

ADJUDICATOR, ADVOCATE, OR SOMETHING IN BETWEEN?

Coming to terms with the role of the party-appointed arbitrator⁺

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I. Secret conversations and illegal wiretaps

1. On 4 November 2009, the Republic of Croatia and the Republic of Slovenia concluded a treaty to submit disagreements over their land and maritime boundaries to arbitration.¹ It was a hard-won diplomatic victory not just for the two States, but also for the European Union, under whose stewardship the treaty had been concluded. For many, this marked the close of the chapter covering the tumultuous period following the breakup of the former Yugoslavia, and it heralded a new era of diplomatic cooperation.

2. A panel of five arbitrators was convened. In the usual way, Slovenia and Croatia each appointed one of its nationals to the

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tribunal. Croatia nominated Professor Budislav Vukas and Slovenia nominated Dr Jernej Sekolec. They were joined by three others: two judges of the International Court of Justice and a distinguished Queen's Counsel, who used to hold the Chichele Professorship of International Law at Oxford University.² The hearings began in 2012, and on 10 July 2015, the tribunal announced that it expected to deliver its award by the middle of December 2015.³ Everything seemed rosy. But then it all went wrong.

3. On 22 July 2015, a Croatian daily newspaper published transcripts and audio recordings of conversations between the Slovenian arbitrator, Dr Sekolec, and the agent for Slovenia, Ms Simona Drenik. Their conversations had been tapped, most probably by Croatian intelligence. This fact, shocking enough on its own, was eclipsed by the revelations which followed. It transpired that Dr Sekolec had, in his conversations with Ms Drenik, divulged contents of the tribunal's private deliberations, including the fact that the tribunal intended to award Slovenia at least two-thirds of the disputed waters. The two discussed how best the other arbitrators could be persuaded to rule in Slovenia's favour on the remaining issues. At one point, it appears that Dr Sekolec even proposed to present to his fellow arbitrators the matters raised by Ms Drenik as if these were his own "notes" on the case.⁴

4. Everything quickly unravelled. The day after the story broke, both Dr Sekolec and Ms Drenik resigned their respective positions as arbitrator and agent. This was followed swiftly by the resignation of Professor Vukas, the Croatian-appointed arbitrator, and Croatia itself soon withdrew from the arbitration. In June this year, an almost entirely re-constituted tribunal issued a partial award, in which it concluded that it has the jurisdiction to proceed with the matter, and held that the arbitration should continue.⁵ Despite this, Croatia steadfastly refuses to participate.⁶ It now appears that the arbitration is, for all intents and purposes, at an end. What was to have been a moment of triumph for European diplomacy has instead emerged as a symbol of the failure of inter-State arbitration.

5. Fortunately, reported incidents like that which took place between Croatia and Slovenia are not common. But the history of international arbitration, and that of inter-State arbitration in particular, does feature examples of shocking allegations of bias and impropriety arising out of the conduct of party-appointed arbitrators. One might think of the *Alaskan Boundaries* arbitration in 1907;⁷ the *Buraimi Oasis* arbitration in the 1950s;⁸ the Iran-United States Claims Tribunal in the 1980s;⁹ and the *Loewen* arbitration in 2004.¹⁰

6. Against that background, it is perhaps unsurprising that some influential voices have spoken out strongly against the institution of the party-appointed arbitrator. The late Professor Hans Smit believed that the problems of misaligned incentives and the predisposition towards bias were endemic.¹¹ He argued that the only solution was the complete abolition of the practice of having party-appointed arbitrators. In a similar vein, Professor Jan Paulsson has said that there can be no justification for tolerating the moral hazards associated with party-appointed arbitrators.¹² He, too, proposes abandoning the present system of party appointments in favour of appointments by neutral arbitral institutions. In 2009, Professor Albert Jan van den Berg analysed the 34 International Centre for Settlement of Investment Disputes (“ICSID”) cases in which a dissent had been issued, and found that in almost *all* those cases the dissents had been issued by the arbitrator appointed by the losing party, causing him to doubt the neutrality of such appointees. He concluded that the “root of the problem is the appointment method”, arguing that a system of unilateral appointments “may create arbitrators who may be dependent in some way on the parties that appointed them”.¹³

7. To be sure, there are risk factors in the system of party appointments—potential bias and conflicts of interest among them—and we must not be blind to this. Indeed, I suggest that with the

explosive growth of arbitration in recent decades and the sharp rise in both the number and diversity of persons professing to stand among the ranks of arbitrators, there has never been a more pressing need for a clear and shared understanding of the proper role of the party-appointed arbitrator.

8. In this lecture, I therefore propose to take a closer look at this subject. I will begin with a brief discussion of the history of party-appointed arbitrators before turning to the challenges posed to this institution by the growth of arbitration accompanying the expansion of global trade. I then offer my own views on the justifications for the retention of the institution and the proper position that the party-appointed arbitrator should occupy. Finally, I discuss some practical rules of engagement and best practices that may be adopted to minimise the risks that are often associated with the system of party appointments. I will close by discussing a forthcoming proposal by the Chartered Institute of Arbitrators (“CI Arb”) which envisages the creation of a centralised disciplinary service to handle complaints of arbitrator misconduct.

II. From Greece to Geneva: the history of the party-appointed arbitrator

9. I begin with the history of party appointments. The institution of the party-appointed arbitrator is of ancient vintage. Its precise origin—like that of arbitration itself—is lost in antiquity.

10. Speeches written by orators in the Classical and Hellenistic periods of ancient Greece make references to party-appointed arbitrators.¹⁴ These speeches are striking because party-appointed arbitrators were consistently referred to as “friends”.¹⁵ This was not just a linguistic affectation because the arbitrators were often family members or personal supporters of the parties. Even the common arbitrator, who was jointly appointed by both parties, was referred to as “*koinos*”, which may be translated as “friend not only of one side, but of both sides”.¹⁶

11. Derek Roebuck, the great scholar of the history of arbitration, explains that the object of arbitration was quite different then. In ancient Greece, the first goal of an arbitrator was not adjudication, but compromise. Arbitrators would try their best to steer the parties towards a mediated settlement. It was only if a compromise could not be reached that the arbitrators would then deliver a decision based on what they thought was just.¹⁷ In that context, partisanship could be

a virtue, rather than a vice, in as much as it might facilitate compromise.

12. In the Renaissance, the practice appears to have been for each party to appoint an equal number of arbitrators, with a final member appointed by both only in the event of a tie. One example is a treaty concluded in 1606 between James I of England and Henry IV of France, which led to the establishment of two tribunals for resolving trade disputes (one in London and the other in Rouen), each with an equal number of party-appointed arbitrators.¹⁸ The careful symmetry in both the location and composition of the tribunals reflects a scrupulous attempt to respect the equality of the two sovereigns, and to create a delicate balance of power that incentivised both sovereigns to behave fairly.

13. From the Renaissance, we can move quickly to the 19th-century *Alabama Claims* arbitration between America and Great Britain, which arose out of events that occurred during the American Civil War.

