DECISION OF ENGLAND'S COURT OF APPEAL (CIVIL DIVISION) RENDERED IN 2000 IN CASE [2000] EWCA Civ 154

The "Saudi Cable" Case

SUBJECT-MATTERS:

(1) What constitutes bias on the part of an arbitrator?
(2) What constitutes misconduct on the part of an arbitrator?
(3) Whether an arbitral institution's decision on a challenge of an arbitrator is final.
(4) Whether the arbitrator should be removed and awards set aside on ground of bias.

FINDINGS:

(1) When deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias.
(2) The ICC Rules do not impose a wider obligation of disclosure than that relating to independence, thus not impartiality. The arbitrator's non-executive directorship of a competitor company did not call in question his independence; and the main plank of the appellants' case concerned the possible disclosure of confidential information to a non-executive director of a competitor, rather than the arbitrator's independence.
(3) The finality provision in the ICC Rules does not mean that the English courts have no power to review the decision of the ICC Court. The finality provision does not operate to exclude the English court's jurisdiction under s.23 of the 1950 Act. Thus, the English courts retain their jurisdiction to determine whether the ICC Rules have been breached when entertaining an application to remove for alleged misconduct.
(4) Even if it were a procedural mishap it would be inappropriate in the circumstances of this case – the arbitration having reached the stage it has - to set aside the awards or to remove the arbitrator.

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PARTIES:

Appellants: 1. AT&T Corporation (USA)
2. Lucent Technologies Inc (USA)

Respondent: Saudi Cable Company (Saudi Arabia)

PLACE OF COURT PROCEEDINGS:

London, England

APPLICABLE LAW:

English law

PLACE OF ARBITRATION:

London, England

APPLICABLE ARBITRATION RULES:

1988 Rules of Arbitration of the International Chamber of Commerce

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Judgment before Lord Woolf, M.R., Lord Justice Potter and Lord Justice May

SUMMARY

In 1992, seven telecommunications companies were invited by the Saudi Arabian telephone ministry to submit bids for the kingdom's sixth communications expansion project (TEP6), valued at about $4.6 billion. Two of these companies were AT&T and Nortel – both large competitors in the North American communications market. Prior to the contract being awarded, all companies were required to sign a pre-bid agreement (PBA) which provided that the successful bidder would buy cable from the Saudi Cable Company (SCC) and that the parties would meet promptly and in good faith to negotiate a mutually satisfactory agreement. It also contained an arbitration clause submitting disputes to the International Chamber of Commerce (ICC) in London, with English law being the law of the agreement.

AT&T won the contract. However, their discussions with the SCC were unsuccessful so AT&T broke off the negotiation and filed a request with the ICC for a declaration that the PBA had been correctly terminated. The SCC countered with a claim that the PBA had not been properly terminated and asked for an order that AT&T comply with the agreement and negotiate in good faith.

The case proceeded to arbitration. The arbitrator was selected as chairman of the three member arbitration tribunal, after having been vetted in the following ways: First, he was asked in telephone conversation if there was anything that might bring his independence into question, to which he replied there was not. (He recalled referring in passing to the fact that he was a non-executive director at Nortel – one of the companies that had been outbid for the TEP6 contract – but this could not be verified). Second, a copy of his *curriculum vitae* was sent to the ICC, which was then forwarded to the two parties. Finally, he signed a statement of independence declaring that there were no facts or circumstances that needed to be disclosed that might call into question his independence in the eyes of the parties.

The arbitrator was confirmed by the parties and the case went forward. In 1966 and again in 1997, the arbitral panel found in favor of the SCC. Then in 1998, an employee of Lucent (an AT&T spin-off) discovered the arbitrator's directorship at Nortel. When AT&T brought this to the arbitrator's attention, he offered to resign the post. However, AT&T would not accept this. They filed a challenge to the arbitrator with the ICC, but in February of 1999 it was dismissed without reasons. In September of 1999, the tribunal made a third award in favor of the SCC and assessing damages from AT&T.

The oversight of the arbitrator's connection to Nortel was attributed to secretarial error. The *curriculum vitae* he had sent to the ICC did not make mention of his directorship, even though he had sent a CV that same day (which *did* contain the directorship) to another person for an unrelated purpose. The explanation was that the arbitrator had both a secretary and an administrative assistant, both of whom kept copies of the CV on different computers. One of these was out of date, and it was this which was given to the ICC as disclosure of his current activities.

The appellants applied for the removal of the chairman and for the awards to be set aside before the English Court. Justice Longmore dismissed the application. AT&T appealed on the issues of misconduct and bias. The Court of Appeal denied the appeal.

Court Proceedings

"Lord WOOLF M.R.:

Introduction

"1. This is an appeal by AT&T Corporation ('AT&T') and Lucent Technologies Inc. ('Lucent') (collectively called 'AT&T' unless the

context otherwise requires) from the judgment of Mr Justice Longmore delivered on 13 October 1999. The judge dismissed AT&T's application for the removal and revocation of the appointment of Mr L Yves Fortier QC as third arbitrator and chairman of an ICC Tribunal ('the Tribunal') and the setting aside of three Partial Awards by the Tribunal in favour of the respondents Saudi Cable Company ('SCC'). The Partial Awards were dated as follows: First Partial Award, 4 September 1996; Second Partial Award, 2 July 1998; Third Partial Award, 15 September 1999.

"2. The grounds of the application were that, at all relevant times before 29th November 1998, AT&T was unaware that Mr Fortier was a non-executive director of a competitor company of AT&T. The competitor is Nortel of Canada ('Nortel'). Nortel was not simply a commercial rival of AT&T in the field of telecommunications. It had also been a disappointed bidder for the contract out of which the disputes being arbitrated arose and could be a competitor for further contracts."

…

"4. The PBA also provided that any disputes arising out of or in connection with the PBA should be finally settled by arbitration. The arbitrators decided that the PBA was governed by the law of New York which recognises the provision quoted above as a binding contractual obligation. The arbitration clause contained in the PBA provided for submission of disputes to the International Chamber of Commerce, the place of arbitration being London. Accordingly English law is the proper law of the arbitration agreement.

"5. The tender for the TEP-6 project was fiercely contested, because of its great value and strategic significance. The contract was awarded to AT&T after high level political lobbying on the part of the competitors. There was considerable criticism of the process by which AT&T was awarded the contract both in the industry and in the press. Nortel was especially aggrieved because it had terminated a 55-year old preferential supply arrangement with Bell Canada in return for a promise of US Government support."

…

"7. The ICC Rules of Conciliation and Arbitration 1988 ('the ICC rules') permit each party to a dispute to nominate its own arbitrator subject to confirmation by the ICC. In addition there is to be a chairman also subject to such confirmation. AT&T nominated Maitre Michael Schneider, a German lawyer practising in Geneva. SCC nominated Mr Robert Von Mehren, a partner in a New York law firm. They were both confirmed in due course. The parties and their arbitrators had lengthy discussions to see if they could agree on a chairman of the Tribunal for confirmation by the ICC.

"8. After a number of names had been canvassed and rejected, the name of Mr Fortier … was suggested. Negotiations for his appointment took place principally between Mr Beechey of Clifford Chance in London on behalf of AT&T and Mr Hamilton of White and Case in New York on behalf of SCC. On 17 March, Mr Beechey faxed Mr Fortier's office in Montreal asking him if he would be available to act as chairman of the Tribunal, telling him something of the dispute and requesting him to forward a curriculum vitae ('CV').

"9. On 20 March Mr Fortier telephoned Mr Beechey who was in the midst of various meetings in Paris and a conversation took place about which there is dispute between the parties. It is not in dispute that Mr Fortier said that there were no facts or circumstances which would call into question his independence as an arbitrator. He also maintains that he 'mentioned' his connection with Nortel. Mr Beechey, who did not make a note of the conversation, does not recollect this. He suggests that it is unlikely he would have instigated any discussion of the directorship or Nortel, being aware of neither. He also asserts that, even if it had been mentioned by Mr Fortier, he would not have been in any position to say that the directorship would pose a problem. In his affidavit, Mr Fortier acknowledges that any mention of the directorship would not have been made in the context of making disclosure, but merely to indicate that he had some experience of the telecommunications industry. He states that he is not surprised that Mr Beechey cannot remember the matter being raised. He (Mr Fortier) at no time regarded his directorship as raising any problem or embarrassment. So far as disclosure is concerned, he simply said that his CV would be forthcoming. When Mr Beechey returned to London, he found a copy of the CV waiting for him, dated 20 March 1995.

"10. Owing to what is agreed to have been a most unfortunate secretarial error, no mention appeared in the CV of Mr Fortier's directorship of Nortel among the number of directorships which were mentioned. By way of unhappy contrast, on the same day Mr Fortier caused a copy of his CV to be sent to Mr VV Veeder QC of Essex Court Chambers in London for an unrelated purpose, which copy did record his directorship of Nortel. The explanation is that Mr Fortier had both an administrative assistant and a secretary. One CV was sent from the computer file operated by the word processor of one and one CV was sent from the word processor operated by the other. It is not clear why the CVs were not the same in content. The probability is that one copy held on one computer file had part omitted in the course of an updating operation, while the other copy held on another computer file did not have the same omission. Whatever the reason, it is accepted between the parties that the omission was due to secretarial error and was not intentional. It is doubly unfortunate that the ICC, whose standard practice, once an arbitrator's nomination is confirmed, is to send copies of his CV to the parties together with a signed Statement of Independence, did not do so on this occasion. The ICC already held a copy of Mr Fortier's CV which did list his directorship of Nortel. However, on this occasion a copy of Mr Fortier's CV was not sent to the parties. It is AT&T's case that, had it been aware that Mr Fortier was a non-executive director of Nortel, it would not have consented to his appointment.

"11. The ICC rules concerning the 'independence' of the parties appear in Article 2 which concerns the constitution of Arbitral Tribunals. Articles 2.7, 2.8 and 2.9 provide as follows:

> *'7. Every arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in the arbitration.*
>
> *Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court 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. Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time-limit for any comments from them.*
>
> *An arbitrator shall immediately disclose in writing to the Secretary General of the Court and the parties any facts or circumstance of a similar nature which may arise between the arbitrator's appointment or confirmation by the Court and notification of the final award.*

8. *A challenge of an arbitrator, whether for alleged lack of independence or otherwise is made by the submission to the Secretary General of the Court of a written statement specifying the facts and circumstances on which the challenge is based.*

   For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator by the Court; or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of the aforementioned notification.

9. *The court shall decide on the admissibility, and at the same time if need be on the merits, of a challenge after the Secretary General of the Court has afforded an opportunity for the arbitrator concerned, the parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time.'*

"12. Article 2.13 of the ICC Rules states that the decision of the ICC as to any challenge of an arbitrator shall be final and the reason for its decision shall not be communicated.

"13. The parties agreed on Mr Fortier as the chairman of the Tribunal subject to ICC approval and the ICC asked Mr Fortier (as well as the other arbitrators) to sign a Statement of Independence on a standard printed form. The form required him to declare to the ICC his willingness to act as an arbitrator and to check one of two boxes. The text beside the first box reads:

'I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties.'

…

"15. Mr Fortier put a cross in the first box and signed the document on 28 March 1995. He was then confirmed by the ICC as the third arbitrator and chairman of the Tribunal….

