

8

CHALLENGES OF ARBITRATORS IN INVESTMENT ARBITRATION

Still Work in Progress?

Loretta Malintoppi and Alvin Yap

| | | | |
|--|------|--|-------|
| I. Introduction | 8.01 | G. Singapore International Arbitration Centre (SIAC) | 8.52 |
| II. The Role of Institutions and Professional Associations | 8.10 | H. The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) | 8.56 |
| A. International Centre for Settlement of International Disputes (ICSID) | 8.10 | III. Innovations in International Investment Agreements | 8.60 |
| B. Permanent Court of Arbitration (PCA) | 8.22 | IV. Selected Decisions on Challenges | 8.81 |
| C. United Nations Commission on International Trade Law (UNCITRAL) | 8.27 | A. 'Issue Conflicts' | 8.86 |
| D. International Chamber of Commerce (ICC) | 8.34 | B. Administrative Secretaries | 8.99 |
| E. Stockholm Chamber of Commerce (SCC) | 8.43 | C. Social Media | 8.109 |
| F. London Court of International Arbitration (LCIA) | 8.47 | V. Conclusion | 8.115 |

I. Introduction

An important aspect of the criticism of investor-state dispute settlement (ISDS) concerns the qualities of arbitrators and their independence and impartiality. Amongst the detractors of the system is US Senator Elizabeth Warren who warned inter alia that 'ISDS could lead to gigantic fines, but it wouldn't employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next'.¹ **8.01**

While Senator Warren's remarks appear to be based on a misunderstanding of the system, her views merit attention, at least to the extent that the diligence, independence, and impartiality of arbitrators are essential in ensuring the integrity and validity of the arbitral process. Moreover, perceptions are important, particularly at a time when ISDS and its main players are under growing public scrutiny. **8.02**

Parties and their counsel perform careful due diligence in selecting the individuals who will hear and decide their case at the outset of the arbitration. Arbitral institutions also play a key **8.03**

¹ Elizabeth Warren, *The Trans-Pacific Partnership Clause that Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.0728c496e988 (last visited Dec. 10, 2017).

role in this regard, particularly when the parties have not agreed on a method of selection of the arbitral tribunal, or if they fail to agree on the presiding arbitrator. At the same time, individuals who sit as arbitrators increasingly choose not to act as counsel in investment disputes, and some have severed ties with large international law firms in order to avoid connections with corporations or states and minimize conflicts of interests.

- 8.04** Not unlike judges in municipal judicial systems, arbitrators play an essential role in the legitimacy of ISDS. It is often said that justice must not only be done, but that it must also be seen to be done. A public perception that arbitrators decide a case in a timely manner and purely on its merits strengthens the legitimacy of ISDS. To that end, arbitral institutions have procedures and mechanisms in place to allow parties to challenge or replace arbitrators who may fall short of prescribed standards of impartiality or independence.
- 8.05** Nonetheless, the debate on the independence and impartiality of arbitrators continues to be lively, also due to the perceived opaqueness and inconsistency of challenge decisions and the uncertainty relating to the standards to be applied to those challenges. This has in turn elicited responses on three fronts, each of which is addressed in this chapter.
- 8.06** Firstly, arbitral institutions have recently either revised their rules and practices or introduced more innovative approaches to challenges of arbitrators. This is mirrored by the adoption of dedicated guidelines by professional associations on issues relating to conflicts of interests of arbitrators.
- 8.07** Secondly, some states have been introducing their own codes of conduct for arbitrators in bilateral and multilateral investment treaties and in the investment chapters of free trade agreements (these instruments will collectively be termed in this chapter as investment agreements), which are designed to take precedence over the institutional rules governing the arbitration.² There thus appears to be a trend on the part of states to take ownership of the standards and rules governing issues relating to the independence and impartiality of arbitrators, rather than leaving these to arbitral institutions. Moreover, in some instances, states seek to bypass some of the criticisms faced by ISDS by creating entirely new bodies, such as the investment court system (complete with a court of appeal) proposed by the EU Commission and included in the Transatlantic Trade and Investment Partnership Agreement.³
- 8.08** At the same time, changes in the way challenges are being decided by arbitrators and appointing authorities have also emerged. In particular, a more concerted effort to develop consistency in challenge decisions can be discerned. This effort extends beyond developing consistency within individual arbitral institutions. Rather, there seems to be a growing desire to create a sense of uniformity and harmonization in the entire sphere of ISDS, across the various arbitral institutions. While such efforts have resulted in increased clarity for some issues, some thorny matters remain and continue to pose challenges to the legitimacy of ISDS.
- 8.09** In section II, recent innovations by the main arbitral institutions will be reviewed. This will be followed by an overview of rules on independence and impartiality of arbitrators contained in recent investment agreements (section III). Section IV will provide a review of some of the issues raised by recent cases and section V will offer some concluding remarks.

² See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement art. 9.19(6). See <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/> (last visited Mar. 13, 2018); see also the draft text of the Transatlantic Trade and Investment Partnership (TTIP) art. 6(3) in s. 3, ch. II, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited Mar. 13, 2018). At the date of writing, the TTIP is still under negotiation.

³ See the draft TTIP ch. II, Sub-Section 4.

II. The Role of Institutions and Professional Associations

A. International Centre for Settlement of International Disputes (ICSID)

Article 57 of the ICSID Convention sets out the two main grounds for disqualification of ICSID arbitrators: (i) the arbitrator manifestly lacks the qualities required by Article 14(1) of the ICSID Convention; or (ii) the arbitrator is ineligible for appointment under Articles 37 to 40 of the ICSID Convention.⁴ **8.10**

Article 38 requires arbitrators appointed by the ICSID Administrative Council chairman not to be nationals of the home state of the claimant investor(s) or the respondent state, while Article 39 requires the majority of the arbitrators on the tribunal to be nationals of states other than the state party to the dispute and the state whose national is a party to the dispute. In *Eudoro Armando Olguín v Paraguay*,⁵ an arbitrator resigned upon receiving Paraguay's proposal for his disqualification on the basis that he and the claimant both held the same nationality.⁶ **8.11**

A third, and rarely invoked, basis for disqualification is provided under Rule 8 of the ICSID Arbitration Rules, which refers to a situation when an arbitrator has become incapacitated or unable to perform the duties of his or her office. **8.12**

A manifest lack of Article 14(1) qualities is invoked most frequently as a ground for disqualification. Article 14(1) requires ICSID arbitrators to possess three qualities: (i) 'high moral character'; (ii) 'recognized competence in the fields of law, commerce, industry or finance'; and (iii) the fact that the arbitrator 'may be relied upon to exercise independent judgment'.⁷ **8.13**

In actual practice, only the third quality has been invoked as a basis for disqualification requests.⁸ While the English version of Article 14(1) refers only to the independence of arbitrators, the equally authentic Spanish version of Article 14(1) requires impartiality of judgment (*imparcialidad de juicio*).⁹ It is now well settled that standards of independence and impartiality are both included within the qualities that an ICSID arbitrator must possess.¹⁰ In the context of Article 14(1) of the ICSID Convention, it is generally accepted **8.14**

⁴ ICSID Convention art. 57.

⁵ Mr. Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award (July 26, 2001).

⁶ *Id.* ¶¶ 15–16.

⁷ It should be noted that ICSID launched a rule amendment process in October 2016 and invited governments and the general public to submit suggestions for amendments. At the time of writing, the Secretariat has collected these comments and is preparing background papers on topics that have been identified for potential rule amendment. For more information, see <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx> (last visited Mar. 14, 2018).

⁸ C. SCHREUER, WITH L. MALINTOPPI, A. REINISCH & A. SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 1202 (2d ed. 2009).

⁹ The relevant part of the Spanish version of art. 14(1) refers to a person who 'inspira[r] plena confianza en su imparcialidad de juicio'.

¹⁰ *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Proposal for Disqualification (Oct. 22, 2007), ¶¶ 28–30 [hereinafter *Suez v. Argentina*]; M. Kinnear & F. Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, in *CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS* 50 (C. Giorgetti ed., 2015); *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Mar. 28, 2016), ¶ 28 [hereinafter *Owens-Illinois v. Venezuela*].

that independence means the ‘absence of external control’,¹¹ while impartiality refers to the ‘absence of bias or predisposition towards a party’.¹² The purpose of these requirements is to ‘protect parties against arbitrators being influenced by factors other than those related to the merits of the case’.¹³

- 8.15** Article 57 of the ICSID Convention requires a challenging party who alleges that an arbitrator lacks the qualities set out in Article 14(1) of the ICSID Convention to establish that there was a ‘manifest lack’¹⁴ of those qualities. The meaning of ‘manifest’ has given rise to varying interpretations, which have inhibited the development of a clear standard of disqualification under Article 57 of the ICSID Convention.¹⁵ The heart of the debate is whether the standard of disqualification under ICSID is the ‘justifiable doubts’ test, or some higher standard.
- 8.16** Before the ruling in the ICSID case *Blue Bank v Venezuela*, it was thought that a higher standard than ‘justifiable doubts’ was necessary.¹⁶ However, in deciding a challenge brought against the majority of the tribunal in *Blue Bank v Venezuela*, the chairman of the World Bank applied a lower threshold than in previous cases. He noted in his decision that ‘Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the “appearance of dependence or bias”’.¹⁷ Regarding the word ‘manifest’, the chairman of the World Bank noted that it means ‘evident’ or ‘obvious’.¹⁸ In that light, ‘manifest’ is merely a rule of evidence, not a qualitative modifier to the standard for disqualification.
- 8.17** Subsequent challenge decisions within the ICSID context followed the approach adopted in the *Blue Bank* ruling and held that the ‘appearance of dependence or bias’ is sufficient to result in disqualification.¹⁹ However, there have also been challenge decisions that did not adopt this standard.

¹¹ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Proposal to Disqualify Professor Phillippe Sands (July 11, 2014), ¶ 116 [hereinafter *İçkale İnşaat v. Turkmenistan*]; *Owens-Illinois v. Venezuela*, *supra* note 10, ¶ 29.

¹² *Id.*

¹³ *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012), ¶ 55 [hereinafter *ConocoPhillips v. Venezuela*].

¹⁴ Article 57 provides: ‘A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV’.

¹⁵ *See, e.g., Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983), ¶ 2: ‘manifest lack’ means ‘not a possible lack of the quality, but a quasi-certain, or to go as far as possible, a highly probable one’. A standard more akin to reasonable doubts was suggested in *Compania de Aguas del Aconquija S.A. & Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001), ¶ 20. In *EDF International S.A., SAUR International S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008), ¶¶ 65–68, ‘manifest’ relates ‘not to the seriousness of the allegation but to the ease with which it may be perceived’.

¹⁶ M. Lalonde, *Quo Vadis Disqualification?*, in *BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 645* (M. Kinnear et al. eds., 2015).

¹⁷ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. Arb/12/20, Decision on the Parties’ Proposal to Disqualify the Majority of the Tribunal (Nov. 12, 2013), ¶ 59 [hereinafter *Blue Bank v. Venezuela*]. *See also* the analysis of this case in Lalonde, *supra* note 16, at 641–53. In the interest of full disclosure, it should be noted that one of the authors of this chapter sat as arbitrator appointed by the respondent in this case following the resignation of Mr. Santiago Torres Bernardez.