14. The British Government had declared its neutrality in the war, but a lacuna in the relevant British statute permitted persons to commission the building of warships in England, so long as they were retrofitted with armaments outside the jurisdiction of the British

courts.¹⁹ And this was precisely how the Confederate agents procured English warships for use in the American Civil War. The most famous of these ships was the eponymous CSS *Alabama*. In the two years she sailed, the *Alabama* sank no less than 64 American vessels and was alleged to have caused millions in direct losses. Needless to say, this caused considerable resentment, and it threatened to precipitate a trans-Atlantic falling-out between Great Britain and the United States.²⁰

15. Shortly after the sinking of the *Alabama* in 1864, the possibility of arbitration was broached to determine the compensation Great Britain should pay the United States for the destruction the *Alabama* had wrought. After years of negotiations, the Treaty of Washington was eventually concluded in 1871. Under it, both states agreed to submit the question of compensation for resolution by a tribunal. Although the Treaty was unusual in many respects,²¹ the issue of the tribunal's composition was dealt with in a somewhat modern way. The parties each appointed one arbitrator and these two arbitrators were joined by three others—a Brazilian, a Swiss, and an Italian—who were appointed by the Emperor of Brazil, the President of the Swiss Confederation and the King of Italy, respectively. The parties preserved some influence through the appointment of a national, but

this was moderated significantly by the presence of a *greater* number of non-nationals.²²

16. The Treaty of Washington is widely-recognised as the “basic model for international arbitration today”.²³ When President Theodore Roosevelt negotiated the Hague Conventions of 1899 and 1907, he was inspired by the memory of the *Alabama Claims* arbitration.²⁴ As a consequence, the First Hague Convention, which established the Permanent Court of Arbitration, enshrined the system of party-appointment.²⁵ The World Courts followed suit. To this day, a party before the International Court of Justice is permitted to appoint an *ad hoc* judge to the Court if no national of that State is already a permanent member of the court.²⁶ In 1927, the International Chamber of Commerce (“ICC”) Rules were revised to provide for a system of party appointments with the stated aim of giving parties “greater freedom of action” in regard to the arbitral process.²⁷ And in ICSID arbitrations, the default configuration is for there to be a panel of three: two party-appointed arbitrators sitting with a presiding arbitrator who would be jointly appointed by the two appointees.²⁸ The system of party appointments has also become an entrenched part of international commercial arbitration between private parties. Party-appointment provisions are ubiquitous and they may be found in the United Nations Commission on International Trade Law

(“UNCITRAL”) Model Law²⁹ and Rules,³⁰ the ICC Rules,³¹ as well as the arbitration laws of multiple jurisdictions.³²

17. This brief historical survey reveals that the institution of the party-appointed arbitrator is not new. Rather, it has deep roots in the history of arbitration. One scholar has referred to it as the “historical keystone” of international arbitration, arguing that party appointments were used as a tool to overcome the distrust between disputants from diverse cultures.³³ Without the comfort of being able to appoint an arbitrator of one’s choosing, it was said that the parties could not be brought to the table.³⁴

18. But history also shows that the institution has not been static. It has evolved to meet the contingencies of the day. In the Greek city states, the party-appointed arbitrator reflected the imperative of settlement. In the Renaissance, he embodied the mutual respect between powerful sovereigns. In the *Alabama Claims* arbitration, the party-appointed arbitrators were part-statesmen, part-jurists, and part-negotiators.

III. The party-appointed arbitrator presently situated

19. However, arbitration plays a vastly different role in the international landscape today. No longer is it a communal affair as in

the Greek city states; nor are party appointments reserved for a tightly-drawn group of elites, as was the case in the *Alabama Claims* arbitration.³⁵ I suggest that the confluence of three modern developments has placed the institution under increasing strain.

Dramatic growth in number and diversity of arbitration practitioners

20. The first is the dramatic growth in the number and diversity of arbitration practitioners. When arbitration was in its nascence, practitioners saw themselves as a small and select group who upheld a code of unwritten rules shaped by common values.³⁶ Trust was the currency of practice and there was little need for written guidance or curial supervision. Challenges to arbitrators were few and far between; in fact, it was so rare that arbitrator misconduct was omitted as a ground for challenge from the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the predecessor to the 1958 New York Convention.

21. But in the past two decades, the arbitration industry has grown in tandem with the surge in global trade and investment flows. As traditional court structures strained to grapple with the complexities thrown up by cross-border commerce, international arbitration emerged to fill that gap by promising a neutral mode of dispute

resolution that could function well across geographical and cultural borders. Its growth was boosted, in large part, by the New York Convention, which gave arbitral awards unprecedented reach. New arbitral institutions were rapidly set up and many jurisdictions liberalised admissions criteria for foreign counsel appearing in international arbitrations within their borders. All of this has seen a tremendous increase in the number and diversity of new entrants to the global arbitration community.³⁷

22. These new entrants hail from myriad legal traditions and bring with them their own conceptions of what constitutes ethically acceptable conduct. To give an oft-cited example:³⁸ in Germany, speaking to a witness before he takes the stand to give evidence may be a ground for professional censure; in America, by contrast, a lawyer who fails to prepare a witness might be thought to have breached his ethical duty to advance his client's best case. The short point is that arbitrators can no longer be said to be meaningfully guided by implied understandings, shared values, or unspoken conventions, because, amidst all this diversity, there is no such thing.

23. This can give rise to particular problems in relation to party-appointed arbitrators. I illustrate this by reference to a 2013 study that was published in the *Journal of International Arbitration* which shows

a marked divergence in the practice and expectations of lawyers in Sweden and the United States in relation to *ex parte* pre-appointment communications between arbitrators and counsel.³⁹ All of the American lawyers surveyed said they had experienced *ex parte* interviews with potential party-appointed arbitrators, as against only 42% of Swedish lawyers who had; and 36% of the American lawyers surveyed expressed the view that such interviews were *always* appropriate, while only 4% of Swedish lawyers thought it to be so. The lack of a common understanding as to what constitutes acceptable conduct is not only a reality today, but is potentially a problem that can, in some instances, cause difficulties in the conduct of international arbitration.

The rise of the professional arbitrator

24. The second development is the rise of a class of arbitrators whose livelihood depends predominantly, if not exclusively, on the receipt of appointments to serve as arbitrator. They are like the itinerant circuit judges of old, save that their jurisdiction is voluntary and, more importantly, their services are remunerated on the basis of demand.

25. An inevitable tension can develop in these circumstances between the arbitrator's personal interests and his professional

duties. Arbitrators earn substantial fees in the cases over which they preside. There is therefore a financial incentive to promote one's attractiveness as a prospective appointee which could, in the eyes of the appointing party, turn on the likely outcome of the cases for which they are appointed.⁴⁰ This sits uncomfortably with the notion that adjudicators should have no interest—much less a pecuniary one—in the outcome of the cases they decide.⁴¹

26. This tension is illustrated by *Cofely v Bingham*,⁴² a decision of the English High Court handed down this year. A trend of repeat appointments by a party, coupled with evidence of partisan behaviour during the hearings, led Mr Justice Hamblen to conclude that apparent bias on the part of the arbitrator had been established. An important factor in the court's decision was the fact that the appointing party maintained a "blacklist" of arbitrators, which presumably comprised arbitrators who, in that party's estimation, were unlikely to render a verdict favourable to it. Mr Justice Hamblen said that the notion that an appointee could fall out of favour with the appointing party depending on the anticipated outcome of the case at hand would be a matter of some import for any person whose income depended on appointments.⁴³

27. Critics have been especially scathing where investment treaty arbitration is concerned. Appointments are said to be restricted to a closed group of select individuals. There have also been assertions of a pro-investor bias because it is said to be in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits.⁴⁴ The argument is that by doing so, the arbitrator both incentivises the bringing of future claims and increases the likelihood that a putative tribunal will have the competence to hear those claims, thereby generating business.