"16. It emerged in the course of the proceedings that, in addition to his directorship of Nortel, which was a non-executive directorship, Mr Fortier also held 474 Nortel shares in accordance with his practice of acquiring a shareholding in any corporation on whose board he sat. It also appears that within his share portfolio he held 300 "common" shares in AT&T. Neither shareholding was disclosed prior to his appointment. However, the substance of AT&T's complaint relates to Mr Fortier's directorship of Nortel, rather than to his small (and effectively insignificant) shareholding."

…

"20. In Autumn 1998, the Saudi Telecom Company … invited bids for a project known as TEP-8. Both Nortel and Lucent (now hived off from AT&T) were invited to tender bids. On 29 November 1998 Mr Heindel, President of Lucent's Saudi Arabian Branch, while undertaking research into Lucent's competitors in relation to that bid, reviewed Nortel's Internet site. He noticed that Mr Fortier was listed in Nortel's Annual Report as a director. He immediately informed Lucent's lawyers, who wrote to Mr Fortier. In reply, Mr Fortier offered to resign his directorship. However, AT&T rejected such offer, and, following further communication between AT&T's lawyers and Mr Fortier, AT&T issued a challenge pursuant to Article 2.8 of the ICC Rules.

"21. On 24 February 1999, the ICC dismissed AT&T's challenge without reasons….

"22. Following the ICC's dismissal of AT&T's challenge, AT&T commenced legal proceedings pursuant to sections 1 and 23 of the Arbitration Act 1950 for an order that AT&T be at liberty to revoke and make void the appointment and authority of Mr Fortier and have him removed and for the Partial Awards to be set aside.

"23. On 20 September 1999 Mr Fortier wrote a letter to both solicitors which speaks for itself. It is in the following terms:

> '… matters such as submissions or tenders for contracts in the ordinary course of Nortel's business are not brought to the attention of the Board of Directors or its committees and that I was entirely unaware of the TEP-8 project until I received Clifford Chance's letter of 3 December 1998.
>
> *In the interest of completeness and to avoid any possible misunderstanding I should add that at the time I was approached to act in this arbitration, I had no knowledge whatever of the TEP-6 project and I learned of it only through the arbitration process.'*

…

"25. Longmore J heard the application. By his order dated 29 October 1999 he dismissed AT&T's applications with costs. He granted permission to AT&T to appeal to this court.

…

"31. Sir Sydney Kentridge advanced before us two broad grounds of appeal, the strands of which were on occasion interwoven but which are appropriately kept separate under the heads of Bias and Misconduct. The first is based on common law principles and the second on the failure of Mr Fortier to comply with the ICC Rules governing the arbitration.

"32. So far as *misconduct* was concerned, Sir Sydney Kentridge's submissions were as follows:

(i) The judge erred in law in holding that, in the context of applications under sections 1 or 23 of the Arbitration Act 1950, finality provisions in any rules of an arbitral body, and in particular Article 2.13 of the 1988 ICC Rules, prevent parties from relying on, and the courts considering, breaches of the arbitral rules in question. The purpose of Article 2.13 is to prevent further recourse to the ICC Court of Arbitration in order to revisit decisions once made as to appointment, challenge, etc, but it does not restrict a party from relying on breaches of rules in the context of applications properly made to the Court under sections 1 or 23 on the grounds of misconduct.

(ii) The judge erred in law in failing to recognise any duty of disclosure on the part of arbitrators in general and Mr Fortier in particular. Sir Sydney Kentridge submitted that a failure to disclose in accordance with the ICC rules on the part of an arbitrator amounts to misconduct for the purposes of the 1950 Act and that, in any event, the judge was wrong to fail to recognise a duty of disclosure on the part of an arbitrator independent of the ICC Rules both as a matter of common law and as a matter of contract between the arbitrator and the parties. In the circumstances of the case, the gravamen and the effect of Mr Fortier's error of non-disclosure was to deprive AT&T of its right to have an arbitrator of their choice, a result which would be manifestly unfair to it and prejudicial to its interest.

(iii) In this connection, Sir Sydney Kentridge submitted that, whatever the position as to secretarial error in relation to Mr Fortier's CV (of which he was unaware), Mr Fortier made a personal error of non-disclosure at three distinct stages. First, when he signed the Statement of Independence, stating that there were no facts or circumstances that might be of such nature as to call into question his independence in the eyes of the parties. Second, when early in the arbitration it became apparent that Nortel had been involved as a disappointed bidder. Third, when it became apparent that AT&T was concerned to

protect the confidentiality of various documents required to be disclosed to SCC in the arbitration.

(iv) The judge was wrong to hold that whether or not a failure to disclose on the part of an arbitrator amounted to misconduct for the purposes of the 1950 Act, so as to justify the setting aside of an arbitral award and/or removal of the arbitrator, depended upon the rules of "assumed bias". He failed to acknowledge that the appellants' complaint consisted of the two separate issues, namely misconduct and bias, and that Mr Fortier's failure to disclose his connection with Nortel constituted misconduct even if it was insufficient in itself to found an allegation of actual or assumed bias.

"33. On *bias*, Sir Sydney Kentridge again made clear that there was no allegation of actual bias against Mr Fortier. However, he submitted that the judge was wrong to hold that Mr Fortier's connection with the parties and the subject matter of the dispute (a) did not breach the rule that no one should be a judge in his own cause (and hence merit automatic disqualification) and (b) did not amount to apparent bias. He was also wrong to investigate the state of mind of Mr Fortier, in the sense that he assessed whether Mr Fortier was or might be actually unconsciously biased. The judge should have held that, by reason of his directorship and interest in Nortel, Mr Fortier was not independent of the parties or of the subject matter in dispute between them or disinterested in the outcome of such dispute.

"34. Sir Sydney further submitted that, in approaching the question of apparent bias on the part of an arbitrator, this court should not apply the 'real danger' test propounded in R v Gough and elaborated in ex parte Dallaglio but should apply the test of 'reasonable suspicion' or 'reasonable apprehension' of bias. This would reflect the broad approach of the courts in cases prior to R v Gough and would reflect the test internationally recognised in arbitration cases. He submitted that 'reasonable apprehension' of bias is the test or standard appropriate to cases where the identity of the adjudicator depends upon the consensual choice of the parties. Finally, whichever test or standard was appropriate, the judge should have held that apparent bias was established in this case.

(1) What Test Should be Applied in Order to Decide Whether There was Bias?

"35. It is possible to deal with the contention of presumed bias or automatic disqualification shortly. Sir Sydney Kentridge with his usual realism recognised that before this Court, he was in considerable difficulty. The decision in Locabail (UK) Ltd v Bayfield Properties Limited and Another [2000] 1 All ER 65 confirms the correctness of the decision of the judge.

"36. On the facts, there are two difficulties in the way of AT&T relying on disqualification. First of all, Nortel was not a party to the arbitration and therefore Mr Fortier had no direct personal interest in its outcome. The second difficulty is that, while it was argued that Mr Fortier had an indirect interest because of his shareholding in Nortel, even projects on the scale of TEP-6 and TEP-8 [the relevant telecommunications expansion projects] could not have been of any material benefit to Mr Fortier. It is unrealistic to suggest that Mr Fortier could be said to be in a position where he was either directly or indirectly acting as 'a judge in his own cause'. This Lord Browne-Wilkinson said in ex parte Pinochet (No. 2) is 'the rationale of the whole rule' (see [1999] 2 WLR 272 at 283). I see no reason to differ from the judge on this aspect of the appeal.

"37. So far as bias is concerned, the serious argument which Sir Sydney Kentridge advances is based on apparent or unconscious bias. Here it was central to his submissions that we should not apply the test laid down in the House of Lords in R v Gough [1993] AC 646. In that case Lord Goff of Chieveley, having set out the various different tests which have been laid down by the various English authorities, went on to emphasise that in this jurisdiction the correct test to apply in considering a case of alleged unconscious bias is the real danger test. In Locabail (at p.73) the court pointed out that whatever were the merits of competing tests the law was now settled in England and Wales by the House of Lords in Gough. In doing so, the court referred to 'two brief extracts' from Lord Goff's speech and I repeat them here. The first is where he said :

> 'In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be

allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose.'

The second passage is:

'In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise, I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, 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. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ...'

"38. As was pointed out in Locabail (at p.74) the Gough approach has not commanded universal approval elsewhere. In Scotland, Australia and South Africa, there has been preference for the reasonable suspicion or reasonable apprehension test, 'which may be more closely in harmony with the jurisprudence of the European Court of Human Rights' (see Locabail at p.74f). While Gough is binding on courts in this jurisdiction, Sir Sydney Kentridge argues that the test laid down in Gough is not strictly binding where it is an arbitrator conducting an arbitration, particularly an international arbitration, who is involved. Sir Sydney Kentridge urges this court not to extend an approach which has been rejected in other jurisdictions in relation to arbitrators when there is no need to do so. He contends that reasonable

apprehension or suspicion of bias provides a better test. He points out that the test in the new Arbitration Act of 1996, s.24, was introduced in order to conform with article 12 of the Uncitral Model Law (it omits the word 'independent'). In addition, he submits that the test of 'justifiable doubt' contained in section 24 of the 1996 Act is closer to the concept of 'reasonable suspicion' than the 'real danger' Gough test.

"39. In Laker Airways Inc v FLS Aerospace Limited [1999] 2 Lloyds Report 45 at pp.48/49, Rix J applied the Gough test in an arbitration case. He was right to do so. Lord Goff had stated in categoric terms that the real danger test should apply to bias on the part of arbitrators (see p.669H-670D). He had indicated that it was desirable that that test should be applicable to all cases of apparent bias, 'whether concerned with justices or members of other inferior tribunals, or with jurors or with arbitrators'. Lord Goff did not deal separately with international arbitrations, but there is no principle on which it would be right in general to distinguish international arbitrations from the other categories of situations to which Lord Goff referred, when the arbitration is, as here, governed by English Law.

"40. Sir Sydney Kentridge's arguments for applying what he argued was a lower threshold to arbitrations lacked conviction. Assuming, without accepting, that the reasonable suspicion test provides a lower threshold than the real danger test, it would be surprising if a lower threshold applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties. After all, there is an over-riding public interest in the integrity of the administration of justice in the courts. It is justice in the courts to which Lord Hewart CJ was referring in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, 259, when stating his famous aphorism, which is accepted throughout the common law world, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

"41. The different phrases which have been used to describe the correct test are all trying to give effect to this principle identified by Lord Hewart. This is why the application of any of the different descriptions of the threshold are likely, in practice, to produce the same result. The word 'real' is linked to 'danger' so as to distinguish

between a real and a fanciful danger. The word 'reasonable' is linked to the word 'suspicion' for the same reason. In both cases it is appreciated that there is a need to avoid quashing or invalidating decisions when there is no reason to do so. As is apparent from the facts of this case, where millions of dollars have already been incurred in the costs of the arbitration and there have been three decisions, it would achieve injustice not justice if the arbitration awards were to be set aside if such a course were not justified. It is not to be forgotten that SCC is an entirely innocent party and it is entitled to have its interests considered when deciding whether to set aside the awards. In ex parte Dallaglio Simon Brown LJ helpfully identified nine propositions which are relevant to the application of the Gough test. In the seventh he indicated that the court 'is no longer concerned strictly with the appearance of bias but rather with establishing the possibility there was actual although unconscious bias' (at p.152). In the same case Sir Thomas Bingham MR, at p.162 stated that the Gough decision shows:

> 'that the description 'apparent bias' traditionally given to this head of bias is not entirely apt, for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand. The famous aphorism of Lord Hewart CJ .... is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias'.