¹⁸ *Blue Bank v. Venezuela*, *supra* note 17, ¶ 61.

¹⁹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), ¶ 66 [hereinafter *Burlington v. Ecuador*]; *Abaclat and Others v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on the

In *Total v Argentina*,²⁰ Argentina argued that the standard of disqualification under the ICSID Convention is the appearance of dependence or predisposition or bias.²¹ The claimant disagreed, arguing that the 'manifest standard implies that it does not suffice to prove the appearance of dependence or bias, but rather that the existence of bias or dependence must be evident or obvious, in the sense that it can be discerned with little effort and without deeper analysis'.²² The remaining members of the ad hoc Committee who decided the challenge did not expressly endorse or reject the 'appearance of dependence or bias' test. However, they appear to have accepted the claimant's position, holding that the challenging party must demonstrate that it is 'manifest, obvious, that the person challenged cannot exercise independent judgment'.²³ **8.18**

It remains to be seen whether the ruling in *Blue Bank* will be the last word on the standard required for disqualification under the ICSID Convention. In any event, *Blue Bank* remains a landmark decision to the extent that it represents a shift in the standard for disqualification under the ICSID Convention. This shift to an 'appearance of dependence or bias' test for disqualification under ICSID is significant. In particular, it may have the effect of aligning the standard of disqualification under the ICSID Convention with the 'justifiable doubts' test commonly applicable under other arbitral rules. However, it should be noted that the word 'manifest' in Article 57 of the ICSID Convention still leaves it open for a party to argue that proof of actual dependence or bias is required. After all, the decision in *Blue Bank* is not binding on non-parties to the case, although, of course, the chairman of World Bank can be expected to maintain the same position in future decisions. It may be that the only way to resolve definitively the issue of the standard for disqualification is to amend Article 57 of the ICSID Convention. However, amending the Convention is a highly ambitious, if not an altogether unrealistic, undertaking, since any amendment requires the approval of the majority of two-thirds of the members of the ICSID Administrative Council and all member states of the Convention.²⁴ **8.19**

Apart from the apparent change in the standard for disqualification under the ICSID Convention, ICSID introduced several new features to its website in December 2014,²⁵ some of which may potentially impact issues of independence and impartiality of arbitrators. The new website contains a list of all ICSID arbitrators and conciliators. It also publishes their CVs (when they have been submitted by the arbitrator or conciliator) in a standard format, and sets out all the ICSID cases they have acted in, whether as arbitrator or as counsel. The new website also allows parties to see real-time updated information on specific cases, such as the subject matter of the dispute, the parties, the arbitrators and who appointed them, and the outcome of the case. **8.20**

Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014), ¶ 76; Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014), ¶ 57 [hereinafter Caratube v. Kazakhstan]; ConocoPhillipsPetrozuata B.V. and Others v. Bolivarian Republic of Venezuela, Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014), ¶ 52; İçkale İnşaat v. Turkmenistan, *supra* note 11, ¶ 117; ConocoPhillips v. Venezuela, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (July 1, 2015), ¶ 83; *Id.* Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (July 26, 2016), ¶ 12(a).

²⁰ Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng (Aug. 26, 2015) [hereinafter Total v. Argentina].

²¹ *Id.* ¶ 31.

²² *Id.* ¶ 60.

²³ *Id.* ¶ 105.

²⁴ ICSID Convention art. 66(1).

²⁵ See <http://livestream.com/ICSID/events/3666176> (last visited Dec. 10, 2017).

8.21 This kind of information may form, and on occasion did form, the basis for challenges, including in connection with repeat appointments of an arbitrator by a particular party, ‘double-hat’ issues arising out of an arbitrator’s acting as counsel in another arbitration involving similar issues, and ‘issue conflict’ arising out of an arbitrator’s appointment as an arbitrator in another case. Thus far, it does not appear that the recent availability of such information via the new website has led to an increase in the number of challenges to arbitrators.

B. Permanent Court of Arbitration (PCA)

8.22 The PCA Arbitration Rules 2012,²⁶ which consolidated, but did not replace, four other sets of procedural rules,²⁷ are based on the 2010 version of the UNCITRAL Arbitration Rules.²⁸ The PCA Arbitration Rules 2012 contain substantially identical grounds for challenge as the UNCITRAL Arbitration Rules, namely, ‘justifiable doubts as to the arbitrator’s impartiality or independence’,²⁹ an arbitrator’s failure to act³⁰ or ‘de jure or de facto impossibility of his or her performing his or her functions’,³¹ Further, Article 11 of the PCA Arbitration Rules 2012 requires potential arbitrators to disclose any circumstance ‘likely to give rise to justifiable doubts as to his or her impartiality or independence’.³²

8.23 A novel feature in the PCA Arbitration Rules 2012 not found in the four previous versions of the PCA Rules and the UNCITRAL Arbitration Rules 2010 are the model statements of impartiality and independence. A potential arbitrator may adopt either of the following model statements:

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the PCA Arbitration Rules 2012 of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

8.24 As these are models, an arbitrator may use them as a reference and ultimately deviate from them. However, it is reasonable to assume that a statement that takes this form is more likely to be regarded by the PCA and the parties as satisfying the disclosure requirement laid out in Article 11 of the PCA Arbitration Rules.

²⁶ See <https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf> (last visited Dec. 10, 2017).

²⁷ PCA Optional Rules for Arbitrating Disputes between Two States (1992); PCA Optional Rules for Arbitrating Dispute between Two Parties of Which Only One is a State (1993); PCA Optional Rules for Arbitration between International Organizations and States (1996) and PCA Optional Rules for Arbitration between International Organizations and Private Parties (1996).

²⁸ M. INDLEKOFER, *INTERNATIONAL ARBITRATION AND THE PERMANENT COURT OF ARBITRATION* 344 (2013).

²⁹ PCA Arbitration Rules 2012 art. 12(1).

³⁰ *Id.* art. 12(3).

³¹ *Id.*

³² *Id.* art. 11.

In addition, any party may request from the arbitrator to supplement the statement of impartiality and independence as follows: **8.25**

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

This additional statement should be read in the light of Article 12(3) of the PCA Arbitration Rules 2012, which applies the challenge procedures in the event an arbitrator fails to act or if there is 'de jure or de facto impossibility of his or her performing his or her functions'. According to an article by a senior legal counsel of the PCA, in an unreported case submitted under a similar provision, Article 13(2) of the UNCITRAL Arbitration Rules 1976, the challenging party sought to remove an arbitrator arguing that the arbitrator's 'huge case load in investment arbitrations' and other adjudicatory and academic commitments constituted a case of de facto impossibility to perform arbitral functions.³³ It was reported that one of the reasons for rejecting the challenge was a statement from the arbitrator regarding the arbitrator's commitment to the case.³⁴ Viewed in this light, the model additional statement in the PCA Arbitration Rules 2012 underscores the importance of an arbitrator's availability and commitment in performing the arbitral function. At the same time, such a statement may assist in resisting a potential challenge under Article 12(3) of the PCA Arbitration Rules 2012. It follows that it may be advisable for an arbitrator to include this statement even if it is not expressly requested.³⁵ **8.26**

C. United Nations Commission on International Trade Law (UNCITRAL)

The provisions relating to challenges of arbitrators in all three versions of the UNCITRAL Arbitration Rules (1976, 2010, and 2013) are identical. They provide that an arbitrator may be challenged if circumstances exist that 'give rise to justifiable doubts' as to her or his impartiality or independence.³⁶ Mere doubt as to the arbitrator's independence or impartiality is not sufficient. The challenging party must demonstrate that the doubt is justifiable.³⁷ The test is 'whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator's [independence] or impartiality',³⁸ having considered all of the relevant facts and circumstances.³⁹ **8.27**

Further, under all three versions of the UNCITRAL Arbitration Rules, an arbitrator may also be challenged if he or she fails to act, or in the event of de jure or de facto impossibility of performing the arbitrator's functions.⁴⁰ This ground has been unsuccessfully invoked to challenge arbitrators on the basis that they failed to devote time to the arbitration⁴¹ or that **8.28**

³³ S. Grimmer, *The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration*, in CHALLENGES AND RECUSALS, *supra* note 10, at 113.

³⁴ *Id.*

³⁵ Such a statement of availability is routinely included by arbitrators under the ICC Rules. See ICC Rules of Arbitration 2012 art. 11(2).

³⁶ UNCITRAL Arbitration Rules 1976 art. 10(1); UNCITRAL Arbitration Rules 2010 and 2013) art. 12(1).

³⁷ Vito G. Gallo v. Government of Canada, Decision on the Challenge to Mr. J. Christopher Thomas, QC (Oct. 14, 2009), ¶ 19 [hereinafter Gallo v. Canada].

³⁸ National Grid Plc v. Republic of Argentina, London Court of International Arbitration Case No. UN 7949, Decision on the Challenge to Mr Judd L. Kessler (Dec. 3, 2007), ¶ 80.

³⁹ Gallo v. Canada, *supra* note 37, ¶ 19; see Grimmer, *supra* note 33, at 96.

⁴⁰ UNCITRAL Arbitration Rules 1976 art. 13(2); UNCITRAL Arbitration Rules 2010 art. 12(3); UNCITRAL Arbitration Rules 2013 art. 12(3).

⁴¹ See Grimmer, *supra* note 33, at 112.

their other professional commitments created a de facto impossibility for them to perform their functions as arbitrators.⁴²

8.29 While the rules relating to challenges of arbitrators have remained the same through all three versions of the UNCITRAL Arbitration Rules, the 2013 version introduced a new Article 1(4), which applies the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁴³ (UNCITRAL Transparency Rules) to investor-state arbitrations in the following instances:

- (a) where the investor-State arbitration was initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014, unless the parties to that treaty have agreed otherwise;⁴⁴
- (b) for investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded before 1 April 2014: (i) where the parties to the arbitration agree to their application in respect of that arbitration; or (ii) where the parties to that treaty or, in the case of a multi-lateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application;⁴⁵
- (c) in an investor-State arbitration in which the respondent is a party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Transparency Convention) that has not made a relevant reservation under article 3(1)(a) or (b) of the Transparency Convention, and the claimant is of a State that is also a party⁴⁶ that has not made a relevant reservation under article 3(1)(a) of the Transparency Convention; or
- (d) in an investor-State arbitration in which the respondent is a party that has not made a reservation relevant to that arbitration under article 3(1) of the Transparency Convention, and the claimant agrees to the application of the UNCITRAL Transparency Rules.

8.30 The UNCITRAL Transparency Rules do not directly address challenges to arbitrators. However, some of the provisions merit further discussion to the extent that they may potentially impact this issue. In particular, under Article 2 of the UNCITRAL Transparency Rules, the name of the disputing parties, the economic sector involved and the treaty under which the claim is made will be made public. Further, the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, any further written statements or written submissions by any disputing party,⁴⁷ expert reports and witness statements⁴⁸ are to be disclosed unless they contain ‘confidential or protected information’ as defined in Article 7 of the UNCITRAL Transparency Rules. Under the UNCITRAL Arbitration Rules, the notice of arbitration and the response to the notice of arbitration may contain the names of the arbitrators appointed by each party.⁴⁹ As a consequence, the names of the arbitrators appointed by each party may also be made public.