International convergence on impartiality and independence

28. Straining against these two developments—the growth in the number and diversity of arbitration practitioners and the challenges posed by the rise of the professional arbitrator—is a third strand: this is the modern consensus that the duties of impartiality and independence apply equally to all members of the tribunal, whether appointed by a party or not. Arbitration is, at its core, a quasi-judicial proceeding and it must operate within certain limits of integrity and fairness.⁴⁵ In the words of the Canadian Supreme Court:⁴⁶

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 advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with free independent and impartial minds as the circumstances permit.

Today, virtually every set of arbitration rules, national laws, and every code of ethics that has been promulgated in relation to international arbitration enshrines this principle.⁴⁷

29. Yet, not so long ago, some were of the view that party-appointed arbitrators could not be held to the same standards of independence and impartiality as those that applied to non-party appointed arbitrators. The most prominent proponents of this idea were the Americans. The 1977 Code of Ethics for Arbitrators in Commercial Disputes jointly prepared by the American Arbitration Association (“AAA”) and American Bar Association (collectively, the “AAA-ABA”) went so far as to provide that party-appointed arbitrators, who were referred to as “non-neutrals”, “may be predisposed toward the party who appointed them” and enjoyed many exemptions from general standards of arbitrator conduct.⁴⁸

30. However, the AAA-ABA eventually walked this back. The 2004 version of the Code states that it is “preferable for all arbitrators—including any party-appointed arbitrators—to be neutral ... and to comply with the same ethical standards”. Thus, while the AAA-ABA still retains a separate set of rules for party-appointed arbitrators, these rules expressly state that they ought only to apply to domestic arbitrations within the United States and *only* if the parties are agreed

on this. Several other notable changes were also made. For example, while the 1977 Code permitted party-appointed arbitrators to engage in unilateral communications with their appointing party,⁴⁹ the 2004 Code subjects all arbitrators, whether party-appointed or not, to the same restrictions on unilateral communication.⁵⁰

31. But the fact that there is, in broad terms at least, a consensus that the party-appointed arbitrator is subject equally to the duties of impartiality and independence is not the end of the matter. There remain grey areas where it is unclear whether the observance of these duties can be reconciled with the way in which some parties and their appointees conduct themselves. I refer, for the purposes of this lecture, to the broad subject of *ex parte* communications between a party and its appointee, both before and after the appointment. But I also think that the tensions that afflict this subject must be considered against the backdrop of the first two trends I have identified, namely, the emergence of many practitioners of diverse backgrounds and the challenges of maintaining a business in offering arbitral services. I would further add that even as we work towards resolving these issues, we must first ensure there is clarity in our understanding of the role of the party-appointed arbitrator so that we minimise the possibility of arbitral misadventure and strengthen the

legitimacy of arbitration as an integral part of the dispute resolution framework for this 21st century world.

IV. Justifications for the party-appointed arbitrator

32. Against the backdrop of those three trends and the related observations, the question, for present purposes, is whether the expectations of independence and impartiality imposed by the modern consensus, coupled with the inescapable realities of arbitration practice today, have conspired to reduce the institution of the party-appointed arbitrator to an anachronism that we have grown accustomed to but perhaps no longer understand the need for.

33. Professor Paulsson, perhaps the most trenchant critic of the institution of the party-appointed arbitrator today, thinks so. He argues that once a dispute has arisen, every step taken by the parties—especially the appointment of arbitrators—will be tactical. This, when coupled with the financial incentives which create the desire for re-appointment, means that the party-appointed arbitrator will often be placed in an impossible position in terms of discharging his duties of independence and impartiality. He concludes thus: “The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence. Why would any party have confidence in an arbitrator selected by its unloved opponent?”⁵¹

34. Two points are frequently made in answer to this. The first is a positive case for the system of party appointments, and the second is a mitigation of its flaws.

Confidence in the process

35. The positive case is that party appointments give the parties confidence in the dispute resolution process. In the words of the late Professor Andreas Lowenfeld, this confidence is founded on the fact that at least one amongst the tribunal “will listen carefully ... to the presentation ... study the documents with care,”⁵² and will appreciate the legal and commercial culture, as well as the procedural expectations of the appointing party. It is said that because of this, parties will be more invested in the process and will therefore be more likely to accept the result and comply with it.⁵³

36. I have no doubt that the selection of a tribunal is a task that must be undertaken with care, and that the tribunal should have the expertise necessary for the adjudication of the dispute placed before it. But what this calls for are persons with a particular *expertise*. It has nothing whatsoever to do with them being appointed by the disputing parties. The exercise of selection with an eye to expertise and competence can just as easily be undertaken, as Professor Paulsson suggests, by a neutral institution.

37. My deeper concern with this argument is that it presents a profoundly unattractive picture of arbitration. Have our expectations really sunk so low that we derive confidence and satisfaction in the process because we think *one* of the three adjudicators will attend to our case carefully and give it the attention it is due? After all, the implicit suggestion is that one can have no confidence in the attentiveness, neutrality and impartiality of anyone on the tribunal apart from one's own appointee, ironic as that may sound. I do not understand this because it runs counter to the most basic expectation of neutrality and impartiality that is surely fundamental to the arbitral process.

38. The short point is this. *All* arbitrators have a duty to study *all* the material, and not only those presented by their appointing parties. *All* arbitrators have a responsibility to give their utmost attention to the cases presented by *both* parties. After all, the task of adjudication is in many respects a comparative exercise. In my view, *all* arbitrators must owe the same duties to *all* parties. Confidence in arbitration must be anchored in the belief that it is a procedurally fair and substantively neutral process for the resolution of disputes. Any other view would be greatly corrosive of confidence in the institution of arbitration. For this reason, I do not think we should do anything that would encourage the belief that the party appointee has a special duty

to apply particular care to the arguments, evidence, understandings and expectations of his appointer.

Incentivising good behaviour

39. I turn to the argument presented in mitigation. Some commentators acknowledge the structural problems with the present system of party appointments, but argue that these problems are mitigated by the fact that impartial and independent arbitrators are often the most sought after. In short, the market will correct itself.

40. Thus, it has been said that an overzealous party-appointee is prone to antagonise the other members of the tribunal and cause them to shut out his views in their entirety for being tainted.⁵⁴ On this basis, it is argued that arbitrators achieve success not by being partisan, but by developing a reputation for being honest, independent and impartial;⁵⁵ and conversely, that parties have an incentive to appoint arbitrators who have a reputation for being even-handed and fair, rather than one who will be partisan.⁵⁶ On this view, the financial incentives promote, rather than discourage, impartiality and independence. Proponents often point to a 2010 survey conducted by the Queen Mary University of London and White & Case LLP in which 66% of corporate counsel surveyed were reported

as having listed “open-mindedness and fairness” as the most important factor in the selection of an arbitrator.⁵⁷

41. But in my view, the force of this analysis is limited because the real problem has never been with the unsophisticated and rankly partisan arbitrator. One quickly gets a sense when a fellow arbitrator is so nakedly biased that his views lose all credibility. The fear, rather, is with those who shape the outcome of the arbitration in favour of their appointing parties in more subtle ways. Power can be exercised in many and varied ways, and it is often most effective when channelled through the capillaries of influence.

42. The interference may be as innocuous as deliberate reticence during the tribunal’s private deliberations; it may be as subtle as a hint made in a casual remark in the corridor on the way to the deliberation room; or it may take the form of a pointed or well-placed question that derails an important line of questioning pursued by the other party’s counsel in cross-examination. None of these might alone amount to much. Collectively, they can change the outcome of the arbitration in a manner which is improper. The real question is whether an implicit expectation that one must pay special attention to the case of one’s appointer, coupled with the financial incentives of appointment, can

consciously, or more dangerously, sub-consciously, motivate this sort of conduct.

