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6

The arbitral tribunal

1 Introduction

6.1 High quality arbitrators are an essential ingredient of effective arbitration proceedings. As arbitration specialists have noted, '[t]he reputation and acceptability of international arbitration depends on the quality of the arbitrators themselves'.[1] The composition of the arbitral tribunal can significantly affect a range of important factors including whether the arbitration is conducted efficiently and economically, whether the award is susceptible to challenge, and even an individual party's chances of success or failure. Issues surrounding the constitution of the arbitral tribunal therefore deserve special attention.

6.2 This chapter follows the life cycle of an arbitral tribunal chronologically. Section 2 describes how an arbitral tribunal is constituted, including the number of arbitrators and their appointment in multiparty arbitrations. In Section 3 we discuss the process of choosing an arbitrator, whether as chairperson, sole arbitrator or party-nominated co-arbitrator, as well as the qualities and qualifications that are generally desirable for international arbitrators. The formal appointment process is discussed in Section 4. In Section 5 we examine the obligations of arbitrators, such as diligence, impartiality and independence, and disclosure of potential conflicts of interest. Section 6 deals with challenges to arbitrators. Finally, issues relating to the resignation, removal and replacement of arbitrators are addressed in Section 7.

1 A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet & Maxwell, 2004, at para 4–47.

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2 Constitution of the arbitral tribunal

6.3 The main principle guiding the appointment of arbitrators is party autonomy. In their contract or even after a dispute arises, parties are free to agree on the number of arbitrators, how they will be appointed, and who they will be. Where there is no agreement or one party refuses or fails to participate in the constitution of the arbitral tribunal, the applicable arbitration rules or procedural law will provide a fallback mechanism to prevent the constitution process from being frustrated.[2]

6.4 An issue that requires determination prior to constitution of the arbitral tribunal is the number of arbitrators to be appointed. Once the number is agreed or decided, the procedural question of how to constitute the arbitral tribunal arises. Disputes involving more than two parties may require special arrangements to be considered when constituting the arbitral tribunal. This section discusses these three issues in turn.

2.1 Number of arbitrators

6.5 For obvious reasons, the number of arbitrators should be odd – usually one or three, but occasionally five. Parties often specify the number of arbitrators in their arbitration agreement, or agree on it once the dispute has arisen.

6.6 There are several factors that may need to be considered when deciding the number of arbitrators.[3] Appointing a sole arbitrator usually produces significant cost savings because only one arbitrator's fees and expenses have to be paid. A sole arbitrator may also be more time effective. For example, coordinating meetings and hearing times should be easier and decisions should be made faster because the sole arbitrator, in contrast to the chairperson of a three-member tribunal, is not required to deliberate or reach consensus with any other arbitrators. Furthermore, the desire to reach consensus among three arbitrators may sometimes lead to compromised solutions as opposed to straightforward outcomes. In extreme cases, co-arbitrators that have been nominated by one of the parties have been suspected of deliberately sabotaging the arbitration process, by causing delay or otherwise, to provide some advantage or benefit to the nominating party.[4] This is rare because most international arbitrators are highly professional[5] but it can occur when a party selects a party-nominated co-arbitrator for the wrong reasons. This will not occur in sole arbitrator tribunals because individual parties have no right to select a member of the panel (unless all parties agree on that person).

2 See generally O Akseli, 'Appointment of Arbitrators as Specified in the Agreement to Arbitrate', (2003) 20 *Journal of International Arbitration* 247.
3 See generally J Kirby, 'With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated', (2009) 26(3) *Journal of International Arbitration* 337.
4 Ibid., at p. 354, citing numerous references.
5 JD Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 228, at para 10–19.

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6.7 On the other hand, opting for a sole arbitrator means that the outcome of the arbitration will be determined by one person alone. This may increase the risk of misunderstandings and errors. The combined knowledge, skills, expertise, cultural awareness, and perhaps even languages of three arbitrators may prove beneficial to the quality of the decisions and the parties' confidence in the process.[6] Perhaps the most compelling reason for preferring three arbitrators is that each side usually is entitled to nominate one member of the arbitral tribunal.[7] Moses has observed that 'it is generally believed that the award is more likely to be within parties' expectations when considered by three arbitrators and that unusual or inexplicable awards are less likely to occur'.[8] After making a similar observation, Redfern and Hunter suggest that '[i]t follows that the ultimate award is more likely to be acceptable to the parties'.[9]

6.8 ICC statistics show that when the number of arbitrators is determined by party agreement, the number agreed is usually three. In 2008, a three-member tribunal was appointed in 61% of ICC arbitrations. In 93.5% of those cases, the number of three was determined by party agreement rather than by the ICC Court.[10] This is different for sole arbitrator cases. In the ICC arbitrations where there were sole arbitrators in 2008, the parties decided the number in only 69.4% of cases. In the remaining 30.6% of cases, it was the ICC Court which decided that there would be a sole arbitrator.[11]

6.9 Where parties agree on a number of arbitrators, they should be careful to record that agreement clearly. Arbitration agreements occasionally contain apparent inconsistencies where the plural 'arbitrators' is used interchangeably with 'arbitrator,' leaving ambiguity as to what the parties intended. Although party choice as to the number of arbitrators will be respected,[12] that choice must first in fact be exercised. An Indian Supreme Court decision in 2009 found that an arbitration clause which merely referred to 'arbitrator(s)' without specifying a number did not amount to an agreement for a three-person arbitral tribunal.[13]

6.10 Absent party choice, most arbitration laws and rules provide a default number of arbitrators or a mechanism for determining the number. A brief survey of the laws and institutional rules in the Asia-Pacific reveals variation among the approaches.

6 Ibid., para 10–18.
7 Redfern, Hunter, et al, op. cit. fn 1, para 4–17.
8 M Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, at p. 117.
9 Redfern, Hunter, et al, op. cit. fn 1, para 4–187.
10 Article 8(2) of the ICC Rules provides: 'Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.'
11 J Fry and S Greenberg, 'The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases', (2009) 20(2) *ICC International Court of Arbitration Bulletin* 12, at p. 15.
12 In the Singaporean decision of *NCC International AB v Land Transport Authority of Singapore* [2008] SGHC 186, the Singapore High Court found that Rule 5.1 of the SIAC Rules did not give the SIAC the discretion to alter the number of arbitrators where the parties have already agreed.
13 *Sime Darby Engineering SDN BHD v Engineers India Ltd*, Arbitration Petition 3/2009.

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6.11 The Model Law in Article 10 provides for a default of three arbitrators.[14] Many jurisdictions, such as Australia, the Philippines, South Korea, Sri Lanka, and Bangladesh have adopted the Model Law approach without amendment. Malaysia defaults to three arbitrators for international and one arbitrator for domestic arbitration.[15] The position in Japan is slightly different. Although providing a basic default of three arbitrators where there are two parties, if it is a multiparty arbitration the question of the number of arbitrators can be referred to a court.[16] By contrast, Singapore, although adopting the Model Law, altered Article 10 of the Model Law to provide that the default should be one arbitrator.[17] Likewise, a sole arbitrator default has been adopted by India.[18] Hong Kong has specifically vested the power in the HKIAC to determine the number of arbitrators when the parties have failed to do so.[19] Article 30 of the Arbitration Law of China does not specify a default number; it simply stipulates that an arbitral tribunal may be composed of one or three arbitrators.

6.12 Turning to institutional rules, again there is variation as to the fallback number of arbitrators. There are broadly four approaches which can be distilled from rules in this region. The most common is that found in its simplest form in Rule 23 of the JCAA Rules and Article 11 of the KCAB International Rules: the default is one arbitrator, but a party can request the institution to consider whether, given the particulars of the dispute, three arbitrators would be better. A slight variation of this approach is found in Rule 5.1 of the SIAC Rules, where SIAC's Registrar may decide in favour of three, rather than the default of one, where it appears in the light of 'the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators'.

6.13 The second approach does away with the default of one arbitrator. An example is Article 8 of the ACICA Rules, which gives ACICA discretion to choose the number after taking into account all relevant circumstances. The HKIAC Rules provide that the HKIAC Council will decide the number of arbitrators absent a choice by the parties. The HKIAC Rules enumerate a detailed procedure and several factors to be considered in deciding the number of arbitrators:

> *Article 6 – Number of Arbitrators*
>
> 6.1 If the parties have not agreed upon the number of arbitrators, the HKIAC Council shall at the request of a party decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account the factors set out in Rule 9 of the 'Arbitration (Appointment of Arbitrators and Umpires) Rules' made under the Hong Kong Arbitration Ordinance. These include:

14 Model Law Article 10 provides
(1) The parties are free to determine the number of arbitrators.
(2) Failing such determination, the number of arbitrators shall be three.
15 Malaysian Arbitration Act 2005 Section 12(2).
16 Japanese Arbitration Act 2003 Article 16.
17 Singapore International Arbitration Act Section 9.
18 Indian Arbitration and Conciliation Act 1996 Section 10.
19 Hong Kong Arbitration Ordinance 1963 Section 34C(5).

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(a) the amount in dispute;
(b) the complexity of the claim;
(c) the nationalities of the parties;
(d) any relevant customs of the trade, business or profession involved in the said dispute;
(e) the availability of appropriate arbitrators; and
(f) the urgency of the case.

6.2 Before deciding on the number of arbitrators to be appointed, the HKIAC Council shall allow the other party or parties to the arbitration to serve on the HKIAC Secretariat brief written responses in support of their contention as to the number of arbitrators appropriate for their dispute. Where no such reasons are served on the HKIAC Secretariat within 14 days of the day on which a request for responses has been made by the HKIAC Secretariat, the HKIAC Council may proceed with the decision.

6.14 A third and very unusual approach is seen in Rule 22 of the Indian Council of Arbitration Rules, where the number of arbitrators is determined by the amount in dispute and whether the parties have paid their cost deposit:

Rule 22
The number of arbitrators to hear a dispute shall be determined as under:
(a) Where the claim including determination of interest, if any, being claimed up to the date of commencement of arbitration in terms of Rule 15, does not exceed Rs. One crore and where the arbitration agreement does not specify three arbitrators, the reference shall be deemed to be to a sole arbitrator, unless the parties to the dispute agree to refer the dispute to three arbitrators within thirty days from the date of notification of request for arbitration.
(b) Where the claim including determination of interest, if any, being claimed up to the date of commencement of arbitration in terms of Rule 15 exceeds Rs. One crore, the dispute will be heard and determined by three arbitrators, unless the parties to the dispute agree to refer the dispute to a sole arbitrator within thirty days from the date of the notification of the request for arbitration.
(c) Where three arbitrators have to be appointed as per the above sub-rule and any of the parties to the dispute fails to make the necessary deposit towards the cost and expenses of arbitration, instead of three arbitrators, the Registrar may appoint a sole arbitrator, where the claim is up to One crore. Where the claim is for more than Rs. One crore, the Registrar may appoint arbitrator/s on behalf of the Respondent as well the as Presiding Arbitrator.

6.15 The problem with rules (or agreements) which determine the number of arbitrators based on the value of the dispute is that the value in dispute may not be clear at the outset of a case. For example, the claimant may be seeking unquantified or declaratory relief and/or the respondent may not yet have filed its counterclaims.

6.16 The fourth approach, reflected by way of example in Article 5 of the PDRCI Rules, is simply to state a default of three, like the Model Law.

6.17 It is interesting to see how the UNCITRAL Arbitration Rules have evolved in that respect. The 1976 version provides for a default number of three arbitrators. However, it appears likely that there will be a slight change. The default position under the 1976 Rules has been retained, subject to a new discretion granted to

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the Appointing Authority to appoint a sole arbitrator at the request of a party. This discretion is limited to certain circumstances, such as the failure of a respondent to participate in constituting the arbitral tribunal. This approach overcomes the problem in the 1976 rules that where the respondent is not participating the claimant can be left with no option but to proceed with an unnecessarily expensive three-member arbitral tribunal to decide a small case.

2.2 Procedure for constituting the arbitral tribunal

6.18 All institutional arbitration rules recognise the principle of party autonomy by allowing parties to agree on the procedure for constituting the arbitral tribunal and to participate in its constitution. Should party autonomy fail, all rules provide a default process to ensure that the arbitral tribunal is constituted and that the arbitration proceeds. The default rules prevent a recalcitrant party from frustrating the process by, for example, refusing to nominate an arbitrator. By adopting arbitration rules in their arbitration agreement, the parties voluntarily agree to this default process. The appointment of arbitrators by an 'appointing authority' or institution, as specified in the arbitration rules, is therefore entirely consistent with party autonomy.

6.19 Typically, if the parties fail to agree on an arbitrator (in the case of a single arbitrator) or if one party fails to nominate/appoint a co-arbitrator, the arbitral institution will make the appointment. In a three-person arbitral tribunal, each side usually nominates one arbitrator and the party-nominated co-arbitrators may be charged with jointly appointing the chairperson. If the co-arbitrators are unable to agree, that responsibility may again shift to the institution, depending on its rules. Rules 6 and 7 of the 2007 SIAC Rules are an example of this process:

> *Rule 6: Sole Arbitrator*
>
> 6.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator. Where parties have reached an agreement on the nomination of a sole arbitrator, Rule 5.3 shall apply.
>
> 6.2 If within 21 days after receipt by the Registrar of the Notice of Arbitration made in accordance with Rule 3, the parties have not reached an agreement on the nomination of a sole arbitrator, the Chairman [of SIAC] shall make the appointment as soon as practicable.
>
> 6.3 A decision of the Chairman [of SIAC] under this Rule shall not be subject to appeal.
>
> *Rule 7: Three Arbitrators*
>
> 7.1 If three arbitrators are to be appointed, each party shall nominate one arbitrator.
>
> 7.2 If a party fails to make a nomination within 21 days after receipt of a party's nomination of an arbitrator, the Chairman [of SIAC] shall proceed to appoint the arbitrator on its behalf.
>
> 7.3 Unless the parties have agreed upon another procedure for appointing the third arbitrator, the third arbitrator who shall act as the presiding arbitrator shall be appointed by the Chairman [of SIAC]. Any nomination made pursuant to the

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procedure agreed to by the parties shall be subject to confirmation pursuant to Rule 5.3.

7.4 A decision of the Chairman [of SIAC] under this Rule shall not be subject to appeal.

6.20 If the parties have opted for ad hoc arbitration, reference will have to be made either to their chosen ad hoc rules or to the applicable procedural law. Article 11 of the Model Law provides the following mechanism for the constitution of the arbitral tribunal:

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties. (Emphasis added)

6.21 As can be seen in the Model Law extract above, Article 11(3)(a) refers the appointment responsibility to 'the court or other authority specified'. This is an extremely important task and the different jurisdictions in this region have designated a variety of persons and institutions to perform it. In Singapore, the Chairman of SIAC has been designated in the legislation as the person to select default arbitrators.[20] Similarly in Malaysia the Director of the KLRCA is given

20 Singapore International Arbitration Act 2002 Section 8(2).

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the responsibility, however should the director be unable or fail to make the appointment, parties can approach the High Court.[21] The Philippines is another jurisdiction in which a specific person is nominated, in this instance the 'National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative',[22] failing which the parties can turn to a Regional Trial Court.[23] In Hong Kong, the appointing power under the legislation is referred to HKIAC as an institution.[24] The Indian legislation nominates 'the Chief Justice of India or the person or institution designated by him'.[25] Australia,[26] New Zealand[27] and Japan[28] each designate courts.

6.22 Parties sometimes identify a specific individual or individuals as arbitrator(s) in their arbitration clause in a contract.[29] It is not advisable to attempt to select arbitrators before a dispute has arisen. While a perceived advantage is that the arbitral tribunal composition will be faster and more certain, difficulties arise when the named person passes away in the interim period or for some other reason is unable or unwilling to act once a dispute arises. Additionally, that person might, in the course of his or her personal life or professional activities since the arbitration agreement was made, have developed a conflict of interest.

6.23 In *Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd*[30] the parties' arbitration agreement provided that the arbitrator would be the marketing director of one of the parties or another officer of that party designated by the marketing director. It stated that all disputes:

> arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Director (Marketing) of the Corporation or of some officer of the Corporation who may be nominated by the Director (Marketing). The Vendor will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an Officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference.

6.24 This rather draconian clause, at least for the party opposing the corporation, was upheld by the Indian Supreme Court which ruled:

> In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person

21 Malaysian Arbitration Act Section 13.
22 Philippines Alternative Dispute Resolution Act Section 26.
23 Philippines Alternative Dispute Resolution Act Section 27.
24 Hong Kong Arbitration Ordinance Section 12.
25 Indian Arbitration and Conciliation Act Section 11. With respect to this section, see the Indian Supreme Court decision of *Citation Infowares Ltd v Equinox Corporation*, Arbitration Application No. 8 of 2008, which considered whether the Chief Justice could appoint an arbitrator even where foreign law governed the main contract.
26 Australian International Arbitration Act 1974 Section 18. However following the introduction of amendments to the Act, provision will be made for the government to designate a prescribed authority (such as ACICA) without requiring further legislative change.
27 New Zealand Arbitration Act 1996 Article 11, Schedule 1.
28 Japanese Arbitration Law 2003 Article 17.
29 See, e.g. the Indian Supreme Court case of *Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd* (2007) 5 SCC 304 discussed below.
30 (2007) 5 SCC 304 (Indian Supreme Court).

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> nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act . . . .

6.25 Rather than identifying a specific arbitrator in the arbitration agreement, a better practice is to identify in advance an appointing authority (which could even be an individual identified by his or her position) or institution charged with selecting arbitrators if the parties cannot agree – an example may be the chairperson of the Chartered Institute of Arbitrators. However, the most common and effective approach is by reference to a set of arbitration rules as described above.

6.26 Because the constitution of the arbitral tribunal can be used as a tactical instrument, it is not surprising that the appointment of arbitrators can be a source of great controversy. At the heart of this controversy is party involvement in the selection process. The benefits of joint selection of arbitrators by all parties can rarely be doubted. Arbitrator selection by an individual party is, however, a potentially different matter. As noted above, it is common for each side in an arbitration to select one of the co-arbitrators. One key advantage of this approach is that the power to select an arbitrator should give the nominating party confidence in the arbitral tribunal. A perceived disadvantage is that the arbitrator could consciously or subconsciously favour the nominating party. As discussed below,[31] parties may nominate co-arbitrators who they believe will assist their case. Nonetheless, arbitrators have mandatory obligations of impartiality and independence.