8.31 Thus, in an arbitration where the UNCITRAL Transparency Rules are applicable, parties may rely on such public information to challenge arbitrators, particularly on the grounds of

⁴² *Id.* at 113.

⁴³ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited Dec. 10, 2017).

⁴⁴ *Id.* art. 1(4), read with UNCITRAL Transparency Rules art. 1(1).

⁴⁵ UNCITRAL Transparency Rules art. 1(2).

⁴⁶ *Id.* art. 2(1), <http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf> (last visited Dec. 10, 2017).

⁴⁷ UNCITRAL Transparency Rules art. 3(1).

⁴⁸ *Id.* art. 3(2).

⁴⁹ UNCITRAL Arbitration Rules 1976 art. 3(4); UNCITRAL Arbitration Rules 2010 and 2013 art. 3(4) and art. 4(2).

repeat appointments by the same party or counsel and ‘issue conflict’ arising from an arbitrator’s involvement in multiple arbitrations concerning the same, or a similar, subject matter.

In May 2015, Algeria put forward a proposal for UNCITRAL to consider the establishment of a code of conduct or ethics for arbitrators in investor-state arbitration.⁵⁰ The UNCITRAL Secretariat, which was requested to assess the feasibility of work in that area, found that there is currently a variety of sources on ethics for arbitrators, such that arbitrators could be concurrently bound by more than one standard depending on the circumstances.⁵¹ The note prepared by the UNCITRAL Secretariat requested the Commission to consider several questions in determining whether to undertake future study in this area, such as whether there is a need for a harmonized and authoritative source on ethics in international arbitration.⁵² In this regard, UNCITRAL noted that views were expressed that ‘the wide array of existing norms and standards on ethics would make it superfluous for [UNCITRAL] to undertake work on the topic’.⁵³ After discussion at the forty-ninth session, UNCITRAL requested the Secretariat to continue working on this matter and to report at a future session on the possible approaches to developing a code of ethics.⁵⁴ Interestingly, UNCITRAL also requested the Secretariat to explore the topic in ‘close cooperation’ with experts, including those from other organizations, thus signalling the intention of collaborating, *inter alia*, with arbitral institutions.⁵⁵ **8.32**

The development of a code of ethics for arbitrators might contribute positively to the legitimacy of ISDS. There is a growing demand for more specific guidelines concerning what arbitrators may and may not do, as reflected in the introduction of codes of ethics and conduct in recently concluded investment agreements.⁵⁶ Moreover, as will be discussed in section III, while a growing consensus has been reached on some issues concerning this topic, there remain some outstanding questions that would benefit from a clarification of the relevant rules and standards. To allay any concern that such a code of conduct may be superfluous, it should be noted that the law and practice on issues of independence and impartiality of arbitrators is evolving rapidly as a result of the initiatives and changes introduced by arbitral institutions, as well as from the rules introduced by states in their investment agreements. **8.33**

D. International Chamber of Commerce (ICC)

Article 14(1) of the ICC Rules of Arbitration 2012⁵⁷ provides that a challenge of an arbitrator may be introduced for ‘an alleged lack of impartiality or independence, or otherwise’. As indicated by the use of the terms ‘or otherwise’, the grounds which can be invoked as a basis of a challenge appear to be open-ended.⁵⁸ One commentary observed that the standard for **8.34**

⁵⁰ Forty-eighth session of the UNCITRAL (June 29–July 16, 2015), UN Doc. No. A/CN.9/855 at 2.

⁵¹ Forty-ninth session of the UNCITRAL (June 27–July 15, 2016), UN Doc. No. A/CN.9/800 at 6–7.

⁵² *Id.* at 7.

⁵³ Report of the forty-ninth session of the UNCITRAL (June 27–July 15, 2016), UN Doc. No. A/71/17, at ¶ 185. See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/29/PDF/V1604829.pdf?OpenElement> (last visited Mar. 13, 2018).

⁵⁴ *Id.* ¶ 186.

⁵⁵ *Id.*

⁵⁶ See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Transatlantic Trade and Investment Partnership Agreement (TTIP); EU–Singapore Free Trade Agreement.

⁵⁷ See <http://internationalarbitrationlaw.com/about-arbitration/international-arbitration-rules/2012-icc-arbitration-rules/> (last visited Mar. 13, 2018). It should be noted that this section does not address the latest version of the ICC Rules of Arbitration, which entered into force on 1 March 2017, after this section was completed.

⁵⁸ L. Malintoppi & A. Carlevaris, *Challenges of Arbitrators, Lessons from the ICC*, in CHALLENGES AND RECUSALS, *supra* note 10, at 143.

challenge under the ICC Rules of Arbitration 2012 is ‘broad and vague’—‘broad’ because of the possibility to challenge an arbitrator for any reason considered appropriate, and ‘vague’ because ‘lack of impartiality or independence or otherwise’ is not defined.⁵⁹

8.35 Article 11(4) of the ICC Rules of Arbitration 2012 prohibits the reasons for the decisions of the International Court of Arbitration (the ICC Court) on appointment, confirmation, challenge, or replacement of an arbitrator to be communicated, which makes it difficult to discern the standard required for a successful challenge under the ICC system. However, against the backdrop of a growing call for transparency, in October 2015, the ICC Court announced that it would, upon the request of all the parties, communicate the reasons for decisions made on challenges and replacement of arbitrators.⁶⁰ This practice was implemented with immediate effect.

8.36 In the most recent (22 September 2016) version⁶¹ of the ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (ICC Note),⁶² the relationship between Article 11(4) of the ICC Rules of Arbitration and the announcement by the ICC Court in October 2015 is clarified. Paragraph 11 of that ICC Note states:

Article 11(4) provides that the Court shall not communicate the reasons for its decisions on the appointment, confirmation, challenge or replacement of an arbitrator. However, upon request of all the parties, the Court may communicate the reasons for (i) a decision made on the challenge of an arbitrator pursuant to Article 14, and (ii) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2). The Court may also, upon request of all the parties, communicate the reasons for decisions pursuant to Articles 6(4) and 10.

8.37 The ICC Court, however, maintains to date ‘full discretion to accept or reject a request for communication for reasons’,⁶³ and it ‘may subject the communication to an increase in the administrative expenses, normally not exceeding US\$5,000’.⁶⁴

8.38 Parties may agree to request reasons for the ICC Court’s decisions in their arbitration agreement, in the terms of reference, or at any stage of the proceedings, as long as the request is made in advance of the relevant decision in respect of which reasons are sought.⁶⁵ In this regard, it should be recalled that a report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities suggested that states resorting to investment arbitration and seeking greater transparency may consider derogating from Article 11(4) of the ICC Rules of Arbitration 2012 and include in their BITs, multilateral investment treaties, investment chapters of their FTAs, or domestic investment law the following language:

⁵⁹ K. DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 5-044 (2012).

⁶⁰ See <http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/> (last visited Dec. 10, 2017).

⁶¹ At the time of writing this section, this was the latest version of the ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration. A new Note concerning the 2017 ICC Rules was issued on 30 October 2017 and is available at <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration> (last visited Mar. 14, 2018).

⁶² See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/practice-notes,-forms,-checklists/> (last visited Dec. 10, 2017).

⁶³ *Id.* ¶ 13.

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 12.

The Parties agree that the ICC International Court of Arbitration shall communicate the reasons for its decisions on the disputed communication, non-confirmation, challenge and replacement of arbitrators, in derogation of Article 11(4) of the ICC Rules of Arbitration.⁶⁶

It should be noted that the communication of the reasons of the Court's decisions, if any, is made to the parties and arbitrators, not to the public at large. However, to the extent the ICC Secretariat publishes periodic surveys of such decisions in the ICC Bulletin, this may serve to shed light on the ICC Court's practice in applying Article 14(1) of the ICC Rules of Arbitration 2012. It is interesting to mention in this regard paragraph 27 of the latest version of the ICC Note, which states: **8.39**

The Court endeavours to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties. Transparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism.

In the ICC system, the ICC Court considers issues of arbitrator's independence and impartiality at two stages of the proceedings: at the time of confirmation or appointment of the arbitrator and, as necessary, during the course of the arbitration.⁶⁷ All prospective arbitrators are required to complete and sign a statement of acceptance, availability, impartiality, and independence and disclose 'any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of any of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality'.⁶⁸ Any doubt must be resolved in favour of disclosure.⁶⁹ This duty of disclosure is a continuing one, and applies throughout the duration of the arbitral proceedings.⁷⁰ **8.40**

In February 2016, the ICC Court adopted a Guidance Note for the disclosure of conflicts by arbitrators,⁷¹ which has been incorporated in the latest version of the ICC Note. It is now clear that, while a failure to disclose is not in itself a ground for disqualification, a lack of disclosure will be considered by the ICC Court in assessing whether an objection to confirmation or a challenge is well founded.⁷² Further, the ICC stated that the standard for disclosure under the ICC Rules of Arbitration is a subjective one and it is for each arbitrator to assess whether a disclosure should be made.⁷³ To assist an arbitrator's or a prospective arbitrator's assessment of whether to disclose a fact or circumstance, the ICC Note listed nine non-exhaustive circumstances which an arbitrator or a prospective arbitrator should pay particular attention to: **8.41**

- (a) The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.

⁶⁶ Available at: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration/> (last visited Dec. 10, 2017).

⁶⁷ L. Malintoppi, *Arbitrator's Independence and Impartiality*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 808 (P. Muchlinski et al. eds., 2008).

⁶⁸ ICC Rules of Arbitration 2012 art. 11(2).

⁶⁹ ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (Sept. 22, 2016), ¶ 18.

⁷⁰ ICC Rules of Arbitration 2012 art. 11(3).

⁷¹ See <https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/> (last visited Dec. 10, 2017).

⁷² ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, *supra* note 69, ¶ 19.

⁷³ See *supra* note 71.

- (b) The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.
- (c) The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
- (d) one of the parties or one of its affiliates as director, board member, officer, or otherwise.
- (e) The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.
- (f) The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
- (g) The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
- (h) The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.
- (i) The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.

8.42 The ICC Note appears to include a wider range of circumstances than those contemplated by the IBA Guidelines. Moreover, unlike the IBA Guidelines, which impose a time limit for the tracing of certain relationships, the ICC Note does not specifically contain such time limits. In addition, unlike the IBA Guidelines which organizes circumstances based on their severity along a traffic-light spectrum, the ICC Note makes no such distinction. Further, when completing his or her statement and identifying whether a disclosure should be made, an arbitrator or prospective arbitrator is obliged to 'make reasonable enquiries in his or her records, those of his or her law firm and, as the case may be, in other readily available materials'.⁷⁴ Thus, under the ICC Note, arbitrators are well-advised to make more comprehensive disclosures out of an abundance of caution, sometimes a tall order for those who practice in large international law firms.

