

THE IMPORTANCE OF BEING INDEPENDENT: LAWS OF ARBITRATION, RULES, GUIDELINES –  
AND A DISASTROUS AWARD

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**Abstract**

*Under most modern laws and rules of arbitration, whether domestic or international, an arbitrator is required to be 'independent' and 'impartial'; and he or she is required to remain so throughout the arbitral proceedings. To emphasise that these requirements of both 'independence' and 'impartiality' are not mere catchphrases but are meant to be taken seriously, national laws (following the lead of the UNCITRAL Model Law) and modern rules of arbitration (such as the UNCITRAL Arbitration Rules) require disclosure of any relationship or connection between an arbitrator (or a prospective arbitrator) and a party or its counsel. To assist parties and prospective arbitrators in deciding what kind of relationships or connections should be disclosed, the International Bar Association has developed and published 'Guidelines on Conflicts of Interest in International Arbitration' (revised in 2014) which are now well established and used in both international and domestic arbitrations. Failure to make a proper disclosure is likely to have a disastrous effect on the arbitral proceedings, with the risk that the Tribunal's award may be set aside – possibly with dramatic repercussions, as happened in France in the recent 'Tapie Affair'.*

**I. Introduction**

Over forty years ago, on December 15, 1976, the General Assembly of the United Nations adopted a set of Rules of Arbitration which had been specially drawn up by UNCITRAL – the United Nations Commission on International Trade Law.<sup>1</sup> These UNCITRAL Rules rapidly gained acceptance as the ground rules for arbitrations throughout the world. They formed the basis of the rules for arbitration adopted by the Iran/US Claims Tribunal<sup>2</sup> and are consistently used in *ad hoc* arbitrations. Although these rules were primarily designed for use in *international* commercial disputes, they have frequently been adapted (or simply adopted) for use in purely domestic arbitrations.<sup>3</sup>

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<sup>1</sup> The Rules were adopted by U.N. Resolution 31/98.

<sup>2</sup> The Iran/US Claims Tribunal, based at The Hague in the Netherlands, was established as the central element of the arrangements under which the US Embassy hostages held in Iran were released in January 1981 in return for the release of Iranian assets “frozen” in the United States by court orders.

<sup>3</sup> The UNCITRAL Arbitration Rules were intended for use in international *ad hoc* arbitrations, but they have since been adopted by some arbitral institutions as their own particular rules of arbitration. For instance, the Chartered Institute of Arbitrators in England, in revising its rules of arbitration for both domestic and international arbitration, simply (and sensibly) adopted the latest version of the UNCITRAL Arbitration Rules, as updated and revised in 2010 by U.N. Resolution 65/22.

One of the fundamental requirements of the UNCITRAL Rules is that every arbitrator, whether sitting alone or as a member of an arbitral tribunal, must be both ‘impartial’ and ‘independent’.<sup>4</sup> The true aim, of course, is to have an arbitrator who is ‘impartial’ – that is to say, someone who does not have any real or apparent bias in favour of any of the parties to the arbitration. However, bias, whether against or in favour of a particular party, is generally not easy to detect; and so ‘impartiality’ alone is not sufficient. The arbitrator must also be ‘independent’. In a bid to ensure this, the UNCITRAL Rules require that a potential arbitrator:<sup>5</sup>

“shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality *or independence*”.

The Rules continue:<sup>6</sup>

“An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and to the other arbitrators unless they have already been informed by him or her of these circumstances”.

If there are ‘justifiable doubts’ as to an arbitrator’s independence or impartiality, he or she may be challenged.<sup>7</sup> Under the UNCITRAL Rules, notice of any such challenge has to be given within 15 days to all parties to the arbitration (and also to the arbitrator who is challenged and the other arbitrators).<sup>8</sup> The notice must state the reasons for which the challenge is made.<sup>9</sup> The arbitrator who is challenged then has a choice. He or she may decide either to withdraw from his or her office or to contest the challenge.<sup>10</sup> If the challenge is contested, the appointing authority<sup>11</sup> will decide on its validity.<sup>12</sup>

Arbitral institutions in general adopt a similar procedure, except that it is they who decide the challenge under their own rules.<sup>13</sup> At first glance, the rules governing the challenge of an arbitrator, and the decision on that challenge, may seem to be relatively simple and the process itself likely to be relatively quick. To think this, however, would be to underestimate both the ingenuity and the tenacity of lawyers! Many challenges turn into a mini-battle with the lawyers for the party that is

<sup>4</sup> See the current UNCITRAL Arbitration Rules, art 6.7 (2010), which requires an appointing authority to “*have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator*”.

<sup>5</sup> UNCITRAL Arbitration Rules, art. 11 (2010) (emphasis added).

<sup>6</sup> *Id.* art. 11.

<sup>7</sup> *Id.* art. 12(1).

<sup>8</sup> *Id.* art. 13(1).

<sup>9</sup> *Id.* art. 13(2).

<sup>10</sup> *Id.* art. 13(3).

<sup>11</sup> The ‘appointing authority’ is the person or institution chosen by the parties to fulfil that office including (a choice that is frequently made) the Secretary-General of the Permanent Court of Arbitration [*hereinafter* the “PCA”] at The Hague. If no appointing authority has been agreed upon within thirty days of a proposal being made, any party may request the Secretary-General of the PCA to designate a person or institution as the ‘appointing authority’, see UNCITRAL Arbitration Rules, arts. 6(1) and 6(2) (2010).

<sup>12</sup> *Id.* art. 13(4).