2.3 Multiparty arbitrations

6.27 As noted above, where three arbitrators are required it is usual that each party nominates one arbitrator and the third, who will act as chairperson, is chosen by the two nominated co-arbitrators, an arbitral institution or some other agreed process. Uncertainty can arise in arbitrations involving more than two parties, because if each party were to nominate an arbitrator the arbitral tribunal would comprise as many arbitrators as there are parties, plus a chairperson.

6.28 There has been very substantial growth in multi-party international arbitrations over the last 10–20 years. Arbitrations involving more than one party now account for approximately one-third of ICC arbitrations. In 2009, 233 ICC arbitrations (28.5%) involved more than two parties. Out of these 233 cases, 206 (88.4%) involved between three and five parties, 21 (9%) involved between six

31 See Section 3.2.2 below.

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and 10 parties, and six (2.6%) involved more than 10 parties. One case filed with the ICC in 2009 had 19 different parties.

6.29 Prior to 1992, unless there was a contrary agreement by the parties, multiple claimants or respondents were ordinarily required to act as one during the composition of the arbitral tribunal. In other words, if a claimant commenced arbitration against two respondents, those two respondents would jointly be expected to nominate one co-arbitrator, whereas the claimant was entitled to nominate the other co-arbitrator. This would effectively mean that the single claimant could choose any arbitrator it wished whereas the two respondents may have to reach a compromise in order to nominate a mutually agreeable arbitrator. This could be seen as an unfair advantage for the claimant.

6.30 In the now famous French *Dutco* case,[32] two respondents argued that because they had different interests they should each be allowed to appoint an arbitrator. The ICC arbitration agreement in that case provided for two party-nominated arbitrators, one nominated by each side. The third and presiding arbitrator was to be selected by the co-arbitrators. The multiple respondents agreed under protest to appoint one co-arbitrator jointly and then later challenged the award, arguing that the arbitral tribunal had been improperly constituted. The French Cour de Cassation agreed, finding that equality in the appointment process was fundamental to arbitration and, under the particular circumstances, equality was lacking in the disputed appointment process.

6.31 This decision prompted the ICC, the next time it amended its arbitration rules, to modify the appointment procedure in multi-party cases in order to ensure equality. Consequently, Article 10 of the 1998 ICC Rules provides that if the multiple claimants or multiple respondents cannot agree on a candidate for joint nomination, then the ICC Court may appoint all three arbitrators – thus restoring equality because neither side is permitted to choose an arbitrator.[33] This change triggered amendments to other institutional arbitration rules throughout the world. Rules changes were made despite the fact that it appears that only one other court – China's Supreme People's Court – has ever considered a similar issue.[34] The decision of the Chinese court is consistent with the *Dutco* principle that parties cannot waive in advance their right to participate in the constitution of the arbitral tribunal.[35]

32 *Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Co*, French Cour de Cassation, First Civil Chamber, 7 January 1992.

33 Article 10 of the ICC Rules provides: '(1) Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9. (2) In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act *as* chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.'

34 This was a point noted by the Supreme People's Court which found an arbitral clause which deprived a party of a right to participate in the appointment process was invalid because it offended equality, as cited in Wang Sheng Chang, 'Formation of the Arbitral Tribunal', (2001) 17(4) *Arbitration International* 401, at Section II(b).

35 On this issue, it is interesting to note that Article 24 of the CIETAC Rules seems to be inconsistent with the *Dutco* decision because the Chairman of CIETAC is only concerned with appointing the arbitrator on behalf of any joint parties that have not been able to agree.

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6.32 It seems that at least one aspect of the *Dutco* principle does not apply in India. As previously discussed, in *Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd*[36] the Indian Supreme Court upheld an arbitration clause contained in a contract which designated the marketing director of one of the parties as the arbitrator, and expressly denied the opposing party the right to object to the independence of that arbitrator on that ground. This offends the *Dutco* principle in the sense that the Indian courts allowed the parties to preclude, in advance of the arbitration, one side from objecting to the identity of the arbitrator.

6.33 The main concern of the *Dutco* principle is to ensure equality in multi-party arbitrations. Two aspects of equality must be respected. The first is that all parties to the arbitration agreement must agree to and be aware of the appointment process. This may seem a somewhat trite observation. However, this was missing among the *Dutco* participants. The ICC Rules in force at that time did not contain a specific procedure for multiparty arbitrations, so no process had been agreed. Second, all parties should be treated equally meaning that, in certain circumstances, if one party loses the right to nominate an arbitrator so should all. As noted above, that principle was reflected in Article 10 of the 1998 ICC Rules.

6.34 Most major sets of international arbitration rules now have specific provisions on the appointment process for multi-party arbitrations.[37] A typical example is Article 11 of the ACICA Rules:

> *11 Appointment of Arbitrators in Multi-Party Disputes*
>
> 11.1 For the purposes of Articles 9 and 10, the acts of multiple parties, whether as multiple Claimants or multiple Respondents, shall have no effect, unless the multiple Claimants or multiple Respondents have acted jointly and provided written evidence of their agreement to ACICA.
>
> 11.2 If three arbitrators are to be appointed and the multiple Claimants or multiple Respondents do not act jointly in appointing an arbitrator, ACICA shall appoint each member of the Arbitral Tribunal and shall designate one of them to act as Chairperson, unless all parties agree in writing on a different method for the constitution of the Arbitral Tribunal and provide written evidence of their agreement to ACICA.

6.35 While Article 11 of the ACICA Rules is similar to Article 10 of the ICC Rules, one difference is the discretion left to the ICC Court not to appoint all three members of the arbitral tribunal, whereas the ACICA Rules leave no such discretion. This is clear from the word 'shall' in Article 11.2 of the ACICA Rules as compared to 'may' in Article 10(2) of the ICC Rules.

36 (2007) 5 SCC 304 (Supreme Court of India). See also the description of aspects of this case above, at Section 2.2.

37 ACICA Rules Article 11; CIETAC Rule 24; HKIAC Rules Article 8.2; KCAB International Rule 4; 2010 SIAC Rules Rule 9; ICC Rules Article 10; and 2010 UNCITRAL Arbitration Rules Article 10. The JCAA Rules do not provide for a specific rule in the case of multiple claimants or respondents, but do expressly state in Rule 10(2) that 'Multiple claimants or respondents shall be deemed to be one party for purposes of the appointment of arbitrators'.

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6.36 Interestingly, the CIETAC Rules do not follow this approach. Article 24(2) provides that where the multiple claimants or multiple respondents cannot agree on an arbitrator, CIETAC will appoint only the arbitrator for the side that could not agree on one. It will not appoint all three arbitrators.[38]

3 Choosing an arbitrator

6.37 The autonomy of parties to choose arbitrators is a frequently cited benefit of arbitration.[39] A poor choice will extinguish this benefit, and may even be detrimental to the party that made the choice. It has been suggested, not surprisingly, that 'when selecting arbitrators a party's objective should be, from the beginning, to obtain the majority of arbitrators which it wants'.[40] By implication this includes the choice of the chairperson. As noted above arbitration rules usually refer the selection of the chairperson to either the co-arbitrators or an institution, and as such the choice is often beyond direct party involvement. However, counsel representing clients have developed strategies to influence that choice indirectly.[41]

6.38 When considering what is desired in an arbitrator, it is useful to distinguish between qualifications and qualities. Qualifications should be given its natural meaning, which involves some kind of formal, recognised training. Qualities, on the other hand, are attributes. These may not be tangible or easily definable, as they may be something esoteric such as the manner in which an arbitrator approaches a problem. Qualifications and qualities are discussed in turn.

3.1 Qualifications of an international arbitrator

6.39 As a general rule there are no formal qualifications necessary to become an international arbitrator. Legal knowledge and experience is not required but is highly desirable. This does not necessarily mean experience practising as a lawyer or even the attainment of a law degree. Many arbitral institutions conduct courses for non-legal professionals which include a legal component. Legal knowledge may also be gained by other professionals through experience sitting as an arbitrator. Most arbitration laws and rules do not provide any required qualifications for arbitrators. Certain exceptions are mentioned below.

38 Article 24(2) of the CIETAC Rules provides: 'Where the Claimant side and/or the Respondent side fail to jointly appoint or jointly entrust the Chairman of the CIETAC to appoint one arbitrator within fifteen (15) days from the date of receipt of the Notice of Arbitration, the arbitrator shall be appointed by the Chairman of the CIETAC.'

39 See generally D Bishop and L Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration', (1998) 14 *Arbitration International* 395, at p. 395.

40 CR Seppälä, 'Recommended Strategy for Getting the Right International Arbitral Tribunal: A Practitioner's View', 6 *Transnational Dispute Management*, Issue 1, March 2009.

41 See the discussion below, and see generally, ibid.

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6.40 First, it has been suggested that as a result of what may have been a legislative oversight, only licensed Japanese lawyers (bengoshi) can sit as arbitrators in Japan. The problem arises because the Japanese Lawyers Law[42] covers arbitration and the Arbitration Law did not create an exception for arbitrators. Commentary suggests that a lawyer not licenced in Japan who acts as an arbitrator would not violate the Lawyers Law provided it was considered a legitimate business conduct.[43] In practice, it is not uncommon for lawyers who are not qualified in Japan to sit as international arbitrators in arbitrations seated in Japan. We are not aware of any case where this has given rise to a successful challenge against the arbitrator or the award.

6.41 In North Korea, requirements for performing the role of an arbitrator (referred to in the legislation as a judge) are set out in Article 19 of the External Arbitration Law. Article 19(4) is quite broad but the wording 'if needed' suggests this is to be an option of last resort:

> *Article 19*
> The judges can be a person of the following qualifications:
> 1. A member of the arbitration committee concerned.
> 2. A lawyer or economic expert who is able to examine and solve a dispute.
> 3. A person who is experienced as an attorney or a judge.
> 4. A well-known overseas Korean compatriot or a foreigner experienced in arbitration affairs, if needed.

6.42 Indonesia also stipulates particular requirements in its Arbitration and Dispute Resolution Act:[44]

> *Article 12*
> (1) The parties who may be appointed or designated as arbitrators must meet the following requirements:
> a. Being authorised or competent to perform legal actions;
> b. Being at least 35 years of age;
> c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties;
> d. Having no financial or other interest in the arbitration award; and
> e. Having at least 15 years experience and active mastery in the field.
> (2) Judges, prosecutors, clerks of courts, and other government or court officials may not be appointed or designated as arbitrators.

6.43 One may wonder how North Korean courts determine that an overseas compatriot is 'well known' and how Indonesian courts determine that a person has 'active mastery in the field'. Other jurisdictions require particular qualifications of arbitrators in domestic arbitrations but not the same, or at all, in international

42 Article 72 Bengoshi Ho, Law No. 205 of 1949.
43 T Nakamura, 'Commercial Litigation/Arbitration', in L Nottage (ed), *Japan Business Law Guide*, vol. 2, CCH Asia, looseleaf service, paras 83–570.
44 Article 12 of the Indonesia Arbitration and Dispute Resolution Act (Law No. 30 of 1999).

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arbitrations.[45] Taiwanese law requires arbitrators in general to receive certain training subject to various exemptions.[46]

6.44 It has been suggested that it is not possible to appoint a bankrupt person as arbitrator in South Korea.[47] However, there does not appear to be a clear prohibition on appointing a bankrupt to the role. The rationale for the exclusion may be a legal incapacity to contract. If this is the reason then it should not be taken as a general rule, because a bankrupt's ability to contract may vary from jurisdiction to jurisdiction. It would, however, seem prudent to avoid appointing a bankrupt arbitrator if possible.

6.45 Rather unusually, the Rules of Arbitration of the Bangladesh Council of Arbitration specifically provide for 'disqualifications' (including insolvency):

> *8.6 Disqualifications*
>
> 8.6.1 An Arbitrator who has attained the age of 75 years or more will automatically cease to be a member of the Panel of Arbitrators. A person who has been appointed as an Arbitrator in a reference before attaining the age of 75 years may continue to serve as an Arbitrator till pronouncement of the final Award in the said reference pending before the Council.
>
> 8.6.2 An Arbitrator shall also ipso facto be disqualified to serve as an Arbitrator if:
>
> a. he is found to be of unsound mind by a court of competent jurisdiction; or
> b. he is adjudged as insolvent; or
> c. he is sentenced to a term of imprisonment exceeding six months for any criminal offence involving moral turpitude; or
> d. by notice in writing to the Council he expresses unwillingness to serve as an Arbitrator; or
> e. his name is deleted from the list of Panel by the Council under Rule 8.4.

6.46 Despite the various requirements that have been cited in the previous paragraphs, it should be recalled that most arbitration laws in the Asia-Pacific do not require any particular qualifications for arbitrators. The qualifications of arbitrators can, however, sometimes affect the manner in which courts may review any resulting arbitral award. This is true regardless of whether these qualifications were expressly sought by the parties or specified in the law or rules. The New Zealand courts have had cause to make observations on this point. In the 2000 Court of Appeal decision of *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*[48] it was noted:

> Where the arbitrator chosen by the parties is legally qualified, it will be harder to obtain leave to appeal the arbitral decision on a question of law. As Lord Donaldson of Lymington MR stated in *Ipswich Borough Council v Fisons PLC* [1990] at p 724, if the chosen arbitrator is a lawyer and the problem is purely one of law, the parties must be assumed to have had good reason for relying on that lawyer's expertise.

45 See, e.g. Article 8 of the Arbitration Law of Taiwan.
46 Ibid.
47 Kyu Wha Lee and Yong Joon Yoon, 'Korea', *The International Comparative Legal Guide to International Arbitration 2006* 258, at p. 260.
48 [2000] 3 NZLR 318, at 334.

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6.47 In 2004, a further statement was made in another New Zealand case, *Methanex Motunui Ltd v Spellman*.[49] Although lengthy it is worthwhile extracting the relevant passage:

> It seems clear that as a general principle, and in the absence of agreement to the contrary, lay arbitrators must confine their fact finding to the information provided by the parties. It seems implicit in the authorities that this is subject only to those matters that would have been the subject of judicial notice in Courts of general jurisdiction, there being no reason for requiring arbitrators to be more blinkered than Judges in that respect. But with that qualification, lay arbitrators must draw their facts from evidence provided by the parties.
>
> The position is different where arbitrators have been chosen for their expertise in the subject-matter of the dispute. Even without express agreement on the subject, it is presumed that such arbitrators can draw on their knowledge and experience for general facts, that is to say facts which form part of the general body of knowledge within their area of expertise as distinct from facts that are specific to the particular dispute: *Zermalt Holdings SA v Nu-life Upholstery Repairs Ltd* [1985] 2 EGLR 14. An arbitrator appointed for his or her special knowledge, skill, or expertise, is entitled to draw upon those sources for the purpose of determining the dispute and need not advise the parties that he or she is doing so: *Mediterranean and Eastern Export Co and Checkpoint Ltd v Strathclyde*.
>
> In the absence of agreement to the contrary, not even experts may rely upon their extraneous knowledge of the specific events in question, whether or not derived from independent work or investigations they may have carried out: *F R Waring (UK) Ltd v Administracao Geral Do Acucar E Do Alcool EP* [1983] 1 Lloyd's Rep 45. But otherwise objectionable fact finding by an expert arbitrator may be rendered acceptable if notice and opportunity to respond is given to the parties.

6.48 Similarly in 2006 the Supreme Court of Victoria observed:[50]

> the standard to be applied in considering the sufficiency of an arbitrator's reasons depends upon the circumstances of the case including the facts of the arbitration, the procedures adopted in the arbitration, the conduct of the parties to the arbitration and the qualifications and experience of the arbitrator or arbitrators. For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge's reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer.

6.49 Although this case concerned a domestic arbitration governed by the Victorian Commercial Arbitration Act, it had various international elements. The Victorian Act specifically requires reasons in arbitral awards,[51] and allows a challenge on

49 [2004] 1 NZLR 95, at 135 (New Zealand High Court).
50 *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402, at 26. See also Chapter 8, Section 3.2.
51 Section 29(1)(c) of the Victorian Commercial Arbitration Act 1984. A similar, though not identical requirement, is found in Article 31 of the Model Law.

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the basis of an error of law on the face of the award.[52] When dismissing the subsequent appeal, the Court of Appeal added:[53]

> Furthermore, in the usual course of events, disputants choose their arbitrators on the basis of qualifications, knowledge or a skill which is fitted to the nature of the dispute, and so to preparing the type of determination which is appropriate. Disputants are also likely to adopt a form of arbitral proceeding which is consonant with those requirements.

6.50 The arbitration agreement may require that arbitrators possess specific qualifications (such as an engineering degree or expertise in a particular industry). If the stated qualification is drafted in mandatory terms, an arbitrator who does not possess it could be challenged. Alternatively, the award could be challenged or its enforcement could be refused on the basis that the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement.[54]

6.51 It is usually preferable not to provide for any strict qualifications of arbitrators in the arbitration clause as this may unduly burden the appointment process once a dispute arises. Unusual qualifications, or combinations of qualifications, may severely limit the number of potential candidates. Furthermore, the specified qualifications may not be necessary or even useful in all cases. For example, the parties to a construction contract might specify that all arbitrators must be engineers with a certain speciality. These engineers might not be suitable if the dispute concerns legal or commercial issues relating to the contract, rather than technical matters. It is better that qualifications specified in arbitration agreements are expressed as being desirable rather than mandatory.[55] Further qualifications, including mandatory qualifications, could be specified by agreement of the parties once the dispute has actually arisen.

3.2 Qualities of an arbitrator

6.52 Qualities of an arbitrator concern the individual's attributes. There are a number of generic attributes relevant to most arbitrators, such as language abilities and experience. Beyond that, a distinction can be drawn between qualities that are desirable in a chairperson or sole arbitrator, compared to those desirable in a party-nominated co-arbitrator. These are addressed below.