My views on the party-appointed arbitrator

43. What the foregoing shows us, I think, is that the present system of party appointments is one which carries some considerable risks. The question then becomes: why should it continue to exist?

44. In answer, some have argued that unilateral appointment is a “right”. As early as the 1907 Hague Conference, one of the participants remarked that “the right of choosing one’s own judges [is] a right which is of the very essence of arbitral justice.”⁵⁸ Those who hold this view contend that the “the right to name an arbitrator has existed for decades, even centuries”⁵⁹ and should be considered one of the “fundamental elements” of international arbitration and that any abrogation of this right will constitute an “assault on the very institution of international arbitration”.⁶⁰ I am not convinced that this argument works. There is no question that the current system of party appointments is one which is historically entrenched. However, it does not follow as a matter of logical necessity that just *because* disputants have been appointing arbitrators from time immemorial, it *ought* therefore always to be so. Indeed it seems to me that party-appointed arbitrators are at best a contingent, rather than a

necessary, part of the institution of arbitration. If indeed the operational landscape as we see it today is such that the perverse incentives are too great to bear or to be tolerated, then a legitimate question can be raised as to whether the practice ought to be discarded.

45. I suggest that the most plausible answer to this is that unilateral appointment is an expression of the principle of party autonomy, and that principle *is* the cornerstone of arbitration.⁶¹ Party autonomy finds its expression in the parties' voluntary submission and participation in arbitration in a form and manner of their choosing, which extends also to the manner of appointing and constituting the tribunal. But to the extent we now regard the system of unilateral appointments as an integral feature of arbitration, I see it as something that has come about by dint of long usage rather than as a feature that is rooted in sound principle.

46. In the final analysis, the present system of party appointments that we have, may be seen as a cultural phenomenon that arbitration users have come to accept, but I am not sure it has any inherent value or significance apart from its long use and history. That said, it is precisely because the system of party appointments has such a long lineage and is so firmly rooted in the practice of arbitration, that I do

not anticipate its abolition. I think the majority of users understand that there are problems with the process and many will try to use this to their benefit and tell themselves, rightly or wrongly, that the other side is also doing the same; but on the whole, they are not ready to give up the ability to influence, at least in part, the composition of the tribunal that will determine their dispute.

47. The challenge for us is to think about how best to accommodate this reality against the backdrop of the growing diversity of arbitration users and the modern commercial pressures that the arbitrator of today faces. This is important so that we preserve the integrity and efficacy of the arbitration process at two levels.

(a) First, at the immediate level of meeting the procedural and substantive expectations of fairness that each party to an arbitration is entitled to hold of the process. The trouble in this context is that, with the plurality of arbitration users today, these sort of mismatched expectations can arise not because of any malevolent intent, but even just as a consequence of cultural differences in terms of the way in which legal practice or adjudication is conducted in that party's society.

(b) Second, at the broader level of keeping confidence in the institution of arbitration. The practice of party appointments

is now so widespread and established that unless we create a framework that effectively manages the risk factors inherent in the practice of party appointments, confidence in the institution of arbitration itself may suffer a harmful blow.

48. This problem is a delicate and complex one, and it has to receive holistic treatment. At a granular level, it is important to first establish a widespread consensus on the appropriate role of the party-appointed arbitrator, and second, to lay down clear guidelines and rules of engagement concerning problem areas such as communications with party-appointed arbitrators and conflicts of interest affecting them. I will shortly suggest some steps to this end which are both prophylactic and self-regulatory. These measures, if applied, would help by articulating clear standards and rules that international practitioners can be expected to abide by. But at a broader level, I think that there is also room for the introduction of a regulatory framework with some bite, to ensure that practitioners who do not keep within these bounds of fair-play and fair-dealing will be taken to task.

49. It is to these matters that I now turn.

V. Articulating a clear role for the party-appointed arbitrator

50. The first step is to understand the proper role of the party-appointed arbitrator. It may be helpful to begin with the modern consensus that all arbitrators have a duty to be independent and impartial. This standard rules out partisanship or non-neutrality. But many think that an arbitrator can preserve his independence and impartiality and yet still maintain some special role in relation to his appointing party. The question is whether this is even possible.

51. Nigel Blackaby and Constantine Partasides—the current editors of *Redfern and Hunter*—argue that party-appointed arbitrators have the additional duty of ensuring that “the arbitral tribunal properly understands the case of the[ir] appointing party” and that “a party-nominated arbitrator can fulfil a useful role in ensuring due process for the party that nominated him or her, without stepping outside the bounds of independence and impartiality”.⁶² Other giants of arbitration scholarship—Doak Bishop and Lucy Reed,⁶³ A A de Fina,⁶⁴ Jacques Werner,⁶⁵ Catherine Rogers,⁶⁶ and Andreas Lowenfeld,⁶⁷ among them, have suggested some variants of this view.

52. To the extent it is suggested that a party might have good and legitimate reasons for retaining the right to choose its arbitrator, I have no difficulty with that, as long as some of the risks that inhere in the

process can be satisfactorily addressed and managed. But to the extent it is suggested that a party-appointed arbitrator should see himself as having a special duty to *one* of the parties, I remain fundamentally uncomfortable with such a view. It seems to rest on the untenable and, as I earlier expressed, dangerous assumption that arbitrators can or should devote special attention or care to the case of any one party, merely by dint of affiliation. The line between driving a lively discussion to ensure that a party's case is fully understood and urging that party's position upon the tribunal may be so fine that it is impossible to work with in practice.

53. And, really, just what is that arbitrator to do? Having taken especial care to understand the nuances of the appointing party's case and having worked hard to ensure that it is properly understood by the other arbitrators, do we really expect that at that point, the arbitrator will mentally shift gears and reject the validity of the case that he has just presented to his colleagues on the tribunal in the most comprehensible way possible? In truth, in this process, there is a danger of *actual bias* when the party-appointed arbitrator unconsciously slips into the territory of self-persuasion; and even greater is the danger of *apparent bias* where such an arbitrator could be seen as being less than impartial by virtue of his role as a quasi-advocate.⁶⁸ I say quasi-advocate because in essence, it is being

suggested that the party-appointed arbitrator's duty is to be the presenter of his appointer's case to the tribunal in the privacy of the deliberation room and to see to it that that case is understood. In truth, the fact that much of this will be played out in the privacy of the arbitral caucus, and therefore outside the knowledge of the parties who might not even be aware of what precisely is taking place, actually has the potential to exacerbate the problem of bias, both actual and apparent.

54. Thus, I prefer a bright line rule. All arbitrators once appointed, irrespective of how they are appointed or by whom, should owe no affinity, partiality or special duty to either side. They have one role, and that is to judge and this should be done fairly with due regard to the interests of both parties. Of course, this does not mean that arbitrators are blank slates. As has regularly been pointed out in the context of administrative law, "an open mind is not an empty one".⁶⁹ Arbitrators are chosen because of the rich tapestry of skills and experiences that they bring to bear, and for their sensitivity to the peculiarities of the dispute in each particular case. This comes in many forms, including legal expertise, industry experience, or shared cultural experiences. Party-appointed arbitrators are no different. They are chosen chiefly because they present a particular matrix of skills and experiences which can usefully inform the tribunal's discussions. There is nothing wrong with this, and if these skills and

experiences are applied in a truly fair manner, they may just as well work against the appointing party as in his favour. But the critical point is that the arbitrator cannot have a special role to play in relation to one party's case just because he was appointed by that party.

