member of the arbitral tribunal obtains knowledge that any particular case before the arbitral tribunal involves circumstances likely to give rise to justifiable doubts as to his impartiality or independence with respect to that case, he shall disclose such circumstances to the President and, if the President so determines, to the arbitrating parties in the case and, if appropriate, shall disqualify himself as to that case.

The Tribunal also adopted "notes" to the various rules, which "notes" relate to the duties of the arbitrators. The notes to Articles 9-12 are as follows:

1. As used in Articles 9, 10, 11 and 12 of the UNCITRAL Rules, with respect to the initial appointment of a member the terms

48. *See* Final Tribunal Rules of Procedure, *reprinted in* 2 Iran-United States Tribunal Reports 405 (1984) [hereinafter Final Tribunal Rules]; Böckstiegel, *Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 4 INT'L TAX & BUS. LAW. 266 (1985).

"party" and "parties" mean one or both of the two Governments, as the case may be. After the initial appointment, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be. Arbitrating parties may challenge a member only on the basis of the existence of circumstances which give rise to justifiable doubts as to the member's impartiality or independence with respect to the particular case involved, and not upon any general grounds which also relate to other cases. Challenges on such general grounds may only be made by one of the two Governments.

2. In applying paragraph 1 of Article 11 of the UNCITRAL Rules, the period for making a challenge to a member of a Chamber to which a case has been assigned shall be fifteen days after the challenging party is given notice of the Chamber to which the case has been assigned, or after the circumstances mentioned in Articles 9 and 10 of the UNCITRAL Rules became known to that party. In the event the case is relinquished by the Chamber to the Full Tribunal, the period for challenging a member who is not a member of the relinquishing Chamber shall be fifteen days after the challenging party is given notice of the relinquishment, or after the circumstances mentioned in Articles 9 and 10 of the UNCITRAL Rules became known to that party.
3. In the event a member withdraws with respect to a particular case or if the challenge is sustained, he shall continue to exercise his functions as a member for all other cases and purposes except in respect of that particular case.
4. In the event that a member of a Chamber is challenged with respect to a particular case and withdraws, or if the challenge is sustained, the President will order the transfer of the case to another Chamber.
5. In the event the Full Tribunal is seised of a particular case and a member is challenged with respect to that case and withdraws, or if the challenge is sustained, a substitute member shall be appointed to the Full Tribunal for the purposes of that case in accordance with the procedure set forth in Article III of the Claims Settlements Declaration as was used in appointing the member being substituted. An appointing authority, if needed, shall be designated as provided in Article 12 of the UNCITRAL Rules.
6. Disclosure statements filed as to each member shall be made available by the Registrar to each arbitrating party in each case.

Neither the UNCITRAL rules nor Tribunal modifications thereto contain any distinction between party-appointed and non party-appointed arbitrators in connection with provisions concerning impar-

tiality, independence, or disclosure. There was an understanding between the governments that the government-appointed arbitrators could communicate with their governments about the selection of third country arbitrators and about rules and procedures. It was also understood between the governments that the arbitrators should not discuss substantive issues or the merits of any case with the governments.

The American arbitrators provided detailed disclosure statements. Indeed, at the outset, before designating its arbitrators, the United States Government inquired as to whether any of the prospective arbitrators had any connection with prospective American claimants or claims. I am told that one former distinguished American jurist was rendered ineligible for appointment because he or his law firm represented one of the major tribunal claimants in connection with the subject matter of a claim that would be submitted to the Tribunal.

Moreover, in the event it turned out that any American arbitrator or his firm had any interest or relationship with a claimant, the arbitrator disqualified himself from sitting on any case in which that claimant was a party.