<sup>13</sup> A comprehensive analysis of challenge and disqualification of arbitrators on grounds of lack of impartiality or independence under different arbitral rules can be found in KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION chs. 7-8 (2012).

making the challenge submitting voluminous correspondence and legal authorities in support of their case and the opposing lawyers replying in kind. Indeed, sometimes in London Court of International Arbitration [“LCIA”] arbitrations for instance, there may even be a formal hearing of the challenge.<sup>14</sup>

The requirements for an arbitrator to be “impartial” and “independent” and the provisions for challenging an arbitrator where there are circumstances that give rise to justifiable doubts as to his or her impartiality or independence, are now written into the rules of the major arbitral institutions. They are also written into most national laws of arbitration, as well as Article 12 of the highly influential UNCITRAL Model Law,<sup>15</sup> which has been adopted in over 70 states, including India.

In these circumstances, it is somewhat bizarre that the national law of one of the leading countries in the world of arbitration does *not* expressly require *both* independence and impartiality on the part of an arbitrator. This however is the position in England as a consequence of the English Arbitration Act of 1996<sup>16</sup>. The members of the Departmental Advisory Committee [the “DAC”], which was charged with drawing up the document that led to the 1996 Act, followed very closely the provisions of the UNCITRAL Model Law. Indeed, it was very much in their interest to do so, to ensure that English law is consistent with the modern arbitration laws of the world-wide arbitration community. However, when considering the power of the English court to remove an arbitrator, the DAC decided that it was unnecessary to state explicitly that the arbitrator or potential arbitrator should be ‘independent’.

The Committee said:<sup>17</sup>

*“The Model Law (Article 12) specifies justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. We have considered this carefully, but despite efforts to do so, no one has persuaded us that, in consensual arbitrations, this is either required or desirable. It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance.*

*The latter [i.e. doubts about the impartiality of the arbitrator] is of course the first of our grounds for appeal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.”*

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<sup>14</sup> See the LCIA Arbitration Rules (2014), art. 10 for Revocation and Challenges of arbitrators. (Since 2006, the LCIA has published decisions on challenges in redacted form).

<sup>15</sup> United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33 [*hereinafter* “UNCITRAL Model Law”], see, in particular, art. 12, ‘Grounds for Challenge of an Arbitrator’. The UNCITRAL Model Law, as its title suggests, was drawn up after extensive consultation as a prototype for modern laws of arbitration, to be adopted by national legislatures, as it stood, or with amendments as they wished.

<sup>16</sup> The 1996 Act applies where the seat of the arbitration is in England, Wales and Northern Ireland.

<sup>17</sup> DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW 1996, REPORT ON THE ARBITRATION BILL, Chairman Lord Justice Saville, Appendix 2, Clause 24 - Power of Court to Remove Arbitrator [*hereinafter* “DAC Report”].

The Committee's position on this issue exemplifies what Thomas Carlyle, the Scottish philosopher, called "unwise intellect". The Committee's decision was well articulated. It was logical; and it was wrong. In making its decision, the Committee took a purely parochial 'English' view of international arbitration. The Committee, which had before it the UNCITRAL Model Law, simply chose to ignore what was happening in the rest of the world. In reality, it is not enough for prospective arbitrators to declare that they are 'impartial', even if they sincerely believe this to be true and are prepared to swear a solemn oath to that effect. Most people like to regard themselves as 'impartial', including the football coach who never sees one of his players committing a foul or the mother who, when her son is convicted of causing grievous bodily harm, tells an unbelieving world that "he is a good boy at heart and wouldn't hurt a fly!" What is needed is more than a self-satisfied assertion of 'impartiality'. There must be a reliable way of verifying that assertion; and the way that has been found is to require a prospective arbitrator not only to *assert* that he or she is independent of the parties, but also to *disclose* any circumstances that may give rise to reasonable doubts as to the truth of that assertion.

'Impartiality' and 'independence' are sometimes treated as if they are interchangeable, but they are not. They are related but distinct concepts. 'Impartiality' is primarily a state of mind. To that extent, it is subjective. 'Independence' by contrast is a matter of fact or law, capable of objective verification – for instance, by looking at any relevant connections or relationships between the arbitrator and one of the parties or its counsel. As was tersely expressed in a commentary on a previous version of the International Chamber of Commerce ["ICC"] Rules:

*"Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind, which it may be impossible for anyone but the arbitrator to check or to know when that arbitrator is being appointed."*<sup>18</sup>

The position is very clear. In almost all arbitrations, whether domestic or international, an arbitrator is required to be 'impartial' – that is to say, without any real or apparent bias in favour of one or other of the parties. However, if an arbitrator is not impartial, (if he or she, consciously or not, is biased in favour of one of the parties) this will generally only manifest itself during the course of the arbitral proceedings.<sup>19</sup> Accordingly, there is usually an additional requirement, namely that an arbitrator or prospective arbitrator must also be 'independent' – and to try to ensure this, a written declaration must be made of any circumstances which may give rise to justifiable doubts as to his or her impartiality or independence.<sup>20</sup> In this way, the assertion of 'impartiality' may be verified objectively. If proper disclosure is made of any facts or circumstances that might give rise to justifiable doubts as to any arbitrator's impartiality or independence and if no objection to the

<sup>18</sup> YVES DERAÏNS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION ch. 4, 118 (2d ed., 2005). These 'New ICC Rules of Arbitration' have been updated and replaced first by the 2012 edition and from March 1, 2017, by the 2017 edition. Deraïns and Schwartz note that in the pre-2012 Rules the express requirement was for an arbitrator to be 'independent' (not impartial) because "*whilst 'impartiality' was what was important, the objective test of 'independence' was preferred.*"

<sup>19</sup> For instance, where in a tribunal of three arbitrators, one arbitrator consistently intervenes on the side of the party that nominated him or her.