E. Stockholm Chamber of Commerce (SCC)

8.43 Under the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce⁷⁵ (SCC Arbitration Rules), a party may challenge an arbitrator if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not possess qualifications agreed to by the parties.⁷⁶ No amendment was made to the SCC Arbitration Rules regarding challenges to arbitrators from the previous version of the rules.⁷⁷

8.44 Further, a prospective arbitrator shall 'disclose any circumstances which may give rise to justifiable doubts as to [his/her] impartiality or independence'⁷⁸ and, upon appointment, submit a signed statement of impartiality and independence disclosing 'any circumstance that may give rise to justifiable doubts as to the arbitrator's impartiality or independence'.⁷⁹

⁷⁴ ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, *supra* note 69, ¶ 19.

⁷⁵ 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf (last visited Mar. 13, 2018).

⁷⁶ *Id.* art. 19(1).

⁷⁷ 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art. 15(1).

⁷⁸ 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art. 18(2).

⁷⁹ *Id.* art. 18(3).

Also, of particular note is the Swedish Arbitration Act (SFS 1999:116) (SAA), which applies to arbitration proceedings seated in Stockholm governed by SCC Rules.⁸⁰ Moreover, the Swedish Supreme Court clarified in 2010 that the SAA will apply as long as the parties agree that the proceedings are to take place in Sweden, even if the arbitrators are not from Sweden or if their duties have been carried out in another country.⁸¹ Section 8 of the SAA sets out a list of non-exhaustive circumstances that will always be considered as diminishing confidence in the arbitrator's impartiality, such as where the arbitrator or a person closely associated to him/her is a party, or otherwise may 'expect notable benefit or detriment' as a result of the outcome of the dispute.⁸² **8.45**

Under the SCC Rules, if a party decides to challenge an arbitrator, the decision is decided by the SCC board.⁸³ The SCC board does not provide reasons for its decisions on challenges of arbitrators, regardless of the outcome of the challenge.⁸⁴ It remains to be seen whether the SCC board will change its practice in the light of the LCIA's and ICC's decisions to change their policies in this matter. It would be useful, for example, for parties to be aware of the extent to which challenges to arbitrators are decided on the basis of Swedish law. **8.46**

F. London Court of International Arbitration (LCIA)

The 2014 version of the LCIA Rules of Arbitration (2014 LCIA Rules) contains several changes relating to the revocation of the appointment of an arbitrator from the 1998 version of the Rules. Article 10.1 of the 2014 LCIA Rules consolidates the grounds for challenge in one provision, as follows: **8.47**

The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

The 2014 LCIA Rules provide that the LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the tribunal or upon a written challenge by any party on the grounds of 'justifiable doubts' as to the arbitrator's impartiality or independence, or if the arbitrator falls seriously ill, refuses, or becomes unable or unfit to act.⁸⁵ Further, the 2014 LCIA Rules set out three situations where an arbitrator may be determined as 'unfit to act': (i) if the arbitrator acts in deliberate violation of the parties' arbitration agreement; (ii) if the arbitrator does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence, and industry.⁸⁶ **8.48**

⁸⁰ N. Lindström, *Challenges to Arbitrators—Decisions by the SCC Board During 2008—2010*, 1, 4, <http://www.sccinstitute.com/media/93825/challenges-to-arbitrators-decisions-by-the-scc-board-during-2008.pdf> (last visited Dec. 10, 2017).

⁸¹ See the discussion of *RosInvestCo U.K. Ltd. v. Russian Federation*, Case No. Ö 2301-09 in Lindström, *supra* note 80, at 2, n. 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ H. Jung, *SCC Practice: Challenges to Arbitrators, SCC Board Decisions 2005—2007*, at 4, <http://www.sccinstitute.com/media/61992/04-art32-jung.pdf> (last visited Dec. 10, 2017).

⁸⁵ LCIA Rules of Arbitration 2014 art. 10.1.

⁸⁶ *Id.* art. 10.2.

- 8.49** In 2006, the LCIA voted to publish abstracts of its decisions on challenges to arbitrators. The first digest of these decisions was published in 2011.⁸⁷ The digest has cast light on how challenges to arbitrators at the LCIA are determined. It is interesting to note that, while Article 10(1)(iii) of the 2014 LCIA Rules uses the same language as the UNCITRAL Arbitration Rules, challenges to arbitrators under the 2014 LCIA Rules may be determined on the basis of a different legal standard than that under the UNCITRAL Arbitration Rules. Where the arbitrations are seated in England, the LCIA Court will apply the standards of independence and impartiality under the applicable statutes and jurisprudence of English law.⁸⁸ It remains an open question what standards will be applicable in a challenge to an arbitrator in a LCIA arbitration not seated in England, since this scenario had yet to arise at the time the digest was published.⁸⁹
- 8.50** Further, in some cases, the LCIA Court has recognized that all the circumstances considered in accumulation may result in a successful challenge, even though each circumstance considered in isolation may not.⁹⁰ For instance, while the failure to disclose facts or circumstances ‘likely to give rise to any justifiable doubts’ is unlikely per se to be a sufficient basis for a challenge to be upheld, it may be considered by the LCIA Court as a factor that weighs towards the removal of an arbitrator.⁹¹ In this regard, LCIA measures a failure to disclose by the same standard as other allegations of bias, which is whether ‘a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that an arbitrator appears to be dependent on a party or is partial to a party’.⁹²
- 8.51** Since 2014, the LCIA’s Registrar’s reports also contain information on challenges to arbitrators. According to the Registrar’s reports in 2014 and 2015, a total of ten challenges were made to arbitrators who had been appointed under the LCIA Rules of Arbitration,⁹³ out of which two challenges were upheld, four were rejected, and four resulted in a resignation.⁹⁴ These numbers reflect a relatively high success rate, given that 60 per cent of the challenges result in a change in the composition of the tribunal. However, given the small sample size, it would be hasty to draw any concrete conclusions about the ease of challenging an arbitrator in a LCIA arbitration.

G. Singapore International Arbitration Centre (SIAC)

- 8.52** In early 2017, the Singapore International Arbitration Centre (SIAC) issued the SIAC Investment Arbitration Rules.⁹⁵ The SIAC is the first arbitral institution to have parallel rules of arbitration that govern commercial and investment arbitrations, respectively.
- 8.53** Under the SIAC Investment Arbitration Rules, an arbitrator may be challenged if ‘circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have

⁸⁷ T. Walsh & R. Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, in *ARBITRATION INTERNATIONAL SPECIAL EDITION ON ARBITRATOR CHALLENGES* 282–313 (William W. Park ed., 2011).

⁸⁸ *Id.* at 286.

⁸⁹ *Id.* at 286.

⁹⁰ *Id.* at 287.

⁹¹ *Id.* at 288.

⁹² *Id.* at 288–89.

⁹³ LCIA Registrar’s Report 2014 and LCIA Registrar’s Report 2015), <http://www.lcia.org/LCIA/reports.aspx> (last visited Dec. 10, 2017). A 2016 report was published on the LCIA website after this section was finalized and can be found at <http://www.lcia.org/LCIA/reports.aspx> (last visited Mar. 14, 2018).

⁹⁴ LCIA Registrar’s Report 2014, at 5; LCIA Registrar’s Report 2015, at 4.

⁹⁵ See <http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017> (last visited Mar. 13, 2018).

agreed'.⁹⁶ This provision is identical to the equivalent provision under the 2016 version of the SIAC Arbitration Rules,⁹⁷ envisaged to apply to commercial arbitration after coming into force on 1 August 2016.

In most respects, the provisions on qualifications and challenges to arbitrators are substantially identical under both the SIAC Investment Arbitration Rules and the SIAC Arbitration Rules 2016. **8.54**

Under the SIAC Investment Arbitration Rules, decisions on challenges are to be reasoned and issued to the parties.⁹⁸ Further, these decisions may be published with the parties' consent.⁹⁹ As these decisions are published, they will no doubt help to elucidate how decisions on challenges under the SIAC Investment Arbitration Rules are made and whether they are in line with decisions under other institutional rules. **8.55**

H. The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)

While not binding¹⁰⁰ and not adopted by an arbitral institution, but by a professional association, the IBA Guidelines have become a very important tool and are regularly referred to in decisions on challenges to arbitrators as indicative for assessing whether a conflict of interest may exist. The majority of the ad hoc Committee in *Total v Argentina* considered that the IBA Guidelines were 'a very useful tool, insofar as they reflect a transnational consensus on their subject matter, and therefore have been used as reference for handling issues related to conflicts of interest in international arbitration'.¹⁰¹ **8.56**

In one case, *Perenco v Ecuador*, the parties agreed ex post facto that the challenge to the arbitrator in that case was to be resolved by applying the 2004 IBA Guidelines.¹⁰² In the decision on that challenge, the Secretary-General of the PCA, appointed by the parties, did not express any difficulty in applying the 2004 version of the IBA Guidelines to resolve the challenge. He held that the relevant question was whether the circumstances, 'from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence',¹⁰³ which represents a substantively identical legal standard as the UNCITRAL Arbitration Rules. **8.57**

While there appears to be no other case where the parties have agreed to adopt the same, or a similar, approach to date, there is at least one example of a treaty where the contracting parties provided that the arbitrators should comply with the IBA Guidelines: the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA).¹⁰⁴ **8.58**

Contrary to this trend, a number of decisions have cast doubt over the applicability of the IBA Guidelines as the legal standard for the determination of arbitrators' challenges, **8.59**

⁹⁶ *Id.* art. 11(1).

⁹⁷ SIAC Arbitration Rules 2016 art. 14.1, <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> (last visited Dec. 10, 2017).

⁹⁸ *Id.* art. 13.4.

⁹⁹ *Id.* art. 38(3).

¹⁰⁰ *Total v. Argentina*, *supra* note 20, ¶ 98.

¹⁰¹ *Id.*

¹⁰² *Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador)*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator (Dec. 8, 2009), ¶ 2 [hereinafter *Perenco v. Ecuador*].

¹⁰³ *Id.* ¶ 4.