VI. Clear and practical rules of engagement

55. I turn now to the practical guidelines which could help parties approach appointments from level ground. As it stands, many arbitral institutions have already published extensive codes of ethics to regulate and guide the conduct of arbitrators involved in arbitrations under their purview. These codes emphasise the importance of independence and neutrality, and they do not distinguish between party-appointed arbitrators and those who are neutrally appointed. This is a good start, but I propose three further steps that may be taken.

A. The appointment process

56. First, I support the publication of clear guidelines on what constitutes acceptable conduct in the appointment process, particularly in the course of what is now becoming the widespread practice of pre-appointment interviews. The pre-appointment interview is an area fraught with difficulty because of the sheer

number of parameters that may influence its propriety, or give rise to an *appearance of impropriety*. The temptation for misdemeanour can be irresistible because of the privacy of the interview; and I dare say it would be naïve to deny the real danger that potential appointees might be swayed to hold out, if not adopt, a position favourable to the appointing party through the interview process. To put it bluntly: the arbitrator is being interviewed for an appointment, which it is in his professional interest to try to secure.

57. The International Bar Association (“IBA”) Rules of Ethics for International Arbitrators 1987 specify that potential arbitrators may entertain queries from the parties “designed to determine his suitability ... provided the merits of the case are not discussed”. They also specify that no hospitality should be received.⁷⁰ Similarly, CIArb has issued a practice guideline which sets out a list of permissible topics for discussion and a list of matters which are off-limits, such as the merits of the case. The guideline also specifies that the arbitrator should be allowed to decline to answer any question without adverse repercussions.⁷¹ However, this begs the question as to whose perspective one adopts when assessing adverse repercussions, because a refusal to answer may, not infrequently, lead to the interviewee being ruled out as a candidate for the appointment. Some prospective appointees might see that as a rather adverse

repercussion! Various other practical matters are also suggested by the guideline such as where the interview should be conducted,⁷² who should be present and conducting the interview,⁷³ and how a record should be kept.⁷⁴

58. I agree with these suggestions and I would add two more. One, as a matter of prudence, the interviews should be kept short. In one case, the ICC Court refused to confirm an arbitrator who spent 50–60 hours with the nominating party before appointment.⁷⁵ If one is sincere about the purpose of the interview, the interaction seldom, if ever, needs to extend beyond an hour or two.

59. Two, and I appreciate that this might appear to be radical, I would propose that all pre-appointment interviews and communications be recorded, and that the transcripts be made available to the other party as soon as is reasonably practicable. I think this is necessary if we are to take seriously the task of throwing light on the pre-appointment process, with a view to disinfecting it.

60. In a piece Mark Friedman wrote in response to the CI Arb practice guideline, he said that, because of the innumerable permutations in which a pre-appointment interview could be conducted, “the overriding control is not guidelines”, but ultimately lies in “judgment about when a conversation strays into unacceptable

territory”.⁷⁶ Despite this, Friedman remains opposed to the idea of recording pre-appointment interviews. He argues that many practitioners “would abhor taping interviews as being intrusive, demeaning and perhaps even likely to provoke more litigation as disgruntled parties pore over every word in search of phrases they might pluck out to support a challenge”.⁷⁷

61. However, no explanation is given for that abhorrence and I, for one, cannot think of any reason—apart from the unexplained allusion to the lawyer’s discomfort—why recordings should not be taken. Everything we say in court or in arbitration is generally recorded and transcribed. This is a central feature of open justice. Is it suggested that these discussions with a potential appointee have a quality of privacy or confidentiality that the other party to the arbitration is to be excluded from them? If so, on what basis? The concern of this spawning litigation is also unsubstantiated. After all, if nothing improper had in fact taken place, then there is nothing that needs to be hidden.

62. The important point is this: arbitration is an adjudicative process and because it is so, we need to not only ensure that justice is done, but also that it is seen to be done, so that the confidence of parties and of the broader society is preserved. Leaving aside faith, it

seems to me that the only way that one could reasonably satisfy the other party that the judgment of the prospective appointee as to what may properly be discussed during the interview was in fact properly exercised, and that the conversation did not stray into unacceptable territory, is by producing a record of the interview. I also suggest that a widespread and uniform practice of recording and disclosing pre-appointment interviews would have the salutary effect of discouraging interviewers from asking improper questions as well as protecting inexperienced and perhaps overly enthusiastic arbitrators from feeling pressured to posture to please their potential paymasters. I am bound to say that I do not think this is a fanciful concern.

B. Unilateral communications

63. Second, I support the institution of a clear rule against unilateral communications following appointment. This prohibition is reflected in the rules of most arbitral institutions and the rationale behind it is self-evident and illustrated starkly by the recent controversy over the Croatia-Slovenia arbitration.

64. However, some institutions in their rules make an exception where the communications concern the selection of the presiding arbitrator. Prominent examples include the International Institute for Conflict Prevention and Resolution, the IBA, and the London Court of

International Arbitration.⁷⁸ It is also said by some commentators to be “established and accepted practice”.⁷⁹ Proponents of the exception argue that the parties are in a better position, by virtue of their greater resources and better understanding of the case, to look up the background and decide on the suitability of prospective appointees.⁸⁰ As against this, there are other institutions such as the World Intellectual Property Organisation and the AAA, whose rules forbid all forms of unilateral communications save for pre-appointment communications.⁸¹

65. For my part, I would align myself with the institutions which have taken a bright line rule against all post-appointment *ex parte* communications, whether or not it relates to the appointment of the presiding arbitrator. I am aware that this suggestion might cut against the grain of prevailing practice,⁸² but my view is that creating any exceptions to the rule against unilateral communications after appointment is dangerous and should not be countenanced. The difficulty with permitting *ex parte* communications even in what might seem to be a relatively narrow area is that these communications, which pertain to the choice of a presiding arbitrator, can extend to strategic considerations influenced by a party’s own view of the merits or prospects of its case. It seems to me to be wholly unsatisfactory

that such matters should be the subject of private *ex parte* communication between a party and its appointee on the tribunal.

66. If the intention is to preserve at least some measure of party involvement in the selection of the presiding arbitrator, this can be achieved through a variety of other mechanisms. Parties may draw up mutually agreed lists of suitable candidates; or they could exchange separate lists of potential appointees with their preferences ranked ordinally. None of this requires *ex parte* communications between a party and its appointed arbitrator.

C. *Conflicts of interest*

67. My third point concerns guidelines for managing conflicts of interest. The issue takes special importance in the context of party-appointed arbitrators because the appointee may often be selected on the basis of dealings the appointer has had with the appointee. This raises the murky spectre of multiple repeat appointments of the same arbitrator by a particular party or counsel. Party appointees should therefore be very mindful of the potential risk of a conflict.

68. Historically, jurisdictions sought to define the list of circumstances in which an arbitrator could be removed on the ground of a conflict of interest. These mirrored the circumstances which might

trigger a recusal for judges: for example, where the adjudicator has a direct pecuniary interest in the case or is related to one of the parties. This practice, was, however, quickly abandoned given the innumerable factual scenarios which might justifiably give rise to concerns over a lack of independence or impartiality.⁸³ In recent years, arbitral institutions and think tanks have attempted to revive this project by publishing guidelines on situations that might necessitate either disclosure or recusal, depending on the nature of the link or connection in question.