"42. Sir Sydney Kentridge criticised both of these statements. Mr Pollock is more accurate when he submits that both the real danger and the reasonable suspicion tests subsume the test laid down by Lord Hewart. Unless there is some foundation for saying that justice has not been done, it is seen to be done. We do not understand the statements in ex parte Dallaglio which are criticised to be seeking to say anything different. The important point for this appeal which Simon Brown LJ identified is that, when deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias.

"43. Was there a real danger here, viewing the matter objectively, that Mr Fortier was predisposed or prejudiced against AT&T because he was a non-executive director of Nortel? As to this, adopting our role of personifying the reasonable man, I consider that Longmore J was entitled to come to the decision which he did for the reasons he gave. In coming to my conclusion, I take into account that:

(a) Mr Fortier is an extremely experienced lawyer and arbitrator who, like a judge, is both accustomed and who can be relied on to disregard irrelevant considerations. In saying this we make it clear we do not attach any importance to the fact that Mr Fortier at all times believed himself to be acting appropriately. He must be judged by objective standards.
(b) There is no reason to reject Mr Fortier's statements in the letter of 20 September 1999 that he was entirely unaware of the TEP-8 project until December 1998 and the TEP-6 project until he became involved in the arbitration process. Until he was aware of the projects there could, of course, be no possibility that they could prejudice him and so no obligation to disclose his connections with Nortel.
(c) Any benefit which could indirectly accrue to Nortel as a result of the outcome of the arbitration would be of such minimal benefit to Mr Fortier that it would be unreasonable to conclude that it could influence him.
(d) Mr Fortier's involvement with Nortel as a result of his non-executive directorship was limited. It was accurately described as an incidental part of his professional life. The role of non-executive directors can differ but the nature of Mr Fortier's directorship is well illustrated by his letter of 20 September 1999.
(e) Mr Fortier did not attach importance to his involvement with Nortel. This is illustrated by his readiness to resign his directorship when he was challenged by AT&T.
(f) Mr Fortier conducted himself in the course of the arbitration in a manner which provided no support for any suggestion that he was prejudiced and the contrary has not been suggested.

"44. It was extremely unfortunate that the mistake about the directorship meant that it was not disclosed, but, on the evidence which is available, that innocent non-disclosure provides the flimsiest of arguments that the indirect interest of Mr Fortier in Nortel would or might affect the way he performed his responsibilities as an arbitrator. I therefore reject the criticism of the judge's decision on bias.

(2) What Constitutes Misconduct on the Part of an Arbitrator?

"45. Section 23(1) and (2) Arbitration Act 1950 provide:

(1) 'Where an arbitrator or umpire has misconducted himself or the proceedings the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.'

"46. It will be noted from the terms of s.23, that the High Court is given a discretion to remove an arbitrator and to set aside an award subject to it being established that the arbitrator has misconducted himself or the proceedings. Misconduct can take many forms. For there to be the necessary misconduct to enable the court to exercise its powers under s.23, there need not be any culpable or blameworthy behaviour on the part of the arbitrator. It can be sufficient if there is a 'procedural mishap'.

"47. What is relied upon here by AT&T is an asserted non-compliance by Mr Fortier with the terms of the arbitration agreement. In particular the failure to comply with Article 2.7 of the ICC Rules, to which we have already referred. Non-compliance with the terms of an arbitration agreement can amount to misconduct. (See the judgment of Diplock J in Margulies Brothers Limited v Dafnis Thomaides & Co (UK) Limited [1958] 1 Lloyds Rep 250 at 253 where he reiterated that "misconduct" of an arbitrator includes any failure by the arbitrator to comply with the terms, express or implied, of the arbitration agreement.)

"48. It is arguable that s.23 refers only to 'misconduct' after the arbitrator has been appointed. Here the initial complaint of non-disclosure relates to Mr Fortier's conduct before he was appointed. However, this is of no practical significance because the obligation to disclose is a continuing obligation and AT&T is entitled to rely on non-disclosure at any one of the three stages to which I have already referred identified by Sir Sidney Kentridge.

(3) Whether ICC's Decision on the Challenge is Final

"49. Turning to the express provision of the ICC Rules which provides that a decision of the ICC Court should be final, I do not accept the view of Longmore J that the finality provision means that the English courts have no power to review the decision of the ICC Court. The finality provision does not operate to exclude the

English court's jurisdiction under s.23 of the 1950 Act. Accordingly, Longmore J was entitled to consider whether there had been 'misconduct' by breaching the terms of the arbitration agreement. When doing so the court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court, but the English courts retain their jurisdiction to determine whether the ICC Rules have been breached when entertaining an application to remove for alleged misconduct.

"50. In this case, the decision of the ICC Court provides no assistance because the decision was not a reasoned one. We do not know the basis upon which the complaint of AT&T was dismissed.

"51. Article 2.7 and the arbitrator's declaration refer to 'independence' and do not refer to 'impartiality'. This is in contrast to the Unicitral Model Law on international commercial arbitration as adopted by the United Nations Commission International Trade Law of 21 June 1985. Article 12 of the Model Law requires the person approached with regard to a possible appointment as an arbitrator to 'disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. In most situations it will be because of a connection or other relationship with a party that the appointment of an arbitrator will be capable of challenge on the grounds of a lack of impartiality. Where this is the situation, the potential arbitrator will not be independent of the parties and will therefore clearly be subject to the express requirement of Article 2.7. I do not consider that it would be right to approach the interpretation of Article 2.7 in a narrow and restrictive manner. However, in this case it is not necessary to express any concluded view as to the application of Article 2.7 to a potential arbitrator whose alleged lack of independence is due to a connection with a third party. If, as I consider the position to be here, Mr Fortier is not disqualified from acting as an arbitrator on the grounds of bias at common law, I cannot see how he can be said to lack the necessary independence to which Article 2.7 refers.

"52. AT&T's primary complaint about Mr Fortier is that they would not have selected him as an arbitrator because they would not have wished to disclose confidential information to even a non-executive director of a competitive rival. Sir Sydney Kentridge stressed in his submissions the dangers to AT&T of information being made available to Mr Fortier when he owed the duties of a non-executive director to Nortel. If an arbitrator disclosed confidential

information to a competitor of a party to an arbitration in the course of the proceedings, he would certainly be open to a charge of misconduct. But this misconduct would not involve a breach of any obligation to be 'independent'. As Sir Sydney developed his submissions, it became increasingly clear that, while AT&T were complaining of bias, their concerns were equally, if not more strongly, focused on their need to preserve confidentiality. Article 2.7 and the arbitrator's declaration are not addressing this need. The need for confidentiality, which can be critical in an arbitration, does not depend on Article 2.7, but on the duty of any arbitrator not to breach the obligations of confidence which he owes to the parties to the arbitration.

"53. Mr Fortier was under the impression he had given a complete CV. Because of the error AT&T was not aware of his connection with Nortel. This connection was obviously a matter of which AT&T would have wished to be aware before it agreed to Mr Fortier's appointment. If it had been, it would have been perfectly reasonable for AT&T to indicate that it would prefer an arbitrator who was not a non-executive of Nortel because of its concerns as to confidentiality. AT&T was deprived of this opportunity, but the ICC Rules do not provide any support for an allegation that Mr Fortier was guilty of misconduct because of the error in the CV.

(4) Whether the Arbitrator Should Be Removed and Awards Set Aside on Ground of Bias

"54. In any event, Mr Fortier having been appointed an arbitrator and the arbitration having reached the stage it has, it would be inappropriate, in the absence of bias, to set aside the awards or to remove Mr Fortier. Furthermore, although AT&T's concerns as to the need to preserve confidentiality are understandable, in the case of an arbitrator as experienced as Mr Fortier, the risk of his actually making disclosure of confidential information to Nortel, consciously or unconsciously, is sufficiently remote to be ignored. In any event, Mr Fortier offered to resign his non-executive directorship but, no doubt recognising the reality of the situation, AT&T did not accept this offer. That being so, I find this allegation to be lacking in conviction.

"55. AT&T is unable to show any grounds for setting aside the awards or removing Mr Fortier based on bias or misconduct. This appeal is, accordingly, dismissed.

Lord Justice POTTER:

“56. Save in the minor respect referred to at paragraphs 67-71 below, I agree with the judgment of the Master of the Rolls and would merely add some observations of my own.

“57. The question has been raised on this appeal as to whether in English law the test to be applied on a complaint of bias against an arbitrator in respect of an award should be different from that applied to judges and tribunals in respect of decisions made by them in the course of the public administration of justice. So far as I am aware, it is the first time that an argument that the tests should diverge has ever been advanced. It arises following the decision of the House of Lords in Gough which considered the question of bias in the context of the public administration of justice, but in which Lord Goff of Chieveley expressed the firm opinion that ‘the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of inferior tribunals, or with jurors or with arbitrators.’

“58. I respectfully agree with that opinion. It seems to me that, whatever the test should be, and it is clearly laid down in Gough in terms of the “real danger” test, it is desirable that it should apply universally in cases before the English court, where such cases fall to be decided according to English law and no different statutory or contractual test is applicable….

“59. We have not been referred to any reported decision prior to Gough which suggests that the English court, when faced with an allegation of bias or apparent bias on the part of an arbitrator, has considered that a different test from that said to be appropriate in the case of publicly constituted courts or tribunals should be applied. It is true that, for the reasons, and having regard to the decisions, which troubled the House of Lords in Gough, judges dealing with applications to set aside arbitrations for misconduct on the grounds of bias have faced difficulty in formulating the objective test to be applied: see, for instance, The ‘Elissar’ [1984] 2 Lloyd’s LR 84 per Ackner LJ at 89; Bremer Handelsgesellschaft -v- Ets Soules et Cie [1985] 1 Lloyd’s LR 160 per Mustill J at 164-5 and [1985] 2 Lloyd’s LR 199 per Ackner LJ at 201-2; Tracomin S.A. -v- Gibbs [1985] 1 Lloyd’s LR 586 per Staughton J at 595-6.

“60. In that last-mentioned case, following a review of the relevant authorities, Staughton J observed:

> 'In many if not most cases it will make no difference which test is applied. That is so in the present case, and I am content to adopt real likelihood, which appears to lay the heaviest burden on the person alleging bias. But I do not, with great respect share the view of Lord Justice Cross (in Hannam's case) and Lord Justice Ackner (in the Liverpool City Justice's case) that there is little if any difference between the two tests. If it had been necessary to decide the point, I would have followed what was said by Lord Justice Edmund-Davies in the Metropolitan Properties case [1969] 1 QB at p.606:
>
> With profound respect to those who have propounded the 'real likelihood' test I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by Reg. -v- Barnsley Licensing Justices itself, as Devlin LJ made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body.'

"61. I am bound to say I agree with the observations of Staughton J in relation to the authorities as they then stood and it seems to me that, in propounding the 'real danger' test in Gough, Lord Goff was seeking so far as possible to strike the right balance between the 'real likelihood' and 'reasonable suspicion' tests. Sir Sydney Kentridge argues that in that respect Lord Goff has not avoided a practical dilution of the principle proclaimed by Lord Hewart CJ that justice must manifestly be seen to be done, whereas to have adopted the test of reasonable apprehension or suspicion would not have had such effect.