<sup>20</sup> See, e.g., the UNCITRAL Model Law, art 12(1).

arbitrator is raised by a party to the arbitration, any subsequent challenge during or after the arbitral proceedings is likely to be unsuccessful. The right to object is deemed to have been waived in respect of any objections founded upon the circumstances contained in the arbitrator's disclosure statement.

In practice, what usually happens is that when someone is approached to act as a party-nominated arbitrator, he or she will disclose any relevant facts or circumstances informally to the prospective nominating party. If neither the prospective arbitrator nor the nominating party considers that there is any reason for concern about those disclosures, the prospective arbitrator will usually accept the appointment. At the same time, he or she will write formally to the parties disclosing any facts or circumstances that the *parties themselves* may regard as giving rise to doubts as to his or her independence or impartiality.

If the arbitration is being conducted under the rules of an arbitral institution, such as the ICC or the LCIA, their Court<sup>21</sup> will look very carefully at these declarations of independence in considering whether or not to appoint the arbitrator (or to confirm the appointment of a party-nominated arbitrator); and they will of course also consider them if there is a challenge to an arbitrator or prospective arbitrator and the institution concerned has to decide whether or not to accept or deny that challenge. In short, the requirements of 'impartiality' and 'independence' are not mere catchphrases. They are meant to be taken seriously.<sup>22</sup>

One of the more difficult problems that confronts an arbitrator or potential arbitrator is that of deciding what relationships or connections should be disclosed in a 'declaration of independence'. A prospective arbitrator who has a significant financial interest in one of the parties should obviously disclose this and is unlikely to be accepted as an arbitrator by the other party.<sup>23</sup> But what if the arbitrator is a non-executive director of an investment bank that holds a small interest in one of the parties as part of a diversified portfolio of investments? This was the situation that confronted an arbitrator in an ICSID arbitration who was challenged because of her position as a non-executive director of an investment bank, although in that role she took no part in investment decisions and was required to be independent of the management of the bank.<sup>24</sup> The other members of the ICSID tribunal, called upon to consider this challenge,<sup>25</sup> took a robust view of their co-arbitrators' position:

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<sup>21</sup> The ICC 'Court' and the LCIA 'Court' are not courts of law; they are in effect the administrative bodies of each institution. Amongst the many commentaries on the work of the ICC, mention should be made of ERIK SCHÄFER ET AL., *ICC ARBITRATION IN PRACTICE* (2005) and JASON FRY ET AL., *THE SECRETARIAT'S GUIDE TO ICC ARBITRATION* (2012). A useful description of the functions of the LCIA Court may be found in MAXI SCHERER ET AL., *ARBITRATING UNDER THE 2014 LCIA RULES – A USER'S GUIDE* ch.1, ¶ 13 (2015).

<sup>22</sup> A note in *Global Arbitration Review* of January 5, 2017 states that a British arbitrator and engineer resident in Malaysia "was [today] sentenced to six months in jail for misleading the Kuala Lumpur Regional Centre for Arbitration into appointing him seven years ago on the basis of a false statement of independence – but an earlier corruption allegation was not pursued". Leave to appeal was given. See *Arbitrator sentenced to jail in Kuala Lumpur*, *GLOBAL ARB. REV.* (Jan. 5, 2017).

<sup>23</sup> Indeed, as will be seen, such an interest would be a complete bar to appointment under the INT'L BAR ASSOC., *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014) [*hereinafter* the "IBA Guidelines"].

<sup>24</sup> See *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 and *In the arbitration under the Rules of the United*

*“The fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator’s impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.”*<sup>26</sup>

It is not only business or financial relationships that may have to be disclosed. There are social and professional relationships too, to consider. For instance, what if a prospective arbitrator is a former partner in the law firm acting for one of the parties? Or what if the prospective arbitrator and counsel are members of the same tennis club or of the same professional association? It is clear that some kind of qualitative test is required: how close is the relationship; how frequent the contact; what (if anything) is the degree of dependency between the party (or its counsel) and the arbitrator or prospective arbitrator?<sup>27</sup>

## II. The IBA Guidelines on Conflicts of Interest in International Arbitration

It was to help in answering questions of this kind, and generally to provide guidance on these difficult practical issues, that the International Bar Association [the “**IBA**”] drew up and published its ‘Guidelines on Conflicts of Interest in International Arbitration’.<sup>28</sup>

When the IBA Guidelines were first under consideration, there was considerable debate about the relevant standard for disclosure of any facts or circumstances likely to give rise to doubts about the independence of an arbitrator or potential arbitrator. Should the test be an objective test (that is to say, what view would a reasonable outside observer take?) or should it be more subjective (that is to say, what view would the parties themselves be likely to take?). This debate is reflected in the Explanatory Notes to the 2004 Guidelines, which read as follows:

*“[B]ecause of varying considerations with respect to disclosure the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analysed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as*

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Nations Commission on International Trade Law between AWG Group Limited v. The Argentine Republic, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (May 12, 2008) [*hereinafter* “Suez v. Argentina”].