Both the United States Government and the American arbitrators took the position that the governments had no power or control over the arbitrators. Thus, for example, the United States Government never attempted to remove one of the arbitrators it had appointed. In a number of cases American arbitrators did vote against American parties and against the American government.[49] For example, the American arbitrators joined in an award implementing an earlier decision awarding Iran $500 million.[50]

Thus, the United States and American arbitrators adhered to the general rule applicable to party-appointed arbitrators in international commercial arbitrations. This may reflect, in part, the fact that one of the American arbitrators, Judge Howard Holtzmann, was chairman of the AAA-ABA Committee that drafted the Code of Ethics and was chairman of the United States delegation which participated in the drafting of the UNCITRAL Rules. Judge Holtzmann's strongly

49. *See, e.g.*, Morris v. Iran, 2 Iran-United States Claims Tribunal Reports 241 (1983); Stone and Webster v. National Petrochemical Co., 1 Iran-United States Claims Tribunal Reports 274 (1982); Gould Marketing, Inc. v. Ministry of Defence, 6 Iran-United States Claims Tribunal Reports 272 (1984); Iran v. United States, 5 Iran-United States Claims Tribunal Reports 131 (1984).

50. Islamic Republic of Iran v. United States of America, 14 Iranian Assets Litigation Reporter 240 (May 8, 1987).

held views on the application of traditional international commercial arbitration standards to the government-appointed arbitrators had an influence on the implementation of these standards.

The Iranian arbitrators may have been in a more delicate situation. Virtually all cases involved the Government of Iran. It may be more difficult in a revolutionary environment to vote against one's own government than against a national or company of one's own country. Interestingly, Iranian domestic law prohibited in a private contract between an Iranian and a foreigner, a provision which binds the parties to arbitration conducted by one or more arbitrators who have the same nationality as the foreign party.[51] An Iranian authority noted, "The purpose of this restriction was to counterbalance the practice of adhesion contracts. Especially in the area of international trade, it has been felt that Iranian businessmen were in a weak bargaining position."[52]

Nevertheless, the Iranian Government and its arbitrators accepted the provisions of the UNCITRAL rules and practices common in international commercial arbitrations as they relate to the duties and obligations of party-appointed arbitrators. The Iranian arbitrators, who were competent lawyers or judges, submitted disclosure statements, and they disqualified themselves in some cases in which they had participated or had an interest. In other cases, after disclosure were made, there were no challenges of the Iranian arbitrator.

Iranian arbitrators have joined in some awards against Iran, but this occurred infrequently, and generally only when the award was substantially less than the amount claimed.[53] Under the UNCITRAL and Tribunal Rules, an award requires a majority.[54] Contrary to my expressed view, there were multiple majorities in cases, which, in effect, often gave decisive power to the chairman.[55]

There have been some suggestions that Iran and at least some of its arbitrators may have had in reality a different conception of the relationship between party-appointed arbitrators and their govern-

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51. Iran Code of Civil Procedure § 633 (Sabi Trans. 1972); Abdoh, *National Report Iran*, IV COMMERCIAL ARBITRATION Y.B. 81, 84 (1979); *Id.* at 219.

52. Abdoh, *supra* note 51, at 84.

53. *See* Schering Corp. v. Iran, 5 Iran-United States Claims Tribunal Reports 361 (1985). Iranian arbitrators often signed arbitral awards and indicated "concurring and dissenting" without specifying to which portion there was dissent or to which portion there was a concurrence.

54. Final Tribunal Rules, *supra* note 48, art. 31(1).

55. *See* Ultrasystems Inc. v. Iran, 4 Iran-United States Claims Tribunal Reports 77, 82 (1983) (Mosk, J., dissenting).

ments.[56] Some of the Iranian arbitrators had actually worked on Tribunal claims in the legal office that handled claims before the Tribunal. A former American Agent to the Tribunal, Arthur Rovine, recounted,

> For example, just a week or so ago my counterpart, the Iranian Agent, told me that he had heard rumors that the American Government was going to withdraw one of the American arbitrators. I was astonished, and I asked him to repeat what he had just said. And he said it again. I informed him that the American Government doesn't have the legal power to withdraw any of the American arbitrators. Mr. Kashan, the Iranian Agent, seemed genuinely surprised. He asked, suppose the American arbitrator wanted to stay for 10 years? I said he *could* stay for 10 years. And Mr. Kashan just shook his head. He then went on to inform me that his government was thinking seriously of withdrawing one of the Iranian officials in the Registry. I said that the Registry staff didn't work for either government. It worked for the Tribunal. He said "Oh that's all right. We can withdraw the people in the Registry and we're seriously thinking of doing just that."
>
> Clearly there's a fundamental difference of approach and it is reflected in all that goes on.[57]