"62. It may well be that adoption of the reasonable suspicion test would afford more comfort to those concerned to preserve the sanctity of Lord Hewart's dictum. However, as it seems to me, the real danger test is intended to be a working test designed to give effect to that dictum, while having regard to substance as well as appearance. In that respect, the remarks of Slade J in R -v- Camborne Justices ex parte Pearce [1955] 1 QB 41 at 52 are salutary:

> 'Whilst endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done that it should in fact be done.'

> Whether or not that is so, I agree with the realism of the post-Gough assessment of Sir Thomas Bingham MR in Ex parte Dallaglio at 162, that the famous aphorism of Lord Hewart now requires qualification in the light of the real danger test. Equally, however, I consider that the need for concern in that respect is more illusory than real.

"63. It is not in dispute that reasonable apprehension of bias is a test in which reasonableness is judged by the standards of the reasonable objective observer. That is, in reality, the court itself, embodying the standards of the informed observer viewing the matter at the relevant time, which is of course the time when the matter comes before the court. That last qualification is important because, in judging whether there is bias or apparent bias, the court approaches the matter on the basis of an observer informed as to the facts upon which, and the context in which, the allegation of bias is made. As Lord Goff observed in Gough:

> 'The law has first to ascertain the real circumstances from the available evidence, knowledge of which would not necessarily be available to an observer at court'.

"64. This, enables the court to consider the matter on the basis of whether or not the particular matters relied on in support of an allegation of bias were or were not known to the person or tribunal against whom the allegation of bias is made. In observing as he did, Lord Hewart was deploying a maxim which is predominantly concerned with principles of openness and fairness in connection with trial procedures, which entitle a party to impugn the proceedings if breach of such procedures can be demonstrated. If a party alleges reasonable suspicion or real danger of bias as similarly affording a reason to set aside a decision, it is right that the court should investigate the factual basis for the allegation in order to see whether there is any real cause for concern. The time at which to judge whether there is real danger or reasonable suspicion of bias is the time at which the investigating (appellate) court sets out the facts upon which its conclusion is based. It is only by that process that the objective observer, who may earlier have been suspicious for what appeared to be good reason at the time, is in a position to judge whether real danger or reasonable grounds for suspicion in fact exist.

"65. Upon that basis I have no doubt that the allegation of apparent bias or the possibility that there was actual, though unconscious, bias (see ex parte Dallaglio at 152) on the part of Mr Fortier fails.

"66. Having failed to establish a case of bias or apparent bias, it was necessary for AT&T to establish some other ground of misconduct on the part of Mr Fortier if it wished to invoke the court's jurisdiction to order his removal. In this respect, Sir Sydney relied upon an asserted failure by Mr Fortier to comply with Articles 2.7, 2.8 and 2.9 of the ICC Rules and a separate act of non-disclosure by putting his cross in the first box of the signed Statement of Independence.

"67. So far as those three Articles are concerned I do not consider that any breach of them has been established. The only matters which they require the arbitrator to declare are matters going to his 'independence' of the parties, or anything which might call that independence into question in the eyes of any of the parties. (Sir Sydney conceded that the word 'reasonably' needed to be read in, as qualifying any calling into question of such independence.) 'Independence' connotes an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties which might lead the arbitrator to favour the party concerned. It is the most frequent and obvious ground upon which the court will infer the possibility of antecedent bias, but it is by no means co-extensive with it. The suggestion that, by reason of some other event or circumstance unrelated to independence, the arbitrator has or may have an antecedent predisposition against one of the parties may give rise to a sustainable allegation of bias but it is not one based on absence of independence.

"68. Nor, in my view, is there reason to suppose that the ICC intended to impose a specific obligation of disclosure on a wider basis than that of independence: c.f. the wording of Article 12 of the UNCITRAL Rules relating to disclosure which provides:

> '(i) 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.' (emphasis added)

"69. It is also of interest to note that s.24(1)(a) of the Arbitration Act 1996 provides that a party to arbitral proceedings may apply to the court to remove an arbitrator on the ground that: 'Circumstances exist that give rise to justifiable doubts as to his impartiality'

"70. In that respect the draftsman appears to have followed the wording of the UNCITRAL Rules but omitting any reference to independence, no doubt on the grounds that the greater includes

the less. The question of whether, by that provision in the 1996 Act, the legislature has introduced a statutory definition of bias different in effect from the real danger test in relation to applications brought under s.24(1)(a) remains for future argument.

"71. I consider that, outside the field of 'independence' covered by the disclosure obligations in Article 2.7, 2.8 and 2.9 and the form of the Statement of Independence, the ICC should be taken as having left the question of disclosure of any matter of possible concern, and in particular the possibility of bias, to the good faith and judgement of the arbitrator. The recognition of antecedent bias or partiality is well recognised as a disqualifying factor going much wider than the issue of independence and is no doubt one which would be recognised by the ICC if any challenge to an arbitrator's impartiality were mounted on that ground. Article 8 permits challenge of an arbitrator to the Secretary-General of the ICC 'whether for an alleged lack of independence or otherwise'. Thus, it is not in my view necessary to interpret Article 2.7 as extending to a complaint of bias in any wider sense than lack of independence for the purpose of enabling a challenge to be made to the Secretary-General under Article 8 and for the arbitrator to be disqualified by the ICC if such challenge is accepted. Thus, insofar as AT&T invites the court to find misconduct or procedural mishap on the basis of a breach by Mr Fortier of the ICC Rules, I consider it has failed to make out its case.

"72. Nonetheless, if I am wrong in that respect, and breach can be demonstrated, it does not seem to me to be one which could possibly justify the removal of Mr Fortier as an arbitrator, or the setting aside of any of the awards made. So far as the non-disclosure of Mr Fortier's directorship of Nortel was concerned, it was entirely inadvertent. Furthermore, as we have held, no suggestion or real danger of partiality arises or has been substantiated. Nor has any disadvantage in the course of the arbitration been demonstrated.

"73. Pressed upon the question of what prejudice AT&T had in fact suffered as a result of the non-disclosure, Sir Sydney was obliged to assert what he called the 'general prejudice' of having had the matter arbitrated by an arbitrator whom AT&T would not have chosen had it been aware of the matter inadvertently not disclosed. While, no doubt, the purpose of the disclosure rules is designed to enable the parties to confirm their choice of arbitrator on a fully informed basis, the fact that such purpose may have been

inadvertently defeated is not in itself sufficient to justify removal of the arbitrator once appointed or the setting aside of awards duly made and untainted by bias. In such cases the court will only take such a step where justice demands it. In my view, no such consideration arises in this case. There is no suggestion that Mr Fortier has acted or would act in breach of confidence, which, as the Master of the Rolls has pointed out, appears to be the principal basis (as opposed to the likelihood of bias), on which AT&T would have objected to Mr Fortier. To set aside the partial awards or to replace Mr Fortier at this stage would be both a costly inconvenience and a substantial injustice to the respondents.

"74. I too would dismiss this appeal.

Lord Justice MAY:

"75. I agree that this appeal should be dismissed for the reasons given by Lord Woolf M.R. Essentially and in short, the reasons which lead me to this conclusion are that, in my judgment:

(a) the test under English law for apparent or unconscious bias in an arbitrator is the same as that for all those who make judicial decisions and is that to be found in the opinion of Lord Goff of Chieveley in R. v. Gough [1993] A.C. 646. On this test, bias was not established in this case against Mr Fortier, and that by a long margin.
(b) even if the test propounded by Sir Sydney Kentridge were to be applied, bias would not be established in this case against Mr Fortier, and that by a long margin.
(c) if there was a procedural mishap such as to enable the court to consider whether to exercise its discretion under section 23 of the Arbitration Act 1950, the case on the facts for removing Mr Fortier as arbitrator, or setting aside the awards which he and his fellow arbitrators unanimously made, was so weak that I consider that the court should not do so.

"76. I express the third of these reasons in the way that I have, because I thought at one stage during the submissions that the academic case that there was a procedural mishap was quite strong. Lord Woolf M.R. has set out the terms of Article 2.7 of the ICC rules in paragraph 11 of his judgment and the text of the printed Statement of Independence in paragraph 13. I agree that Mr Fortier's non-executive directorship of Nortel may be seen as not calling in question his independence. I also agree that a main plank of AT&T's case concerned the possible disclosure of confidential information to a non-executive director of a competitor, rather than

Mr Fortier's independence as arbitrator. But it did seem to me that there was a reasonably persuasive general case that his non-executive directorship 'might be of such a nature as to call into question [his] independence in the eyes of [one] of the parties'. If AT&T had known of this directorship at the outset, an objection by them to his acting as arbitrator would, in my view, probably have been regarded as reasonable and would have been sustained. They did not know, and I was inclined to think that his unwitting failure to tick the second box in the Statement of Independence could be seen as a procedural mishap. But I do not think that it is necessary to reach a conclusion on this point because, even if it were a procedural mishap, I do not consider that the court should now exercise a discretion in AT&T's favour under section 23 of the 1950 Act."

OBSERVATIONS BY STEFANO AZZALI AND BENEDETTA COPPO

1. INTRODUCTION

The facts of this English Court of Appeal's decision[1] may be unusual, but the decision itself is significant for the international arbitration environment as it concerns some topical issues. The purpose of this paper is to analyse some of these issues, such as the finality of an arbitral institution's decision and the significance of bias and misconduct of an arbitrator, from an arbitration institution's perspective. Reference to the Italian legislation and to the Milan Chamber of Arbitration would be constantly made.

(1) What Constitutes Bias on the Part of an Arbitrator?

Both the Commercial Court and the Court of Appeal rejected the ground of bias of the third arbitrator raised by AT&T.[2] Justice Longmore finally considered there was no real danger of apparent or unconscious bias in the case at issue, so that no ground to remove the arbitrator could be found.[3]

Before the Court of Appeal, the claimants admitted there was no allegation of actual bias against the chairman.[4] Anyway, the claimants' counsel underlined that AT&T would have not accepted him as third arbitrator if his relationship with a competitor had been disclosed. According to AT&T, the Court should apply a test of reasonable suspicious or apprehension of bias, rather than of real danger. In the claimants'

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[1] Published in "International Arbitration Report", 2000, no. 6, section G.

[2] The claimants' application was brought under Section 23 of 1950 English Arbitration Act, as reported in note no. 4.

[3] Justice Longmore considered that, on the ground of common law principles, "*there is an automatic disqualification for any Judge who has a direct pecuniary interest (such as owing shares) in one of the parties or is otherwise so closely connected with the party that can truly be said to be judge in his own cause; apart from that, if an allegation of apparent or unconscious bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the Judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue*."

[4] Sutton, David St. John – Gill, Judith Russell on Arbitration, 22nd ed., Sweet & Maxwell, 2003, § 4-030 "Actual bias is rarely established, but clearly provides ground for removal. More often there is a suspicion of bias which has been variously described as apparent or unconscious or imputed bias."

opinion the real danger test should not be applicable for arbitrators, especially in international arbitration.

But English authorities, analysing an arbitrator's apparent or unconscious bias, correctly applied the real danger test.[5] The Court reports a House of Lords decision[6] and specifies the real danger test should apply also to arbitrators,[7] granting the court's analysis to be based on "terms of possibility rather than probability of bias."[8] In this case, the Court of Appeal pointed out that the chairman of the arbitral tribunal did not act as a judge in his own case, neither directly nor indirectly.