69. The most prominent example is the IBA's Guidelines on Conflicts of Interest. These guidelines were first published in 2004 and revised in 2014.⁸⁴ In broad terms, it sets out a tiered and categorised system of disclosure, where different types of "flags" might be raised depending on which category the connection in question falls into.⁸⁵ This is also, in broad terms, the position taken by the ICC, which recently issued a guidance note to parties and arbitral tribunals setting out a non-exhaustive list of situations in which the independence or impartiality of arbitrators may be called into question and which may trigger an obligation of disclosure.⁸⁶

70. In principle, I support the promulgation of guidelines, which provide a helpful reference point for practitioners who require working

examples of what is and is not acceptable conduct. They also serve as a good working tool for arbitrators and parties seeking to police themselves. Guidelines, however, become dangerous when they are treated not as illustrative, but as prescriptive. In the final analysis, the existence of a matter implying a need for disclosure does not necessarily imply the existence of a conflict of interest, much less an absence of neutrality. Whether there are justifiable grounds for suspecting a lack of impartiality or independence is ultimately, as the English High Court reiterated recently, a matter that is “classically appropriate for a case-specific judgment”.⁸⁷ This is a powerful insight. Thus, what the prospective appointee must do in each case is to consider the facts fairly and exercise his judgment thoughtfully using the counsel of such materials as the IBA Guidelines and the ICC Guidance Note.

VII. A systematic approach to arbitrator regulation

71. In the last part of my lecture, I consider the issue of arbitrator conduct from a different perspective. The first three points I have touched on are preventive in nature and provide guidance for parties and prospective arbitrators. My final suggestion, however, proposes the establishment of a central body to oversee the discipline of international arbitrators. The broad idea has been canvassed for

some time now.⁸⁸ More recently, CI Arb has given this serious thought. Some of my colleagues at CI Arb and I are developing a proposal for CI Arb to offer to other arbitral institutions an outsourced disciplinary adjudication process in respect of complaints against arbitrators in general, not just party-appointed ones. I see this as an instance of self-regulation by the arbitration profession and I see it as a measure that will ultimately strengthen arbitration as a whole even while it improves outcomes in individual cases.

72. I should caution that this is a work-in-progress, but we are in the process of drafting a set of rules that will allow instances of arbitrator misconduct to be referred to and resolved by CI Arb as a completely independent institution. We envisage this operating primarily in the context of arbitrations administered by institutions. Where a complaint arises in a given case, we envisage that the rules will establish a tiered system under which the complaint will first be raised to the arbitral institution administering the arbitration. If justifiable cause for complaint is found on a preliminary inquiry by the institution, the matter will then be referred to CI Arb, which will consider the matter further. CI Arb may take no further action, or it may administer disciplinary proceedings presided over by arbitrators selected from a list of qualified practitioners maintained by CI Arb.

73. A finding of misconduct could result in sanctions which can include, for example, the removal of the transgressing arbitrator from the arbitral institution's list of approved arbitrators or expulsion from CI Arb. On the other hand, dismissal of the claim should put an end to any subsequent due process challenge arising out of these facts being made against the award that is eventually issued. This will likely be the case as long as the process is written into the rules of the arbitral institutions in question and are matters that the parties have agreed to abide by when they arbitrate under the auspices of the institution in question. As a general rule, the findings of any disciplinary proceedings conducted by CI Arb will be published and notified to other arbitral institutions enrolled in the scheme.

74. This scheme will have several advantages. I begin by suggesting that CI Arb is an ideal body to offer this service and to conduct and administer such proceedings, principally for four reasons:

- (a) First, CI Arb enjoys the great benefit of neutrality as it is not itself involved in administering arbitrations—it is and will be wholly independent. This will overcome one complaint that is sometimes raised, which is that the arbitral institutions may find it difficult to effectively discipline their own.

(b) Second, CIArb is a truly global arbitration body with a long reach in membership across numerous jurisdictions. This will ensure sensitivity to a wide arc of practice and also ensure that qualified persons to run the scheme can be drawn from the world over, thus enhancing its legitimacy.

(c) Third, CIArb is an institution steeped in arbitral learning and training, and it has devoted considerable attention to the development of best practices. This will help ensure that the scheme remains at the cutting edge as an effective means of advancing the rule of law in arbitration.

(d) Fourth, the proposed scheme will build on the existing independent disciplinary system of CIArb which already enjoys worldwide credibility.

75. Beyond this, and looking ahead, I envisage that the scheme will put in place a robust and independent disciplinary process to investigate instances of arbitrator misconduct. This will enhance the legitimacy of arbitration. Moreover, we intend to publish the decisions of the disciplinary tribunals, and I expect this will contribute over time to the development of a corpus of law on the standards of conduct of arbitrators which can then educate and guide practitioners from any jurisdiction. I said earlier that I see this as an example of self-

regulation. The idea is that issues of arbitrator conduct will, under this proposal, be dealt with by arbitrators under the auspices of CIArb rather than by many different courts and it should enhance the legitimacy of arbitration as a whole, if many of the leading institutions were to come on board. We hope to take this proposal to the major institutions in the course of the next year or two and look forward to their receiving it warmly.

VIII. Conclusion

76. I will conclude by leaving you with this thought. I have been speaking on the need for steps like these to be taken if we are to preserve the confidence of users in the arbitration process. But they are also needed for another equally important reason: training and schooling new lawyers and entrants into the field of arbitration on the acceptable standards of conduct and behaviour that are to be expected of practitioners; for it is these young practitioners who are the foundations on which the future of arbitration will rest.

77. The path that our young colleagues will follow into a career in international arbitration will differ significantly from the one that I, and many among those of my generation, followed. Most of us learnt our craft in court where there was much less scope for rules, procedures and expectations to be misunderstood. And when we ventured into

arbitration, we mostly interacted with others who had a similar formation. The young today are no longer bound by the shackles of the past. They can and do step into the practice of global arbitration from the start, but they do so in an environment that features a wide penumbra of what constitutes acceptable practice and conduct. As we think again of the institutional design of arbitration to suit the needs of a dynamic and burgeoning market, we should strive to do what we can to provide a measure of clarity in terms of what is and is not acceptable so that in the process, we might lessen the chance of things going awry.

78. Thank you very much.

¹ Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (25 May 2011) 2748 UNTS 3 (entered into force 29 November 2010).

² Permanent Court of Arbitration, Press Release dated 13 April 2012: <<https://www.pcacases.com/web/sendAttach/238>> (accessed 22 August 2016).

³ Permanent Court of Arbitration, Press Release dated 10 July 2015: <www.pcacases.com/web/sendAttach/1308> (accessed 22 August 2016).

⁴ I relied heavily on an excellent article on the subject published by Arman Sarvarian & Rudy Baker, "Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal", posted on the blog of the European Journal of International Law: <<http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/>> (accessed 22 August 2016).

⁵ Permanent Court of Arbitration, Press Release dated 30 June 2016: <<https://pcacases.com/web/sendAttach/1785>> (accessed 22 November 2016); the partial award may be found at: <<https://pcacases.com/web/sendAttach/1787>> (accessed 22 November 2016).

⁶ Croatian Ministry of Foreign and European Affairs, Press Release dated 30 June 2016: <<http://www.mvep.hr/en/info-servis/press-releases/press-release-on-arbitral-tribunal%E2%80%99s-decision-,25852.html>> (accessed 22 August 2016).

⁷ This arbitration arose out of a border dispute between the US and Canada on where the boundary between Alaska and Canada should be drawn. Theodore Roosevelt wrote to the American appointees to the Tribunal putting pressure on them to take the US government's position in the award: see Jan Paulsson, "Moral Hazard in International Dispute Resolution" 25(2) *ICSID Review* 339 ("Paulsson").