6.53 Furthermore, it is important to consider not only the individual members of the arbitral tribunal but also the collective qualities of the arbitral tribunal as a whole[56] to deal with the disputed issues, cultural differences and expectations of the parties. Cultural adaptability is maximised when a three-member

52 Section 38 of the Victorian Commercial Arbitration Act 1984.
53 *Oil Basins Ltd v BHP Billiton Ltd* (2007) VSCA 255, at 58. The judgment in this case also usefully demonstrates the importance of knowing the unique characteristics of the *lex arbitri* in any given case. The court distinguishes many of the appellants' arguments on the basis that the English Arbitration Act is different from the Victorian Commercial Arbitration Act.
54 See generally Chapter 9 concerning the challenge and enforcement of arbitral awards.
55 For a discussion of what should and should not be included in arbitration agreements, see Chapter 4.
56 R Goodman-Everard, 'Cultural Diversity in International Arbitration – A Challenge for Decision-makers and Decision-making', (1991) 7(2) *Arbitration International* 155, at p. 155.

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arbitral tribunal includes arbitrators of three different nationalities.[57] The diversity of nationalities brings to the panel a richness of legal experience and training, languages and cultures. The combined skills and backgrounds of the three arbitrators increases the prospects that all parties' arguments will be thoroughly understood and that the procedure and outcome will take into account the international character of the arbitration.

3.2.1 Chairpersons and sole arbitrators

6.54 The chairperson must be fair and be seen to be fair so as to inspire and maintain the confidence of the parties and co-arbitrators. He or she must also have an ability to control the parties, manage the co-arbitrators and conduct the proceedings efficiently.[58] The potential for obstructionist behaviour from parties, or even sometimes co-arbitrators, is a real possibility in international commercial arbitration, and a good chairperson should therefore be able to respond to this behaviour. In addition, the chairperson should be particularly capable of understanding and analysing legal issues and problems. This applies to both substantive and procedural legal issues. Chairpersons are frequently chosen because of their experience with the law and practice of international arbitration itself.[59] Overall, the most significant quality a chairperson can have is to inspire confidence in the arbitral process.

6.55 Arbitration rules frequently invest extra powers in the chairperson vis-à-vis the co-arbitrators. For example, Article 17.3 of the ACICA Rules states in part that '[q]uestions of procedure may be decided by the chairperson alone . . . '.[60] A well-organised person with good managerial skills would therefore be a more desirable candidate than a disorganised and curt person. Similarly, but more importantly, the presiding arbitrator is often empowered to deliver the award alone where a majority decision cannot be reached. For example, CIETAC Rule 43.5 states that 'Where the arbitral tribunal cannot reach a majority opinion, the award shall be rendered in accordance with the presiding arbitrator's opinion'.[61]

6.56 In contrast, neither the Model Law nor the UNCITRAL Arbitration Rules give this power to the chairperson, instead requiring a majority decision. The issue of whether the stance of the UNCITRAL Arbitration Rules on this particular point should be changed was keenly debated in the UNCITRAL Working Group II.[62]

57 On the issue of nationality of arbitrators, and in particular the nationality of the chairperson, see Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)', (2008) 31(3) *Fordham International Law Journal* 603.
58 See generally T Webster, 'Selection of Arbitrators in a Nutshell', (2002) 19(3) *Journal of International Arbitration* 261.
59 Kirby, op. cit. fn 3, at p. 354.
60 See also KCAB International Rules Article 30; SIAC Rules, Rule 15.3 and Beijing Arbitration Commission Article 39.2, all of which provide the chair this power subject to prior confirmation by the other members of the arbitral tribunal. Under UNCITRAL Arbitration Rules, Article 31(2) also permits the arbitral tribunal to pre-authorise the presiding arbitrator to make procedural decisions, but such decisions are subject to revision.
61 See also KCAB International Rules Article 30; Beijing Arbitration Commission Article 39.1; ICC Rules Article 25.1; SIAC Rules, Rule 27.
62 47th session, 10–14 September 2007, Vienna. The decision to retain the majority rule provision in the 2010 UNCITRAL Arbitration Rules may have been influenced by the fact that the rules are used in many investment arbitration disputes. See L Nottage and K Mills, '"Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests', (2009) 26(1) *Journal of International Arbitration* 25, at p. 54.

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During the course of that debate it was suggested that a majority rule may force a presiding arbitrator to agree with the least unpalatable opinion of one of the co-arbitrators. Where the rules require a majority, an ideal chairperson should be able to convince a co-arbitrator towards his or her view or be capable of finding a compromised, but still appropriate, solution.

6.57 The qualities desired of sole arbitrators are similar to those of chairpersons, except that sole arbitrators are not required to manage co-arbitrators and the additional powers allocated to chairpersons are obviously not applicable. A good sole arbitrator should, in addition to the qualities required of a chairperson, be exceptionally well organised, self-motivated, able to work alone and meticulously diligent. This is because he or she will have to scrutinise and organise his or her own work, without the comfort of reminders and a sounding board in the form of co-arbitrators.

6.58 As noted above,[63] some practitioners suggest that parties can take steps to influence the appointment of the chairperson or sole arbitrator. There are several ways this may be achieved. In the first instance it is open to parties to choose a method of appointment involving their participation in the nomination of the chairperson. Seppälä suggests that parties should attempt to agree on a profile identifying some of the qualifications or qualities both parties want in the chairperson.[64] The profile is then submitted to the arbitral institution which is asked to provide a list of potential candidates. The parties then try to reach an agreement to appoint someone from that list. The same process can also be utilised when a sole arbitrator is to be appointed. However, where a list procedure cannot be agreed for the chairperson, Seppälä notes that parties can often exercise indirect influence. He notes that arbitration rules, such as the ICC Rules[65] (and laws[66]), often require that consideration be given to the parties' and co-arbitrators' nationalities when appointing a chairperson. While the parties' nationalities are already known, as may be the nationality of the co-arbitrator nominated by the opposing party, one could deliberately pick an arbitrator of a particular nationality to narrow the pool of potential chairpersons.

3.2.2 Party-nominated co-arbitrators

6.59 Particular qualities are sought in party-nominated co-arbitrators. These are often qualities which the appointing party perceives as suggesting that the arbitrator's presence on the arbitral tribunal will increase its chances of success. Of course, arbitrators – regardless of how they are appointed – are duty-bound to act at all

63 See Section 3.
64 Seppälä, op. cit. fn 40.
65 ICC Rules Articles 9.1 and 9.5, ACICA Rules Article 9.3, JCAA Rules, Rule 25.3. Article 11.2 of the HKIAC Rules states that the chairperson must have a different nationality to that of the parties, but does not mention the co-arbitrators. Nationality is not specifically mentioned in the SIAC Rules.
66 Article 11(5) Model Law directs that the nominated court or other appointing authority 'in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties'. An equivalent provision is not needed in the Chinese Arbitration Law due to the effective prohibition of ad hoc arbitration in China.

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times with impartiality and independence, and must not blindly support the party that nominated them.[67] That said, an individual arbitrator's views on or approach to particular issues might be known or expected. An aspect of the person's legal, cultural or other background or experience may mean he or she is likely to take a particular approach. This background research or 'due diligence' on the mind and outlook of an arbitrator has become an essential part of preparing for an arbitration.

6.60 This position is well summarised by a comment from Martin Hunter which has since been cited many times. Hunter says that 'when I am representing a client in an arbitration, what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias'.[68] Although, in Hunter's own words, this comment 'provoked a lively reaction'[69] when it was made and was certainly met with some resistance, it can safely be said that it reflects common practice. Pierre Lalive notes that '[Hunter] just said out loud what everyone silently thinks, and one may even wonder if the lawyer acting differently would not betray his client!'[70] Other commentators have noted that selection of arbitrators predisposed to their clients' case is a 'natural and expected aspect of the party appointment system' and 'need carry no suggestion of disqualifying partiality'.[71]

6.61 Hunter describes the ideal appointee as 'someone who is likely to be genuinely persuaded by my argument'.[72] He gives the example that 'in representing a government who has nationalised an oil company I'm not likely to choose an investment banker from a capitalist country with many years experience of battling for investors in less developed countries or someone who has published a series of articles showing that he has a conservative viewpoint on the interpretation of the phrase "prompt, adequate and effective" compensation'.[73] There is thus a considerable element of common sense in choosing the right party-nominated arbitrator.

6.62 Whether the selection of an arbitrator sympathetic to an argument actually helps in the long term is difficult to prove empirically. One can project that if at least one arbitrator understands certain reasoning or sympathises with a line of argument, some of that reasoning or argument should be transposed into the award and into any decisions taken by the arbitral tribunal. On the other hand, if a co-arbitrator's views are markedly different from those of the chairperson this may lead to confrontation or tension, and could thus be counterproductive to the nominating party's interests.

67 See further below the discussion of the standards of independence applicable to party-nominated co-arbitrators.
68 M Hunter, 'Ethics of the International Arbitrator', (1987) 53 *Arbitration* 219, p. 223; (then restated in M Hunter, 'The Arbitral Process and the Independence of Arbitrators', (1991) *ICC Publication No. 472*, p. 164.).
69 Hunter, 1987, ibid., at p. 225.
70 P Lalive, 'Conclusions' in 'The Arbitral Process and the Independence of Arbitrators', (1991) *ICC Publication No. 472*, pp. 119 and 122.
71 Bishop and Reed, op. cit. fn 39, at p. 396.
72 Hunter (1987), op. cit. fn 68, p. 225.
73 Ibid.

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6.63 In that sense, it is vital for party-nominated arbitrators to act fairly and impartially with regard to arguments submitted by the party that did not appoint them. Selection of an overtly non-neutral arbitrator has unquestionable tactical disadvantages, apart from the possibility of challenge and removal of the arbitrator. Several commentators believe that advocacy in favour of the arguments of the arbitrator's nominating party is unhelpful because a good chairperson is likely to detect such partiality and treat with considerable suspicion and caution any suggestions made by that arbitrator.[74] Such an approach by a co-arbitrator may actually increase the chairperson's willingness to form a majority with the other co-arbitrator. As Hunter says, it is 'entirely counterproductive to a party's interests if the arbitrator [it] has nominated demonstrates (inadvertently or otherwise) at an early stage of the arbitration that he is going to vote for that party regardless of the merits of the case'.[75]

6.64 The service provided by a lawyer to his or her client when presented with an opportunity to participate directly in constituting the arbitral tribunal must include a choice of the best possible co-arbitrator. Choosing an unhelpful co-arbitrator wastes one of the single most proactive steps that can be played by a party's lawyer in constituting the arbitral tribunal. It is worth reiterating that the integrity of the arbitral process is not to be compromised by encouraging conscious appointment of non-neutral arbitrators. To the contrary, nomination of an arbitrator who is actually biased or is perceived to be so is almost inevitably contrary to the nominating party's interests.

6.65 Some debate exists over the appropriateness of appointing young practitioners as co-arbitrators.[76] Current practice shows that parties are sometimes hesitant to appoint someone who does not have a well-established reputation in international arbitration. This is rumoured to have resulted in a perceived 'elite' group of arbitrators who share between themselves appointments in the majority of significant cases. It is understandable that one feels more secure appointing someone who has already proved his excellence. Why take the risk of appointing someone 'new'? Indeed it takes time, patience and effort to build expertise and to be recognised as a competent practitioner worthy of appointment as a co-arbitrator. A prominent practitioner and arbitrator has commented that:[77]

> individual reputations in this field grow only by the slow accretion of evidence of independence and fair mindedness in numerous instances when it really matters. Elitism is no sin; the ambition to work at the highest possible level is surely a healthy one. The building of a reputation in this challenging context is a lengthy process, which offers no assurance of success. However, it creates a depth of confidence which can never be achieved by self-serving declarations.

74 Kirby, op. cit. fn 3, at p. 349; K-H Bockstiegel, 'The Arbitral Process and the Independence of Arbitrators', (1991) *ICC Publication No. 472*, p. 23; A Berlinguer. 'Impartiality and Independence of Arbitrators in International Practice', (1995) 6 *American Review of International Arbitration* 339, at p. 346; Redfern, Hunter, et al, op. cit. fn 1; A Lowenfeld, 'The Party-appointed Arbitrator in International Controversies: Some Reflections', (1995) *Texas International Law Journal* 30, at pp. 59–70. Lowenfeld notes that being overly sympathetic turns the chairperson off and often leads to a challenge by the opposing party.
75 Hunter (1987), op. cit. fn 68, p. 26.
76 Kirby, op. cit. fn 3, at p. 354.
77 J Paulsson, 'Ethics, Elitism, Eligibility', (1997) 13 *Journal of International Arbitration* 13, at p. 19.

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This point is certainly true. However, the creation of an exclusive elite can also undermine the provision of quality services to parties. Well-known arbitrators may well accept too many cases, thus becoming too busy fully to involve themselves in every case. This can mean they are less able to study the case thoroughly and may even delegate work to their associates. Criticism is then levelled by parties who feel they are paying for a distinguished arbitrator when it is in fact somebody else carrying out the work. 6.66

On the other hand, a younger arbitrator is more likely to prioritise the arbitration, schedule early hearing dates, have more time to devote to the arbitration, see the appointment as a privilege, and be very diligent, even if he or she does not have the same amount of experience. Several organisations have been established to enhance the training and profile of younger practitioners. Examples in this region include the Australasian Forum for International Arbitration (AFIA); the Asian Chapter of the ICC Young Arbitrators Forum, and the Young Members Group of Charted Institute of Arbitrators (CIArb) East Asia Branch.[78] 6.67

3.2.3 Pre-appointment interviews

It has become common for counsel and even parties to interview prospective arbitrators and in particular co-arbitrators before deciding whether to appoint them. This is another form of the due diligence parties will conduct on arbitrators. Not surprisingly, this practice is sometimes controversial because it can lead to a perception of partiality. However, it is not prohibited and can be beneficial if used wisely and within ethical limits. While it is vital that discussions be kept at a very general level and that the particulars of the case itself are not discussed, it can be beneficial for an arbitrator to learn something about the case so as to evaluate his or her own suitability. Arbitrators might also be questioned on matters such as time availability. 6.68

The IBA Guidelines on Conflicts of Interest in International Arbitration[79] deal with pre-appointment interviews. They provide on the 'green list' (meaning that it does not have to be disclosed) the following rule:[80] 6.69

> the arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to the appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or the procedural aspects of the dispute.

There is relatively little institutional guidance on how pre-appointment interviews should be conducted. The Practice Guidelines on the Pre-Appointment Interview of Prospective Arbitrators issued in 2007 by the Chartered Institute of Arbitrators are unique in this regard. The guidelines mainly contain commonsense advice. For example, the interview should take place in a business setting and not in a social environment such as over dinner. The meeting should be 6.70

78 These associations and others that are similar are discussed in Chapter 1, Section 4.
79 See 'IBA Guidelines on Conflicts of Interest in International Arbitration', www.int-bar.org/images/downloads/guidelines%20text.pdf accessed on 3 July 2010, and Section 5.2.2 below.
80 Ibid., Green List 4.5.1.

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planned well in advance with details of exactly how long it will take, who will be present, and how the interview will be conducted. For the benefit of both the party and the arbitrator a precise record of the interview should be made and provided to the opposing side once the arbitrator has been appointed. Interviews of sole or presiding arbitrators should not take place in the presence of one party alone. The guidelines also suggest that unsuccessful interviewees should usually only be compensated for reasonable expenses but not time. Those who are successfully appointed should submit their claims for expenses and time in the usual way – carefully noting that they relate to the interview. In practice, arbitrators rarely charge fees for these pre-appointment interviews.

6.71 Pre-appointment interviews become most controversial when the parties do not limit themselves to interviewing one prospective arbitrator about availability etc., but interview several candidates with the aim of establishing which one is most likely to decide in their favour. This practice has been termed a 'beauty parade',[81] in a similar way to beauty contests between law firms that are pitching to a client for prospective briefs. Whether beauty parades are ethically acceptable depends primarily on the content of the discussions and whether they are disclosed to the opposing party. The recommendations of the above-mentioned Chartered Institute Guidelines are helpful in this respect.

4 Formal appointment of arbitrators

6.72 It is important to distinguish between the nomination and the appointment of an arbitrator. Simply because a person is nominated (or proposed) to act as arbitrator does not impose an obligation on him or her to accept the nomination. Much like an ordinary contract for services, the position hinges on the principles of offer and acceptance. The nomination only binds the arbitrator once accepted. As reviewed below, the arbitrator's acceptance of the nomination may be all that is required to appoint an arbitrator but under certain rules the acceptance may constitute only a pre-condition to appointment.[82]

6.73 The point at which appointment occurs can be of importance as it carries certain effects. It is generally only when an arbitrator has been appointed that he or she may be afforded immunity from civil liability.[83] The point of time from which immunity takes effect may vary under some institutional rules because even if arbitrators accept the nomination there may be further steps to be taken

81 Referred to in French as 'concours de beauté' by VV Veeder, 'L'indépendance et l'impartialité de l'arbitre dans l'arbitrage international', in L Cladiet, T Clay and E Jeuland (eds), *Médiation et Arbitrage*, Litec, 2005, at p. 219.

82 Some common law practitioners refer to the act of acceptance as 'entering the reference'.

83 There is a generally accepted view that a contractual (or at least quasi-contractual) relationship exists between the arbitrators and the parties, although it is not without its critics. If such a relationship does exist, then arbitrators may find themselves subject to civil damages claims. Although most claims one might expect would naturally arise after the commencement of the arbitration (and hence after the appointment of the arbitrator), it is conceivable that a claim such as for breach of confidentiality may occur before an arbitrator's appointment. For a discussion of the contractual relationship between arbitrators and parties see K Lionnet, 'The Arbitrator's Contract', (1999) 15(2) *Arbitration International* 161; and Lew, Mistelis and Kröll, op. cit. fn 5, at p. 276, para 12–4.

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for them to be officially appointed. For example, under Article 9 of the ICC Rules, party-nominated arbitrators who have accepted nomination must thereafter be confirmed by the ICC Court or Secretary-General. Consequently, under this procedure a party-nominated arbitrator is not appointed until he or she has been confirmed.[84] At the opposite end of the scale are the ACICA Rules, which follow the more common formula (also used, for example, in the UNCITRAL Arbitration Rules). The terminology adopted in the ACICA Rules refers solely to the appointment of arbitrators with no mention as to their nomination. Implicit in this wording is the need first to nominate an arbitrator, who is then required to accept or decline the nomination. Upon acceptance, the arbitrator would be appointed under those Rules.