Under the ICSID Convention that governs arbitrations between states and investors, and that requires arbitrators to be “persons of high moral character” who may be “relied upon to exercise independent judgment”, the challenge of an arbitrator is decided upon by a majority of the other arbitrators, on a panel of three or more arbitrators. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159, arts. 14(1) and 40(2). This Convention is known as the ‘Washington Convention’ or, to the aficionados, as the ‘ICSID Convention’. The history of the Convention is recounted in ANTONIO R. PARRA, THE HISTORY OF ICSID (2012).

<sup>25</sup> For a helpful note on “qualifications and challenges” of arbitrators under the ICSID Rules, *see* LUCY REED ET AL, GUIDE TO ICSID ARBITRATION 133-137 (2d ed. 2011).

<sup>26</sup> Suez v. Argentina, *supra* note 24 at 18.

<sup>27</sup> For a fuller discussion on this and other issues arising from the challenge of arbitrators, *see* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶¶ 4.75 - 4.151 (6th ed. 2015).

<sup>28</sup> The IBA Guidelines were first drawn up and published by the IBA in 2004. They were revised and updated in 2014.

*reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7.2 of the ICC Rules for this standard.”<sup>29</sup>*

The ICC Rules to which the Working Group referred required a prospective arbitrator to disclose “any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence *in the eyes of the parties*.<sup>30</sup> This wording is retained in the current (2017) Rules, with the additional words “as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.”<sup>31</sup>

Accordingly, a prospective arbitrator who is aware of circumstances that might give rise to reasonable doubts as to his or her independence “*in the eyes of the parties*” is required to disclose those facts and circumstances – together with any others that might throw doubt on his or her impartiality. It is clear from this that whilst it is the ‘impartiality’ of an arbitrator that is the key factor, other matters that might be seen by the parties as casting doubt on the impartiality must be disclosed. However, if an arbitrator or prospective arbitrator is challenged because of the facts or circumstances that *have* been disclosed, the decision as to whether or not that challenge should be accepted is *not* based on what view the parties take or are likely to take, but on what view a reasonable outside observer would take. In other words, when it comes to assessing whether or not a challenge should be accepted, the test is an objective one. This is made clear in the current IBA Guidelines where the following explanation is given:<sup>32</sup>

“(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording ‘impartiality or independence’ derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a ‘reasonable third person test’). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.”

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<sup>29</sup> IBA Guidelines, Explanation to General Standard 3 (2004). (This text was approved by the IBA Council on May 22, 2004).

<sup>30</sup> This rule was in article 7(2) of the ICC Rules of Arbitration that were in force from January 1, 1998 (emphasis added).

<sup>31</sup> ICC Rules of Arbitration in force as from March 1, 2017, art. 11(2).

<sup>32</sup> See IBA Guidelines, *supra* note 23, Explanation to General Standard 2.

After setting out and explaining the ‘General Standards’, the IBA Guidelines go on to look at the kind of relationships or connections that should be disclosed. They do so by establishing what has become known as the ‘traffic lights system’. There are three lists – the ‘Red List’, the ‘Orange List’ and the ‘Green List’. As already indicated<sup>33</sup>, some relationships on the Red List, such as where the arbitrator has a significant financial interest in one of the parties, cannot be waived by the parties. Other items on the Red List, such as where the arbitrator has given legal advice on the dispute to one of the parties, must be declared but the parties may waive any objection to that arbitrator, if they are prepared to do so. Relationships on the Orange List, such as where the arbitrator and counsel of one of the parties are members of the same set of barristers’ chambers must be disclosed, but they may be waived by the parties.<sup>34</sup> Relationships on the Green List need not be disclosed.

The IBA Guidelines are not in any sense binding regulations. They constitute part of what is known as the “soft law” of international arbitration. Most arbitral institutions such as the ICC, will usually consult the IBA Guidelines in looking at any challenge to an arbitrator or prospective arbitrator, but in practice they take care to say that they are not applying the Guidelines in any formal sense. This is as it should be. A formal or mechanistic application of the Guidelines would be unwise. Consider, for example the situation in which an arbitrator or prospective arbitrator was formerly a partner in one of the law firms engaged in the arbitration. The IBA Guidelines state, at 3.3.3 of the Orange List, that disclosure must be made if:

“The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.”<sup>35</sup>

At first sight, this would suggest that an arbitrator or prospective arbitrator who had been a partner of one of the counsel in the case, but who had left the relevant law firm more than three years ago, would *not* need to disclose his or her past relationship with that counsel. However, this is too simplistic a view. A partner in an established law firm (unless he or she makes a habit of flitting from one firm to another) is likely to retain links of respect and friendship with the people with whom he or she was once in partnership. If so, this is surely something that should be disclosed?

Similar considerations are likely to apply to relationships that are on the Green List, which *prima facie* need not be disclosed. What if, to go back to a previous example, a prospective arbitrator is a member of the same tennis club as the counsel for one of the parties? According to the Green List, if any arbitrator (or prospective arbitrator) has a relationship with the counsel for one of the parties through membership of a social organisation, there is no need for disclosure.<sup>36</sup> As a broad general

<sup>33</sup> See IBA Guidelines, *supra* note 23.

<sup>34</sup> The Departmental Advisory Committee (*see* DAC Report, *supra* note 17), in deciding against lack of independence as a ground for removing an arbitrator said that “*it is often the case that one member of a Barristers’ Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law*”. It is now generally accepted, however, that whilst such a relationship may be accepted by the parties, it needs to be disclosed to them so that they have an opportunity to object, if they wish to do so - and in practice, one party frequently does object.

<sup>35</sup> IBA Guidelines, *supra* note 23, Part II, “Orange List” ¶ 3.3.3.