¹⁰⁴ CETA art. 8.30(1). The full text of the CETA is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited Dec. 10, 2017).

at least in the context of ICSID arbitration.¹⁰⁵ For instance, the non-challenged members of the *Tidewater v Venezuela* tribunal distinguished the standard of disqualification under Article 57 of the ICSID Convention from the ‘justifiable doubts’ test formulated in the IBA Guidelines.¹⁰⁶ Further, the majority of the ad hoc Committee in *Total v Argentina* observed that the IBA Guidelines relate mainly to standards applicable to the duty to disclose and not to the standards applicable to a disqualification request.¹⁰⁷ The same view was echoed by the unchallenged members of the *Caratube v Kazakhstan* tribunal, which referred to the 2004 version of the IBA Guidelines.¹⁰⁸ More recently, in March 2016, the English High Court, in an application to challenge an arbitration award under the English Arbitration Act 1996,¹⁰⁹ held that there are

[W]eaknesses in the 2014 IBA Guidelines in two inter-connected respects. First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).¹¹⁰

III. Innovations in International Investment Agreements

- 8.60** States have recently also taken steps to tackle the issue of independence and impartiality of arbitrators, driven in part by the growing voices of criticism of ISDS. A particularly noticeable trend is the introduction of more specific and detailed rules relating to the qualities, independence, and impartiality of arbitrators in investment agreements. These rules can be highly specific and detailed, which may explain why states have labelled them ‘codes’ of conduct or ethics for arbitrators.
- 8.61** The rules contained in such investment agreements are usually intended to impose a higher standard of impartiality or independence than those established under the various institutional rules. For instance, under the investment chapter of the EU–Singapore Free Trade Agreement¹¹¹ (EU–Singapore FTA), an arbitrator may be challenged¹¹² if he or she failed to ‘disclose any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety

¹⁰⁵ In an entirely different context, that of the maritime sovereignty in a state-to-state dispute between Mauritius and the United Kingdom, the tribunal had occasion to observe that the IBA Guidelines (which had been relied upon by the party moving to challenge an arbitrator) were ‘private law sources’, or rules developed in the context of commercial disputes, which could not apply to inter-state arbitrations. The tribunal concluded that the applicable standard was art. 10 of the PCA Optional Rules, according to which an arbitrator may be successfully challenged if ‘circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’. *Chagos Marine Protected Area Arbitration (Mauritius v. U.K.)*, Reasoned Decision on Challenge (Nov. 30, 2011), ¶ 138.

¹⁰⁶ *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (Dec. 23, 2010), ¶ 43 [hereinafter *Tidewater v. Venezuela*].

¹⁰⁷ *Total v. Argentina*, *supra* note 20, ¶ 98.

¹⁰⁸ *Caratube v. Kazakhstan*, *supra* note 19, ¶ 59.

¹⁰⁹ *W Limited v. M Sdn Bhd* [2016] E.W.H.C. 422 (Comm).

¹¹⁰ *Id.* ¶ 34.

¹¹¹ Text of the EU–Singapore Free Trade Agreement as of May 2015 is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (last visited Dec. 10, 2017). At the date of writing, the EU–Singapore Free Trade Agreement has not come into force.

¹¹² *Id.* art. 9.18, ¶ 8.

or bias in the proceedings'.¹¹³ The Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators of the latest draft text of the Transatlantic Trade and Investment Partnership (TTIP), and the Code of Conduct for the Australia–China Free Trade Agreement, contain a substantially identical provision.¹¹⁴ Under these treaty provisions, a failure to disclose per se would violate the Code of Conduct and may consequently lead to disqualification in parallel provisions of arbitral rules.

Under Article 57 of the ICSID Convention, a failure to disclose does not per se result in disqualification.¹¹⁵ Similarly, under the IBA Guidelines, a failure to disclose does not in itself demonstrate that an arbitrator is partial or lacks independence; only the facts and circumstances not disclosed can do so.¹¹⁶ It is worth noting in this regard that the Secretary-General of the PCA held in a challenge decision in the case of *Belokon v Kyrgyz Republic*,¹¹⁷ in the context of the UNCITRAL Arbitration Rules 1976, that in certain cases, a failure to disclose circumstances may in itself give rise to justifiable doubts as to the arbitrator's independence and impartiality.¹¹⁸ However, the decision does not further specify what these circumstances may be. **8.62**

Moreover, in the investment agreements mentioned, where a failure to disclose can in itself result in disqualification, the parties also require arbitrators to take all reasonable efforts to become aware of any interests, relationships, or matters that should be disclosed prior to her or his selection as an arbitrator¹¹⁹ and after he or she has been selected.¹²⁰ Such provisions may be viewed in the light of the fact that the ICSID Arbitration Rules do not specifically require an arbitrator to investigate possible compromising circumstances, and they do not prescribe standards as to the extent and nature of such investigation.¹²¹ **8.63**

Another example where the parties to an investment agreement intend to impose a more onerous standard on arbitrators is provided by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). A code of conduct for arbitrators will apparently be issued by the Trans-Pacific Partnership Commission as part of the Rules of Procedure prior to **8.64**

¹¹³ Emphasis added.

¹¹⁴ See the draft text of the Transatlantic Trade and Investment Partnership (TTIP) art. 3, ¶ 1 of Annex II of ch. II, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf ((last visited Dec. 10, 2017); at the date of writing, the TTIP is still under negotiation; paragraph 2 of Annex 9-A of the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, available at: <https://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf> (last visited Dec. 10, 2017).

¹¹⁵ *Tidewater v. Venezuela*, *supra* note 106, ¶ 40; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator (Mar. 19, 2010), ¶ 64 [hereinafter *Alpha v. Ukraine*]; *ConocoPhillips v. Venezuela*, *supra* note 13, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (July 26, 2016), ¶ 12(d).

¹¹⁶ *Tidewater v. Venezuela*, *supra* note 106, ¶ 43; *ConocoPhillips v. Venezuela*, *supra* note 13, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012), ¶ 60.

¹¹⁷ *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Decision on Challenges to Arbitrators Professor Kaj Hobér and Professor Jan Paulsson (Oct. 6, 2014) [hereinafter *Belokon v. Kyrgyz Republic*].

¹¹⁸ *Id.* ¶ 68.

¹¹⁹ Code of Conduct of the Australia–China Free Trade Agreement Annex 9-A, ¶ 2; EU–Singapore Free Trade Agreement, Code of Conduct for Arbitrators and Mediators, Annex 9-F, ¶ 3; Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, draft text of the TTIP Annex II, art. 3(1).

¹²⁰ Code of Conduct of the Australia–China Free Trade Agreement, Annex 9-A, ¶ 3; Code of Conduct for Arbitrators and Mediators, EU–Singapore Free Trade Agreement, Annex 9-F, ¶ 5; Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, draft text of the TTIP, Annex II, art. 3, ¶ 3.

¹²¹ *Suez, Sociedad General de Aguas Barcelona S.A. and Vivendi Universal S.A. v. Argentina* and other cases, ICSID Case Nos. ARB/03/19 and ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008), ¶ 47 [hereinafter *Second Suez v. Argentina Challenge*].

the CPTPP's entry into force.¹²² At the date of writing, a draft text of such a code of conduct is not publicly available (assuming that such a draft exists at this stage). However, it is significant that the CPTPP requires arbitrators to comply with the Code of Conduct 'in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators'.¹²³ On that basis, it appears that the CPTPP negotiators intended to set a more stringent standard for arbitrators, and wished to lower the bar for successful challenges compared with Article 57 of the ICSID Convention.

- 8.65** Arbitration under ICSID is an option for investor-state dispute settlement under the investment agreements mentioned.¹²⁴ Given the difference in standards prescribed under these investment agreements and under Article 57 of the ICSID Convention, it will be interesting to see how the different standards will be reconciled in challenge decisions arising out of these investment agreements.
- 8.66** Moreover, an increasing number of recent investment agreements require that arbitrators sitting in investor-state arbitration should possess specific qualities. These add further grounds of challenge to arbitrators in cases arising out of those agreements to what is provided in the relevant arbitration rules.
- 8.67** Unlike the ICSID Convention and Rules and the UNCITRAL Arbitration Rules, these treaties also specify the circumstances in which the arbitrators can be regarded as lacking independence and impartiality. Some recent investment agreements expressly provide that an arbitrator should not take instructions from the disputing parties¹²⁵ or from any organization or government with regard to matters before a tribunal.¹²⁶ For instance, paragraph 2 of the EU–Singapore FTA Code of Conduct provides:

Throughout the proceedings, every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. *Arbitrators shall not take instructions from any organisation or government with regard to matters before a tribunal.* Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.¹²⁷

- 8.68** Other investment agreements require an arbitrator not to be 'affiliated with'¹²⁸ the disputing parties or the home state of the disputing investor. No further clarification is usually provided

¹²² See CPTPP final text arts. 9.22(6) and 28.10(1)(d), <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/> (last visited Mar. 13, 2018).

¹²³ *Id.* (emphasis added).

¹²⁴ EU–Singapore FTA art. 9.16(1)(a); TTIP art. 6(2)(a) of s. 3 of ch. II; CPTPP art. 9.19(4)(a).

¹²⁵ See, e.g., Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments art. 12, ¶ 17(b); Australia–China FTA art. 9.15(8); Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments art. 28(2); Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments art. 26(2).

¹²⁶ See, e.g., Australia–China FTA art. 9.15(8); Code of Conduct for the EU–Singapore FTA, ¶ 2; Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments art. 18(5); draft text of the TTIP art. 11(1).

¹²⁷ Emphasis added.

¹²⁸ See, e.g., Australia–China FTA art. 9.15(8); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India art. 20)(11)(c); Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments art 27(2); Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments art. 17(b).

as to the nature and extent of the affiliation that would fall foul of such a requirement. There are however some exceptions, such as the Australia–China Free Trade Agreement, which specifies that an individual who is on the panel of potential arbitrators established by the Committee on Investment, which is set up by the two state parties, shall not, by virtue of that fact alone, be deemed to be affiliated with the government of either state party.¹²⁹

An interesting example is the CETA, which states that the fact that a person receives remuneration from a government does not in itself make that person ineligible as an arbitrator.¹³⁰ This might be seen as contradictory since, when an individual receives remuneration from a government, there is at least the appearance of financial dependence on that government. By contrast, the Australia–China Free Trade Agreement and the TTIP require arbitrators to avoid ‘entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias’.¹³¹ **8.69**

The EU–Singapore FTA, Australia–China FTA, and the draft text of the TTIP require an arbitrator not to allow past or existing financial, business, professional, family, or social relationships or responsibilities to influence his or her conduct or judgment.¹³² This seems to suggest that it may not be sufficient for the challenging party to demonstrate that an offending relationship exists, but that party must also show that the relationship influences the arbitrator’s conduct or judgment. **8.70**

Apart from arbitrators’ relationships, some recent investment agreements also specify other possible sources of improper influence on the arbitrators. For instance, some agreements require arbitrators not to be influenced by ‘self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism’,¹³³ or to ‘incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties’.¹³⁴ **8.71**

A significant number of recent investment agreements further require arbitrators to have expertise or experience in public international law, international trade, or international investment law, or experience in dispute resolution under international investment agreements.¹³⁵ Under the TTIP, members of the appeal tribunal in the investment court system ‘shall possess the qualifications required in their respective countries for appointment to be the highest judicial offices, or be jurists of recognised competence’.¹³⁶ This type of provision **8.72**

¹²⁹ Australia–China FTA art. 9.15(8).

¹³⁰ CETA art. 8.30(1) n. 10.

¹³¹ Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, draft text of the TTIP, Annex II, art. 5(5)of; Australia–China FTA art. 9.15(16).

¹³² Australia–China FTA art. 9.15(15); Code of Conduct for Arbitrators and Mediators, EU–Singapore FTA, Annex 9-F, ¶ 13; draft text of TTIP, Annex II art. 5(4).

¹³³ Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, draft text of the TTIP, Annex II art. 5(1); Code of Conduct for Arbitrators and Mediators, EU–Singapore FTA, Annex 9-F, ¶ 10; Code of Conduct, Australia–China FTA, Annex 9-A, ¶ 12.