6.74 The 2007 SIAC Rules follow the ICC approach. In a circular released to announce those 2007 Rules, Lawrence Boo, then SIAC's Deputy Chairperson, stated:[85]

> The unequivocal, institutional nature of SIAC arbitration is embodied in the 2007 Rules . . .
> (i) SIAC's role as the appointing authority is clarified in Rule 5, whether arbitrators are party-appointed, party nominated, agreed to by parties, or nominated or appointed by any third person. In all cases, an arbitrator is not deemed to be appointed until confirmed by the Chairman of SIAC.

6.75 The equivalent provision now appears as Rule 6 in the 2010 SIAC Rules. Indeed, in this edition the Chairman's authority appears to be further emphasised by reference to the finality of his/her decision in Rule 6.4.

5 Obligations of arbitrators

6.76 'International arbitrators should be impartial, independent, competent, diligent and discreet.' Such is the first line of the Introductory Note of the 1987 IBA Rules of Ethics for International Arbitrators.[86] This guideline highlights the fact that being an arbitrator carries certain duties and obligations. However, it has been suggested that there are people who will willingly accept an appointment as an arbitrator without fully appreciating their duties.[87] This could seriously affect the conduct of a specific arbitration, but it will also tarnish the reputation of arbitration generally. The responsibility for ensuring that potential arbitrators are aware of their obligations should be shared by the prospective arbitrators and those who are appointing them.

6.77 This section begins by considering the general obligations of arbitrators and their potential liability. It then moves to a specific discussion of their disclosure

84 For an explanation of the appointment process in ICC arbitration see Fry and Greenberg, op. cit. fn 11.
85 Circular, Release of New SIAC Rules, 3rd edn, 1 July 2007, Schedule of fees and practice notes, 28 May 2007 (www.siac.org.sg/Pdf/WhatnewsRules2007Circular.pdf).
86 Although these rules are not directly binding on either arbitrators or parties (unless specifically adopted by agreement), they are one of the few such guidelines of their kind. They cover not only the duty of disclosure, but issues such as fees, diligence, involvement in settlement discussions and confidentiality of deliberations.
87 Redfern, Hunter, et al, op. cit. fn 1, at para 5–11.

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obligation. The special obligations of impartiality and independence are addressed separately in the discussion on challenges to arbitrators in Section 6.

5.1 General obligations and potential liability

6.78 In accepting an appointment, arbitrators agree to the inherent duties of care and diligence attached to their role. These duties may not be spelt out in arbitration rules but are nonetheless implied. As part of these duties, arbitrators should make themselves available and be able to devote the time and effort necessary to read the parties' submissions carefully, examine the evidence produced, attend all meetings and hearings, and work on producing a quality award after a thorough, unbiased analysis of the entire case. Naturally, an arbitrator should refrain from doing anything which would prejudice the arbitration or the parties.

6.79 Born suggests that the obligations of international arbitrators can be summarised as:[88]

- a duty to resolve the parties' dispute in an adjudicatory manner;
- a duty to conduct the arbitration in accordance with the parties' arbitration agreement;
- a duty to maintain the confidentiality of the arbitration;
- in some contexts, a duty to propose a settlement to the parties; and
- a duty to complete the arbitrator's mandate.

6.80 The first duty Born refers to is particularly important. It encompasses a number of more discrete obligations and significantly overlaps with the other duties he lists. Redfern and Hunter describe this as a duty to act judicially,[89] which perhaps better captures the nature of the obligation. Although arbitrators are given wide discretion to determine the parties' disputes, there are expectations about the process which will lead to that determination. This is clearly described in Rule 15(2) of the SIAC Rules, which reads:[90]

> In the absence of procedural rules agreed by the parties or contained in these Rules, the Tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute. (Emphasis added)

6.81 We have referred to the fundamental importance of a fair process repeatedly throughout this book. It includes the issues of impartiality and independence which are discussed separately below.[91] The requirements of an expeditious and economical process in part relate to availability. The arbitrator must allocate the time and commitment to see the arbitration through to its prompt completion. Arbitrators should be professional, calm and diligent in this process.

6.82 Some rules expressly refer to an obligation on the arbitrator to make every effort to deliver an enforceable award.[92] Where it is not referred to expressly

88 G Born, *International Commercial Arbitration*, Kluwer, 2009, at p. 1615.
89 Redfern, Hunter, et al, op. cit. fn 1, at para 5–24.
90 See the discussion of arbitrators' duties in Chapter 7, Section 4.3. The equivalent provision in the 2010 SIAC Rules is Rule 16.1.
91 See Section 6.1.1.
92 ICC Rules Article 35; SIAC Rules, Rule 35.3; LCIA Rules Article 32.2.

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such an obligation may be implied generally or in the requirement of final determination.[93] There are nevertheless limits to this obligation. Even the most experienced international arbitrators cannot foresee every single issue (such as a form or process requirement) that every possible enforcement court in the world might raise. Even if arbitrators have this information at their disposal, it may not be practicable to attempt to comply with all such requirements in a single case. Furthermore, theoretically some of these requirements may be contradictory, rendering it impossible to deliver an award simultaneously enforceable in two particular jurisdictions. Therefore, arbitrators should make every effort to ensure that they deliver an award that: (i) complies with the spirit of the New York Convention; (ii) is enforceable at the seat of arbitration; and (iii) is enforceable in any jurisdictions that the arbitral tribunal can reasonably foresee that a party to the arbitration may seek to enforce the award.

6.83 If an arbitrator breaches a general obligation during the course of an arbitration, the breach might provide grounds for an application to remove the arbitrator. The resignation, removal and replacement of arbitrators is considered in Section 7 below. In some circumstances, parties may even be able to bring legal action against an arbitrator.

6.84 As briefly referred to above, some international arbitration laws provide arbitrators with protection from civil law suits.[94] Although the precise wording differs slightly between the various legislation, for obvious reasons immunity is not generally given in situations where there has been fraud or some similar intentional dishonesty on the part of the arbitrator. The New Zealand legislation takes a slightly different approach. Rather than providing a blanket statement of immunity from liability and then carving out exceptions, it provides a general immunity from negligence in the course of acting in the capacity of an arbitrator without any other qualification.[95]

6.85 Most international arbitration rules also contain an exclusion of liability provision to protect arbitrators and arbitral institutions from civil liability.[96] In early 2009 a decision of the Paris Court of Appeal caused concern among the arbitration community when it suggested that the ICC Court could not validly exclude liability for acts or omissions in the performance of its essential duties.[97] The reasoning of this decision, while directed at an arbitral institution, could arguably be applied mutatis mutandis to arbitrators. While arbitrators and arbitral institutions should be accountable for their actions or omissions, it is important they

93 Born, op. cit. fn 88, at p. 1621.
94 See, e.g. Section 28 of the Australian International Arbitration Act; Section 2GM of the Hong Kong Arbitration Ordinance; Section 47 of the Malaysian Arbitration Act; Section 25 of the Singapore International Arbitration Act. Japan is an exception. There are relatively few cases from this region involving the liability of arbitrators. In a Victorian Supreme Court case concerning a domestic Australian arbitration, the legal costs associated with an annulled award were unsuccessfully sought against the arbitrator in *Mond v Berger* [2004] VSC 150. There is a New Zealand High Court case from 1994, *Pickens v Templeton* [1994] 2 NZLR 718, however this was prior to the introduction of Section 13 of the New Zealand Arbitration Act.
95 Section 13 of the New Zealand Arbitration Act '[a]n arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator'.
96 See, e.g. ACICA Rules Article 44; HKIAC Rules Article 40; SIAC Rules Article 33.
97 *SNF (France) v Chambre De Commerce Internationale (France)*, Paris Court of Appeal, First Chamber C, 22 January 2009, 07–19492.

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are able to perform their functions without fear of spurious liability claims. Given the considerable sums of money frequently involved in international commercial arbitrations, potential exposure to civil liability claims could have detrimental consequences on the manner in which arbitrators and institutions conduct arbitrations.

6.86 The Japanese Arbitration Law does not expressly address the issue of immunity for an arbitrator against civil liability. Rather unusually it contains criminal sanctions for miscreant arbitrators. Significantly these would apply whenever the seat of arbitration was in Japan, even if the offending conduct took place in a different jurisdiction.[98]

5.2 Disclosure obligations

6.87 Arbitration laws and rules impose a duty of disclosure of all facts or circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Impartiality and independence represent core obligations of an arbitrator. They are so widely recognised that they amount to general international principles and are therefore incumbent on any arbitrator in all circumstances. All arbitration laws and rules require arbitrators to be and remain independent, although there is variation in the precise language used. The concepts of impartiality of independence are closely related but not exactly the same.[99]

6.88 Identifying which facts or circumstances an arbitrator should disclose is not always easy. The International Bar Association published in 2004 Guidelines on Conflicts of Interest in International Arbitration to assist arbitrators in deciding what should be disclosed. These Guidelines are discussed below, after reviewing the general principles of disclosure as found in arbitration laws and rules.

5.2.1 General principles of disclosure

6.89 Most laws and rules require prospective and serving arbitrators to disclose to the parties any circumstances that might give rise to a reasonable doubt about their independence or impartiality. When the parties have opted for institutional arbitration, the arbitrator's disclosure obligations may extend to the arbitral institution.

6.90 Article 12(1) of the Model Law is typical of the laws in this region:

> When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

98 L Nottage, 'Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?', (2004) 7(2) *International Arbitration Law Review* 54, at pp. 57, 59; and T Nakamura, 'Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration', (2004) 17 *Japanese Commercial Arbitration Association Newsletter* 1, at p. 5.
99 See Section 6.1.1.

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The second sentence is important because it requires a continuing obligation of disclosure right through until the end of the proceedings.

6.91 Under the CIETAC Rules, the arbitrator's disclosure obligation is only to CIETAC and not the parties.[100] CIETAC then communicates the disclosure to the parties.

6.92 Depending on the arbitration rules, the arbitrator may have to sign a declaration or statement of independence when appointed. Article 7(2) of the ICC Rules provides in this regard:

> Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat 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. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

6.93 Once a declaration of this kind has been made, a presumption exists that the arbitrator is impartial and independent as at the date of the declaration. The onus of rebutting that presumption lies with the party bringing the challenge.[101]

6.94 Disclosure duties can be very strict, requiring arbitrators associated with large law firms to check thoroughly whether any offices of their firm have acted or are acting for a party or one of its subsidiaries. A recent decision of the Paris Court of Appeal suggests that an arbitrator's actual knowledge of a potential conflict of interest involving his law firm is not necessary, and that constructive knowledge may be sufficient to disqualify the arbitrator.[102] It should be noted that this case is currently being appealed to the Cour de Cassation, France's highest court.

5.2.2 IBA Guidelines

6.95 The different national tests, as well as cultural attitudes towards impartiality and independence, can create doubts as to what an arbitrator must disclose. The IBA has noted that 'even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, members of the arbitration community often apply different standards in making decisions concerning disclosure, objections and challenges'.[103] As noted above, in order to assist its members and the profession generally the IBA has produced Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines'), setting out principles and examples of circumstances arbitrators should disclose in connection with impartiality and independence.

100 CIETAC Rules Article 25.
101 See, e.g. the US decision *Consolidated Coal v Local 1643 United Mine Workers*, 48F 3d 125 (4th Cir 1995) (US Court of Appeals, Fourth Circuit).
102 Paris Court of Appeal, 12 February 2009 (07/22164).
103 IBA Guidelines (Conflicts), op. cit. fn 79, at p. 3.

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6.96 The IBA Guidelines do not have the force of law but are merely guidelines. Nonetheless, they are now widely referred to by parties, arbitrators and courts.[104] The Secretariat of the ICC Court also refers to them in footnotes to memoranda that it prepares to brief the ICC Court on its decisions on challenges and contested arbitrator confirmations. The Guidelines certainly do not bind the ICC Court. Both the current and former Secretaries General of the ICC Court have explained why the ICC Court is not bound.[105]

6.97 The IBA Guidelines consider various scenarios concerning when issues as to impartiality and independence arise and when they do not. For ease of reference, these are then categorised by colour – red, orange, and green. Situations described in the Red List are those which create a conflict of interest. This list is divided into two sub-categories: the 'non-waivable Red List' and the 'waivable Red List'. Situations described in the non-waivable Red List give rise to a conflict of interest which automatically disqualifies arbitrators from accepting or continuing their mandate, regardless of whether a party has challenged the arbitrator. As an example, the non-waivable Red List contains the situation where 'the arbitrator has a significant financial interest in one of the parties or the outcome of the case'.[106] However, a situation where 'the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties' falls into the waivable Red List.[107] This means a conflict of interest exists that must be disclosed. The effect of a waivable Red List categorisation is that the arbitrator cannot continue to act unless the parties agree otherwise.

6.98 The Green List covers situations which do not give rise to a conflict of interest and, according to the IBA Guidelines, need not be disclosed. An example of these situations is a pre-appointment interview with a party that is limited to availability etc.[108] or the fact that 'the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but the opinion is not focused on the case that is being arbitrated)'.[109]

6.99 In-between situations fall into the tricky Orange List, which is 'a non exhaustive enumeration of situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence'.[110] The arbitrator is under a duty to disclose those

104 See, e.g. L Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered', (2007) 10 *International Arbitration Law Review* 999, who suggests that the jury is still out on whether the guidelines are the cause of the increase in challenges, but does describe the increase as a 'flood'. Contrary to Trakman's suggestion, the ICC Court has not seen an increase in the number of challenges since the Guidelines were released in 2004. See also Fry and Greenberg, op. cit. fn 11, at p. 17.
105 See AM Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators', (2007) *ICC International Court of Arbitration Bulletin* 7, Special Supplement, at p. 36; and Fry and Greenberg, op. cit. fn 11, at p. 17.
106 IBA Guidelines (Conflicts), op. cit. fn 79, Non Waivable Red List, 1.3.
107 Ibid., Waivable Red List 2.1.1.
108 Ibid., Green List, 4.5.1.
109 Ibid., Green List, 4.1.1.
110 Ibid., Part II, para 3.

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situations. If an Orange List disclosure is made and the parties fail to object, then the parties are understood to have accepted the arbitrator. Although it may sound like a clear and simple approach, in practice, it can require a very onerous conflict of interest check. For example, an arbitrator must disclose that 'the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator'.[111]

6.100 The IBA Guidelines are not without their critics.[112] When reading them it is important to remember the perspective from which they were drafted. Michael Bond has observed that:[113]

> [o]ne might reasonably question whose interests the [IBA] Working Group served. It consisted of 19 members; of the 13 members for whom information is available from Martindale Hubbell, eight work at firms with more than 275 lawyers. Five of those members work at firms with more than 500 lawyers, including the world's largest law firm . . . .

This might explain what is sometimes considered a relaxed approach by the IBA Guidelines to situations where the arbitrator's law firm has provided services for or against one of the parties to the arbitration.

6.101 Finally, numerous gaps in the IBA Guidelines have been identified. One of the gaps – the situation where an arbitrator is concurrently serving as co-counsel with one of the parties' counsel in another matter – is significant because it led to four successful challenges or non-confirmations of arbitrators by the ICC Court between 1 July 2004 and 1 August 2008.[114]

6 Challenges to arbitrators

6.102 After formal appointment of an arbitrator, that arbitrator can be challenged. A successful challenge will result in the impugned arbitrator's removal. Ordinarily, he or she will be replaced but sometimes the remaining arbitrators can proceed without such a replacement. The possibility for parties to challenge arbitrators ensures the integrity of the arbitration process. As explained below, depending on the arbitral rules adopted, challenges to arbitrators may be determined by the authority that appointed the arbitrator, the arbitral institution (or its delegate), the unchallenged members of the tribunal, or even the arbitral tribunal including the challenged arbitrator.

111 Ibid., Orange List, 3.1.4.
112 See, e.g. M Ball, 'Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?', (2005) 21(3) *Arbitration International* 323. Despite expressing some criticisms, Ball does conclude by stating that the guidelines have made an important contribution.
113 M Bond, 'A Geography of International Arbitration', (2005) 21(1) *Arbitration International* 99, at p. 104.
114 Fry and Greenberg, op. cit. fn 11, at p. 17.

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6.103 There are two main grounds on which to challenge an arbitrator: partiality or lack of independence, discussed in Section 6.1, and misconduct, discussed in Section 6.2.

6.1 Challenges for partiality or lack of independence

6.104 The underlying purpose of independence or impartiality requirements is to ensure that the parties are treated equally and that the award is not influenced by an arbitrator's bias. What matters most, therefore, is ensuring that the arbitrator is free of any influence on his or her decision-making. It follows that a party should be entitled to challenge an arbitrator who it considers to be lacking impartiality for any reason. Challenges for partiality or lack of independence are by far the most common form of challenge.

6.105 The concepts of impartiality and independence are distinguishable. Section 6.1.1 explains the distinction. Section 6.1.2 focuses on the challenge process. Sections 6.1.3 and 6.1.4 address how allegations of partiality and lack of independence are assessed by arbitral institutions and by courts respectively. An issue raised in the context of the assessment of impartiality and independence is whether the same standard applied to chairpersons or sole arbitrators should apply to party-nominated co-arbitrators. This is addressed in Section 6.1.5. We then discuss how impartiality and independence are treated in 'arb-med' proceedings in Section 6.1.6.

6.1.1 Impartiality and independence distinguished

6.106 Most laws and rules use 'independence' and/or 'impartiality' as the operative language to test arbitrator bias.[115] These terms are considered to be clearer and more precisely definable than the concept of 'neutrality.'[116] Although closely related, independence and impartiality are generally considered to be technically distinguishable terms, but somewhat interchangeable for practical purposes in international arbitration.

6.107 Some practitioners contend that the overall concept that covers both impartiality and independence is clear without the need for individual definition of

115 Article 12(2) of the Model Law provides that 'An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence'. The UNCITRAL Arbitration Rules Article 9, and 2010 UNCITRAL Arbitration Rules Article 11, also mention both 'impartiality and independence,' as do the 2010 SIAC Rules, Rule 11; ACICA Rules (Article 13); BCA Rules, Rule 9.12; KCAB International Rules, Article 13; ICA Rules, Rule 26; and LCIA Rules (Articles 5(2), 10(3)). Article 11(1) of the ICC Rules states that an arbitrator may be challenged 'for an alleged lack of independence or otherwise', but does not expressly mention impartiality.