<sup>36</sup> *See Id.* Part II, “Green List” ¶ 4.3.1 (“*Contacts with another arbitrator, or with counsel for one of the parties*”).

rule, this is no doubt correct; but if, for example, the two members regularly play together as doubles partners, or work together in developing the facilities of the club, this should probably be disclosed. It is not only the fact of a relationship or connection that needs to be taken into account. It is also the depth and quality of that relationship.

It should be apparent from what has been said in this article that serious efforts are made to ensure that arbitrators are truly independent and impartial and remain so throughout the arbitral proceedings. This requirement is driven home in the provisions of national laws, in the UNCITRAL Rules and in the rules of the leading arbitral institutions. It is underlined and reinforced by the disclosure requirements that have already been described; and it is policed by the Courts and the arbitral institutions. However, occasionally things go wrong and the requirements for disclosure are ignored. An arbitrator who is not truly independent is appointed as a member of the tribunal – and when the deception is discovered, the whole carefully constructed edifice of the arbitral proceedings is likely to come crashing down. This is what happened in the Tapie Affair.

### III. The Tapie Affair

In December 2016, Madame Christine Lagarde (a highly respected Frenchwoman who has been Managing Director of the International Monetary Fund in Washington since July 2011) appeared on trial in France before the Court of Justice of the French Republic.<sup>37</sup> It was alleged that as a former Minister of the Economy<sup>38</sup> she was guilty of misappropriation of public funds.<sup>39</sup> To be clear, it was not suggested that Mme. Lagarde herself had used public money for her own purposes. But what she *had* done when she was a Minister, was to agree that a dispute, which was in effect, one between a French businessman (Monsieur Bernard Tapie) and a state-owned French bank (Crédit Lyonnais), should be resolved by an arbitral tribunal comprising three French lawyers.

Mme. Lagarde was alleged to have committed two offences. First, it was said that she was guilty of ‘culpable negligence’ in agreeing that a long-running series of disputes between Bernard Tapie and the French bank should be taken away from the French courts, where it had lingered for ten years or more, and should instead be referred to an *ad hoc* tribunal of three arbitrators. Secondly, it was said that she was guilty of ‘culpable negligence’ in failing to challenge the decision of the arbitral tribunal that had awarded substantial damages (plus interest) to the liquidators of the Tapie group of companies, together with 45 million Euros for the alleged ‘moral harm’ that had been done to Bernard Tapie and his wife. The charge against Mme. Lagarde carried the possible penalty of a substantial fine and one year’s imprisonment. It also threatened to ruin her career as head of the International Monetary Fund.

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<sup>37</sup> The Court of Justice of the French Republic [*hereinafter* the “French Court of Justice”] is a special court established to try ministers and former ministers charged with offences committed whilst in office. The court is in some respects a court of peers, being made up of twelve parliamentarians and three judges from France’s Supreme Court, the Court of Cassation.

<sup>38</sup> Mme. Lagarde’s full title was Minister of the Economy and of Finance, Industry and Employment.

<sup>39</sup> The charge was misappropriation of public funds committed by a third party and resulting from the negligence of Mme. Lagarde (contrary to Article 432-16 of the French Penal Code).

For lawyers accustomed to dispute resolution, two very disquieting questions immediately spring to mind. First, how can it be negligent to agree that a commercial dispute should be referred to arbitration rather than to the courts? Secondly, how can it be negligent to fail to challenge an arbitral award, given that in arbitration the parties generally waive their right to recourse against the award (insofar as any such waiver can validly be made)?<sup>40</sup>

As to the first charge against Mme. Lagarde, it is surely uncontroversial to say that arbitration is a well-established and well-respected method of resolving commercial disputes. Indeed, it is a safe bet that at the present time, somewhere in the world, lawyers and businessmen are signing agreements to the effect that if any dispute should arise in the course of their business relationship it will be resolved by arbitration. For example, an Indian company that is entering into a contract in the English language with a Chinese company for the supply of manufactured goods will probably not wish any dispute to be adjudicated in the Chinese courts, where the lawyers, the pleadings and the language will be ‘foreign’ to the Indian company and where the judgment of the local court might well be unfavourable to a ‘foreign’ litigant. For its part, the Chinese company is likely to take a similar view about having its dispute resolved by an Indian court; and so, the two parties will agree that if any dispute does arise between them, it will be submitted to arbitration and that this arbitration will take place in the language of the contract, before a ‘neutral’ tribunal, and in a ‘neutral’ venue. As one leading commentator has said:

*“Although there are many reasons why parties might prefer international arbitration to national courts as a system of dispute resolution, the truth is that in many areas of international commercial activity, international arbitration is the only viable option or as once famously put, ‘the only game in town’.”*<sup>41</sup>

As to the second charge against Mme. Lagarde (that of ‘culpable negligence’ in failing to challenge an award that she herself said had caused her to be “dismayed and stupefied”<sup>42</sup>) it is generally accepted, for better or for worse, that arbitration is a ‘one-stop’ process, in which the parties usually give up their right to challenge the award.<sup>43</sup>

The problem for Mme. Lagarde was that the arbitration to which she agreed was *not* an ordinary commercial arbitration. It was the culmination of a bitter dispute that had been fought out over

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<sup>40</sup> For examples of waivers of any form of appeal or recourse against an arbitral award, *see* the UNCITRAL Arbitration Rules, art. 34(2); the ICC Rules of Arbitration, art. 34(6); and the LCIA Arbitration Rules, art. 26(8).

<sup>41</sup> Toby T. Landau, “*Arbitral Lifelines: The Protection of Jurisdiction by Arbitrators*,” in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 282-287 (ICC Congress Series No. 13, 2007).