The claimants referred also to the well-known common law principle that justice should not only be done, but should also manifestly and undoubtedly be seen to be done. The Court agreed this statement must currently be combined with the real danger test: the aim of the court's determination on bias, whether of a judge or of an arbitrator, must be to avoid any invalid decisions, basing its determination on an analysis of possibility rather than probability.

The Court of Appeal examined the facts of the case. The chairman's non-executive directorship was not related to a party of the arbitration and it was but "an incidental part of his professional life," his shareholding was inadequate to grant him any real benefit, his reputation as an international arbitrator and his conduct in the arbitral proceeding did not suggest any bias. The Court concluded the accidental non-disclosure of the third arbitrator was an unfortunate oversight but did not suffice to allege bias because there was not a real danger of bias. The Court ruled that there was in the circumstances no justifiable doubt as to the arbitrator's impartiality, as required by Section 24.1 letter (a) of the 1996 English Arbitration Act.[9]

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[5] Merkin, Robert *Arbitration Act 1996*, LLP, 2000, p. 63.

[6] *R. v. Gough*, 1993, AC 646, in "Weekly Law Review," 1993, 2, p. 883.

[7] *Laker Airways Inc. v. FLS Aerospace Ltd.*, April 20, 1999, in "ASA Bulletin", 1999, no. 3, p. 382-395. See Brown, David W. *Arbitrators, Impartiality and English Law – Did Rix J Really Get It Wrong in the Laker Airways?*, in "Journal of International Arbitration", 2001, no. 1, p. 123-130; and Merjian, Armen H. *Caveat Arbitrator: Laker Airways and the Appointment of Barristers as Arbitrators in Cases Involving Barrister-Advocates from the Same Chambers*, in "Journal of International Arbitration", 2000, no. 1, p. 31-70.

[8] In particular, in the Court of Appeal's decision, Lord Woolf makes clear that, when English law applies, no distinctions should be made between judges and international arbitrators, and that "*the Courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold to apply to Courts of law than applies to a private tribunal whose "judges" are selected by the parties*."

[9] According to Section 24.1 letter (a) of the 1996 English Arbitration Act, a party to an arbitration may apply to the court to remove an arbitrator on the ground "*that*

In so ruling, the Court applied the real danger test, and held that the outcome of the arbitration could not affect the chairman's interest.

The test for apparent bias in the present case has been that of real danger, while the House of Lords has recently held that the real possibility test - in the eye of a reasonable objective outsider - should apply.[10] This is a new test that seems to be closer to Section 24.1 letter (a) of the 1996 English Arbitration Act, where it speaks of "justifiable doubts."[11]

Hence, the House of Lords gave an overview of the real danger test.[12] Then, it emphasised the modest adjustment of the real danger test suggested by Lord Phillips in Re Medicaments & Related Classes of Goods.[13] Finally, the House of Lords introduced a critical approach.[14]

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circumstances exist that give rise to justifiable doubts as to his impartiality." About bias under English law, see Lazarus, Kevin *Arbitrators, Bias and the Arbitration Act 1996*, in "Arbitration," 2000, no. 4, p. 258-263.

[10] House of Lords *Week v. Magill*, 2001 UKHL, 67, AC, 2002, no. 2, p. 357, referring to the Court of Appeal in *Re Medicaments & Related Classes of Goods* (no. 2), 2001, in "Weekly Law Review," 2001, 1, p. 700. See Sutton, David St. John – Gill, Judith *op. cit.*, § 4-031.

[11] AT&T submitted this argument to the Court: "*the test of justifiable doubts contained in s. 24 of the 1996 Act is closer to the concept of reasonable suspicion than the real danger Gough test*."

[12] The *real danger* was expressed by Lord Goff in *R. v. Gough*, see note no. 24, Lord Goff held: "*I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.*"

[13] See note no. 28. In this decision, Lord Phillips held: "*The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge 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, or a real danger, the two being the same, that the tribunal was biased*."

[14] This approach can be read in Lord Hope's words: "*I would* […] *delete from it* [the test to be applied] *the reference to "a real danger". Those words no longer serve a useful purpose here* […]. *The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*."

Briefly stated, the real possibility test asks the court to decide if there is a real possibility of lack of impartiality in the eye of an objective observer[15] (while the real danger test applied in the AT&T case did not emphasise the public perception of the irregular incident[16]).

As concerned the ICC Arbitration Rules, which were chosen by the parties in their arbitration clause, Art. 2.7 of 1988 Rules asked any prospective arbitrator to disclose in writing to the ICC Secretary General "any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eye of the parties." Under the 1998 Rules, Art. 7.2 has formalised the statement of independence.[17] It is up to the arbitrator to find out what shall be disclosed, taking into account the point of view of the parties (in the eye of the parties). According to ICC, the test to disclose for an arbitrator shall be that of reasonability in relation to all parties.[18]

As to the Arbitration Rules of the Milan Chamber, Art. 6.2 provides for a statement of independence with a clear reference to prejudice.[19] This provision is reaffirmed in the Code of Ethics for arbitrators attached to the Rules. The Chamber of Arbitration of Milan is currently revising its Rules;[20]

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[15] See also Court of Appeal in *Director General of Fair Trading v. Proprietary Association of Great Britain*, January 2001, as reported in "Arbitration Law Monthly", 2001, no. 5, p. 3-4 "*Of wider interest* […] *is the Court of Appeal's view of the sustainability of the real danger test which had been approved in earlier cases. The Court of Appeal held that the test did not give sufficient weight to the reasonable views of an ordinary member of the public, ie whether an objective onlooker might have a reasonable apprehension of bias*."

[16] Eastwood, Gillian *A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators*, in "Arbitration International," 2001, no. 3, p. 287-312.

[17] Art. 7.2 "*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 eye of the parties*."

[18] Derains, Yves – Schwartz, Eric A. *op. cit.*, p. 121-122 "[…] *arbitrators are, thus, required to "stretch their minds" so as to consider how particular facts and circumstances may be perceived by the parties. The mere fact that an arbitrator may not himself consider that particular facts call into question his independence does not suffice to justify non-disclosure*."

[19] Art. 6.2 "*When giving notice of his acceptance, the arbitrator shall state in writing: - any relationship with the parties or their counsel which may affect his independence and impartiality; - any personal or economic interest, either direct or indirect, in the subject matter of the dispute; - any prejudice or reservation as to the subject matter of the dispute which may affect his impartiality*."

[20] The new Rules of the Milan Chamber of Arbitration shall apply after January 1, 2004.

the revised version shall explicitly provide for the arbitrators' duty to disclose and maintain an explicit reference to bias.

Under English law, apparent bias is a ground for removal of both arbitrators and judges. No account is taken of the consensual nature of arbitration or of the parties' role in appointing their own arbitrators.[21]

Italian law on arbitration also provides that arbitrators may be challenged on the same grounds as judges as listed in Art. 51 of the Italian Code of civil procedure.[22] Italian law on challenge does not point out any difference between arbitrators and judges. Art. 51 lists a number of grounds on which a judge shall abstain from taking part in the proceedings. These are the grounds on which the parties can disqualify an arbitrator. Grounds for challenge can be summarised as follows: (1) an interest in the dispute (only this reason might itself lead to annulment of the decision); (2) parenthood or other relationship with one of the parties including, but not limited to, prior consultation and assistance with reference to the dispute at issue. These grounds concern circumstances that may effectively affect independence (1) or impartiality (2).

A broader interpretation of the grounds for challenge listed in Art. 51 may be advisable, considering the differences existing between State judges and arbitrators. In this connection, we stress that Italian arbitration law refers to Art. 51 in its entirety. Art. 51 is comprised of two paragraphs. Art. 51.2 provides that a judge shall abstain if this course is strongly advisable (gravi ragioni di convenienza). This provision has a broader scope than the list in Art. 51.1 and suggests that arbitrators shall not accept an appointment where circumstances exist that may influence their

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[21] Eastwood, Gillian *op. cit.*, p. 287-312 "[…] *the mere fact that arbitration is a consensual process and that the parties choose their arbitrators in a way that they cannot choose their judges does not logically lead to the conclusion that the test for bias should be any different. The administration of justice requires the highest standard of impartiality and fairness from the judiciary, and a reasonably low threshold test for their removal where their impartiality or fairness is in doubt.* […] *the arbitral process would break down entirely if a party could require an arbitrator to be removed due solely to unjustified subjective concerns which might not pass the threshold test applied to the judiciary*."

[22] Italian Code of Civil Procedure, Art. 815.1. See Consolo, Claudio *La ricusazione dell'arbitro*, in "Rivista dell'arbitrato," 1998, no. 1, p. 17-32; and, from an international point of view, Giovannucci Orlandi, Chiara *Ethics for International Arbitrators*, in "UMKC Law Review," 1998, 67 UMKC L. Rev. 93. As provided by Art. 836**,** Art. 815 applies to the challenge for international arbitrators too, "*unless the parties have agreed otherwise*."

impartiality.[23] This is a mere suggestion, as the law regulates the abstention of judges[24] but is silent on the abstention of arbitrators.

(2) What Constitutes Misconduct on the Part of an Arbitrator?

AT&T grounds of appeal concerned also the arbitrator's misconduct.[25] According to AT&T, Justice Longmore failed to recognised the chairman's duty of disclosure. By failing to disclose his relationship with a competitor company, the chairman breached ICC Rules Art. 2.7[26] and gave rise to misconduct under Section 23 of the 1950 English Arbitration Act.[27]

The Court of Appeal specified that "misconduct can take many forms. […] It can be sufficient if there is a procedural mishap." The Court admitted "non-compliance with the arbitration agreement can amount to misconduct. […] However, in this case it is not necessary to express any concluded view as to the application of art. 2.7 to a potential arbitrator whose alleged lack of independence is due to a connection with a third

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[23] Fazzalari, Elio *Ancora sull'imparzialità dell'arbitrato*, in "Rivista dell'arbitrato", 1998, no. 1, p. 2.

[24] Italian Code of Civil Procedure, Art. 51.2 identify the competent authority, which decides upon a judge's abstention, while no equivalent authority exist for arbitrators. See Consolo, Claudio *op. cit.*, p. 27, where the author links this situation to an implicit duty of disclosure on arbitrators.

[25] AT&T upheld the chairman's non-compliance with the arbitration agreement when he failed to comply with Art. 2.7 for the ICC Rules, "*both as a matter of common law and as a matter of contract between the arbitrator and the parties. In the circumstances of the case, the gravamen and the effect* […] *of non-disclosure was to deprive AT&T of its right to have an arbitrator of their choice, a result which would be manifestly unfair to it and prejudicial to its interest*."

[26] 1988 ICC Rules, Art. 2.7 "*Every Arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in arbitration. Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court 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. Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time-limit for any comments from them. An arbitrator shall immediately disclose in writing to the Secretary General of the Court and the parties any facts or circumstances of a similar nature which may arise between the arbitrator's appointment or confirmation by the Court and the notification of the final award*."

[27]1950 English Arbitration Act, Section 23.1 and Section 23.2 see note no. 4; this provision now falls in 1996 English Arbitration Act, Section 24.1 lett. *d* as a ground for the removal of an arbitrator "*that he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable despatch in conducting the proceedings or making an award*".

party. If [the chairman] is not disqualified from acting as an arbitrator on the grounds of bias at common law, I cannot see how he can be said to lack the necessary independence to which art. 2.7 refers." The Court finally rejected this ground of appeal as well.