116 Some consider that 'neutrality' involves mainly the question of nationality. See P Lalive, 'On the Neutrality of the Arbitrator and the Place of Arbitration', (1984) *Swiss Essays on International Arbitration* 23, at p. 24. The term has also been used synonymously with impartiality in particular with respect to the different standards for party-appointed arbitrators in some US arbitration rules. See M Smith, 'Impartiality of the Party-appointed Arbitrator', (1990) 6 *Arbitration International* 320, at p. 323. It is also used synonymously with independence. See G Bernini, 'The Arbitral Process and the Independence of Arbitrators', (1991) *ICC Publication No. 472*, p. 31. For a suggested solution to the labyrinth of opinions regarding the meaning of the term 'neutrality' see Berlinguer. op. cit. fn 74, at 346.

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each of these terms,[117] while others have argued that excessive analysis of the definitions in inconsistent ways has led to greater confusion rather than clarity.[118] Despite such commentary, distinct definitions are extractable from scholarly writings.

6.108 A generally accepted definition of independence is the absence of actual, identifiable relationships with a party to proceedings or someone closely connected to the party.[119] The test for independence examines the appearance of bias and not actual bias[120] and is thus entirely objective. It looks only at tangible elements; facts that can be shown or proved. Satisfying a test for independence does not require showing the effect of any relationships on the mind of the arbitrator concerned. Offending relationships could be of a business, social, family or financial nature. Slightly more contentious is the question whether identifiable relationships between a party's legal counsel and an arbitrator affect independence.[121] Generally, such relationships are examined to see whether they are relevant to independence. Relationships with counsel are likely to affect independence if they involve financial dependence, such as regular referrals of work. They will probably affect independence if social relationships go beyond ordinary business encounters (such as membership of the same professional association) to significant social contact outside of business.

6.109 In limited circumstances, the fact that an arbitrator and counsel share barristers' chambers may affect independence. This issue arose in the ICSID case of *Hrvatska Elektroprivreda v Slovenia*.[122] There, however, the claimant's applied to prevent the counsel from acting in the arbitration rather than to challenge the arbitrator. The particularly experienced arbitral tribunal ruled in favour of the claimant and ordered that the counsel could not participate in the case. The arbitral tribunal cited the respondent's late announcement of the involvement of that particular counsel as a critical factor.

6.110 Impartiality, in contrast to independence, is a subjective concept, concerned with the tendency of an arbitrator actually to favour one of the parties' positions. Impartiality is not concerned with the outside appearance of bias. It does not necessarily require tangible relationships that could be the cause of the arbitrator acting unfairly. It examines the likelihood of an arbitrator actually having a state of mind or prejudgment that favours one side in the dispute. A lack of impartiality could be caused by totally immeasurable, psychological motives or prejudices,[123]

117 X De Mello, 'Réflexions sur les règles déontologiques élaborées par l'International Bar Association pour les arbitres internationaux', (1988) *Revue de l'arbitrage* 333, at p. 342.
118 Berlinguer, op. cit. fn 74, at p. 343.
119 Ibid., p. 346; MS Donahey, 'The Independence and Neutrality of Arbitrators', (1992) 9 *Journal of International Arbitration* 31, at p. 31; Smith, op. cit. fn 116, at p. 323.
120 Donahey, ibid., p. 31.
121 See, e.g. A Hirsch, 'Les Arbitres: peuvent-ils connaitre les advocates des parties?' (1990) *ASA Bulletin* 7 and S Bond, 'The ICC Arbitrator's Statement of Independence: A Response to Prof Alain Hirsch', (1990) *ASA Bulletin* 85.
122 ICSID Case No. ARB/05/24, Tribunal's Ruling of 6 May 2008.
123 There are several theories which attempt to explain otherwise unexplainable incidences of bias. See, for example, R Delgado, C Dunn, P Brown, H Lee and D Hubbert, 'Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution', (1985) *Wisconsin Law Review* 1359, at p. 1375.

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so it is foreseeable that an arbitrator could act partially without any objectively explainable or provable reason for doing so.[124] It 'is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind. This presents special difficulties in terms of measurement . . . .'.[125]

6.111 A case against an arbitrator for an alleged lack of impartiality could most easily be made out where the arbitrator blatantly favours one party. Blatant favouritism is very rare and difficult to prove,[126] so statutes referring to impartiality usually reduce the evidentiary burden by allowing for removal of arbitrators where there are justifiable or reasonable doubts as to their impartiality.[127] Unfortunately, whether advances in neurological science will ever enable us realistically to test impartiality remains a question so hypothetical that it can safely be ignored. Rather, in order to prove partiality or lack of independence, we must rely on objective factors that can be proved and tested in front of a court, arbitral tribunal or institution. In practice therefore, much like the way independence is assessed, objective factors (i.e. independence) are the best means to examine impartiality.

6.1.2 Procedure

6.112 The procedural aspects of the challenge process will be determined by any express provisions of the arbitration agreement itself, the parties' choice of arbitration rules or the *lex arbitri*. For example, if the parties have chosen institutional arbitration like ICC or SIAC, a body (or individual) within the relevant institution will rule on the challenge.[128] Other rules vest the power in different bodies, such as the authority that appointed the arbitrator,[129] the unchallenged members of the tribunal,[130] or even the arbitral tribunal including the challenged arbitrator.[131] If a procedure has not been determined by the parties, the *lex arbitri* should provide one. Where the Model Law applies, Article 13 (set out below) provides that the challenge will first be submitted to the arbitral tribunal and, if the challenge is rejected, may be submitted to a designated court.

6.113 There are three possible scenarios once a challenge is filed and before that challenge is determined. First, the opposing party may agree to the challenge. The arbitrator's mandate would then ordinarily terminate, although an arbitrator

124 The situation is explained as being '. . . where a judge is not a party to a suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial . . . ' *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2)*, (1991) 1 All ER 557, 586 (House of Lords).
125 Redfern, Hunter, et al, op. cit. fn 1, at p. 239, para 4–55.
126 The Singaporean High Court decision of *Turner v Builders Federal* [1988] 1 SLR 532 could be interpreted in this light. The court inferred that the arbitrator had predetermined the issues and found a clear indication of bias (at para 102): 'there is no doubt in my mind that Mr Smith has approached this arbitration with a prejudiced mind, to the point of being hostile to one of the parties'. Another example commonly referred to by a number of commentators is *Re Catalina (Owners) and Norma M V (Owners)* [1938] 61 Lloyd's Law Reports 360 (King's Bench, Divisional Court), where the arbitrator, during the course of the proceedings, had been heard to express the view that all Portuguese people were liars.
127 For example, the Model Law, Article 12(2).
128 ACICA Rules Article 14.4; CIETAC Rules Article 26(6); HKIAC Rules Article 11.7; ICC Rules Article 11; ICA Rules, Rule 26; JCAA Rules, Rule 29(5); KCAB International Rules Article 13(5); SIAC Rules, Rule 12.
129 UNCITRAL Arbitration Rules Article 12.
130 VIAC Rules Article 11; ICSID Convention Article 58.
131 As discussed below this is the procedure set out in the Model Law Article 13(2). See also generally Appendix 1 'Asia-Pacific arbitral institutions at a glance' which includes details on who determines challenges in accordance with each institution's rules.

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occasionally purports to remain on the panel despite all parties agreeing to remove him.[132] A second possible scenario is that the arbitrator resigns. The arbitrator may not wish to continue the mandate if one party has lost confidence in him or her. A question arises as to whether such resignations should be accepted. The ICC Court does not always accept an arbitrator's resignation in these circumstances.[133] It is important to note that tendering a resignation after having been challenged should not be seen as an admission that the challenge was justified. Article 11(3) of the UNCITRAL Rules specifically provides in relevant part that:

> When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. (Emphasis added).

6.114 The third scenario is perhaps the most frequent: the arbitrator does not resign and the opposing party contests the challenge. In this scenario a decision on the merits of the challenge will have to be taken.

6.115 The 2010 SIAC Rules 12 and 13 provide a typical example of the procedure for a challenge submitted to an arbitral institution:[134]

> *Notice of Challenge*
>
> 12.1 A party who intends to challenge an arbitrator shall send a notice of challenge within 14 days after the receipt of the notice of appointment of the arbitrator who is being challenged or, except as provided in Rule 10.6, within 14 days after the circumstances mentioned in Rule 11.1 or 11.2 became known to that party.
>
> 12.2 The notice of challenge shall be filed with the Registrar and shall be sent simultaneously to the other party, the arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the reasons for the challenge. The Registrar may order a suspension of the arbitration until the challenge is resolved.
>
> 12.3 When an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge . . .
>
> *Decision on Challenge*
>
> 13.1 If, within 7 days of receipt of the notice of challenge, the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily within 7 days of receipt of the notice of challenge, the Committee of the Board [of SIAC] shall decide on the challenge.
>
> . . .
>
> 13.5 The Committee of the Board's decision made under this Rule shall be final and not subject to appeal.

6.116 Pursuant to Rule 13.5, the decision of the Committee of the Board of SIAC is expressed to be final, expressly denying any opportunity of appeal to SIAC or

132 Fry and Greenberg, op. cit. fn 11, at p. 27.
133 Ibid., at p. 28.
134 See also ACICA Rules Article 14; CIETAC Rules Article 26; HKIAC Challenge Rules; ICC Rules Article 11; JCAA Rules, Rule 29; KCAB International Rules Article 13.

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perhaps even a court. If Rule 13.5 is intended to preclude the right of an appeal to the courts, then it appears to conflict with the opportunity provided in Article 13(3) of the Model Law to have a court review a challenge decision. Article 13(3), which is extracted below, provides that a party may, within 30 days, ask a court to review a decision that has rejected a challenge. The language of the Article strongly suggests that this right exists even where the challenge procedure has been agreed by the parties. It is therefore unclear whether Rule 13.5 of the SIAC Rules (or its equivalent in other institutional arbitration rules)[135] would be effective in preventing review by the courts under a provision of law such as Article 13(3) of the Model Law.[136]

6.117 Although it is not a feature of institutional arbitration rules in this region, some rules like those of the German Institution of Arbitration ('DIS Rules') invest the arbitral tribunal with power to rule on the challenge.[137] The challenged arbitrator remains on the arbitral tribunal during this process and participates in the decision. Although this may at first seem unusual, the same approach is used in Article 13(2) of the Model Law, which is set out below. A variation of this procedure is found in the Arbitration Rules of the Vietnam Arbitration Centre, which refer challenges first to the unchallenged arbitrators. The President of the Centre then effectively acts as an umpire if necessary.[138]

6.118 If the parties have chosen ad hoc arbitration, their chosen rules may provide for a challenge procedure. If the chosen arbitration rules are silent, or no rules have been chosen, it is necessary to examine the *lex arbitri*. Article 13 of the Model Law provides:

> *Article 13 – Challenge procedure*
> (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
> (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

135 Similar provisions, although not referring expressly to 'appeals' are found for example in the ICC Rules Article 7(4); ACICA Rules Article 43.2; KCAB International Rules Article 10.3.
136 See also *Saipem S.p.A. v Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, discussed in Chapter 9, Section 9.2.2. With relevance to the determination of challenges to arbitrators, the ICSID tribunal found (at paras 137–144) that the ICC Court's authority as regards the determination of challenges is not exclusive under Bangladesh law. That ICSID tribunal's reasoning could be applied analogously to other laws.
137 DIS Rules Section 18.3.
138 VIAC Rules Article 11.

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6.119 A party wishing to challenge an arbitrator should do so as soon as practicable after it becomes aware of the facts leading to its concern. There are two primary reasons to act promptly. First, there are likely to be significant costs involved if it becomes necessary to remove an arbitrator in an arbitration that has been proceeding for a long period of time. Second, by failing to take steps against an arbitrator at the first opportunity, a party may lose its right to make the challenge. Generally, arbitration rules provide that any challenge has to be brought within a certain time (usually 15 or 30 days) from when the arbitrator was appointed or, if later, from when the challenging party became aware of the facts giving rise to the challenge.[139]

6.120 The New Zealand High Court case of *Grey District Council v Banks*[140] provides an example of the consequences of failing to challenge an arbitrator within the required time limits. Although concerning a domestic arbitration, the relevant provisions[141] replicate Articles 12 and 13 of the Model Law in all material respects. At its simplest, this case involved an arbitrator who had a clear and undisputed financial interest in the outcome of the arbitration. Justice Panckhurst observed:[142]

> In my view it is beyond argument that Mrs Banks has a personal interest sufficient to justify challenge to her impartiality and independence in this case. Article 12 supplies the standard, namely 'if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence . . . '. Where, as here, the appointed arbitrator has a direct financial interest in the very question which is the subject matter of the arbitration then doubts about their impartiality and independence abound. It is difficult to imagine a more obvious case of personal interest.

6.121 However, Justice Panckhurst found that any action to remove the arbitrator must fail because it had been brought outside the 15 day time limit provided in Article 13(2) (as per the Model Law). This caused him to further observe:[143]

> This Court may only decide on a challenge in terms of Art 13(3) where a challenged arbitrator refuses to withdraw from office. The exercise of that limited power is subject to compliance with the requisite time limits. There must be both a challenge made by a party within the 15 days provided and an appeal to this Court within 30 days. This, it seems to me, is an unsatisfactory situation but one from which there is no escape . . .

6.122 It should be noted that, although time limits such as these may preclude the removal of an arbitrator, there may still be grounds to have an award set aside, or to resist its enforcement, on the basis that the arbitrator was not independent.

139 ACICA Rules Article 14.1 (15 days); CIETAC Rules Article 26.3 (15 days); HKIAC Rules Article 11.5 (15 days); ICC Rules Article 11.2 (30 days); JCAA Rules, Rule 29.3 (two weeks); KCAB International Rules Article 13. 3 (15 days); SIAC Rules, Rule 11.1 (14 days).
140 [2003] NZAR 487. The case was then upheld on appeal.
141 Articles 12 and 13, First Schedule New Zealand Arbitration Act 1996.
142 [2002] NZAR 487 at 496.
143 Ibid., at 495.

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6.1.3 Assessment of impartiality and independence by arbitral institutions

6.123 Since arbitration is in principle confidential, the decisions of arbitral institutions on any matters (including challenges) are usually kept confidential and not disclosed. Moreover, the general practice of arbitral institutions is not to provide reasons for their decisions, either to the challenged arbitrator, any other arbitrators or to the parties. Many institutional rules contain provisions like that found in Rule 8 of the HKIAC Challenge Rules:[144]

> The Council's determination in respect of any challenge shall be given to the parties in writing. The Council may in its sole discretion decide whether to support such determination with reasons.

6.124 There is movement within some institutions towards providing some guidance and insight into their thinking when determining challenges alleging partiality or a lack of independence. Institutions have adopted different paths to providing this information. In 2006 the LCIA announced that it would put in place procedures to begin publishing challenge decisions on its website.[145] Taking another approach, the ICC regularly publishes articles describing the ICC Court's practice and citing examples and trends relating to challenge decisions.[146] A number of the examples cited below are drawn from those publications.

6.125 Challenges against international arbitrators must be determined on a case by case basis. Guidance, whether in terms of articles by institutions or the actual publication of decisions, is to be welcomed and encouraged. However, there is a danger, particularly where individual decisions are published, that these may be seen as a body of precedent. A body of precedent could work contrary to the concept of case by case determination and might encourage reducing challenges to a matter of technicalities in precedents, which would be unfortunate. Furthermore, publishing individual challenge decisions might delay and complicate the issuing of those decisions and cause additional costs.[147]

6.126 In the highly supervised form of arbitration practised by the ICC Court, there is a number of stages at which the ICC Court may consider whether an arbitrator is independent. The first occasion is at the time of confirmation. Under the ICC Rules, nominated arbitrators do not formally commence their role until confirmed by the ICC Court or Secretary General (a similar approach is now taken in the SIAC Rules). As part of that confirmation process, the

144 Some rules provide that reasons need not be given (e.g. ACICA Rules Article 43.2; CIETAC Rules Article 26.6); while others provide that reasons will not be given (e.g. ICC Rules Article 7(4)). The JCAA Rules, KCAB International Rules and SIAC Rules do not state whether reasons will be provided.
145 As at the time of writing no decisions had been published by the LCIA.
146 See, e.g. Fry and Greenberg, op. cit. fn 11; Whitesell, op. cit. fn 105, at p. 7; D Hascher, 'ICC Practice in relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators', (1995) 6(2) *ICC International Court of Arbitration Bulletin* 4; S Bond, 'The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration' in *The Arbitral Process and the Independence of Arbitrators*, (1991) ICC Publication 472, p. 9.
147 For an explanation of the reasons why the ICC Court does not publish challenge decisions see Fry and Greenberg, op. cit. fn 11, at p. 30, and Whitesell, op. cit. fn 105, at p. 39.

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nominated arbitrator is required to complete a statement of independence. If the nominated arbitrator discloses any matters, the statement of independence is referred to as a 'qualified statement of independence'. All statements of independence from party-nominated arbitrators (both qualified and unqualified) are sent to the parties prior to the ICC Court deciding whether to confirm the appointment. The parties then have an opportunity to object to the arbitrator's confirmation.

6.127 Examples of confirmation of ICC arbitrators despite objection from one of the parties include the following:[148]

(i) where the opposing party alleged that there had been prior contact between the appointing party and nominated arbitrator. The party and arbitrator explained, and the ICC Court found, that the contact had simply been that necessary to determine whether the arbitrator was available to serve in the case;
(ii) where an arbitrator had served in the same political party and same parliament as counsel for one of the parties; and
(iii) where it was alleged that the arbitrator had failed to disclose that he had co-authored a legal book with one of the parties' counsel. The arbitrator had also worked in the same firm as that counsel. The arbitrator was confirmed, taking into account that more than nine years had elapsed since the arbitrator and counsel had been members of the same firm.

6.128 In contrast, the ICC Court has refused to confirm nominations in instances where the matters raised could call into question the independence of the arbitral tribunal. Examples of non-confirmation include:[149]

(i) where an arbitrator was an acting as a director of a company that had an indirect shareholding in the respondent;
(ii) where an arbitrator's law firm was part of an alliance of law firms to which the firm representing one of the parties also belonged; and
(iii) where an arbitrator was already acting as a co-arbitrator in a related arbitration where he had been nominated by the same party.