<sup>42</sup> The French Court of Justice recorded that Mme. Lagarde was ‘consternée et stupéfaite’ by the Award, *see*, Cour de Justice de la République [Court of Justice of the Republic] Dec. 19, 2016, 2016/001 at 14, [http://www.media.wix.com/ugd/ed2618\\_f7fce5b5f57d45edbbf1937a0128e75c.pdf](http://www.media.wix.com/ugd/ed2618_f7fce5b5f57d45edbbf1937a0128e75c.pdf) [*hereinafter* “Judgment of the French Court of Justice”] (All translations from French are by the author).

<sup>43</sup> Indeed, in an international arbitration, even if the parties do not agree to waive any rights of recourse, the grounds for challenge of an award are usually restricted to issues of procedure or of public policy: *See*, for instance, the UNCITRAL Model Law, art. 34; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. V. For a general discussion of the recognition and enforcement of arbitral awards, *see* REDFERN & HUNTER, *supra* note 27, particularly chs. 10 and 11.

many years in the French courts. The story began in December 1992 when Bernard Tapie<sup>44</sup>, burdened with considerable debts and knowing that he was again about to become a Minister in the French Government, instructed his bank, Crédit Lyonnais<sup>45</sup>, to sell his majority shareholding in Adidas, the German manufacturer of sports equipment. On February 12, 1993, Crédit Lyonnais and an affiliate sold this shareholding for approximately 218 million Euros to a group of investors who then re-sold it for considerably more, in a pre-arranged transaction that was completed in December 1994.

Bernard Tapie (and most of the Tapie group of companies) subsequently went into liquidation. In 1995, the liquidators began proceedings in the French courts against Crédit Lyonnais and a company called Consortium de Réalisation [“CDR”], that had been established to hold the bad debts of Crédit Lyonnais and that was wholly owned by the French Government. In September 2005, the Paris Court of Appeal gave judgment in the liquidators’ favour for damages of 135,000,000 Euros. This represented compensation both for the sale of Adidas at less than its real value and for the “moral harm” that had been sustained by Bernie Tapie and his wife.

The case then went to the highest French Court, the Cour de Cassation. On October 9, 2006, this court struck out parts of the lower court’s decision and referred the case back to the Paris Court of Appeal, but with a different bench of judges. Thus, 11 years after they had begun legal proceedings in the French Courts, Bernard Tapie, his wife and the liquidators of the Tapie Group were still without any final decision on their claim. Faced with this unsatisfactory situation, the liquidators proposed that all the law suits that were being fought in the French Courts between themselves and the French State should be brought to an end and that all matters in dispute between the parties should be referred to an *ad hoc* arbitral tribunal of three arbitrators. This proposal was considered by the Respondents’ team of officials and legal advisers, including Mme. Lagarde, who at the time was Minister of the Economy and of Finance, Industry and Employment. There were arguments for and against the proposal – including the argument that it was in the interests of the French state to continue proceedings in the French courts, where the decision of the Court of Cassation appeared to have strengthened the state’s position,<sup>46</sup> rather than refer the dispute to a private tribunal of private individuals.

Finally, however, it was agreed that the dispute *should* be submitted to arbitration and on November 16, 2007 a ‘Submission Agreement’ (or ‘Compromis’) was signed by the parties. It was agreed that the arbitral tribunal would consist of three French lawyers: Pierre Estoup, a former President of the Versailles Court of Appeal; Jean-Denis Bredin, a distinguished lawyer and a member of the prestigious French Academy; and as President of the arbitral tribunal, Pierre Mazeaud, a former President of the French Constitutional Council. It was also agreed that there would be no appeal from the tribunal’s award (subject to Article 1484 of the French Code of Civil Procedure, which allows an appeal for procedural or other irregularities, including violation by an arbitrator of public

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<sup>44</sup> M. Tapie is a well-known French businessman, politician (he was twice a Minister in the French government) and an occasional actor, singer and TV host.

<sup>45</sup> Crédit Lyonnais was at the time the largest state-owned French bank.

<sup>46</sup> Judgment of the French Court of Justice, *supra* note 42, at 10.

policy). Finally, and perhaps most importantly in view of what transpired later, it was agreed by the parties that any general damages awarded would be capped at the sum of 295 million Euros and that damages for ‘préjudice moral’ (or moral harm) which if awarded would go to Bernard Tapie and his wife personally, would be capped at 50 million Euros.<sup>47</sup>

On July 7, 2008, the arbitral tribunal issued its award.<sup>48</sup> It appears, from reading this award, that the arbitral tribunal took its task seriously as it went through the labyrinthian complications of the “Tapie affair”. The arbitral tribunal concluded, as the Paris Court of Appeal had done in its judgment of September 30, 2005, that the bank had failed in its duty to Bernard Tapie by selling his shareholding in Adidas at substantially less than its true value.<sup>49</sup> In assessing the damages to be paid to the claimants, the arbitral tribunal distinguished between compensation for the bank’s breach of duty (préjudice matériel) and compensation for the ‘moral harm’ (préjudice moral) suffered by Bernard Tapie and his wife.<sup>50</sup> It fixed the former at the sum of 240 million Euros and the latter at the sum of 45 million Euros.<sup>51</sup>

The sums awarded were within the “cap” agreed to by the parties’ lawyers, but they were substantially higher than the damages fixed by the Paris Court of Appeal in its judgment of September 30, 2005 – a judgment that had been partially set aside by the French Court of Cassation.<sup>52</sup> The tribunal’s award was, not surprisingly, greeted with dismay by Mme. Lagarde and her advisers. There were discussions as to whether or not it should be challenged, as to which different opinions were expressed.<sup>53</sup> Finally, it was decided that the award should not be challenged and payments were made as ordered by the tribunal.<sup>54</sup>

This might have been the end of the affair. But it was not. Rumours of malpractice circulated and in September 2008, the Financial Commission of the French Parliament interviewed Bernard Tapie and subsequently Mme. Lagarde about what was becoming known as a ‘Scandale d’Etat’ (a State

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<sup>47</sup> *Id.* at 11.