In Lord Woolf's words "Article 2.7 and the arbitrator's declaration refer to independence and do not refer to impartiality."[28] The Court also admitted bias could be a ground for challenging an arbitrator under the ICC Rules, as Art. 2.8 stated a challenge is made "whether for an alleged lack of independence or otherwise," but it concluded the facts did not prove the arbitrator's lack of independence and since the allegations of bias had not been established, he should not to be removed.

Much has been written about the definition and the difference between independence and impartiality.[29] Briefly speaking, dependence is related to any objective relationship between an arbitrator and one of the parties based on economical, professional, family or friendship point of view. Partiality is a more subjective notion and relates to an innermost state of mind that may not be manifest.[30]

In its decision, the Court of Appeal considered that the ICC clearly related the duty of disclosure to independence, but no direct provision linked that duty to the broader concept of impartiality. The Court noted

[28] Lord Potter added "[…] *the only matters which they* [1988 ICC Rules, Art. 2.7, 2.8, 2.9] *require the arbitrator to declare are matters going to his independence of the parties.* […] *Nor* […] *is there a reason to suppose that the ICC intended to impose a specific obligation of disclosure on a wider basis than that of independence.* [...] *I consider that, outside the field of independence,* […] *the ICC should have be taken as having left the question of any matter of possible concern, an in particular the possibility of bias, to the good faith and judgement of the arbitrator. The recognition of antecedent bias or partiality is well recognised as a disqualifying factor going much wider than the issue of independence* […]."

[29] See Redfern, Alan – Martin, Hunter *Law and Practise of International Commercial Arbitration*, 3rd edition, Sweet & Maxwell, 1999, § 4-47/4-56, p. 210-216; Berlinguer, Aldo *Impartiality and Independence of Arbitrators in International Practice*, in "The American Review of International Arbitration", 1997, no. 4, p. 339-373; *Fouchard Gaillard Goldman on International Commercial Arbitration*, edit by Emmanuel Gaillard and John Savage, Kluwer Law International, 1999, § 1021-1047, p. 561-576; Bernini, Giorgio *The Conduct of the Arbitral Proceedings: Standards of Behaviour of Arbitrators*, in "ICC International Court of Arbitration Bulletin", 1991, p. 31-37.

[30] A definition can be found in Art. 3 of the *International Bar Association Ethics for International Arbitrators*, 1987, in "Yearbook Commercial Arbitration", 1987, and in Redfern, Alan – Hunter, Martin *op. cit.*, *Appendix L,* "[…] *Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties*."

that an explicit reference to impartiality was possible and stressed the difference between Art. 2.7 of the 1988 ICC Rules and the standards required by the UNCITRAL Rules[31] and the 1996 English Arbitration Act,[32] which both clearly mention impartiality. The same is provided for in the UNCITRAL Model Law.[33]

The Italian Code of civil procedure does not expressly word any general duty of being independent or impartial for an arbitrator, nor do the Articles[34] on the challenge of arbitrators expressly mention independence or impartiality. We have remarked that an arbitrator can be challenged on the same grounds as a judge. Rather than generally referring to an arbitrator's duty of being impartial/independent, Italian law provides for a list of peremptory grounds for disqualification: a general duty can be deduced from these expressed grounds. However, while a judge's independence and impartiality are implied, as judges are public officers, the independence and impartiality of arbitrators relate to their private agreement with the parties, that is to say to a trust relationship which seems harder to define.[35] Arbitrators dispense a particular form of justice adapted to a closer relationship with the parties. This relationship can become more and more complex in international arbitration, where a list may not fit countless different situations. However, in Italy too, no one can be judge in his/her

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[31] UNCITRAL Arbitration Rules, Article 9 "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

[32] 1996 English Arbitration Act, Section 24,1 lett. *a* relating to the grounds for removal of an arbitrator "*Circumstances exist that give rise to justifiable doubts as to his impartiality*." The Court referred to this provision as follows: "[…] *the draftsman appears to have followed the wording of the Uncitral rules but omitting any reference to independence, no doubt on the grounds that the greater includes the less*."

[33] UNCITRAL Model Law, Art. 12. 1 "*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*."

[34] Italian Code of Civil Procedure, Articles 815, 836 and 51.

[35] Bernardini, Piero *The Italian Law on Arbitration, Text and Notes*, Kluwer Law International, 1998, p. 13, note no. 22 "*The appropriateness of the reference to this Article for the challenge of an arbitrator is doubtful considering the different status of the two subjects*."

own cause. This general principle applies to arbitrators because of the judicial role they have vis-à-vis the parties in the proceedings.[36]

The 1998 edition of the ICC Arbitration Rules still refers to independence only.[37] The ICC drafters' choice was based on the remarks that independence is a more objective concept than impartiality, so it is easier to ascertain.[38] The lack of explicit reference to impartiality does not mean, however, that a partial arbitrator can be appointed.[39] In fact, as the Court of Appeal noticed, the ICC rule on the challenge of arbitrators[40] mentions the lack of independence or otherwise.[41]

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[36] Dimundo, Antonino in Alpa *L'arbitrato profili sostanziali*, Utet, 1999, "Il mandato ad arbitrare, la capacità degli arbitri, la responsabilità degli arbitri", Vol. I, p. 441-442; Fazzalari, Elio *op. cit.*, p. 1-2.

[37] 1998 ICC Rules, Art. 7.1 "*Every arbitrator must be and remain independent of the parties involved in arbitration*."

[38] Bond, Stephen *The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitrator*, in ICC Publishing 1991, no. 472, p. 9-16, in particular p. 11 where the author lists some of the reasons why the impartiality concept was not part of the 1988 Rules "[…] *discussion focused on the more objective nature of the concept of independence as compared to the subjective nature of the concept of impartiality. third, no one offered a satisfactory definition of impartiality.*"; Hascher, Dominique *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrator*, in "ICC International Court of Arbitration Bulletin", 1995, no. 2, p. 4-18, see p. 5. Consider also Derains, Yves – Schwartz, Eric A. *op. cit.*, p. 108-109 "*Because of the Rules' failure to explain what is meant by independence or to mention impartiality together with the reference to independence, the nature of the requirement now set forth in Article 7(1) has been the subject of confusion and controversy. It has from time to time been suggested, in particular, that the language contained in Article 7(1) ought to be amended to refer explicitly to impartiality. However, as can be seen, the ICC did not take advantage of the Rules revision process to make such an amendment. Article 7(1), on the contrary, is formulated in the same manner as Article 2(7) of the former Rules and, thus, continues to refer only to independence*."

[39] Derains, Yves – Schwartz, Eric A. op. cit., p. 110 "This having been said, the requirement of independence does not in and of itself guarantee an arbitrator's impartiality. Even an independent arbitrator may be biased. In the event that an arbitrator's partiality can be demonstrated, it, thus, remains open to a party either to object to that arbitrator's appointment or subsequently to seek the arbitrator's removal by means of the challenge procedure set forth in the Rules. The absence of an express reference to impartiality in Article 7(1) should not be construed as meaning that an arbitrator's partiality is to be tolerated. Moreover, apart from what the Rules may expressly provide, the law applicable to the arbitration may itself impose a requirement of impartiality."

[40] 1998 ICC Rules, Art. 11.1.

[41] It has been suggested that the different approach of the ICC and other arbitral institutions or national legislation lies in the moment when the test of

As far as the Arbitration Rules of the Milan Centre are concerned, they clearly state that "When giving notice of his acceptance, the arbitrator shall state in writing any relationship with the parties or their counsel which may affect his independence and impartiality."[42] The broad scope of this provision, which aims at covering all cases, leaves no room for doubts. The revised edition of the Rules will also explicitly mention the arbitrator's duty to file a statement of independence.

The Rules of the Chamber of Arbitration of Milan focus the duty of an arbitrator of being both independent and impartial in the same provision where they establish his/her duty to sign a statement of independence.[43] First, the duty of disclosure refers to any relationship an arbitrator may have both with the parties and their counsel; second, it concerns a direct and indirect personal or economic interest; finally, it applies also to prejudice or reservation as to the subject of the dispute. The duty of disclosure persists throughout the arbitral proceedings[44] and it is an obligation for the arbitrator, not a mere suggestion. The duty is included in the Code of Ethics attached to the Rules, and Art. 1 of this Code states "An arbitrator accepting a mandate in an arbitration administered by the Chamber of Milan shall act according to the Chamber's National and International Rules and this Code of Ethics." When they enter an arbitral agreement referring to the Chamber of Arbitration of Milan, the parties accept the Code of Ethics too, because it is part of the Rules. It is significant that this Code may play an important role, especially in international arbitration. It is not

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independence/impartiality may occur. See Eastwood, Gillian *op. cit.*, p. 287-312 "*In the ICC Rules, the standard is initially applied at the nomination stage.* […] *This test of independence is therefore being applied at the outset of the proceedings, when concrete information concerning an arbitrator's past relationship can easily be objectively verified. Evidence of partiality cannot be inferred from such information is far less easy to identify prior to the commencement of proceedings, and is not therefore expressly covered in the Rules relating to the nomination stage, but is covered (although not expressly) in the Rules relating to a possible challenge to an appointed arbitrator. In contrast, the standard of impartiality which appears in the 1996* [English] *Act is to be applied later in the proceedings, as a ground of challenge.* […] *In their Report accompanying the draft Bill which became the 1996 Act, the Department Advisory Committee on Arbitration Law* […] *reasoned that the lack of independence will often give rise to justifiable doubts about impartiality (and is therefore covered by the wording of the section)*."

[42] Art. 6.2 as reported in note no. 37.

[43] See Art. 6.2.

[44] The last sentence of Art. 6.2 rules " Where necessary, due to supervening facts, this Statement shall be repeated in the course of the arbitral proceedings until the award is filed." This provision will be maintained in the revising edition of the Rules, but it will place a wider reference to the end of the proceedings, instead of until the award is filed.

always easy to define what the concept of impartiality or independence implies. Also, national laws may provide different requirements in relation to this issue. We believe that the Code of Ethics may help an arbitrator when filing his/her disclosure, it may guide the parties when selecting the appropriate arbitrator and may help a correct development of the proceedings in case of a challenge.

The issue of the duty of disclosure is strictly related to the ground of appeal based on misconduct that AT&T rose before the English Court of Appeal. Neither Italian nor English law establish a duty of disclosure for arbitrators, nor they followed the UNCITRAL Model Law's indication of an affirmative duty of disclosure, as expressly established by art. 12.1.[45] In Italy, however, the view that a duty of disclosure is implied in the general duty of any arbitrator to act fairly and according to the public policy principle of good faith has been strongly supported.[46] Authors also argue that, in Italy, there is a duty of disclosure based on a professional man's ethics[47] and on the respect of the agreement with the parties.[48]

The 1998 ICC Rules explicitly formalised the duty of disclosure.[49] The ICC has no code of conduct or ethics for its arbitrators,[50] that is to say it is

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[45] Art. 12.1 as reported in note no. 53. This provision assumes that the arbitrator himself can say whether facts or circumstances can give rise to *justifiable doubts*, and he is asked to think about and disclose. For further reading, see Holtzmann, Howard M. – Neuhaus, Joseph E. *UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law and Taxation Publisher, 1989.