6.129 The second stage at which the ICC Court considers the independence of arbitrators is when a party files a challenge pursuant to Article 11 of the ICC Rules. This rule is quite wide and also allows for challenges based on the conduct of the arbitration.[150] As the examples below demonstrate, there is a wide variety of grounds on which independence challenges are brought and dismissed by the ICC Court:[151]

148 ICC International Court of Arbitration, 'Independence of Arbitrators', (2007), *ICC International Court of Arbitration Bulletin*, Special Supplement. See in particular Whitesell, op. cit. fn 105, pp. 7–42. Further and more recent examples are provided in Fry and Greenberg, op. cit. fn 11.
149 ICC International Court of Arbitration, ibid. See in particular Whitesell, op. cit. fn 105, pp. 7–42. Further and more recent examples are provided in Fry and Greenberg, op. cit. fn 11.
150 Removal of an arbitrator for technical misconduct is discussed below, see Section 6.2.1.
151 ICC International Court of Arbitration, op. cit. fn 148. See in particular Whitesell, op. cit. fn 105. Further and more recent examples are provided in Fry and Greenberg, op. cit. fn 11.

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(i) The ICC Court rejected a challenge where one party claimed that the chairperson had studied and lived for some years in the country where the other party was incorporated. This, it was alleged, caused doubts about his independence.

(ii) The ICC Court rejected a challenge to a chairperson who was also chairperson of another arbitration in which one of the parties' counsel was sitting as a co-arbitrator. Although the challenge failed, the ICC Court observed that this is the kind of matter that should be disclosed in the statement of independence.

(iii) The ICC Court rejected a challenge to a party-nominated arbitrator alleged to have had direct contact and discussions with the nominating party. The challenged arbitrator acknowledged that he had discussed the names of potential chairpersons of the arbitral tribunal with the party. However, he stated that he came to his own decision on who should take on that role during discussions with the other co-arbitrator and that his direct discussions with the party did not involve the substance of the dispute.

6.130 In the following cases, the ICC Court accepted the challenge:[152]

(i) where a party-nominated arbitrator revealed that he had previously acted for one party in a matter concerning an earlier but related transaction;

(ii) where a sole arbitrator whose law firm and the firm auditing one of the parties were part of the same law firm alliance; and

(iii) where a chairperson was from a law firm which was acting in a claim against the parent company of one of the parties to the arbitration. The challenge was upheld notwithstanding that the law suit was not related to the arbitration and it was a foreign office of the chairperson's firm.

6.131 Because other regional institutions have not so far published information about specific challenges, it is not possible to compare the ICC Court's approach with other institutional practice.

6.1.4 Assessment of impartiality and independence by domestic courts

6.132 An arbitrator's (or a judge's) impartiality and independence is a public policy matter. Therefore, in principle the courts maintain ultimate control over determining whether an arbitrator is independent and impartial. The fact that a challenge to an arbitrator is dismissed by an arbitral institution competent to decide the challenge in accordance with its rules does not in and of itself prevent a court from setting aside an award on the ground that, under its own standard, the challenge should have succeeded. It is therefore crucial to understand how courts assess these issues.

6.133 In reviewing the cases below, it is important to consider the perspective from which an arbitrator's impartiality or independence will be judged. This is not

152 ICC International Court of Arbitration, op. cit. fn 148. See in particular Whitesell, op. cit. fn 105. Further and more recent examples are provided in Fry and Greenberg, op. cit. fn 11.

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always clear. For example, English courts have on occasion been criticised for failing to consider properly the appearance of bias from the perspective of the party challenging the arbitrator.[153]

6.1.4.1 *The different tests used by domestic courts*

6.134 Courts in this region currently test the impartiality and independence of judges and arbitrators by the same standard. The convincing arguments against applying the same standard to arbitrators and judges are discussed below.[154] The benefit of doing so is that there are more examples of cases dealing with impartiality or independence that can be examined with a view to determining the approach of the relevant court. As the analysis below indicates, there appears to be at least two, and probably three, different tests currently used by courts in this region to determine whether an arbitrator (or judge) should be disqualified.

6.135 The recent history of the issue as it developed in England provides useful guidance as it has subsequently influenced the common law Asia-Pacific jurisdictions.[155] *R v Sussex Justices; Ex Parte McCarthy*[156] introduced what became known as the 'reasonable apprehension' test of bias.[157] Although the dominant test for a considerable period of time, it was never definitively affirmed as settled law. The alternative test had been couched in terms of a 'real likelihood' of bias.[158] Perhaps trying to bring the tests together, Lord Goff famously considered the issue in *R v Gough*.[159] Taking its name from the case, not the judge, the '*Gough* test' enquires 'whether there was any real danger of unconscious bias on the part of the decision maker . . . '.[160] Lord Goff explained that 'I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias'.[161]

6.136 This test was followed in *Laker Airways Inc v FLS Aerospace Ltd*[162] and again affirmed in *AT & T Corporation and Lucent Technologies Inc v Saudi Cable Co*.[163]

153 A Merjian, 'Caveat Arbitrator: Laker Airways and the Appointment of Barristers as Arbitrators in Cases Involving Barrister Advocates from the same Chambers', (2000) 17 *Journal of International Arbitration* 31.
154 See Section 6.1.4.3.
155 See also S Luttrell, 'Go Back to Gough: An Argument for the "Real Danger" Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific', (2008) 16 *Asia Pacific Law Review* 2.
156 [1924] 1 KB 356 (King's Bench, High Court).
157 This is sometimes termed the 'reasonable suspicion' test. As Justice Deane of the High Court of Australia noted in *Webb v The Queen* [1993] 181 CLR 41, at 68: 'I have used the word "apprehension" in preference to the word "suspicion" for the reason that the latter word is capable of conveying shades of meaning which are inappropriate in this context. As a practical matter, however, there is little, if any, difference between the content of the two words when prefaced by "reasonable".'
158 See, e.g. *Tracomin SA v Gibbs Nathaniel (Canada) Ltd* [1985] 1 Lloyd's Rep 586.
159 *R v Gough* [1993] AC 646. For a detailed discussion of the Gough test in international arbitration see S Luttrell, *Bias Challenges in International Arbitration – The Need for a 'Real Danger' Test*, Kluwer Law International, 2009.
160 *AT & T Corporation and Lucent Technologies Inc v Saudi Cable Co* [2000] EWCA Civ 154, 128.
161 *R v Gough* [1993] AC 646, at 737.
162 [1999] 2 Lloyd's Rep 45 (Queen's Bench, Commercial Court).
163 [2000] EWCA Civ 154 (Court of Appeal).

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The *AT & T* case involved a challenge to the independence of the chairperson of an arbitral tribunal. The factual scenario is a classic example of why, in an increasingly complex global commercial world, the commercial and professional activities of the relatively small group of leading international arbitrators may give rise to challenges to their independence.[164] In 1992, the Saudi Arabian Government invited seven international telecommunications companies to tender for a project. Among the tenders were AT & T and Northern Telecom Ltd. The former was successful. A term of the tender required that certain supplies would be sourced from the Saudi Cable Co. A dispute arose between AT & T and the Saudi Cable Co, and the matter went to ICC arbitration in 1995. During the proceedings, AT & T became aware that the chairperson of the arbitral tribunal was a non-executive director of Northern Telecom Ltd – one of the unsuccessful tenderers. AT & T challenged the chairperson. The challenge was rejected by the English Court of Appeal, applying the *Gough* test.

6.137 The *Gough* test itself was reinterpreted in the House of Lords decision *Porter v Magill*.[165] In that case Lord Hope phrased the test as 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the arbitral tribunal was biased'.[166] The difference between this test and *Gough* is the perspective from which the alleged bias is to be considered. Under the *Gough* test, the court must determine whether it considers that there is a perception of bias. Applying *Porter*, the determination must be made from the standpoint of a fair-minded and informed but outside observer – in other words not the court itself. In another House of Lords decision, Lord Mance has implicitly noted that this is not an easy task:[167]

> But the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answers on issues such as those before the court, without their being easily cast as unreasonable. The differences of view in the present case illustrate the difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion.

6.138 Turning to the Asia-Pacific region, the leading decision on this issue in New Zealand is *Muir v Commissioner of Inland Revenue*[168] which expressly rejects the *Gough* test by overruling previous authority.[169] One aspect of this judgment could be read to infer that the *Porter v Magill* test and the reasonable apprehension test

164 For a similarly classic factual scenario from this region, see *Jung Science Information Technology Co Ltd v ZTE Corporation* HCCT 14/2008 (Hong Kong High Court, Court of First Instance) discussed at Section 6.1.4.2.
165 [2002] 2 AC 357.
166 See also *AWG Group Ltd (formerly Anglian Water Plc) v Morrison* [2006] EWCA Civ 6.
167 *R v Abdroikov*, *R v Green* and *R v Wilkinson* [2008] 1 All ER 315, at 81.
168 [2007] 3 NZLR 495 (Court of Appeal).
169 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (Court of Appeal).

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are one and the same.[170] However, the better reading is that the reasonable apprehension test now applies in New Zealand:[171]

> In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the 'bias' ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

6.139 In Australia, the reasonable apprehension test is well established as the test applicable to judges. It is, however, likely that the test applicable to arbitrators will soon be the *Gough* test. In late 2009, a Bill was introduced into the Australian parliament to amend Australia's International Arbitration Act. One aspect specifically requiring amendment in the legislators' view was the test for arbitrator bias. The explanatory memorandum, which accompanied the bill, stated that the amended legislation would 'provide that the test for whether there are justifiable doubts as to the impartiality or independence of an arbitrator is the real danger of bias test set out in *R v Gough*'.[172] The significance of this change is the perspective from which the danger of bias is assessed. As noted above in the *Gough* test it is the perspective of the court and not a generic fair-minded observer.

6.140 The test in Singapore is termed 'reasonable suspicion'. It was noted with approval by the Singapore Court of Appeal in *Re Shankar Alan S/O Anant Kulkarni* that:[173]

> In the [*Re Singh Kalpanath*] decision, Chan Sek Keong J in fact emphasised that the concern was not whether there is in fact a real likelihood or possibility of bias, but simply whether a reasonable man without any inside knowledge might conclude that there was an appearance of it.

6.141 There is Hong Kong case law which appears either to confuse or merge the *Porter* and reasonable suspicion tests. In the 2007 decision of *Lee Hong Dispensary*

170 'We prefer the approach in *Porter v Magill* and *Webb* because of the way in which it confirms the appropriate "window" through which the relevant conduct is to be viewed: that is, it emphasises how something might reasonably be regarded by the public, in the form of the reasonable informed observer.' [2007] 3 NZLR 495, at 35. This comparison can be understood as limited to characterising the test from the perspective of a reasonable person rather than the court.
171 [2007] 3 NZLR 495, at 36 and 37.
172 Australian International Arbitration Amendment Bill 2009, Explanatory Memorandum, para 92. See also the Australian International Arbitration Amendment Bill 2009 Section 14. The amended section is expected to appear as Section 18A in the International Arbitration Act as amended.
173 [2006] SGHC 194, at 110. See also *Turner v Builders Federal* [1988] SLR 532 (High Court); *Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310 (Court of Appeal); *Tang Kin Hwa v TCM Practitioners Board* [2005] 4 SLR 604 (High Court).

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Superstore Co Ltd v Pharmacy and Poisons Board, a Court of First Instance decision, Justice A Cheung observed:[174]

> the applicable test for apparent bias may be found in *Deacons v White & Case Ltd Liability Partnership* [2004] 1 HKLRD 291. In that case, the Court of Final Appeal endorsed the 'reasonable apprehension test'. In short, the court must ascertain all the circumstances which have a bearing on the suggestion that the judge or tribunal was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge or tribunal was biased. The material circumstances will include any explanation given by the judge or tribunal under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review, it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real possibility of bias notwithstanding the explanation advanced. (Emphasis added)

6.142 However, higher authority places the *Porter v Magill* version as the test applicable in Hong Kong. In 2005 Chief Justice Li, on behalf of the Court of Final Appeal, noted that '[t]he test for disqualification is whether the circumstances are such as would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the judge would be biased in dealing with the matter'.[175] He reaffirmed that position in *Suen Wah Ling t/a Kong Luen Construction Engineering Co v China Harbour Engineering Co (Group)*.[176]

6.143 Malaysian law is perhaps the hardest to identify with certainty. As in England, Malaysian courts have struggled to find a settled position. The Malaysian Federal court has described bias as 'a state of mind that is in some way predisposed to a particular result, or that is closed with regard to a particular issue'.[177] Cases from 2005 and 2006 suggest that the question to be asked is whether there is a 'real danger' of bias – in other words the *Gough* test.[178] However, in the 2007 case of *Seraya Sdn Bhd v Government of Sarawak*,[179] Justice Clement Skinner observed: 'So it can be seen that [. . .] it is necessary to apply the standard of a reasonable and fair minded person knowing all the relevant facts.' It should be noted that this 2007 decision is only High Court authority whereas the earlier 2006 case of *Dato' Tan Heng Chew v Tan Kim Hor*[180] is a Federal Court decision and thus more authoritative.

174 [2007] HKCU 379, at para 17.
175 *Ng Yat Chi v Max Share Ltd* [2005] HKCU 69, at para 121.
176 [2008] HKCU 570; see also *Jung Science Information Technology Co Ltd v ZTE Corporation* HCCT 14/2008.
177 *Tan Kim Hor v Tan Chong & Motor Co Sdn Bhd* [2003] 2 MLJ 278, at 285.
178 *Darshan Singh v Farid Kamal Hussain* [2005] 3 MLJ 502; *Majlis Peguam Malaysia v Raja Segaran* [2005] 1 MLJ 15; *Dato' Tan Heng Chew v Tan Kim Hor* [2006] MLJU 11.
179 [2007] MLJU 0595.
180 [2006] MLJU 11. This case explicitly rejects any need to modify the *Gough* test in line with the *Porter v Magill* changes.

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6.144 The above analysis has shown that there are arguably three different tests currently applied in this region among common law jurisdictions – the *Gough* test, the *Porter v Magill* test and the reasonable apprehension test. One may question whether there are, in fact, three tests because, as noted above, various courts have a tendency to treat *Porter v Magill* and the reasonable apprehension test as the same. In our view, however, there are persuasive arguments that they are different. The reasonable apprehension test has a lower threshold. The *Porter v Magill* test effectively requires a finding that the fair-minded person would, as a matter of fact, consider that there was a real possibility of bias. In contrast, the reasonable apprehension test merely requires that a reasonable suspicion of bias might occur. These tests could conceivably lead to different outcomes. The distinction was carefully considered by Justice Deane in the Australian High Court decision of *Webb v The Queen*.[181] Justice Deane was contrasting the reasonable apprehension test with the *Gough* test, however in this respect *Porter v Magill* does not differ from *Gough*.

6.1.4.2 *Selected court decisions on partiality and lack of independence*

6.145 While the previous section assessed the tests applied by courts, this section provides regional and international court decisions in which parties have called into question (rightly or wrongly) the impartiality and/or independence of an arbitrator.

6.146 The 2008 Hong Kong decision of *Jung Science Information Technology Co Ltd v ZTE Corporation*[182] is an example of an unsubstantiated allegation of bias where there is some form of connection between counsel and an arbitrator. The High Court's Court of First Instance in Hong Kong considered a challenge against a well-known arbitrator from this region. The challenge was dismissed. The party challenging the arbitrator cited as one of its grounds for challenge an alleged friendship between the arbitrator and a partner in one of the law firms acting for the opposing party. To support its allegations the party argued that the arbitrator and the partner were both board members of HKIAC and that they had often both spoken at the same conferences. When dismissing the challenge the court observed:[183]

> It would not occur to the objective onlooker in possession of the following relevant facts and circumstances to even consider it possible that Mr Yang was influenced to favour ZTE with whom he had no relationship whatsoever merely because ZTE happened to be represented in the opening stage of the Arbitration by a solicitor with whom he had a social and professional relationship in arbitration-related matters :
> (1) The international arbitration circle in Hong Kong is small. Frequent contacts between persons which are active in this area are to be expected. Links and connections can arise without calling into question independence and impartiality between colleagues.

181 [1993] 181 CLR 41, at pp. 71–74.
182 HCCT 14/2008.
183 *Jung Science Information Technology Co Ltd v ZTE Corporation*, HCCT 14/2008 at 56.

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(2) Both Mr Yang and Mr Moser (whose profile on the internet is adduced in evidence) are senior, highly experienced and well-respected practitioners in international arbitration in Hong Kong and overseas.
(3) Both can be expected to observe high standards of integrity.
(4) Given the time they have respectively been involved and the standing they have respectively attained in international arbitration in Hong Kong and elsewhere, the social and professional interactions described by Mr Yang are not and cannot be said to be out of the ordinary. One would have expected them to know or even be very familiar with each other.
(5) That relationship is open given what JSIT managed to find out about it from the internet and from instructing a local firm of solicitors.
(6) Freshfields and Mr Moser's representation of ZTE has likewise been open at all material times. Correspondence emanating from Freshfields were marked with a file reference which included what anyone more familiar with legal practice in Hong Kong would have realized to be Mr Moser's initials thereby signifying his involvement in the matter.
(7) Mr Yang was in fact nominated and appointed by the HKIAC, not by Freshfields.
(8) In any event, Mr Moser ceased acting for ZTE before the close of pleadings and before the Arbitration became procedurally contentious.
(9) The arbitral tribunal did rule against ZTE in favour of JSIT on whether the Jurisdictional Challenge should be decided as a preliminary issue and on five items of technical documents sought by JSIT from ZTE. (Emphasis added)

6.147 Another ground which might give rise to concerns about impartiality are those instances when an arbitrator has private contact with one party or appears to have received some sort of personal correspondence from that party. In the Singapore case of *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd*, Judicial Commissioner Chan Sek Keong observed that '[w]hile I would agree that there is no absolute rule against an arbitrator corresponding directly with the parties, this, in my view, should only be done in very exceptional circumstances'.[184] At around the same time, the Western Australian Supreme Court found that the mere fact an arbitrator had become aware that one party had rejected a settlement offer did not give rise to a reasonable apprehension of bias.[185]

6.148 The 1997 Victorian Court of Appeal decision in *Gascor v Ellicott*[186] provides an interesting example of a prior relationship challenge. This Australian decision concerned an allegation of apprehended bias against an arbitrator. The arbitrator had previously acted as counsel for one of the parties in a different but not entirely unrelated arbitration. As a consequence, many of the same expert witnesses were expected to appear. When acting as counsel in the earlier arbitration, the arbitrator had had to cross-examine these witnesses apparently in a vigorous manner. A second ground for the challenge was that the arbitrator had failed to disclose this prior relationship. The matter was first raised before the arbitrator, who dismissed the challenge. The challenge was also unsuccessful

184 [1988] 1 SLR 532, at 55 (High Court).
185 *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168.
186 [1997] 1 VR 332.