¹³⁴ Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, draft text of the TTIP, Annex II art. 5(2); Code of Conduct for Arbitrators and Mediators, EU–Singapore FTA, Annex 9-F, ¶ 11; Code of Conduct, Australia–China FTA, Annex 9-A, ¶ 13.

¹³⁵ See, e.g., Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India art. 20(11)(e); Australia–China FTA art. 9.15(8); Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments art. 28(2); Agreement between Canada and Mali for the Promotion and Protection of Investments art. 25(2); Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments art. 12(17); EU–Singapore FTA art. 9.18(6).

¹³⁶ See the draft text of the TTIP art. 10(7), section 3.

may have the undesired result of limiting the pool of potential candidates for arbitrators' positions, and encouraging parties to select the same individuals with tried and tested expertise in order to reduce the risk of possible challenges.

- 8.73** Recent investment agreements also provide that an arbitrator who breaches the confidentiality of deliberations may be disqualified. For instance, under the EU–Singapore FTA Code of Conduct, an arbitrator and former arbitrator ‘shall not at any time disclose the deliberations of a tribunal, or any arbitrator’s view regarding the deliberations’.¹³⁷ If an arbitrator fails to do so, he or she may be open to challenge under the EU–Singapore FTA.¹³⁸ Similar provisions can be found in the draft text of the TTIP, the Australia–China FTA, and the CETA.¹³⁹
- 8.74** Another development in recent investment agreements is the inclusion of more specific and detailed rules concerning the nationality of the arbitrators. For instance, the Agreement on Investment under the Framework on Comprehensive Economic Cooperation between ASEAN and India not only requires the arbitrator to be of a different nationality than the investor but also not to have his or her usual place of residence in the territory of the investor’s home state or the respondent state.¹⁴⁰ Under the bilateral investment agreement between Israel and Myanmar, arbitrators are required to be nationals of states having diplomatic relations with both Israel and Myanmar.¹⁴¹ The bilateral investment agreement between India and the United Arab Emirates (UAE) provides that the presiding arbitrator and the appointing authority be a national of a country (apart from India and UAE) which has diplomatic or consular relations with both India and UAE.¹⁴²
- 8.75** This recent practice shows an effort by states to provide greater clarity and certainty in defining the qualities of arbitrators and the contours of the notions of independence and impartiality. While questions persist as to the compatibility of these provisions with existing arbitration rules and possible limitations to the pool of talent from which arbitrators are drawn, they clearly signal the importance of achieving predictability and a certain consistency when it comes to issues relating to arbitrators’ qualities and the duties inherent in their office.
- 8.76** A more drastic response to the question of arbitrators’ impartiality and independence is found in the EU’s proposal to overhaul the entire model of arbitral tribunals hearing investment arbitrations and replace it with a standing investment court, staffed by judges or members appointed by state parties.¹⁴³ The latest draft of the TTIP envisages the creation of an investment court system, comprising a permanent tribunal of first instance and a permanent appeal tribunal.¹⁴⁴ The former is to be composed of fifteen judges selected by a specialized committee established under the TTIP: five nationals of an EU Member State, five nationals of the United States and five nationals of third countries.¹⁴⁵ The TTIP prescribes stringent requirements for their qualifications, providing as follows:

¹³⁷ Code of Conduct for Arbitrators and Mediators, EU–Singapore FTA, Annex 9-F, ¶ 18.

¹³⁸ EU–Singapore FTA art. 9.18(7).

¹³⁹ See the draft text of the TTIP art. 7(3); Code of Conduct of the Australia–China FTA, Annex 9-A, ¶ 20; Code of Conduct for Arbitrators and Mediators, CETA, Annex 29-B, ¶ 19.

¹⁴⁰ Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India art. 20(11)(b).

¹⁴¹ Agreement between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments art. 8(5).

¹⁴² Agreement between the Government of the Republic of India and the Government of the United Arab Emirates on the Promotion and Protection of Investments art. 10, ¶¶ 7(a) and 7(b).

¹⁴³ European Union, DG Trade, Concept Paper, ‘TTIP and Beyond—The Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards an Investment Court’ (May 6, 2015) at 11.

¹⁴⁴ See ch. II of the draft text of the TTIP art. 9(4)(3) and art. 10(4)(3).

¹⁴⁵ *Id.* art. 9(2).

The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.¹⁴⁶

The permanent appeal tribunal will hear appeals from the awards issued by the tribunal of first instance. It is to be made up of six members: two nationals of an EU Member State, two nationals of the United States, and two nationals of third countries. The qualifications required for selection to the permanent appeal tribunal are largely the same as those required for selection to the tribunal of first instance except that the judges shall possess the qualifications ‘required in their respective countries for appointment to the highest judicial offices’.¹⁴⁷ **8.77**

The TTIP prescribes stringent requirements concerning the independence and impartiality of judges on the first instance tribunal and members of the appeal tribunal and require them to comply with a code of conduct. These requirements have been discussed and bear similarities with provisions found in other investment agreements. **8.78**

The creation of a permanent investment court system might address some of the concerns surrounding the independence and impartiality of arbitrators in ISDS. However, the judges and members of the appeal tribunal, including those from third countries, will be paid a monthly retainer fee by the state parties to the TTIP.¹⁴⁸ This may invite questions as to the judges’ financial dependence on the state parties. Moreover, the establishment of such a permanent investment court removes one of the key advantages of arbitration, which is the ability of a party, in this case the investor, to select its own arbitrator. In that light, one might consider whether such a permanent investment court system is sufficiently different from the domestic courts of the host state, and whether it is a truly viable alternative to investor-state arbitration. **8.79**

Furthermore, under this model, it would appear that, for each investment treaty entered into, a separate investment court structure will be created. For instance, the EU–Vietnam Free Trade Agreement also envisages the establishment of a permanent first instance tribunal and a permanent appeal tribunal.¹⁴⁹ The same is the case under the CETA between the EU and Canada.¹⁵⁰ If this model is replicated across more investment agreements, it will result in the multiplication of investment courts, all of which are to be staffed by members who are highly qualified, as required under those investment agreements. This would lead to a quickly depleting supply of suitable candidates, creating difficulties in staffing the investment courts with qualified and competent individuals. In addition, as the investment courts will be autonomous to each other, their decisions will not be binding on one another, thus creating the potential for inconsistent, or even contradictory, decisions emanating from different investment courts. **8.80**

IV. Selected Decisions on Challenges

According to a study co-authored by the Secretary-General of ICSID in 2015,¹⁵¹ since the first challenge to an arbitrator in *Amco v Indonesia* in 1982, there have been fifty-nine **8.81**

¹⁴⁶ *Id.* art. 9(4).

¹⁴⁷ *Id.* art. 10(7) (emphasis added).

¹⁴⁸ *Id.* art. 9(12) & art. 10(13).

¹⁴⁹ EU–Vietnam FTA arts. 12 & 13, section 3.

¹⁵⁰ CETA arts. 8.27 & 8.28.

¹⁵¹ Kinnear & Nitschke, *supra* note 10, at 34.

decisions issued on challenges to ICSID arbitrators and ad hoc Committee members, out of which only four challenges were upheld.¹⁵² Notwithstanding the low success rate of challenges, it is significant that the composition of tribunals changed in 30 per cent of the cases where a request for disqualification was brought.¹⁵³ This reflects the fact that many challenged arbitrators resign before the decision on the challenge is issued, thus signalling the psychological impact of challenges regardless of their outcome.¹⁵⁴ The same study records that as of 1 September 2014, eighty-four ICSID arbitrators and ad hoc Committee member appointments have been subject to challenges.¹⁵⁵ This represents only 5.2 per cent of all appointments of ICSID arbitrators and ad hoc Committee members.¹⁵⁶

- 8.82** In a similar study on challenges submitted to the Secretary-General of the PCA published in 2015, since 1976, twenty-six challenges have been submitted to the Secretary-General of the PCA for determination under the 1976 or 2010 UNCITRAL Arbitration Rules.¹⁵⁷ In that same study, it was found that 61 per cent of the challenges submitted to the Secretary-General of the PCA were rejected, 25 per cent of them were accepted and 11 per cent of them resulted in a resignation.¹⁵⁸
- 8.83** Consistent decisions on challenges on the same issues have resolved some questions on what constitutes a lack of independence and impartiality of arbitrators. For instance, it is now clear that repeat appointments by a party are, in and of themselves, unlikely to result in disqualification under the ICSID Convention.¹⁵⁹ Rather, the overall circumstances are to be considered, and in particular, if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.¹⁶⁰ However, the question remains: how many repeat appointments is too many?
- 8.84** Similarly, it now seems to be uncontroversial that an adverse ruling by an arbitrator against a party does not in and of itself establish a lack of impartiality.¹⁶¹ In the first *Abaclat v Argentina* challenge,¹⁶² one of the grounds raised by Argentina was the 'manifest arbitrariness' in the challenged arbitrators' rejection of Argentina's urgent request for provisional measures.¹⁶³ In the second *Abaclat v Argentina* challenge,¹⁶⁴ Argentina challenged the arbitrators on the basis that the procedural decisions on the briefing calendar demonstrated a lack of equality of treatment of the parties.¹⁶⁵ Similarly, in the first *ConocoPhillips v Venezuela* challenge,¹⁶⁶

¹⁵² *Id.* 37.

¹⁵³ *Id.*

¹⁵⁴ *Id.* For the views of a well-known arbitrator on this point, see Lalonde, *supra* note 16, at 641–53.

¹⁵⁵ Kinnear & Nitschke, *supra* note 10, at 34.

¹⁵⁶ *Id.*

¹⁵⁷ See Grimmer, *supra* note 33, at 82.

¹⁵⁸ The remaining 3% of challenges were withdrawn: see Grimmer, *id.* at 84, Table 3.1.

¹⁵⁹ Kinnear & Nitschke, *supra* note 10, at 57; Grimmer, *supra* note 33, at 98.

¹⁶⁰ See Kinnear & Nitschke, *supra* note 10, at 58–59.

¹⁶¹ *Id.* at 55.

¹⁶² *Abaclat v. Argentina*, *supra* note 19, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated September 15, 2011 (Dec. 19, 2011).

¹⁶³ *Id.* ¶ 71.

¹⁶⁴ *Abaclat v. Argentina*, *supra* note 19, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014).

¹⁶⁵ *Id.* ¶ 48.

¹⁶⁶ *ConocoPhillips v. Venezuela*, *supra* note 13, Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014).

Venezuela sought to disqualify the arbitrators on the basis of their refusal to entertain an application to reconsider the tribunal's decision on jurisdiction and merits.¹⁶⁷ These challenges were all rejected, showing that a mere adverse ruling is not sufficient to constitute a successful ground for challenge on the basis of lack of impartiality or independence, at least in the context of the ICSID Convention.