[46] Dittrich, Lotario in Tarzia – Luzzatto – Ricci, *Legge 5 gennaio 1994, n. 25, Nuove disposizioni in materia di arbitrato e disciplina dell'arbitrato internazionale*, Cedam, 1995, *sub* Art. 815 "Ricusazione degli arbitri", p. 80, where the author suggests that, before accepting to be appointed, arbitrators disclose any circumstances that may give rise to doubts of partiality, because of the good faith principle. After the arbitration has begun, arbitrators shall disclose all grounds for incompatibility for possible challenge by the parties. Bernardini, Piero *op. cit*, p. 13, note no. 22 "*Although no express provision is made regarding prospective arbitrator's duty to disclose any ground for a potential challenge, it is held that the canon of good faith imposes such a duty.*"

[47] See the Code of Ethics of the Italian Law Society, particularly Art. 37 *Conflict of interest* providing for a duty of abstention in case of conflict of interest.

[48] Consolo, Claudio *op. cit.*, p. 26; Ricciardi, Edilberto *La scelta degli arbitri e la costituzione del collegio arbitrale: deontologia e prassi*, in "Rivista dell'arbitrato", 1992, no. 4, p. 793-811.

[49] 1998 ICC Rules, Art. 7.2 "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." On the contrary,

up to the arbitrators to define the facts which fall within the limits of their disclosure. This approach can be said to be useful, considering the growing number of international arbitral proceedings, in order to adapt the ICC Rules to any different situation that may arise. In any case, the players of the present world-wide arbitral stage are quickly changing,[51] and they may be in need of suggestions, indications or guidelines.

(3) The Finality of an Arbitral Institution's Decision

When AT&T first applied for the removal of the chairman before the Commercial Court, SCC asserted the finality clause contained in Art. 2.13 of 1988 ICC Arbitration Rules prevailed.[52] Justice Longmore referred the well-established English principle that "no English Court could contemplate enforcing an award affected by bias" and held that "questions of bias were free-standing questions and were not to be determined by reference to the rules of the ICC which would interpret its own rules in the way that seemed to it to be correct." In other words, the State Court was not entitled to review the ICC Court's decision on the arbitrator's challenge but, because of the above-mentioned general principle, it was entitled to verify whether the arbitrator's conduct was affected by bias.

The Court of Appeal's decision did not confirm Longmore's consideration about the finality clause of the ICC Rules. Lord Woolf affirmed "The finality provision does not operate to exclude the English Court's jurisdiction under s. 23 of the 1950 Act.[53] Accordingly, Mr. Justice

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1988 ICC Rules, Art. 2.7, as reported in note no. 35, provided that arbitrators disclose, without mentioning a statement of independence.

[50] Derains, Yves – Schwartz, Eric A. *op. cit.*, p. 121 "*Deciding whether and what to disclose is nevertheless difficult and delicate exercise. No guidelines or rules have been articulated by the ICC in this respect, and the Court has strongly resisted doing so on the theory that any such guidelines would not only be inadequate, but possibly misleading as well, given the variety of circumstances that may be encountered*."

[51] Craig, W. Laurence – Park, William W. – Paulsson, Jan *op. cit.*, § 1.04, p. 4-6, the authors analyse the ICC statistics as follows: "*Comparing the regional origins of parties, over the last eleven years there has been a significantly decreased prevalence of parties from Western Europe.* […] *Concurrently, there is an important increase from the Far East, Latin America, and Eastern Europe's recently independent states*."

[52] 1988 ICC Rules, Art. 2.13 "*Decision of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final. The reasons for decisions by the Court as to the appointment, confirmation, challenge or replacement of an arbitrator on the grounds that he is not fulfilling his functions in accordance with the Rules or within the prescribed time-limits, shall not be communicated.*"

[53] 1950 English Arbitration Act, Section 23:

Longmore was entitled to consider whether there had been misconduct by breaching the terms of the arbitration agreement. When doing so the Court, if required to interpret the ICC rules, would naturally pay the closest attention to any interpretation of the ICC rules adopted by the ICC court, but the English Courts retain their jurisdiction to remove a misconducted arbitrator. In this case, the decision of the ICC court provided no assistance because the decision was not a reasoned one."

The revised edition of the ICC Rules has not modified the earlier provision on the finality of the ICC Court's decisions.[54] The ICC did not mean hereby to deny parties possible means of recourse under national law.[55]

According to the Milan Rules (similar, in this issue, to the ICC Rules), the Arbitral Council renders a final decision on an arbitrator's challenge.[56] As far as the Milan Chamber's practice is concerned, the finality effect of its Arbitral Council's decision has always been respected, and, so far, no appeal to a State court is reported.

"1. Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
2. Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.
3. Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application."

[54] 1998 ICC Rules, Art. 7.4 "*The decision of the Court as to appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated*." See Derains, Yves – Schwartz, Eric A. *A Guide to the New ICC Rules of Arbitration*, Kluwer Law International, 1998, p. 126, where the authors suggest that the drafters' aim was to "*prevent parties from rearguing matters that have already been the subject of a Court decision, in the interest of expedition and also to avoid overcrowding the Court's already heavy agenda*."

[55] Craig – Park – Paulsson *International Chamber of Commerce Arbitration*, 3rd ed., Oceana, 2000, § 13.02, p. 207 "*The Court's decision on challenges are deemed a matter of administration (established acceptable tribunals) rather than the exercise of jurisdictional power (the resolution of a dispute between the parties). This approach is confirmed by the general provisions of Art. 1(2) that the Court does not itself settle disputes and of Art. 7 (4) that the Court does not give reasons for its decisions on challenges*."

[56] International Arbitration Rules, Art. 7.1 "[…] *The Arbitral Council shall render a final decision on the challenge.*" *www.camera-arbitrale.com*

As far as State laws are concerned, the English arbitration law[57] and the UNCITRAL Model Law[58] expressly provide that parties may apply to a State judge, although at different stages of the proceedings.

In Italy,[59] there has been no case dealing with the subject matter of this English Court of Appeal's decision. Art. 815[60] of the Italian Code of civil procedure contemplates the challenge of arbitrators in national proceedings, applying the same grounds for challenge provided for State judges. Scholars

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[57] 1996 English Arbitration Act, Section 24.2 and Section 24.3 "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 satisfied that the applicant has first exhausted any available recourse to that institution or person. The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending." See also Born, Gary B. International Commercial Arbitration: Commentary and Materials, 2nd ed., Kluwer Law International, 2001, p. 649 "An advisory committee examining reform of English arbitration law declined to recommend following the UNCITRAL Model Law regarding interlocutory judicial challenges to arbitrators. Mustill, A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law, reprinted in, 6 Arb. Int'l 3, 28 (1990) ("To introduce a formal procedure for challenging the arbitrator [during the arbitral proceedings] would be an open invitation to delaying tactics by the respondent.")."

[58] UNCITRAL Model Law on International Commercial Arbitration, Art. 13.3 "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." For a comparison between this UNCITRAL provision and the ICC Rules, see Hascher, Dominique The UNCITRAL Model Law, in "Croatian Arbitration Yearbook", 1995, p. 27-32, in particular see p. 29 where the author suggests "The major concern in connection with the ICC Rules raised with regard to this [Art. 13.3] provision of the UNCITRAL Model Law is that under the ICC Rules, a challenge or replacement of arbitrators is being decided by the International Court of Arbitration. There is an important provision in the ICC Rules set out in Article 2(13) of the ICC Rules which states that the decision of the International Court of Arbitration is final. This is because the ICC arbitration system is highly supervised and monitored. Pending an arbitration, there should therefore be no room for court intervention."

[59] See Giovannucci Orlandi, Chiara in Carpi *Arbitrato*, Zanichelli, 2001, *sub* art. 815 "Ricusazione degli arbitri", p. 203-216; Biavati, Paolo in Carpi, *Arbitrato*, Zanichelli, 2001, *sub* art. 836 "Ricusazione degli arbitri," p. 771-773.

[60] Italian Code of Civil Procedure, Art. 815.1 "A party may refuse to accept an arbitrator whom he has not appointed, for the reasons laid down in Art. 51." Art. 815.2 "A challenge shall be made by petition to the president of the court of first instance referred to in Art. 810, second paragraph, within the peremptory time limit of ten days after the appointment has been notified or the ground for challenge has come to the party's knowledge, if later. The president issues an order against which there shall be no appeal, after hearing the challenged arbitrator and making summary enquiries where necessary."

agree (and courts never disagreed) that the parties can depart from State courts by choosing an institutional arbitration, and they can initiate the disqualifying proceedings before the arbitral institution. By this solution, the parties would implicitly derogate from the courts' competence, and they would submit the decision to an institution's authority of their own choice: the institution's decision is expected to be of weight, and no recourse to a State court shall be admitted. This derogation is expressly admitted in international arbitration by art. 836.[61]

In theory, also pending an institutional arbitration, no Italian law provision prevents the parties from applying to a State court for the challenge of an arbitrator. Considering a State court as an appeal court for the institution's decision could be also unlikely: Art. 815.2 imposes a very short time limit to proceed, so that this possibility becomes quite unrealistic. The reason of such a short time limit is to save the arbitral proceedings from any pretext or undue delay.[62] On the other hand, some Italian authors suggest that, when there is an arbitrator's challenge, the institution and the State court may play simultaneously.[63] Any party could apply for challenge, at the same time, before two different "authorities:" the chosen arbitral institution and the State court (so respecting the time limit fixed in art. 815.2).

Indeed, under Italian law the parties could have the arbitrator's conduct reviewed by a later court decision. Art. 829.1(9)[64] provides the award can be challenged on the grounds of violation of the principle of due process.[65]

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[61] Italian Code of Civil Procedure, Art. 836 "The challenge of arbitrators is regulated by Art. 815, unless the parties have agreed otherwise." See Frigo, Manlio in Tarzia – Luzzatto – Ricci, Legge 5 gennaio 1994, n. 25, Nuove disposizioni in materia di arbitrato e disciplina dell'arbitrato internazionale, Cedam, 1995, sub Art. 836 "Ricusazione degli arbirti", p. 240-245; the author suggests Art. 836 means a wider provision than Art. 815, and it assures the parties the right to agree on waiving any challenge.

[62] See Bernardini, Piero *L'arbitrato commerciale internazionale*, Giuffrè, 2000, p. 151-153.

[63] Caponi, Remo *L'arbitrato amministrato dalle Camere di commercio in Italia*, in "Rivista dell'arbitrato," 2000, no. 4, p. 663-697.

[64] Italian Code of Civil Procedure, Art. 829. 1 "Notwithstanding any waiver, a recourse for setting aside may be filed in the following cases: […] (9) where the principle of due process [contraddittorio] has not been observed in the arbitration proceedings."

[65] An arbitrator's lack of impartiality/independence may rise in the course of the proceedings, when his/her conduct in favour of one of the parties breaches the due process principle.

Scholars suggest that Art. 829.1(2)[66] provides for an additional ground for setting aside related to the arbitrator's independence/impartiality, as the award can be challenged if the appointment of the arbitrators was not in accordance with the parties' directives on the constitution of the arbitral panel, as agreed in the arbitration clause. Courts have neither confirmed nor dismissed this last suggestion. Furthermore, Italian law provides for a limitation that does not exist in English law: pursuant to Art. 815.1, parties can only challenge the arbitrator they have not appointed.[67] This provision prevents filibustering and stresses the trust between parties and the arbitrator they freely appointed.