<sup>48</sup> Arbitrage entre CDR Creances, Consortium de Realisation et Safala MJA, Me Didier Courtoux, M. Bernard Tapie, Mme. Bernard Tapie, Sentence, July 7, 2008, <http://www.lexinter.net/JPTXT4/JP2005/tapie.pdf> [*hereinafter* the “Award”]. In its award, the arbitral tribunal commented that “*Arbitration was chosen because it was the only way of dealing at the same time with all the disputes in issue and this as a last resort, since the parties had waived any appeal*”, see the Award, at 52 (Translation by the author).

<sup>49</sup> *Id.* at 30.

<sup>50</sup> *Id.* at 35, 39.

<sup>51</sup> *Id.* at 43.

<sup>52</sup> The Award of 45,000,000 Euros for ‘moral harm’ contrasts sharply with the nominal sum of one Euro claimed in the Paris Court. To an outside observer, it seems surprising that the defendants, or the lawyers acting for them, were prepared to accept a cap as high as 45 million Euros for ‘moral harm’ where it seems that damages are often simply nominal.

<sup>53</sup> One argument that was raised in the subsequent legal proceedings was that the arbitration was an international arbitration, involving German as well as French interests; and that consequently the Award was an international award that could not be challenged on its merits. (In French law, broadly speaking an arbitration is ‘international’ if the nature of the business is international, even if the parties are resident in the same country.) The argument that the arbitration was ‘international’ was rejected by the Paris Court of Appeal.

<sup>54</sup> Before the French Court of Justice, Mme. Lagarde was asked: “*What was the risk of bringing a challenge [to the Award]?*” She answered: “*That of re-opening fifteen years of legal proceedings and of setting off again on a judicial marathon.*”, *Affaire Tapie: Le procureur soutien Lagarde*, LE MONDE, Dec. 17, 2016 at 14.

Scandal)<sup>55</sup>. Inquiries were begun. In the period from January to March 2013, the financial police conducted raids on the homes and offices of those involved in the Tapie affair, including (amongst others) Bernard Tapie himself, his lawyer, the arbitrator Pierre Estoup and Mme. Lagarde. In June 2013, CDR (the respondents to the arbitration) applied to the Paris Court of Appeal for a review of the award of the arbitral tribunal.

The CDR contended<sup>56</sup>, in presenting its case to the Paris Court of Appeal, that the arbitration was a domestic arbitration and not an international arbitration and so the provisions of the French Civil Code were applicable to it. The CDR went on to contend that the evidence that had come to light as a result of the investigations by the French judicial police from June 2013 onwards, showed that the arbitral award itself was contaminated by fraud. In particular, the winning party and one of its lawyers were alleged to have had a long-term “privileged relationship” with one of the arbitrators, Pierre Estoup, who had failed to disclose that relationship and who had played “*an essential and decisive role in drawing up the award which had been rendered against CDR in a fraudulent manner*”. The Paris Court of Appeal agreed with these contentions. The Court held that the arbitration was not an international arbitration, but a domestic arbitration: it was in essence a dispute involving multiple financial connections between a French bank and its French clients; and it did not involve any international commercial interests.<sup>57</sup> The Court held further that under Article 598 of the French Code of Civil Procedure, an arbitral award could be set aside if it had been brought about by fraudulent conduct on the part of the successful party. In the Court’s judgment, the evidence available from June 2013 onwards revealed that there had been such conduct. In particular, the long-term relationship of Pierre Estoup with the successful party and one of its lawyers had not been disclosed as it should have been, and so his declaration of independence was false.<sup>58</sup> The Court also found that Pierre Estoup had taken a dominant part in the arbitral proceedings, and in so doing had brought about an award that was favourable to the claimants.<sup>59</sup>

In its judgment,<sup>60</sup> the Paris Court of Appeal was severe in its condemnation of M. Pierre Estoup for failing to declare his relationship with Bernard Tapie and with his lawyer. The Court said:

*“... it has been demonstrated that Monsieur Estoup, in defiance of the requirement of impartiality which is the very essence of the arbitral function, has in taking control of the arbitration procedure, in presenting the case in a one-sided manner and then in deliberately and systematically turning the tribunal’s thinking in the direction that favours the interests of the party that he intended to favour in connivance with that party and its counsel, has exercised a determining influence on the arbitral tribunal and has procured its decision by fraud.*”

<sup>55</sup> An investigative journalist who had been following the Tapie Affair since the outset published a book on what he called “*one of the gravest state scandals since the beginning of the V<sup>th</sup> Republic*”, see LAURENT MAUDUIT, *TAPIE – LE SCANDALE D’ÉTAT* (2013). At about the same time, Bernard Tapie himself published a book that he called “*A state scandal, yes! But not what they tell you*”, see BERNARD TAPIE, *UN SCANDALE D’ÉTAT, OUI! MAIS PAS CE QU’ILS VOUS DISSENT*, (Pion, 2013).