⁸ The dispute concerned ownership of a forlorn oasis on the border of Saudi Arabia and modern day Oman. Saudi Arabia appointed Sheikh Yusuf Yasin, its deputy foreign minister, as its nominee. The arbitration collapsed into confusion and acrimony after the British complained about Sheikh Yusuf's incessant interference with the tribunal and his constant communications with the Saudi government: see Rudolf Bernhardt, *Decisions of International Courts and Tribunals and International Arbitrations* (Elsevier, 2014) at p 41.

⁹ Some Iranian arbitrators appointed to the Tribunal were apparently from the legal office that handled the Iranian government's claims before the Tribunal: see Richard M Mosk, "The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal" 1 *Transnational Law* 253 ("Mosk") at p 269.

¹⁰ *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)98/3, Award (26 June 2003). This was an arbitration between a Canadian company and the US government under the North American Free Trade Agreement ("NAFTA"). The US-appointed arbitrator met with US Department of Justice officials prior to his appointment, and he was told that if the US government lost the case, they "could lose NAFTA". One scholar commented that the tribunal ruled in favour of the US government on "a highly abstruse point ... which the three arbitrators, most specialists agree, got quite wrong": *Paulsson* at p 345.

¹¹ Hans Smit, "The Pernicious Institution of the Party-Appointed Arbitrator", *Columbia FDI Perspectives* No 33 (14 December 2010).

¹² *Paulsson* at pp 357 and 362.

¹³ Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration" in *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Mahnoush Arsanjani *et al*, eds) (Brill Academic, 2011) at pp 824–825.

¹⁴ See the examples cited in Alfonso Gomez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (Kluwer Law International, 2016) (“Gomez-Acebo”) at para 2-5. Demosthenes, writing in the 4th century BC, describes a private dispute between two parties which was submitted for resolution in terms that we would not be unfamiliar with. The parties each appointed one person to sit on the tribunal and, together, selected one common arbitrator. They agreed that if this tribunal of three could not come to a consensus, a decision would be taken by majority vote. This is taken from a speech entitled “Against Aparurius” contained in Demosthenes, *Orations, Volume IV: Orations 27–40: Private Cases* (Translated by A T Murray) (Harvard University Press, 1936) at p 211:

[T]hey proceeded to an arbitration, and after drawing up an agreement they submitted the matter to one common arbitrator, Phocritus, a fellow-countryman of theirs; and each appointed one man to sit with Phocritus, Apaturius choosing Aristocles of Oea, and Parmeno choosing me. They agreed in the articles that, if we three were of one mind, our decision should be binding on them, but, if not, then they should be bound to abide by what the two should determine.

¹⁵ See, eg, “Against Archebiades” in *Lysias*; “On the Estate of Dicaeogenes” in *Isaeus*.

¹⁶ Derek Roebuck, *Ancient Greek Arbitration* (The Arbitration Press, 2011) (“Roebuck”) at p 164.

¹⁷ Roebuck at p 351.

¹⁸ John Bassett Moore, *History and Digest of International Arbitrations* vol 5 (Government Printing Office, 1898) at p 4832.

¹⁹ Tom Bingham, “The Alabama Claims Arbitration”, 52 *International & Comparative Law Quarterly* 1 at pp 9–10.

²⁰ Roy Jenkins, *Gladstone* (Macmillan, 1995) at p 356–357.

²¹ Not the least of which was that it purported to lay down, in Article VI, three rules of substantive law relating to the obligations of neutral states in times of law which would apply *retrospectively*, in the sense that the Tribunal was to evaluate Great Britain’s conduct by reference to these principles. This was clearly a product of compromise, rather than legal principle.

²² V V Veeder, “The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator — From Miami to Geneva” 107 *Proceedings of the American Society of International Law* 387 (“Veeder”) at pp 392–393.

²³ Veeder at pp 392–393.

²⁴ Shabtai Roseanne, *The World Court: What it is and how it works* (Martin Nijhoff Dordrecht, 1995) at pp 5–6.

²⁵ 1899 Hague Convention, Art 24.

²⁶ Statute of the Permanent Court of International Justice, Art 31; Statute of the International Court of Justice, Art 31.

²⁷ International Chamber of Commerce, “Arbitration – Revision of the Rules of Conciliation and Arbitration” ICC Brochure No 50 at pp 4 and 11.

²⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art 37(2)(b).

²⁹ UNCITRAL Model Law (2006), Art 11(3).

³⁰ UNCITRAL Arbitration Rules (2010), Art 33(1).

³¹ ICC Rules of Arbitration (2012), Art 12(2).

³² France, the UK, Canada, India, Hong Kong, Singapore.

³³ Veeder at p 391.

³⁴ Joseph M Mathews, “Difficult Transitions Do Not Always Require Major Adjustment – It’s Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration” 25(2) *ICSID Review* 356 at pp 357 and 362.

³⁵ Charles Francis Adams, the appointee of the United States, was the grandson the nation’s first President and the son of its fourth, and had spent a great deal of time in London where he held office as American Chief diplomatic representative. Alexander

Cockburn, the appointee of Great Britain, was the Lord Chief Justice of England and Wales.

³⁶ Doak Bishop & Margrete Stevens, "The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy" at p 5: <http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/ethics/ethics_in_int_arb_-_icca_2010_-_bishop.pdf> (accessed 22 August 2016).

³⁷ Gary Born & Thomas R Snider, "A Code of Conduct for Counsel in International Arbitration", *Kluwer Arbitration Blog* (16 November 2010): <<http://kluwerarbitrationblog.com/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration/>> (accessed 22 August 2016).

³⁸ Catherine A Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration" 23 *Michigan Journal of International Law* 341 at p 344.

³⁹ Niklas Elofsson, "Ex Parte Interview of Party-Appointed Arbitrator Candidates: A study Based on the Views of Counsel and Arbitrators in Sweden and the United States" 30 *Journal of International Arbitration* 230.

⁴⁰ Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1998).

⁴¹ *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759.

⁴² *Cofely Limited v Anthony Bingham and another* [2016] EWHC 260 (Comm).

⁴³ *Cofely Limited v Anthony Bingham and another* [2016] EWHC 260 (Comm) at [108].

⁴⁴ Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) at pp 126–128.

⁴⁵ In inter-State arbitration this is often expressed as the difference between a "diplomatic" and "judicial" model of arbitration: see Steven Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications, 1987) at pp 144–154. In the case of international commercial arbitration, the difference is between a "contractual" and "judicial model". An early champion of the judicial view was Judge Pound: see *American Eagle Fire Insurance Co v New Jersey Insurance Co* (1925) 240 NY 398 at 405.

⁴⁶ *Steven Szlilard v Ralph Szasz* [1954] 1 SCR 3 at 4, *per* Rand J.

⁴⁷ See the examples cited in footnotes 5–7 of Chapter 4 of *Gomez-Acebo*. The UNCITRAL Rules, for example, affords parties a right to challenge an arbitrator if "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence: see UNCITRAL Arbitration Rules (2013), Art 12(1). See also London Court of International Arbitration Rules (2014), Art 5.3. Other sets of rules use different expressions, but the purport and effect is the same.

⁴⁸ ABA Code of Ethics for Arbitrators in Commercial Disputes (1977), Canon VII(A)(1). Some have suggested that this was precipitated by the general shift in American jurisprudence that jettisoned the "judicial" view of arbitration in favour of a "contract" view espoused by the New York Court of Appeals in *In re Astoria Medical Group and Health Ins Plan of Greater new York* 11 NY2d 128 (1962) at 135: see *Mosk* at 259.