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in the courts. The Victorian Court of Appeal found that '[a]lthough there were similarities in subject matter ... the circumstances did not show that a fair-minded member of the public might entertain a reasonable apprehension that, because of the arbitrator's participation as arbitrator ..., he might not bring an impartial and unprejudiced mind to the resolution of the issues raised in the present arbitration'.[187] More recently the Victorian Supreme Court rejected a challenge where the arbitrator had previously acted as counsel for a particular type of client.[188] In this case the concern appears to have been that the arbitrator's previous instructions from trade unions implied he held particular views. The challenge was rejected, particularly because none of the parties to the arbitration were trade unions.

6.149 Another interesting independence case is the English Court of Appeal decision in *Sumukan Ltd v Commonwealth Secretariat*.[189] Although ultimately turning on a number of different matters including questions of diplomatic immunity, the court did not accept that a clause which allowed only one party to appoint the entire arbitral tribunal was invalid. In that instance Lord Justice Toulson felt that the independent, fair-minded observer would look at all the circumstances including 'the eligibility of the person appointed'.[190]

6.150 The unsuccessful *Gascor* challenge referred to above can be contrasted with a challenge that was successful in fairly similar circumstances in the 2005 English decision *ASM Shipping Ltd v TTMI Ltd*.[191] In that case, the challenged arbitrator had previously been instructed by one of the firms of solicitors acting in the arbitration. The arbitrator's involvement in the earlier case was apparently quite brief. However, as one of the witnesses from the earlier arbitration was also to be a witness in the current arbitration, there was a concern of potential bias. During the earlier arbitration, particularly serious allegations had been made against this witness, and the implication of the challenge was that the arbitrator must have known about these allegations, and would not be able to dismiss them from his mind. The arbitrator could not recall ever previously meeting the witness and denied knowledge of the allegations. Despite this, the court found that a suspicion of bias was possible and removed the arbitrator. The decision has been strongly criticised.[192]

6.151 Another example of this situation comes from the District Court of The Hague.[193] Although a Dutch decision, it does have a strong connection to the Asia-Pacific. A Malaysian company was involved in an arbitration with the Republic of Ghana. The Republic of Ghana's submissions relied in part on an earlier published arbitral award in a completely separate arbitration but one

187 [1997] 1 VR 332, at 333.
188 *Able Demolitions & Excavations v State of Victoria* [2004] VSC 511.
189 [2007] EWCA Civ 1148.
190 [2007] EWCA Civ 1148, at 71.
191 [2005] EWHC 2238 (Comm).
192 H Dundas, 'Conflicts of Interest in International Arbitration – A Wrong Turning', February 2006, IBA Legal Practice Division, *Arbitration Committee Newsletter*, at p. 14.
193 District Court of Hague, pet. No. HA/RK 2004, 778.

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which had considered a virtually identical issue. One of the current arbitrators disclosed that he had been engaged as counsel to have the earlier award set aside. The Republic of Ghana then challenged the arbitrator, and the matter ultimately ended up before the District Court of The Hague. The court conditionally upheld the challenge, whereupon the arbitrator resigned as counsel in the other matter. Commentary on this decision notes that in order for a challenge to be upheld on this basis the role of arbitrator and counsel should be concurrent.[194] That is, an arbitrator should not be disqualified simply because he or she has previously acted as counsel on a similar issue. This concurs with the Australian position noted above.[195] However, the IBA Guidelines place this in the waivable Red List.[196]

6.152 It was noted by the Supreme Court of Victoria decision in *Gascor v Ellicott*[197] that the failure of an arbitrator to disclose a matter that might give rise to justifiable doubts would not itself give rise to justifiable doubts. In practice, however, failure of an arbitrator to disclose facts or circumstances relevant to independence or impartiality will be treated with suspicion.

6.153 The issue of disclosure by an arbitrator was considered in early 2009 by the Paris Court of Appeal because the chairman of an ICC arbitral tribunal omitted to disclose, among other things, that the Beijing office of his law firm had advised the parent company of one of the parties on an unrelated project in China.[198] The chairman had disclosed that certain offices of his law firm had advised and represented several companies of the claimant's group. However, the respondent discovered from the program of an international conference that the chairman's law firm was currently acting for the claimant's affiliated companies in China. The respondent challenged the chairman under the procedures in the ICC Rules but the ICC Court rejected the challenge.

6.154 The respondent protested the challenge rejection during the arbitration and later sought to set aside the arbitral tribunal's partial award on the ground that the arbitral tribunal had been improperly constituted. The Paris Court of Appeal found that the chairman had not been exhaustive in his verification of potential conflicts of interest. The court noted, but did not give significant weight to, the fact that the chairman's law firm employs over 2200 lawyers in some 32 countries, and that the chairman probably had no personal knowledge of the Chinese matter in question. The court concluded that 'by reason of the lack of independence of the arbitrator, the arbitral tribunal has been irregularly constituted ... [and] the partial award of 10 December 2007 must be set aside'. The court also emphasised that an arbitrator's duty to disclose facts likely to constitute a conflict of interest exists throughout the arbitration. One cannot simply rely on the declaration of independence provided at the appointment stage. It should be noted

194 IBA Legal Practice Division, *Arbitration Committee Newsletter*, March 2005.
195 The case referred to earlier is *Able Demolitions & Excavations v State of Victoria* [2004] VSC 511.
196 See Section 5.2.2.
197 [1997] 1 VR 332.
198 Paris Court of Appeal, 12 February 2009 (07/22164), (authors' translation).

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that this decision has been appealed to the Cour de Cassation, France's highest court.

6.1.4.3 *Inappropriateness of using the same bias test for judges and arbitrators*

6.155 It was noted above that courts in this region generally apply the same test for independence and impartiality to both judges and arbitrators.[199] Indeed, courts in most jurisdictions apply the same test whether the person in question is a judge, arbitrator, juror or an administrative official with delegated authority. Despite this trend, there are compelling differences suggesting that arbitrators should be treated somewhat differently.

6.156 Arbitrators are not judges. Judges are generally required to take an oath of office. As the Scottish Court of Session has stated:[200]

> The judicial oath is an important protection, not only against actual bias, but also against apparent bias, because it is not only in many ways definitive of a judge's duty, it also so imbues the judge that it becomes his or her second nature, unconsciously as well as consciously, to abide by it. Obviously, the judicial oath, and all that it carries with it, cannot serve as a complete guarantee of impartiality, but in our opinion the fair-minded and informed observer, taking account of these considerations, would give it great weight. Such an observer would also recognise the desirability of a judge keeping in touch with the world beyond the courts, and that his or her personal interests and experience may lead to membership of or involvement with external organisations.

6.157 The last sentence of the extract is particularly poignant to this discussion. It is certainly true that judges should keep in touch with the world beyond the courts, but they are not expected to maintain an active, financial role in that world as ordinary citizens might do. In contrast, arbitrators are neither tenured adjudicators nor bound by a judicial oath and are often professionally engaged in various spheres of business, finance and industry. Indeed, it may be precisely because of their commercial (and *not* judicial) experience that arbitrators are chosen. This view is echoed in changes to the Australian International Arbitration Act. The explanatory memorandum to the amendment bill stated:[201]

> Equating arbitrators with judges is not consistent with the principles underpinning arbitration. While there is no doubt that an arbitrator should be impartial, arbitrators will be selected by the parties in some instances because of their specific knowledge of an industry or particular arrangements. More typically an arbitrator will be a senior member of an international law firm, barrister, expert in a particular field or an academic. Accordingly, it is appropriate to apply a standard different than that for judges to such persons.

6.158 On the opposite side of the debate are those, such as a respected arbitrator from this region,[202] who have suggested that arbitrators should be held to stricter

199 See also Luttrell, 2008, op. cit. fn 155.
200 *Helow v Advocate General* [2007] CSIH 5, at para 35.
201 International Arbitration Amendment Bill 2009 (Australia), Explanatory Memorandum, para 89.
202 FS Nariman, 'Standards of Behaviour of Arbitrators', (1988) 4(4) *Arbitration International* 311.

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standards than judges. This line of argument suggests that because arbitrators are part of the commercial world they are more exposed to temptation.

6.159 Both of these positions are considered to be extremes by those who argue that the current approach adopted by, for example, the English courts is the middle and appropriate position.[203]

6.160 Parties who have chosen arbitration should generally be understood to accept and give little, if any, weight to some of the more distant connections that might nevertheless force the recusal of a judge. As previously noted, the pool of highly experienced international arbitrators is relatively small, although rapidly growing. So, on the one hand, the same people often find themselves involved in arbitrations as either arbitrator or counsel; and on the other hand, conflicting out too many arbitrators may result in inexperienced or otherwise inappropriate appointments.

6.1.5 The standard for party-nominated co-arbitrators

6.161 It is not clear whether the standard for deciding whether an arbitrator is independent or impartial should be applied equally to all arbitrators. In some jurisdictions like the US, there is sometimes said to be a greater expectation and therefore perhaps tolerance that party-nominated arbitrators will pursue the interests of the nominating party. In this region the issue has been addressed in New Zealand, where all arbitrators are held to the same standard of impartiality and independence. The following passage from *Banks v Grey District Council* can be interpreted as meaning the same standards apply to the entire tribunal, and may well find favour in other regional courts – certainly those of the common law tradition. The New Zealand Court of Appeal held:[204]

> . . . each arbitrator has a fundamental duty to act fairly and impartially. This duty is at the essence of arbitration, and extends to party-appointed arbitrators. The observation of Tompkins J in *Tolmarsh Developments Ltd v Stobbs* [1990] LVC 835 at p 838 is in point:
>
> 'At the stage when the two arbitrators have entered upon the reference and are endeavouring to reach agreement, it is essential that they must be, and must be seen to be, acting impartially, objectively and with an absence of bias.'

6.162 Even when nominated by a party, an arbitrator is under a duty to be and remain impartial and independent. A party-nominated arbitrator does not 'represent' that party within the arbitral tribunal. It was noted above in Section 3.2.2 that it is in fact not in the nominating party's interests to choose a biased arbitrator. Most experienced arbitrators say that they do not feel a particular duty toward the party that nominated them, but tend to pay particular attention to the arguments presented by that party. This is perfectly acceptable and does not mean that the arbitrator will necessarily favour the position of the nominating party or try to influence the other arbitrators in that respect. The same standard for impartiality

203 S Singhal, 'Independence and Impartiality of Arbitrators', (2008) 11(3) *International Arbitration Law Review* 124, at p. 125.
204 [2004] 2 NZLR 19, at para 27.

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and independence can therefore be applied to all arbitrators, regardless of who nominated the arbitrator.

6.1.6 Impartiality and arb-med or med-arb

6.163 Arb-med is a dispute resolution process which combines arbitration and mediation.[205] The mediation, if it occurs, will take place with the parties' consent at an appropriate stage during the arbitration proceedings. A more common variation is med-arb, where arbitration is preceded by mediation. Issues of impartiality will not arise in connection with the arb-med or med-arb processes if the arbitrator and mediator are different people. But it may be the same individual who is asked to wear both hats. In those circumstances the question of impartiality becomes very real.

6.164 In mediation, parties frequently have a private, confidential caucus with the mediator. This is a virtual antithesis of arbitration procedures which require all communications to take place with all parties present (or in copy in the case of written communications). One significant concern is the fear that one party might, in private, give the arbitrator important information that the opposing party is unaware of, and is therefore unable to respond to and clarify. Thus, at first glance it seems unlikely that mediation and arbitration could co-exist with the same individual taking on both roles.

6.165 The standard approach of *lex arbitri* in jurisdictions where arb-med or med-arb is permitted is simply to require that the parties agree in writing to the arbitrator acting also as a mediator. However, among arbitral legislation around the world, two countries in this region stand out for their guidance and regulation on this issue. Those jurisdictions are Hong Kong and Singapore.[206] Both of these jurisdictions provide a mandatory waiver. By entering into an agreement to allow the arbitrator to act as a mediator, the parties have waived their right to challenge the arbitrator on that basis. Both jurisdictions also stipulate that the arbitrator must reveal to all parties any information considered to be relevant to the arbitration prior to recommencing the arbitral process after a mediation attempt. In both pieces of legislation this is a mandatory provision from which the parties cannot derogate.[207]

6.166 Irrespective of whether the *lex arbitri* provides guidance on how the arb-med process should be conducted, the question remains whether it is realistically possible for an arbitrator not to form certain views subsequent to a mediation attempt. Will arbitrators be able to avoid being influenced by information disclosed to them by a party in a private caucus session during a mediation? As a general rule the answer to that question may be yes. As Rosoff has observed:[208]

205 Arb-med is explained and considered in Chapter 7, Section 6.12.
206 The Hong Kong legislation is extracted in Chapter 7 at para 7.92. Section 16 of the Singapore International Arbitration Act. See generally J Rosoff, 'Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings', (2009) 26(1) *Journal of International Arbitration* 89, at p. 98.
207 Rosoff, ibid., at p. 100.
208 Ibid., at p. 97 (references omitted).

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> Disregarding information is a required skill that arbitrators should possess. Arbitrators may be required to consciously disregard information that is not presented during arbitral proceedings, such as public documents, information in the media and previous experience during the course of 'normal' arbitration proceedings. Additionally, arbitrators may also be required to disregard evidence they deem inadmissible after first reviewing the evidence for admissibility.

6.167 As a practical matter, it would seem highly advisable for arbitrators to seek not only the parties' agreement in writing, but also to have the parties waive challenge rights which may arise from the mediation process. Naturally, such a waiver would not affect the arbitrator's duty to act independently and impartially.[209] Arbitrators might alternatively consider inviting the parties to adopt provisions similar to those found in the Hong Kong and Singaporean legislation.[210]

6.2 Challenges for misconduct

6.168 Most arbitration rules and laws provide a mechanism for removing arbitrators for reasons other than relating to their independence or impartiality. Arbitrators can be removed for misconduct or when they fail to perform their functions, or fail to perform them in good time.

6.169 After examining what constitutes misconduct and the procedure for such challenges, this section provides examples of arbitral institution and court decisions on misconduct.

6.2.1 Definition and procedure

6.170 Misconduct is not a term used in the Model Law or international arbitration statutes generally. However, it remains relatively common in domestic arbitration statutes. Singapore's domestic legislation no longer uses the term misconduct but, when it did, in 2002 the Singapore High Court observed:[211]

> There is no statutory definition of what constitutes 'misconduct' but this term has been discussed in many cases and academic texts and there is a clear understanding of what it means in relation to the behaviour of an arbitrator in respect of himself or the proceedings. It should be noted at once that to find misconduct on the part of the arbitrator does not of itself impute any slur on his character. Misconduct can be found in respect of the technical handling of the arbitration and need not be a matter of bias or prejudice or other disreputable action on the part of the arbitrator.
>
> No actual bias or partiality need be shown as long as the court is satisfied from the conduct of the arbitrator, either by his words, his action or inaction or his handling of the proceedings, that he displayed a real likelihood that he might not be able to act judicially.

209 Ibid., p. 96.
210 See generally M Hwang, 'The Role of Arbitrators as Settlement Facilitators – Commentary', (2004) 12 *ICCA Congress Series* 571.
211 *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 4 SLR 748, at p. 755.

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6.171 As the above citation suggests, there is occasionally overlap in domestic court case law between decisions dealing with an allegation of partiality or dependence and issues of misconduct. In some legal systems, the courts consider partiality or dependence as a species of misconduct.

6.172 Article 14 of the Model Law provides for removal of an arbitrator who 'becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay'. The mechanism in Article 14 is very different from Article 13 (which deals with challenges as to independence and impartiality) because it provides a direct route to the court and is not time limited. However, it does not give the court a supervisory role as the article is not invoked by technical misconduct – that is, the court cannot assess whether the arbitrator is conducting the proceedings in an appropriate manner. A court is only able to intervene to keep the arbitration moving when it has effectively stopped – albeit by the drastic measure of removing the arbitrator.

6.173 Although the Singapore (domestic) Arbitration Act adopts much of the Model Law, Section 16 follows the English model.[212] In the Singaporean decision of *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd*,[213] the court examined the differences between the former Singaporean legislation governing domestic arbitration and the then new legislation. After noting that the word 'misconduct' had been removed from the legislation it observed that the test was now one of 'substantial injustice':[214]

> Under s 16(1)(b) of the Act, an applicant has to show that the arbitrator's conduct of the proceedings has caused or will cause him to suffer substantial injustice. Loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice. Dyson J in *Conder Structures v Kvaerner Construction Ltd* [1999] ADRLJ 305 said, and I adopt his statement, that loss of confidence in an arbitrator is neither a sufficient nor a necessary condition of substantial injustice. Previously, as long as the court was satisfied that from the conduct of the arbitrator a

212 English Arbitration Act 1996 Section 24(1)(d).
Section 16 of the Singapore Arbitration Act states:
16. (1) A party may request the Court to remove an arbitrator –
(a) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or
(b) who has refused or failed –
(i) to properly conduct the proceedings; or
(ii) to use all reasonable despatch in conducting the proceedings or making an award, and where substantial injustice has been or will be caused to that party.
(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the Court shall not exercise its power of removal unless it is satisfied that the applicant has first exhausted any available recourse to that institution or person.
(3) While an application to the Court under this section is pending, the arbitral tribunal, including the arbitrator concerned may continue the arbitration proceedings and make an award.
(4) Where the Court removes an arbitrator, the Court may make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses, or the repayment of any fees or expenses already paid.
(5) The arbitrator concerned is entitled to appear and be heard by the Court before it makes any order under this section.
(6) No appeal shall lie against the decision of the Court made under subsection (4).

213 [2005] 3 SLR 512.