Undoubtedly, Iranian representatives believed that American arbitrators were no more unbiased or independent than Iranian arbitrators.[58]

Even if there have been variations in views on the practices of government-appointed arbitrators, the Tribunal has been operating relatively successfully. The governments and the parties before the Tribunal have had knowledge of the roles and relationship and views of the arbitrators and have, with a few exceptions, not made any

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56. *See, e.g.*, ITT Indus. v. Iran, 2 Iran-United States Claims Tribunal Reports 348, 349 (1984) (Aldrich, J. concurring); Ultrasystems, Inc. v. Iran, 2 Iran-United States Claims Tribunal Reports at 121 (1983) (Mosk, J., concurring); Mahmoud Kashani dissenting with regard to Presidential Order No. 31, 6 Iran-United States Claims Tribunal Reports 303 (1984); Documents Arising from the Episode of 3 September 1984, 7 Iran-United States Claims Tribunal Reports 281, 281-316 (1984); Feldman, *Ted L. Stein on the Iran-U.S. Claims Tribunal-Scholarship par Excellence*, 61 WASH. L. REV. 997, 1004 (1986); S. Schwebel, *supra* note 42, at 253-96; *Proceedings of the 77th Annual Meeting (April 14-16, 1983)*, 30 American Society of International Law 26.

57. American Society of International Law, *supra* note 56, at 26.

58. Aksen, *The Iran-United States Claims Tribunal and the UNCITRAL Arbitration Rules- An Early Comment*, in THE ART OF ARBITRATION 1, 4 (J. Schultsz & A.J. van den Berg eds. 1982); *see* ITT Indus., Inc. v. Iran 2, Iran-United States Claims Tribunal Reports 348 (1983); Note by Dr. Shafie Shafeiei Regarding the Concurring Opinion of George H. Aldrich, 2 Iran-United States Claims Tribunal Reports, 356, 356-58 (criticizing American arbitrator for allegedly not being impartial).

challenges. Over the past few years Iranian and American arbitrators have participated fully in the arbitral process. Reasoned decisions and opinions have been and are being rendered and published.[59] Generally, despite diplomatic differences between Iran and the United States and some sharply worded opinions (which are not unheard of in American appellate cases), Iranian and United States representatives to the Tribunal and the arbitrators work together in a civil and courteous manner.

Basically, the UNCITRAL Rules and general principles applicable to international commercial arbitration have worked well in the context of the Iran-United States Claims Tribunal. Although the Tribunal's operation has not been uniformly smooth, it has not faced the fatal disruptions that some other public international arbitral bodies have encountered.[60]

The Iran-United States Claims Tribunal has overcome a number of obstacles, including hostile governments, sensitive and complicated issues, different legal systems and languages and other problems. Importantly, the Tribunal, the governments and the parties before the Tribunal accepted in principle, if not in practice, the concept of independent party-appointed arbitrators who are supposed to adhere to the same ethical standards as the neutral or third party arbitrators. Parties before the Tribunal were aware at all times of the possibility of any actual partiality or lack of independence. The Tribunal and the parties demonstrated the necessary flexibility to cope with any deviations from the standards normally applicable to party-appointed arbitrators in international arbitrations.

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59. Awards and decisions are reported in Iran-United States Claims Tribunal Reports (Grotius Publications Limited); Iranian Assets Litigation Reporter (Andrews Publications); Mealey's Litigation Reports-Iranian Claims (Mealey Publications); and on WESTLAW.

60. *See* Note, *supra* note 42, at 329-32; S. Schwebel, *supra* note 42, at 253.