There remain, however, unresolved questions that require further clarity. This section will discuss three of these questions, selected in the light of their growing relevance and importance in recent years. **8.85**

A. 'Issue Conflicts'

As a reflection of the uncertainty surrounding this issue, there has yet to be a settled definition of the notion of 'issue conflict'.¹⁶⁸ A narrow definition was suggested in Schreuer's Commentary to denote a situation where 'an arbitrator is also involved as counsel in another pending case'.¹⁶⁹ This type of situation has also been described as 'role confusion'¹⁷⁰ or the 'dual role scenario'.¹⁷¹ A broader definition of 'issue conflict' that has been suggested is 'actual bias, or an appearance of bias, arising from an arbitrator's relationship with the subject matter of, as opposed to the parties to, a dispute'.¹⁷² The American Society of International Law–International Council for Commercial Arbitration established in 2013 a Task Force (ASIL–ICCA Task Force) on issue conflicts in investor-state arbitration. The task force issued a report on 17 March 2016 but was unable to offer a satisfactory alternative to the expression 'issue conflict' and acknowledged that there is no settled definition of the term.¹⁷³ Indeed, it may be premature at the present time to define this concept before its full extent and significance is understood. **8.86**

The Report of the ASIL–ICCA Task Force indicates that some members of the arbitration community hold the view that 'issue conflict' is 'perhaps the most significant matter affecting the credibility of investor-state arbitration'.¹⁷⁴ One commentator wrote that: '[i]t is surely only a matter of time before "role confusion" and "issue conflict" raise a serious concern'.¹⁷⁵ **8.87**

It is beyond the scope of this section to give the topic of 'issue conflict' thorough treatment. Moreover, a considerable amount of literature has been written on the matter.¹⁷⁶ Thus, this section will only touch upon a few key points that warrant further consideration. **8.88**

¹⁶⁷ *Id.* ¶ 17.

¹⁶⁸ *Id.* ¶ 11.

¹⁶⁹ Schreuer et al., *supra* note 8, at 1206.

¹⁷⁰ P. Sands QC, *Conflict of Interest for Arbitrators and/or Counsel*, in Kinnear et al., *supra* note 16, at 655.

¹⁷¹ R. Zamour, *Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in Devas v. India and its Impact*, in CHALLENGES AND RECUSALS, *supra* note 10, at 227–46.

¹⁷² G. Griffith & D. Kalderimis, *'Pure' Issue Conflict in Investment Treaty Arbitration*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 607 (David Caron et al. eds., 2015).

¹⁷³ Report of the ASIL–ICCA Task Force on Issue Conflicts in Investor-State Arbitration, ¶ 16, http://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.

¹⁷⁴ *Id.* ¶ 11.

¹⁷⁵ See Sands, *supra* note 170, at 655.

¹⁷⁶ See, e.g., *id.*, *supra* note 170, at 655–68; Griffith & Kalderimis, *supra* note 172, at 607–25; L. Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in Muchlinski et al., *supra* note 66, at 789–829; A. Sheppard, *Arbitration Independence in ICSID Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131–56 (Christina Binder et al. eds., 2009); J. Levine, *Dealing with Arbitrator 'Issue Conflicts' in International Arbitration*, 61 DISP. RESOL. J. 60 (2006); M. Gearing & A.C. Sinclair, *Partiality and Issue Conflicts*, 5(4) TDM (2008); M. Hwang & K. Lim, *Issue Conflict in ICSID Arbitrations*, in SELECTED ESSAYS ON INTERNATIONAL ARBITRATION 474–544 (Michael Hwang ed., 2013); J.R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26(1) BERK J. INT'L L. 111 (2008).

8.89 It may be thought that ‘issue conflict’ is not about an arbitrator’s relationship with a party or a counsel since it arises ‘without the overlay of any external relationship’.¹⁷⁷ However, while it may be convenient to discuss this type of situation as a distinct category separate from challenges that are based on the arbitrator’s relationship with a party or counsel, the reality may be that this type of challenges can only be fully understood in the context of and in connection with other categories of challenges.

8.90 The same set of facts may give rise to multiple bases for the same challenge, based on the arbitrator’s relationship with a party or counsel and also on the separate grounds of ‘issue conflict’. For instance, in *Caratube v Kazakhstan*,¹⁷⁸ the claimant challenged the arbitrator on the basis of his repeat appointment by the same counsel or party in three other cases¹⁷⁹ and because his appointment in one of those three cases, *Ruby Roz*, allegedly caused an ‘issue conflict’.¹⁸⁰ The challenge was eventually upheld on the ground of ‘issue conflict’. The remaining members of the *Caratube* tribunal held:

Based on a careful consideration of the Parties’ respective arguments and in the light of the significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that—independently of Mr. Boesch’s intentions and best efforts to act impartially and independently—a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would prejudice legal issues in the present arbitration based on the facts underlying the Ruby Roz case.¹⁸¹

8.91 The challenge based on the arbitrator’s repeat appointment by the same counsel or party was similarly rejected.¹⁸² In reaching this conclusion, the decision cited the following passage from *Tidewater v Venezuela*:

In the view of the Two Members, there would be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator’s judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.¹⁸³

8.92 In considering point (b) in the cited passage from *Tidewater v Venezuela*, that is, whether there was a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases, the decision noted that this point has been ‘dealt with’ in the section concerning the discussion on ‘issue conflict’.¹⁸⁴ This reasoning suggests that ‘issue conflict’ is part of the consideration of whether a challenge based on repeat appointments should be upheld. One might argue, on the basis of the *Caratube* tribunal’s reasoning, that, where a challenge is based on repeat appointments, the risk of ‘issue conflict’ should always be considered.

¹⁷⁷ Griffith & Kalderimis, *supra* note 172.

¹⁷⁸ *Caratube v. Kazakhstan*, *supra* note 19.

¹⁷⁹ *Id.* ¶ 100.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ¶ 90 (emphasis added).

¹⁸² *Id.* ¶ 107.

¹⁸³ *Tidewater v. Venezuela*, *supra* note 106, ¶ 47.

¹⁸⁴ *Caratube v. Kazakhstan*, *supra* note 19, ¶ 105.

The viability of such an argument is open to discussion, but it may not be advisable to pre-judge the issue whether ‘issue conflict’ is a distinct and separate category of challenge unrelated to other grounds. It may be the case that ‘issue conflict’ can only be fully understood in relation to, in connection with, and in the context of, other grounds of challenges. **8.93**

It has also been suggested that views expressed on similar legal issues are less likely to result in this type of challenge compared to views about factual matters specific to the case.¹⁸⁵ The 2014 IBA Guidelines treat the expression of a legal opinion concerning an issue that also arises in the arbitration as falling within the Green List and not giving rise to justifiable doubts as to the arbitrator’s impartiality.¹⁸⁶ One commentator also observed that an arbitrator should not be successfully challenged for expressing ‘abstract views on how the applicable law in an investment treaty arbitration must be understood and interpreted’.¹⁸⁷ **8.94**

However, it is doubtful whether an arbitrator’s views of legal issues should be accorded greater latitude by virtue of the mere fact that they concern issues of law, as opposed to facts. In *CC/Devas v India*,¹⁸⁸ an arbitrator was successfully disqualified on the basis of his views on legal issues. In that arbitration, India sought to rely on an ‘essential security interests’ clause in the Mauritius–India BIT to justify its alleged breaches of that BIT.¹⁸⁹ India argued that in three other ICSID arbitrations chaired by the disqualified arbitrator,¹⁹⁰ all subsequently annulled,¹⁹¹ the tribunals had decided that the ‘essential security interests’ provisions in the US–Argentina BIT incorporated the ‘state of necessity’ defence under customary international law.¹⁹² India pointed out that, in two of the other arbitrations, the awards were annulled because of the original tribunal’s ruling on the relevant legal issue, and the third award was annulled because the original tribunal erred in its interpretation of the ‘state of necessity’ defence.¹⁹³ Subsequent to, and notwithstanding the annulments, the disqualified arbitrator maintained and affirmed his position on the relevant legal issue in an academic article.¹⁹⁴ **8.95**

The claimant argued that ‘a prior decision of law or other opinion on a legal issue cannot serve as a basis for a challenge’.¹⁹⁵ The then president of the International Court of Justice, Judge Peter Tomka, who decided the challenge as the appointing authority, disagreed with the claimant and upheld the challenge, stating: **8.96**

In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the arbitrator’s] ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of the three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? [The arbitrator] is certainly entitled to his

¹⁸⁵ Report of the ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration, ¶¶ 173–75.

¹⁸⁶ 2014 IBA Guidelines § 4.1.1.

¹⁸⁷ S.W. Schill, *Arbitrator Independence and Academic Freedom*, 15 J. WORLD INV. & TRADE 1, 6 (2015).

¹⁸⁸ *CC/Devas (Mauritius) Ltd. and Others v. India*, PCA Case No. 2013-09, Decision on the Respondent’s Challenge to Hon. Marc Lalonde as Presiding Arbitrator and Professor Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013) [hereinafter *CC/Devas v. India*].

¹⁸⁹ *Id.* ¶ 18.

¹⁹⁰ *Id.* India challenged both Mr. Marc Lalonde and Professor Francisco Orrego Vicuña. Only Professor Francisco Orrego Vicuña was successfully disqualified.

¹⁹¹ *Id.* ¶ 19.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* ¶ 62.

¹⁹⁵ *Id.* ¶ 56.

views, including to his academic freedom. But equally the Respondent is entitled to have its argument heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that [the arbitrator] should withdraw from this arbitration.¹⁹⁶

- 8.97** Judge Tomka's decision in *CC/Devas v India* shows that an arbitrator may run the risk to be disqualified on the basis of his or her views on a legal issue. Indeed, in principle, there is no reason why the positions expressed by arbitrators in their academic writings should be immune from challenges based on 'issue conflict'. There remain concerns, however, that exposing opinions on legal issues to challenges might result in a chilling effect on academic writing. Judge Tomka's view, as expressed above, seems to be that the key question is whether a reasonable observer would believe that the challenging party has a chance to convince the arbitrator to change his or her mind on a legal issue on which the arbitrator repeatedly voiced a consistent position. Thus, not only the challenging party must show that the arbitrator expressed certain views on a particular legal issue, but also that the arbitrator is not willing to change her/his mind on that matter. This is a high threshold for the challenging party to meet.
- 8.98** Moreover, it is accepted that an arbitrator's freedom of expression does not render him or her immune from a challenge where prejudgment on factual issues in a particular case can be shown. It is difficult to maintain that a different position should be accorded to prejudgment on legal, rather than factual, issues, when the arbitrator may potentially cause the same degree of prejudice to the parties and the legitimacy of the arbitral process. In the context of investment arbitration, claims may be dismissed on the basis of a legal ruling. Serious prejudice may thus also result from an arbitrator's inability, if proven, to consider certain legal issues with an open mind.