Administered or institutional arbitration, as opposed to ad hoc arbitration, offers some specific advantages.[68] An institution's organisation may improve the efficacy of the proceedings. By challenging the final authority of the chosen institution, the parties themselves can seriously compromise, or totally loose, the benefits they were looking for when choosing that institution. When the parties sign their arbitration agreement and they select an arbitral institution, they opt for an expedite and effective way to settle eventual disputes. At the same time, a contract rises from this agreement between the parties and the institution. In accordance with this contract, the parties accept the rules of the institution and its schedule of fees, while the institution is bound to the tasks provided in the same rules. Thus, the parties empower the institution to assist the arbitral tribunal and to support the proceedings. An application to a state court In the course of an arbitration may then be seen as a breach of this contract.

[66] Italian Code of Civil Procedure, Art. 829. 1 "Notwithstanding any waiver, a recourse for setting aside may be filed in the following cases: […] (2) where the arbitrators have not been appointed according to the provisions laid down in Chapters I and II of this Title, provided that this ground for setting aside has been raised in the arbitration proceedings."

[67] Any party can challenge the arbitrator appointed by another party and the arbitrator appointed by the two party-appointed arbitrators or by an appointing authority, see Toriello, Fabio in Punzi, *L'arbitrato profili sostanziali*, Utet, 1999, *sub* "La ricusazione degli arbitri, la liquidazione nel compenso," Vol. I, p. 509-528.

[68] See Azzali, Stefano *Practical Aspects of Administered International Arbitration*, in "IFCAI Conference", February 20-21, 1992, Cairo, Egypt, p. 127-131; and in Alpa, *L'arbitrato profili sostanziali*, "L'arbitrato amministrato e l'arbitrato ad hoc", Utet, 1999, Vol. I, p. 807-825. For example, the parties know the rules the arbitral tribunal will follows and can foresee the different steps and the costs of arbitration; also the institution assists throughout the proceedings to prevent unnecessary delay.

2. THE RECENT IBA DRAFTED GUIDELINES ON IMPARTIALITY, INDEPENDENCE AND DISCLOSURE IN INTERNATIONAL COMMERCIAL ARBITRATION

Recently, the International Bar Association has provided its Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration.[69]

Today, ethics may represent a very delicate aspect for both arbitrators and all other parties involved in arbitration. The IBA acknowledges new kinds of commercial situations can began, due to the growth of international business. Arbitrators may face complex relationships wondering which are the facts that can undermine their reputation as an independent arbitrator. Parties may lose their trust in arbitration because of a partial arbitrator, or they may abuse their right of challenging to slow down proceedings on purpose. The IBA's Committee on Arbitration and ADR appointed a Working Group whose aim is to provide guidance to those involved in international commercial arbitration: parties, arbitrators, arbitral institutions and State courts.

The Preamble of the Guidelines states at the outset these are not a revised edition of the IBA Rules of Ethics for International Arbitrators,[70] which "remain in effect as to subjects that are not discussed in the Guidelines." Although the international arbitration community is very well aware of the IBA Rules of Ethics, whose authority is widely recognized, actually a separate, explicit agreement is required for their application.[71]

The 2003 IBA Guidelines are divided into three main sections:

> a general section dealing with impartiality, independence and disclosure: the Guidelines outline the general standards that lead to different stages of the arbitral proceedings, that is to say the criteria to be followed when appointing an arbitrator, filing a statement of disclosure, conducting an arbitration, deciding upon a challenge etc.;

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[69] *www.ibanet.org*, *Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration,* second draft, August 22, 2003.

[70] See note n. 50.

[71] *Fouchard Gaillard Goldman on International Commercial Arbitration, op. cit.*, § 356, p. 179 "[…] *the mere fact that these rules exist will lead the parties, the arbitrators and the courts to take them into account when examining arbitrators' conduct and liability. In spite of both their presentation as a code of ethics and the requirement for the express agreement of the parties* [reference is to the Introductory Note of the 1987 Ethics for International Arbitration]*, they constitute new rules, and therefore a new private source of arbitration law with certain degree of authority*."

an explanatory section, related to the first one, where notes are given on each general standard;

a final section on the practical application of the standards: Red, orange and green lists are given depending on the danger level as to impartiality/independence in different situations.

Some of the aspects dealt with the English Court of Appeal's decision may be seen in the light of these new Guidelines. In particular, we can underline the Guidelines confirm how difficult can be to distinguish between independence and impartiality when deciding on arbitrators ethics and refer to both when a decision is to be taken on the arbitrators' position. By so doing, they agree with the UNCITRAL Model Law and also include bias. As concerns the test to be applied when deciding upon and arbitrator's ethics, the Guidelines suggest it shall be an objective test, and they refer it to a reasonable third person.

The Guidelines further state that "if facts or circumstances exist that may, in the eye of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances." The Guidelines provide therefore for a duty of disclosure and for a subjective test (in the eye of the parties). In doubt, the arbitrator shall disclose.

The explanatory notes stress the two tests concern two different steps of the proceedings (Part. II, General Standard 3(a) "objective test for disqualification and successful challenge, and subjective test for disclosure"). This explanation makes clear that disclosure is a chance for the parties to evaluate the position the arbitrator has described, but it does not represent an admission of his/her conflict of interest.

The IBA Guidelines provide a useful outline for arbitration practitioners. We suggest that arbitral institutions should also take similar initiatives on arbitration in general and the role of arbitrators in particular. The arbitration community is not a private club but the ordinary way business people choose to settle international commercial disputes. Arbitral institutions are going to play a key role for the training of the present, growing arbitration community. Any constructive proposals are welcome, and the IBA Guidelines represent a step in the right direction.

3. CONCLUSION

In the last decades, the business community has highly intensified its relationships, new technologies have improved long-distance contracts and

today's commercial circle has expanded to cover the entire planet.[72] At the same time, arbitration has become the ordinary way to settle international commercial disputes.[73] Such growth has often resulted in a more complex and more legalistic attitude of the parties in arbitration. Meanwhile, we have witnessed a sort of globalisation of the legal profession: law firms have branch offices all over the world.[74] These situations frequently leads to conflicts of interests, because international arbitrators are bound by their firm's relationships.

The non-expendable and highly recognised principle of the independence and impartiality of arbitrators is undisputed. The consensus is that this principle is the foundation of efficient proceedings, especially considering that it directly involves the parties at the appointment stage. A violation of the arbitrator's duty of independence and impartiality, however, must be ascertained in a concrete manner, as parties often act on purpose to delay proceedings. A balance must therefore be found between the parties' rights and the smooth development of the proceedings.

The English Court of Appeal's decision at issue clearly shows that not any oversight can be a ground for challenge.[75] An extreme enforcement of the principle of independence and impartiality would surely slow down the

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[72] See in general Bernini, Giorgio, *Is There a Growing International Arbitration Culture?*, in ICCA Congress, 1996, "International Dispute Resolution: Towards an international Arbitration Culture," general editor Albert Jan van den Berg, Kluwer, 1998, p. 41-46.

[73] Böckstiegel, Karl-Heinz *The role of national courts in the development of an arbitration culture*, ICCA Congress, 1998, "Improving the Effeciency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention", general editor Albert Jan van den Berg, Kluwer, 1999, p. 224-225 "[…] *the rise of international commercial arbitration is mainly due to the fact that the business community in most countries involved in international trade and investment prefers arbitration to court jurisdiction for a number of reasons.* […] *States themselves have, of course, recognized this interest in many ways such as ratification of the New York Convention* […] *as well as by enacting more modern and liberal arbitration statutes in the recent past.*"

[74] Günther, Klaus *Merging Law Firms and Coping with Conflicts of Interests*, in ASA Special Series No. 18 "Conflicts of Interests in International Commercial Arbitration", p. 45-55 "*The tendency for law firms to become ever larger is, in particular, a result of the globalisation of the economy. Today not only major international businesses merge, but also an increasing number of middle-sized enterprises which are being forced to operate globally.* […] *Such mergers creates questions of conflicts of interests for their existing clients but even more for the acceptance of new clients*."

[75] Craig – Park – Paulsson *op. cit.*, § 13.04, p. 222 "*The pragmatism of the approach should serve to preserve the efficacy of the awards from attack based on purely formal failure of disclosure*."

proceedings: realism shall prevail.[76] What mostly matters is that no lack of the principle of independence/impartiality invalidates the efficacy of the award.

Arbitral institution can pledge independent arbitrators by the requirements of its rules and by its control activity. The institutional rules shall impose a duty of disclosure, but they should not be too detailed in order to provide the best solution for concrete cases. Defining general guides for the behaviour of arbitrators is a hard task, which codes of ethics try to tackle, that is made even more difficult by the multi-cultural, business-focused world arbitrators and institutions are working in, where different legal systems coexist.

The Rules of the Chamber of Arbitration of Milan clearly set the duty of impartiality on arbitrators. The Rules are supported by the Code of Ethics attached to them. The Arbitral Council decides on the challenge of arbitrator, and the Rules and the Code of Ethics guide it both, supplemented by the statement of independence the arbitrator has filed. By so providing, the Milan Chamber's aim is to apply the best solution to each particular situation. The Council examines the real facts of the case as described in the statement of independence by the arbitrator and in the reasoned challenge filed by a party, deciding on the challenge according to the general requirements of the Rules, as specified in the Code of Ethics. The goal is to protect the parties' interest of being judged by an independent arbitrator, without shelving the proceedings. According to the Rules, the Arbitral Council may consider issues related to an arbitrator's impartiality/independence when confirming him/her, or when deciding on his/her challenge. In the Milan Chamber's practice, in the recent past, the Council has drawn a lack of impartiality from the fact that an arbitrator has been the counsel of his/her appointing party before a State court or before another arbitral tribunal. In another case, the Arbitral Council admitted an arbitrator's challenge on the ground that a close relative of his/her appointing party was practising in his/her firm. On the other hand, the Council has not considered as disqualifying ground being scholars at the same University of the appointing party's counsel.

We can remark the Milan Chamber's general purposes are confirmed by the fact that the Arbitral Council can remove an arbitrator ex officio.[77] This

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[76] Tschanz, Pierre-Yves *Arbitrators' Conflicts of Interests: Switzerland*, in ASA Special Series No. 18 "Conflicts of Interests in International Commercial Arbitration", p. 65-79 "[…] *the solution cannot be to disclose everything and anything. Over-disclosing jeopardizes the arbitration process by creating unwarranted bases for objections*."

[77] Art. 7.1. This provision will be maintained in the new edition of the Rules.

provision is related to Art. 15[78] of the Code of Ethics which repeats the possibility for the Chamber to replace an arbitrator who does not comply with the Code, but it adds that great care shall be paid to the course of the proceedings. According to this Article, a replacement shall not cause an undue delay to the proceedings. Anyway an arbitrator's misconduct can be sanctioned to a later stage by not confirming him/her in other arbitral proceedings. This rule helps the Chamber to secure a high confidence in the arbitral tribunal, and it urges the arbitrator to behave throughout the whole proceedings. No case-by-case codification can assure the same result.

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[78] Code of Ethics for Arbitrators, Art. 15 "*The arbitrator who does not comply with the provisions of this Code may be replaced by the Chamber of Arbitration. Where it is not appropriate to replace the arbitrator in order not to cause useless delay in the arbitral proceedings, the Arbitral Council may sanction the behaviour of the arbitrator, also after the conclusion of the arbitral proceedings, by refusing to confirm him in subsequent arbitral proceedings*."