214 Ibid., at 527.

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> reasonable person would think that he had displayed real likelihood of not being able to act judicially, that was enough to remove him for misconduct. That is no longer the case. The test now is different.

6.174 Despite this, it may be possible to argue that apparent breaches of natural justice are the result of bias and therefore impartiality.[215] Such an approach would avail the complainant of the procedures in Article 13 of the Model Law. As noted before there is occasional overlap between misconduct and bias.

6.175 An evident policy of the Model Law is to ensure that the arbitration proceeds through to an award. For example, a challenged arbitrator is empowered to proceed and deliver an award notwithstanding a pending challenge against the arbitrator.[216] However, this does not necessarily prevent a party from challenging the award for that reason after it has been delivered. In the New Zealand High Court decision of *Grey District Council v Banks*[217] (the appeal from which was referred to above), Justice Pankhurst specifically stated that he made no comment on whether failing to object in time would affect any later challenge to an award.

6.176 Most arbitration rules also deal with the situation where an arbitrator misconducts the proceedings in some way. Article 15(2) of the ACICA Rules provides a typical example:[218]

> In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of him or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply.

6.177 Article 14(2) of the KCAB International Rules vests the same power in the institution. However, it does not indicate exactly how that power is to be exercised:

> The Secretariat may remove any arbitrator who fails to perform his or her duties or unduly delays in the performance of his or her duties, or is legally or actually unable to perform his or her duties.

6.178 Arbitrators are usually only removed on the application of a party to the proceeding. The above provision does not make clear whether a replacement can be on the KCAB's own initiative. Article 27(1) of the CIETAC Rules is similarly unclear. The ICC Court's power to remove an arbitrator on its own initiative is examined in the next section. The Indian Council of Arbitration Rules,[219] the JCAA Rules[220]

215 See observations made in *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR 14, at 26.
216 See, e.g. *Mitsui* ibid., where an interim injunction to prevent a challenged arbitrator from proceeding to an award was refused.
217 [2003] NZAR 487.
218 See also for example: PDRCI Rules Article 13(2); SIAC Rules, Rule 13(2); UNCITRAL Rules Article 13(2); 2010 UNCITRAL Arbitration Rules Article 12(3); and ICC Rules Article 12(2). The 2010 SIAC Rules, Rule 14.2 notably also expressly refers to fulfilling functions within prescribed time limits.
219 ICA Rules, Rule 27.
220 JCAA Rules, Rule 30.

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and the Rules of Arbitration of the Bangladesh Council of Arbitration[221] include similar provisions.

6.2.2 Arbitral institution decisions on misconduct

As noted above, the fact that arbitration is in principle confidential means that published decisions of arbitral institutions are rare. Nonetheless, some examples of ICC Court decisions on the removal of arbitrators have been made public. 6.179

Article 12(2) of the ICC Rules provides that an arbitrator will be replaced 'on the Court's own initiative when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits'. According to Fry and Greenberg, 'the most common ground for initiating replacement proceedings is when the arbitrator is causing unacceptable delays, is not responding to correspondence from the Secretariat and/or the parties, or is not conducting the arbitration in accordance with the Rules'.[222] Article 12(2) resulted in the removal of an arbitrator by the ICC Court on 19 occasions between 1998 and 2008. The following represent recent examples:[223] 6.180

(i) Due to a series of disagreements among them, the members of the arbitral tribunal were having difficulties working together, and there were serious delays in the completion of a majority award in accordance with the ICC Rules. The ICC Court replaced the chairman of the arbitral tribunal. With a strong, fresh chairman, the case quickly moved back on track.

(ii) In another case, replacement proceedings were initiated on the basis that the arbitrator was not available for a hearing at any of the times requested by the parties. One party pointed out this scheduling difficulty to the Secretariat and the ICC Court decided to initiate replacement proceedings. The sole arbitrator immediately resigned.

(iii) In yet another case, the sole arbitrator had little previous experience acting as an international arbitrator. This showed in the way that he managed (or failed to manage) the file. Doubt existed as to whether the sole arbitrator had verified that his correspondence reached the intended addressees and whether messages left with his assistant reached him. Furthermore, the sole arbitrator's statements on jurisdiction in the draft terms of reference suggested prejudgment of the issue. The sole arbitrator resigned after the replacement proceedings were commenced.

(iv) There was also a case in which the ICC Court decided to initiate replacement proceedings against the co-arbitrator nominated by the respondent after he twice cancelled his participation in the hearing on the merits at the eleventh hour, appearing to prioritise his other professional activities. The situation caused delays and additional costs for the parties and other members of the arbitral tribunal. After the ICC Court had initiated the replacement

221 BCA Rules, Rule 9.8.1.
222 Fry and Greenberg, op. cit. fn 11, at p. 29.
223 Ibid.

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proceedings, but before all of the parties' comments had been sought for the purposes of the ICC Court's final decision on the removal, the respondent agreed with the claimant's proposal that the arbitrator be replaced by agreement of the parties under Article 12(1) of the ICC Rules.

6.181 Not all of the above-mentioned examples would fall under a typical definition of misconduct, however they illustrate how an institutional arbitrator removal provision can be utilised.

6.2.3 Court decisions on misconduct

6.182 Most allegations of arbitrator misconduct heard before courts tend to involve matters of procedure. A common expression associated with court-based applications of this kind is that a party has 'lost confidence' in the arbitrator's ability to perform his or her duties. This appears to have derived from the notion of misconducting the arbitration.

6.183 During an unsuccessful challenge attempt in *Anwar Siraj v Ting Kang Chung*[224] where incompetence was alleged, it was noted by the Singapore High Court that:

> A subjective lack of confidence in the arbitrator by one party is not a sufficient ground to remove him. The test is an objective one and there must exist real grounds for which a reasonable person would think there is a real likelihood that the arbitrator could not or would not fairly determine the issue on the basis of the evidence and the arguments to be adduced before him (*Hagop Ardahalian v Unifert International SA* (The 'Elissar') [1984] 2 Lloyd's Rep 84 at 89).
>
> The applicant must show that his decision was likely to have been coloured by something which should have no part at all in a fair decision-making process.

6.184 In 2001, in what was also a failed attempt to remove an arbitrator, but this time in the High Court of Hong Kong, Justice Burrell observed:[225]

> [Challenging an arbitrator] is a serious application to make and would only be granted in exceptional circumstances. In this case, it seems to me that the application is made for no better reason than the arbitrator consistently made findings contrary to the applicant's submissions (which they no doubt felt were correct) and they therefore lost confidence. What they lost confidence in was not the arbitrator's ability to discharge his duties properly but in the prospects of him making findings in their favour.

6.185 More recently, in *Gingerbread Investments Ltd v Wing Hong Interior Contracting Ltd*[226] Justice Burrell was called on again to consider an application alleging misconduct. On that occasion it was noted that a 'mere error of law cannot constitute misconduct ... but relying on utterly irrelevant evidence *might* provide evidence of misconduct'.[227]

224 [2003] 2 SLR 287, at 297.
225 *CCECC (HK) Ltd v Might Foundate Development Ltd* [2001] HKCU 916, at para 62.
226 HCCT 14/2008 (Hong Kong, High Court).
227 HCCT 14/2008 at 23, 24 (original emphasis).

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6.186 An example of a regional court ordering the removal of arbitrators is *Sea Containers Ltd v ICT Pty Ltd*.[228] The decision was controversial not so much for the legal outcome but rather the New South Wales Court of Appeal's scathing review of the arbitral tribunal's conduct. In that case, the members of the arbitral tribunal put fee proposals to the parties prior to their appointment in the ad hoc arbitration. The parties agreed to these proposals and the arbitral tribunal was constituted. After the arbitration had commenced the arbitral tribunal asked the parties to agree to pay both hearing cancellation fees and security for the arbitrators' costs – neither of which had been contemplated in the original fee agreement. There was disagreement about whether the arbitral tribunal could require the parties to make these payments, and various proposals were put and withdrawn at different stages by each of the parties. Eventually one party agreed to pay extra fees but the other did not. While this was occurring, the parties appeared to be making progress towards settling the case. When the parties sought a stay of the proceedings, the arbitral tribunal refused to make the consent order unless both parties agreed to the payment of cancellation fees. The party that refused to agree challenged the arbitral tribunal, arguing that as a certain level of hostility between that party and the arbitral tribunal had developed, that party was concerned that it might not receive equal treatment.[229] The New South Wales Court of Appeal removed all three members of the arbitral tribunal.

6.187 The arbitral tribunal in *ICT* was comprised of three arbitrators with a significant amount of combined arbitration (both domestic and international) and judicial experience. It is therefore somewhat surprising that the situation was allowed to develop. The issue could have been avoided had the arbitrators addressed premature termination in their initial fee agreements. Such a provision was, and still is, commonplace in ad hoc arbitrator fee arrangements. The New South Wales Court of Appeal in *ICT* cited with approval the following passage from Mustill and Boyd written in 1989:[230]

> These are all cases in which the arbitrator seeks to be paid for work done before the reference came to an end. It is, however, possible that the arbitrator will look for more than this. He may argue that but for the premature termination of the reference he would have been entitled to earn additional fees, and that the loss of fees is something for which he should be compensated. Such an argument may in isolated cases reflect a genuine hardship. The arbitrator may have been asked to set aside several weeks for the hearing. If the dispute is settled immediately beforehand, the arbitrator may not be able to fill the space with sufficiently remunerative work. The Court would no doubt feel sympathy in such a case, but it is unlikely to provide redress. A claim in damages would be hopeless, for even if the relationship could properly be explained in terms of contract, it would be absurd to contend that the parties committed a breach by failing to continue with the reference of a dispute which for practical purposes had ceased to exist: for example, because it was settled or because in the exercise of a statutory

228 [2002] NSWCA 84 (Australia).
229 For a further detailed discussion of this case see S Greenberg, 'Latest Developments in International Arbitration Down Under', (2003) 7(2) *Vindobona Journal*, at p. 287.
230 MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn, Butterworths, 1989, at pp. 243–44.

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> or common law jurisdiction the court had prevented it from being pursued. Nor is the proposition more attractive if the relationship is one of status, rather than contract. Public policy demands that the arbitrator should be paid for what he has done, but not that he should be paid for what he has not done. Indeed, considerations of policy point the other way, for the Court would not wish to confer on the arbitrator a right to compensation, the existence of which might inhibit the freedom of the parties to settle the dispute as they think best, or to invoke the supervisory jurisdiction of the Court when circumstances so required. Much the better view, we suggest, is to treat the risk of a settlement as an occupational risk of arbitrating. If a dispute is so large and the potential hardship to the arbitrator so great the risk appears unacceptable, there is nothing to prevent the arbitrator from stipulating as a condition for agreeing to accept the appointment that he shall be recompensed for keeping his time available.

6.188 The question of arbitrator fees has also been considered in detail in Switzerland. The Swiss Federal Tribunal found that a challenge to an arbitrator's fees did not constitute reasonable grounds for affecting independence or impartiality.[231] In this case a partially successful claimant was unhappy with the award of damages it received and sought to challenge the arbitral tribunal's independence. The arbitral tribunal had decided in a partial award that the respondents were liable for wrongful contract termination. It subsequently turned to the quantification of damages. During this second stage of the proceedings, the claimant kept increasing the amount in dispute. Concurrently, the arbitral tribunal also requested several advances on its fees and costs. The claimant repeatedly protested against those amounts, and requested the reduction of what it alleged was an excessive hourly rate fixed by the arbitral tribunal. In the final award, the claimant was granted very little compared to what was claimed, and was ordered to bear the entirety of the arbitration costs and the respondents' legal costs.

6.189 The claimant argued, in its challenge before the Swiss Federal Tribunal, that there were reasonable doubts as to the impartiality and independence of the arbitrators. Its argument relied in part on an allegation that the arbitral tribunal applied an excessive hourly rate only after the claimant's request for hours spent on the case. It also alleged a conflict of interest between the claimant and the arbitral tribunal as to the fixing of fees. The Swiss Federal Tribunal dismissed the claim, emphasising that a dispute as to an arbitrator's fees is not, of itself, a ground that would affect independence or impartiality.

6.190 In the 1998 Hong Kong decision of *Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens*,[232] the court removed an arbitrator for misreading the arbitration rules and failing to give reasons for his decision. It was noted that simply misreading the rules would not have been sufficient on its own. In a similar vein, but perhaps more controversially, the arbitrator in the Malaysian case of *Sineo Enterprise Sdn Bhd v Jayarena Construction Sdn Bhd*[233] was removed on the basis that an arbitrator does not have the power to adopt a procedure that involves no oral hearing without the parties' consent. The arbitrator had decided

231 4P.263/2002, *A Ltd v B SA*, (unreported Swiss Supreme Court, 10 June 2003).
232 [1998] 4 HKC 171 (Court of First Instance).
233 [2005] MLJU 216 (High Court).

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that an interlocutory application did not require an oral hearing, even though one party had repeatedly sought one. Other examples include the Australian state of New South Wales Supreme Court decision in *Reganam Pty Ltd v Crossing*[234] where the court was satisfied that the arbitrator was 'unsuitable' for the particular dispute.[235] In that instance the judge described errors made by the arbitrator in the award as 'manifest and it is not unfair to describe them as fundamental and elementary'.[236]

7 Resignation and replacement of arbitrators

Challenging an arbitrator is not the only circumstance in which a vacancy may occur on an arbitral tribunal. An arbitrator may resign his or her appointment, be subjected to an agreement by the parties to replace him or her, or may pass away during the course of the arbitration. This usually leads to replacement. 6.191

7.1 Resignation of arbitrators

It is always possible for an arbitrator to resign. The decision to resign is significant and should not be taken lightly. An arbitrator should only resign in circumstances where the integrity or efficiency of the arbitral process would be compromised by the arbitrator's continued involvement. For example, this might include situations where a conflict of interest (real or perceived) arises, or the arbitrator is appointed as a judge or to some other public position which will demand significant time commitments. An arbitrator might also resign due to illness or when his or her relationship with the other members of the arbitral tribunal becomes difficult or unprofessional; for example where a chairperson of an arbitral tribunal cannot control or work with his co-arbitrators. 6.192

Two arbitral institutions reserve the power to refuse to accept an arbitrator's tender of resignation. They are the Bangladesh Council of Arbitration[237] and the ICC Court.[238] Fry and Greenberg point out that between 1998 and 2008 the ICC Court received 208 tenders of resignation, five of which were rejected.[239] There was a further rejection in 2009. The rejected resignations tend to be where an arbitrator offers to resign after having been challenged and the ICC Court considers that this is not warranted. Examples of accepted resignations include where a conflict of interest has arisen or where an arbitrator feels that the complexity of the case has exceeded his qualifications. Arbitrators may also 6.193

234 [2007] NSWSC 582.
235 Another Australian decision to use the phrase 'suitable' was *Enterra Pty Ltd v ADI Ltd* [2002] NSWSC 700, however in that case it was noted that an arbitrator was not unsuitable simply because of difficulties with available times to conduct the arbitration.
236 *Reganam Pty Ltd v Crossing* [2007] NSWSC 582, at para 68.
237 BCA Rules, Rule 9.8.1.
238 ICC Rules Article 12.1.
239 Fry and Greenberg, op. cit. fn 11, at p. 28.

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resign after the ICC Court commences proceedings to remove and replace the arbitrator, as foreseen in Article 12(2) of the ICC Rules. In one ICC case, the entire arbitral tribunal tendered its resignation after its award on jurisdiction was set aside by a court at the seat of arbitration.[240] The ICC Court accepted the resignation of all three arbitrators.

7.2 Agreements to replace arbitrators

6.194 Concerning party agreement to replace an arbitrator, one might expect that where all parties agree on replacement, the arbitrator would step down. This did not happen in one ICC Court case in 2008. The parties there agreed that the co-arbitrator nominated by claimant should be replaced because, despite what was stated on his curriculum vitae, he was not able to work in the language of the arbitration without the assistance of translators and interpreters. The arbitrator, who was from a developed Western European country, refused to recognise the parties' agreement to replace him, arguing that the Secretariat of the ICC Court should be required to provide translations and interpretation services. He also contended that if he were removed, he would be entitled to damages consisting of his fees through until the end of the case. The ICC Court took note of the parties' agreement, in accordance with Article 12(1) of the Rules, and replaced the arbitrator with a new nominee provided by the claimant.[241]

7.3 Replacement of arbitrators

6.195 When an arbitrator resigns or is removed, the question of how to proceed with the arbitration inevitably arises. If the arbitration is institutional, the rules will contain a procedure to appoint a replacement. This is usually the same method adopted for the original appointment. Article 22 of the Japanese Arbitration Law is typical:[242]

> Unless otherwise agreed by the parties, where the mandate of an arbitrator terminates under any of the grounds described in each item of paragraph (1) of the preceding article, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

6.196 The other aspect to the question of how to proceed concerns the conduct of the arbitration itself – and in particular whether it is necessary to repeat previous proceedings. In some instances it may be necessary and appropriate to provide the new arbitrator with an opportunity to hear witness testimony and oral submissions made prior to his or her appointment. In other instances, simply reading the transcript and submissions may be sufficient, thus saving considerable time

240 Ibid.
241 Ibid.
242 Model Law Article 15; Chinese Arbitration Law 1994 Article 37; Malaysian Arbitration Act 2005 Section 17; New Zealand Arbitration Act 1996 Article 15, Schedule 1; ICC Rules Article 12(5).

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and expense. Most arbitral rules empower the arbitral tribunal to order that hearings be repeated, if the arbitral tribunal deems it necessary.[243] For example, Article 15 of the 2010 UNCITRAL Arbitration Rules and Article 13.1 of the HKIAC Rules state:

> If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his/her functions, unless the arbitral tribunal decides otherwise.

6.197 The UNCITRAL Arbitration Rules,[244] SIAC Rules[245] and PDRCI Rules[246] are slightly different. They state that hearings will be repeated if the chairperson of the arbitral tribunal is the replaced arbitrator, and if the parties have not agreed otherwise.

243 ACICA Rules Article 16; CIETAC Rule 27(3); ICA Rules, Rule 27; JCAA Rules, Rule 8.2; KCAB International Rules Article 4; ICC Rules Article 12(4).
244 UNCITRAL Arbitration Rules Article 14.
245 SIAC Rules, Rule 14.
246 PDRCI Rules Article 14.