<sup>56</sup> See the submissions of the CDR summarised in the decision of the Paris Court of Appeal, cour d’appel [CA] [regional court of appeal] Paris, Feb. 17, 2015, 13/13278 at 8, <http://www.lapres.net/ca170215.pdf> [*hereinafter* “Paris Court of Appeal Decision”].

<sup>57</sup> *Id.* at 15.

<sup>58</sup> *Id.* at 18.

<sup>59</sup> *Id.* at 27.

<sup>60</sup> *Id.*

*For this reason, the fact that the award was made unanimously by the three arbitrators is of no consequence once it is established that one of them has drawn the others into a fraudulent activity.”*<sup>61</sup>

The decision to annul the award was subsequently confirmed by the highest French Court, the Court of Cassation.<sup>62</sup> The Court said that the concealment by an arbitrator of circumstances that were likely to give rise in the minds of the parties to a reasonable doubt as to his impartiality and independence, with the object of favouring one of the parties, constituted fraud that could lead to the quashing of an arbitral award, if that award had been arrived at by such fraudulent conduct on the part of the arbitrator and a party (or that party’s lawyer).<sup>63</sup>

The judgments of the Paris Court of Appeal and the French Court of Cassation in the Tapie Affair serve to underline the importance of independence and impartiality on the part of an arbitrator. The Paris Court of Appeal, as has been seen, described the requirement of ‘impartiality’ as “the very essence of the arbitral function”; and the Court of Cassation condemned the arbitrator in question for concealing circumstances which, if they had been disclosed, could have led the parties to question his independence and consequently his impartiality. On investigation, it became apparent that M. Estoup had connections with Bernard Tapie, and an even closer relationship with one of his lawyers, that went back over many years. If these relationships had been disclosed to the parties, as they should have been, M. Estoup’s appointment as an arbitrator would presumably have been challenged. He would then either have resigned or been dismissed as an arbitrator. But the relationships were not disclosed. M. Estoup was found to have exercised a dominant influence over the other two members of the tribunal to the point (as already stated) that the Paris Court of Appeal said that they had been drawn into a fraudulent activity<sup>64</sup> and the arbitral tribunal’s award was quashed. Thus, a case that on the face of it could have been a winning case became instead a complete disaster.

What then of the allegations of culpable negligence against Mme. Lagarde? The French Court of Justice in its decision of December 19, 2016 decided that Mme. Lagarde had *not* been negligent in agreeing that the dispute should go to arbitration. Given the failure of past attempts to resolve the disputes between the parties, and the cost and delay of the various court actions between the parties that were still ongoing, it was sensible to try to put an end to them by referring all matters in dispute to an arbitral tribunal.<sup>65</sup> However, the French Court of Justice concluded that Mme. Lagarde *had* been negligent in deciding not to challenge an award that she herself had said left her ‘consternated and stupefied’.<sup>66</sup> Nevertheless, having regard to the world financial crisis that at the relevant time

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<sup>61</sup> *Id.*

<sup>62</sup> See Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., June 30, 2016, Bull civ. I, No. 932 (Fr.), [https://www.courdecassation.fr/jurisprudence\\_2/communiqués\\_4309/arbitrage\\_affair\\_adidas\\_30.06.16\\_34753.html](https://www.courdecassation.fr/jurisprudence_2/communiqués_4309/arbitrage_affair_adidas_30.06.16_34753.html) [hereinafter “Decision of the Court of Cassation”].

<sup>63</sup> *Id.* at 8.

<sup>64</sup> See Paris Court of Appeal Decision, *supra* note 56.

<sup>65</sup> Judgment of the French Court of Justice, *supra* note 42, at 14.

<sup>66</sup> *Id.* at 14.

was demanding Mme. Lagarde's full attention, and also given her international reputation, the Court did not consider it appropriate to inflict any punishment on Mme. Lagarde.<sup>67</sup>

#### IV. Conclusion

Lawyers and others who are accustomed to dispute resolution regard arbitration as a reputable and an effective method of resolving disputes. Indeed, it is so where the participants understand what they are doing and play the "only game in town" by the rules of fairness and disclosure. However, when public interest is involved (as for instance in a dispute that involves a state or state entity) the process of arbitration is less readily understood and accepted. Much of the criticism in the French press and elsewhere was derived from the concept that a dispute in which the state might be ordered to make a payment out of public funds was a matter for the state courts which are open to public scrutiny, rather than for a private tribunal of private individuals.

In fact, disputes involving public funds are often determined by arbitral tribunals – for instance, under the ICSID Rules to which reference has already been made. However, if a dispute is referred to arbitration, then whether or not it involves a state entity, and whether or not it involves public funds, it is essential that the members of the arbitral tribunal should be persons of integrity who can be trusted to be (and who can be seen to be) both 'impartial' and 'independent'. In arbitral proceedings, as in the courts of law, justice must not only be done, it must also be seen to be done. This is why the concept of 'independence' of an arbitrator is vitally important. Few recent cases illustrate this as dramatically as the Tapie Affair.<sup>68</sup>

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<sup>67</sup> *Id.* at 16. Subsequently, the governing body of the IMF confirmed its confidence in Mme. Lagarde.

<sup>68</sup> The Global Arbitration Review reported that on May 19, 2017 the Court of Cassation, France's highest court, rejected M. Tapie's appeal against the decision of the Paris Court of Appeal, which had denied his claim against the French state-controlled bank, CER. *See Tapie: the end of the end of the affair?*, GLOBAL ARB. REV. (May 19, 2017).