⁴⁹ ABA Code of Ethics (1977), Canon VII(C)(2).

⁵⁰ ABA Code of Ethics (2004), Canon X(C).

⁵¹ *Paulsson* at pp 357 and 362.

⁵² Andreas F Lowenfeld, "The Party-Appointed Arbitrator in International Controversies: Some Reflections", 30 *Texas International Law Journal* 59 ("*Lowenfeld*") at p 65.

⁵³ Yuval Shany, "Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings" 30 *Loyola of Los Angeles International and Comparative Law Review* 467 at p 474; David J McLean & Sean-

Patrick Wilson, “Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations” 9(1) *Pepperdine Dispute Resolution Law Journal* 167 at pp 168–169; *Veeder* at p 402.

⁵⁴ Yves Derains, “The Deliberations of the Arbitral Tribunal—Retour au délibéré arbitral”, in *The Resolution of the Dispute—From the Hearing to the Award* (Markus Wirth, ed) (ASA Special Series, 2007) at p 16.

⁵⁵ Daphna Kapeliuk, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators” 96 *Cornell Law Review* 47, in which the author concludes after a statistical analysis of Investment Treaty arbitration decisions that (at p 90):

[T]he arbitrators’ valuable professional reputation could be a key incentive for them to remain impartial. Impartiality critically affects not only their future selection as arbitrators but also other spheres of their professional careers, whether as private counsel or as academics. In order to promote their reputation, arbitrators may choose to increase accuracy and to counter any real or perceived biases rather than to cater to any particular interests. This tendency rings especially true for repeat arbitrators in the arbitration market, whose most valuable trait may be their reputation as credible and independent decision makers.

⁵⁶ Alexis Mourre, “Are unilateral appointments defensible? On Jan Paulsson’s Moral Hazard in International Arbitration”, *Kluwer Arbitration Blog* (5 October 2010): <<http://kluwerarbitrationblog.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/>> (accessed 22 August 2016).

⁵⁷ 2010 *International Arbitration Survey: Choices in International Arbitration* at p 26: <<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>> (accessed 3 July 2016).

⁵⁸ See J Scott, *The Proceedings of the Hague Peace Conference, Translation of the Official Texts, II The Conference of 1907, Meetings of the First Commission 2* (Leon Bourgeois, 1921), quoted in Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) (“*Born*”) at p 1639.

⁵⁹ Charles N Brower & Charles B Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded” 29(1) *Arbitration International* 7.

⁶⁰ Charles N Brower, Michael Pulos & Charles B Rosenberg, “So Is There Anything Really Wrong With International Arbitration as We Know It?” at p 7: <https://international-arbitration-attorney.com/wp-content/uploads/arbitrationCharles_Brower_So_Is_There_Anything_Really_Wrong_with_International_Arbitration_A.pdf> (accessed 22 August 2016).

⁶¹ See *Born* at p 1639.

⁶² Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at para 4.30.

⁶³ Doak Bishop & Lucy Reed, “Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration” 14(4) *Arbitration International* 395 (“*Bishop & Reed*”) at p 405.

⁶⁴ A A de Fina, “The party appointed arbitrator in international arbitration – Role and Selection” 15(4) *Arbitration International* 381 (“*de Fina*”) at p 382.

⁶⁵ Jacques Werner, “Editorial – The Independence of Party-Appointed Arbitrators: For a Rule of Reason” 7(2) *Journal of International Arbitration* 5 at p 5.

⁶⁶ Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014) at paras 8.57–8.76.

⁶⁷ *Lowenfeld* at p 65.

⁶⁸ *Gomez-Acebo* at pp104–105.

⁶⁹ *Barbosa v Di Meglio* [1999] NSWCA 307 at [9], per Mason P.

⁷⁰ IBA Rules on Ethics for International Arbitrators (1987), rr 5.1 and 5.5.

⁷¹ CIArb, *Practice Guideline 16: The Interviewing of Prospective Arbitrators* (“*Practice Guideline 16*”) at 3.1(10) and 3.1(11).

⁷² *Practice Guideline 16* at 3.1(15).

⁷³ *Practice Guideline 16* at 3.1(6).

⁷⁴ *Practice Guideline 16* at 3.1(7).

⁷⁵ Dominique Hascher, “ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators” 11 *ICC Arbitration Bulletin* 4 (November 1995); see also *Practice Guideline 16* at 3.1(16), which suggests that there should be an agreed time limit imposed on interviews.

⁷⁶ Mark W Friedman, “Regulating Judgment: A Comment on the Chartered Institute of Arbitrators’ Guidelines on the Interviewing of Prospective Arbitrators” (2008) 2 *Dispute Resolution International* 288 (“*Friedman*”) at p 292.

⁷⁷ *Friedman* at p 289.

⁷⁸ CPR Rules on Non-Administered Arbitrations, Art 7.4; IBA Rules on Ethics for International Arbitrators (1987), r 5.2; LCIA Arbitration Rules (2014), Art 13.5.

⁷⁹ See for example, *de Fina* at p 383.

⁸⁰ *Bishop & Reed; Born* at p 1699.

⁸¹ AAA International Arbitration Rules, Art 13.6; WIPO Arbitration Rules, Art 21.

⁸² *Born* at pp 1697–1698.

⁸³ *Gomez-Acebo* at para 4-36.

⁸⁴ IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Part II.

⁸⁵ At the top is the “Non-Waivable Red List”, which triggers *mandatory* recusal, with no exception. Going down a tier, there is the “Waivable Red List”, which concerns matters which would give rise to significant doubts as to the arbitrator’s independence and impartiality but can be cured with the informed consent of both parties. Third is the “orange list”, which pertains to matters which trigger mandatory disclosure, but may or may not give rise to concerns over fitness to serve. At the very bottom is the “green list”, where there is no disqualifying conflict of interest and therefore no requirement of disclosure.

⁸⁶ International Chamber of Commerce, “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” (13 July 2016) at paras 17–22:

<<http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=19327366894>>

(accessed 22 August 2016).

⁸⁷ *W Ltd v M Sdn Bhd* [2016] EWHC (Comm). The sole arbitrator in that case was a partner of a law firm which regularly advised an *affiliate* of the defendant, which in turn earned significant remuneration for that work. On this basis, the claimant sought to challenge the award on the ground of apparent bias. It was common ground that the arbitrator himself had never done any work for the defendant had, for the last 10 years, operated effectively as a sole practitioner who did not concern himself with the affairs of the partnership.

Ordinarily, that would be the end of the matter. However, para 1.4 IBA Guidelines includes as a condition to be disclosed circumstances in which “[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant income therefrom.” What was worse, para 1.4 fell within the “Non-waivable red list”, which pertains to matters which trigger automatic recusal. Counsel for the defendants submitted that the IBA guidelines were “pretty emphatic”, a “very powerful factor”, and even that a real possibility of bias had arisen “because that is what we are told through Paragraph 1.4”. Mr Justice Knowles unhesitatingly gave short shrift to this argument.

⁸⁸ Last year, for example, the Swiss Arbitration Association proposed creating a transnational body known as the Global Arbitration Ethics Council, which will deal with all sanctions relating to purely ethical issues. See Anne-Carole Cremades, “The Creation of a Global Arbitration Ethics Council: a Truly Global Solution to a Global

Problem”, *Kluwer Arbitration Blog*: <<http://kluwerarbitrationblog.com/2015/11/24/the-creation-of-a-global-arbitration-ethics-council-a-truly-global-solution-to-a-global-problem/>> (accessed 22 November 2016).