B. Administrative Secretaries

- 8.99** While not strictly a matter related to the independence and impartiality of arbitrators, recent challenges have shown that the role of administrative secretaries, if misused, can have a significant impact on the legitimacy of arbitral tribunals and the integrity of the arbitration process.
- 8.100** The debate about the propriety of using an administrative secretary to assist the tribunal in some of its tasks has taken a different dimension in ISDS, particularly in connection with a challenge raised in *Yukos v Russian Federation Arbitration*,¹⁹⁷ where the tribunal's secretary was accused of going beyond merely administrative functions in the exercise of his duties, thus risking the annulment of the award.
- 8.101** In the *Yukos* award, the tribunal found that Russia violated the Energy Charter Treaty and awarded the former shareholders of Yukos more than US\$50 billion in damages. Russia applied to set aside the award in The Hague District Court. One of the grounds Russia relied on for its setting aside request was the fact that the arbitrators allegedly did not perform their mandate, but had delegated it to the administrative secretary to the tribunal.¹⁹⁸ Russia argued that the secretary's recorded hours were between 40 per cent to 70 per cent more than each of the arbitrators.¹⁹⁹ Further, Russia produced a linguistic expert report to show that there was a

¹⁹⁶ *Id.* ¶ 64.

¹⁹⁷ *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Final Award (July 18, 2014).

¹⁹⁸ Judgment of The Hague District Court (Apr. 20, 2016), ¶ 4.2(3).

¹⁹⁹ Writ of Summons filed in The Hague District Court (Nov. 10, 2014), ¶ 497.

95 per cent likelihood that the assistant drafted important sections of the award. Russia also pointed out the fact that there was no disclosure obligation for the assistant and that he did not make any statement regarding his impartiality and independence.²⁰⁰

While The Hague District Court set aside the award on other grounds and ultimately did not deal with this matter, Russia's arguments nevertheless raised questions regarding the legitimacy of the arbitral proceedings in that case, as well as more general concerns about the proper use of a tribunal secretary. **8.102**

It is common practice in complex international arbitrations for a tribunal secretary to be appointed to assist the president of the tribunal. In a survey of a cross-section of international arbitration practitioners, users, and providers conducted by Young ICCA in 2012, 95 per cent of respondents approved the use of arbitral secretaries.²⁰¹ The 2012 survey also revealed that in practice an arbitral secretary not only performs administrative tasks, but also non-administrative tasks, which may include drafting parts of the award and analysing the parties' submissions.²⁰² In fact, the role of administrative secretaries has occasionally expanded to such an extent that some commentators have referred to the tribunal's secretary as the 'fourth arbitrator'.²⁰³ **8.103**

However, it is clear that arbitrators should not delegate their decision-making to the tribunal secretary since the mandate of the arbitrator is *intuitu personae*.²⁰⁴ While an improper delegation of decision-making is not explicitly provided as a ground for challenge under any existing arbitration rules for the time being, it might arguably amount to a 'failure to act' by the arbitrator, which is a ground for challenge under most arbitration rules.²⁰⁵ **8.104**

There are relatively few guidelines or standards governing tribunal secretaries. Regulation 25 of the ICSID Administrative and Financial Regulations provides that an ICSID tribunal secretary shall perform functions at the request of the President of the tribunal or at the direction of the ICSID Secretary-General, but does not specify what these functions are. The ICC Rules of Arbitration 2012 are silent on tribunal secretaries, or 'administrative secretary' (term used by the ICC).²⁰⁶ However, the ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration provides that an administrative secretary may perform 'organisation and administrative tasks' such as transmitting documents and communications on behalf of the arbitral tribunal, organizing and maintaining the arbitral tribunal's file and locating documents, conduct legal or similar research, and attending hearings, meetings, and deliberations.²⁰⁷ The ICC Note also clearly provides as follows: **8.105**

²⁰⁰ *Id.* ¶¶ 485 & 487.

²⁰¹ Young ICCA Guide on Arbitral Secretaries, *The ICCA Report No. 1*, at 2, https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/ICCA-Reports-No.-1_Young-ICCA-Guide-on-Arbitral-Secretaries.pdf (last visited Dec. 10, 2017).

²⁰² *Id.*

²⁰³ L.W. Newman & D. Zaslowsky, *The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries*, 248(104) N.Y. L.J. (2012); C. Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147 (2002).

²⁰⁴ Young ICCA Guide, *supra* note 201, at 6.

²⁰⁵ See, e.g., UNCITRAL Arbitration Rules 2013 art. 12(3) and PCA Arbitration Rules 2012 art. 12(2).

²⁰⁶ Nothing has changed in this regard in the 2017 ICC Rules.

²⁰⁷ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, *supra* note 69, ¶ 84. The Note regarding conduct of the arbitration under the 2017 ICC Rules contains similar language, see <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> (last visited Mar. 14, 2018).

Under no circumstances may the arbitral tribunal delegate decision-making functions to an Administrative Secretary. Nor should the arbitral tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.²⁰⁸

- 8.106** However, in spite of its strong language drafted in mandatory terms, the ICC Note does not specify what are the ‘decision-making functions’ or ‘essential duties’ that cannot be delegated by an arbitral tribunal. Similar guidelines issued by the Hong Kong International Arbitration Centre (Guidelines on the Use of a Secretary to the Arbitral Tribunal) contain detailed provisions on the functions that an arbitral secretary may perform,²⁰⁹ but they do not identify the activities that an administrative secretary may not perform.²¹⁰
- 8.107** The question of what constitutes the decision-making functions or essential duties of an arbitrator touches on more fundamental issues about arbitration as a mode of dispute settlement. Further questions may be asked concerning whether and to what extent an administrative secretary should assist the arbitrator in the performance of decision-making functions, participate in the tribunal’s deliberations or perform other essential duties. Should a research note prepared by a tribunal secretary be treated no differently than an academic article read by the arbitrator, or can a meaningful distinction be drawn between what constitutes permissible and impermissible influence?
- 8.108** There are no easy answers to these questions. The fact remains that, although the use of administrative secretaries is not per se objectionable, it needs to be transparent and regulated, in order not to undermine the legitimacy of the arbitration process.

C. Social Media

- 8.109** With the rapid development of communications technology and the ever-expanding role of social media, there is now an unprecedented number of channels for arbitration practitioners to advertise their skills and express their views in real time, with the potential to reach an extremely large audience. Social media also threatens to blur the line between private and public information with a touch of a button, or more likely, a virtual button.
- 8.110** In May 2014, the IBA adopted a set of guiding principles on social media conduct for the legal profession.²¹¹ These principles reflect the impact that social media may have on the perceived independence and impartiality of arbitrators. In particular, the IBA principles state the following:

Social media creates a context in which lawyers may form visible links to clients, judges and other lawyers. Before entering into an online ‘relationship’, lawyers should reflect upon the professional implications of being linked publicly. Comments and content posted online ought to project the same professional independence and the appearance of independence that is required in practice.

- 8.111** In that light, a challenge to an arbitrator made on the basis of an online ‘relationship’ is not a fanciful possibility. Indeed, such a challenge was made by Venezuela in *Fábrica de Vidrios*

²⁰⁸ *Id.* ¶ 85.

²⁰⁹ See ¶¶ 3.3 & 3.4.

²¹⁰ Paragraph 3.2 of the HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal provides: ‘The arbitral tribunal shall not delegate any decision-making functions to a tribunal secretary, or rely on a tribunal secretary to perform any essential duties of the tribunal’.

²¹¹ IBA International Principles on Social Media Conduct for the Legal Profession, adopted on May 24, 2014 by the International Bar Association, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Dec. 10, 2017).

Los Andes v Venezuela,²¹² on the basis of the arbitrator's ties to a law firm, whom Venezuela argued is hostile to its interests as a result of its merger with another firm, which acted against Venezuela in numerous matters. Although the arbitrator left the first firm before the merger, Venezuela repeatedly challenged him on the basis of his alleged ties with that firm. In a challenge brought in July 2016, Venezuela pointed out that one of the arbitrator's assistants was described on her LinkedIn profile as 'working since August 2013 until the present day as an attorney in the international arbitration practice at [the relevant firm]'. On that basis, Venezuela complained that the arbitrator's assistant had access to the case file for *Fábrica de Vidrios Los Andes v Venezuela*.

The unchallenged members of the tribunal said that a 'serious question' would arise over the integrity of the proceedings if Venezuela's assertions were true. Thus, they held that it was 'legitimate and proper' for Venezuela to seek clarifications from the arbitrator over this matter. The arbitrator clarified that his assistant's description on her LinkedIn profile was 'inaccurate' and that she was not a member of the firm in question. The remaining members of the tribunal accepted the arbitrator's explanation and rejected Venezuela's challenge on that basis. **8.112**

This challenge is a timely reminder that members of the arbitration community should be mindful that the information uploaded on social media profiles may be used against them or others. It also raises difficult questions about the evidential weight to be accorded to online profiles and actions more generally. In this case, the information on the assistant's LinkedIn profile appears to have been simply rebutted by the arbitrator's explanation that the profile was inaccurate. However, it is not difficult to imagine that, in a similar situation, further and actual proof of the assistant's lack of involvement with the relevant law firm might be necessary, such as a statement from the firm confirming that the assistant was in fact not an employee. **8.113**

Related questions come to mind. Can being 'Friends' on Facebook or a connection on LinkedIn be used as evidence of a close relationship between an arbitrator and a party or counsel which may affect the arbitrator's impartiality?²¹³ Can the fact that an arbitrator has 'liked' or 'shared' a post on Facebook be used as evidence of her/his approval of the contents of the post in support of a challenge based on 'issue conflict'? For the time being, all of this may appear to be far-fetched, but as demonstrated by the challenge in *Fábrica de Vidrios Los Andes v Venezuela*, these questions may surface again and may need to be answered at some point. **8.114**

V. Conclusion

In recent years, new measures have been taken from different quarters to defend and strengthen the legitimacy of ISDS. Issues relating to the independence and impartiality of arbitrators and their commitment to make themselves available and resolve disputes efficiently remain at the forefront of the reform process. The lack of a centralized rule-making authority means that every user of the system, be it arbitral institution, professional association, arbitrator, or state negotiating an investment agreement, is at liberty to devise the **8.115**

²¹² *Fábrica de Vidrios Los Andes v Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to disqualify L. Yves Fortier, Q.C., Arbitrator (May 5, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8815.pdf>. (last visited Dec. 10, 2017).

²¹³ Paragraph 4.4.4 of the IBA Guidelines 2014 states that where '[t]he arbitrator has a relationship with one of the parties or its affiliates through a social media network', this situation falls under the Green List.

best method to confront and counter the backlash against ISDS. As a variety of different approaches emerges, it remains to be seen whether certain 'best practices' will be recognized and, if so, whether uniform standards will be developed.

- 8.116** The effects of the steps taken so far and their impact on future challenges can only be measured in time. Provisions inserted by states into their investment agreements and new codes of conduct for arbitrators will be tested when these agreements enter into force, if and when challenges are raised. In the meantime, it is significant, and encouraging, that arbitral institutions and international organizations such as UNCITRAL appear to be increasingly collaborating in an effort to achieve a greater harmonization of applicable standards and rules.

This chapter is part of a wider volume, consumers of this chapter may not use any part of the text or redistribute the chapter without prior permission from the publisher.

The book "Arbitration Under International Investment Agreements: A Guide to the Key Issues" is available on the OUP website (<https://global.oup.com/academic/product/arbitration-under-international-investment-agreements-9780198758082?q=yannaca-small&lang=en&cc=gb#>)