The Worldly Arbitrator: Conflicts of Interest Due to Close Personal Friendship and Enmity in a Cross-Cultural Context

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ABSTRACT

This article considers conflicts of interest based on "close personal friendship" and "enmity" in the light of the enhanced importance of the factual context for such allegations. The article surveys recent decisions of national courts and arbitral institutions. It concludes that the threshold for finding a conflict on these grounds remains high, mainly because arbitrators enjoy a relatively broad sphere of professional activity. There seems to be convergence on the application of an objective test along the lines of the IBA Guidelines, which encourages transparency. Consistent with this view, arbitrators should apply a significantly lower threshold for disclosure of relevant (i.e., non-trivial) personal relationships. Enmity, however, seems to follow a different dynamic and is less amenable to arbitrator disclosure.

1 INTRODUCTION

One of the things I have missed during the COVID-19 pandemic is the opportunity of spontaneous conversation during in person conferences. These conversations often provide a setting for sharing recent experiences with other practitioners or scholars. These informal exchanges can sometimes include candid views about the world of international arbitration. One can see these occasions as a form of bonding, the strengthening of a link of confidence or even mutual standing as between the interlocutors.

The remarks that follow offer a few thoughts about such links and their possible place in the dynamics of international arbitration. These thoughts are by no means meant to be comprehensive. They are prompted by the work, career and mentorship of Professor Francisco Orrego Vicuña.[1]

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1 Nassib Ziadé, "Francisco Orrego Vicuña (1942 – 2018): A Life of Service to International Law and Diplomacy," BCDR International Arbitration Review, vol. 6, no 1 (2019) pp. 1-4.

Escobar, Alejandro A., 'The Worldly Arbitrator: Conflicts of Interest Due to Close Personal Friendship and Enmity in a Cross-Cultural Context'. *BCDR International Arbitration Review* 7, no. 2 (2020): 285–300.

2 CULTURAL CONTEXT IN THE APPLICATION OF RULES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

The recent exploration of conflicts of interest in international investment arbitration, has identified a concern for "problematic relationships" affecting an arbitrator. Relationships would be regarded as problematic when they cast doubt on the independence and impartiality of the arbitrator.

As with many legal standards, there is little disagreement at the core of the principle that arbitrators must be and remain independent and impartial. *Nemo iudex in causa sua* needs no explanation. The principle is front and centre of the widely cited International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"). The principle translates neatly into the IBA Guidelines' non-waivable red-list category of identity between an arbitrator and a party. An equally well-accepted rule is the proscription of *ex parte* communications with arbitrators (except on the selection of a presiding arbitrator). This is not an IBA Guidelines category, which indicates the need to rely on the general provisions of the IBA Guidelines concerning independence and impartiality.

The more distant from the core, however, the more difficult it becomes to judge whether a given relationship is "problematic". The reason is so obvious it may sometimes be overlooked. The law is a social phenomenon. All practice of law is therefore a professional practice within or about social relationships. A career in international arbitration or international law is built upon relationships. It may co-exist and overlap with other relationships, both personal and professional. The same may be true of other fields of law (and careers in "international law" are varied), but international arbitration is characterized by being more flexible, less externally regulated and more reliant on individual probity.

The IBA Guidelines are an expression of these traits. Although not legally binding, they have done much to develop an international consensus on the standard for assessing independence and impartiality. The "traffic-light" lists of the IBA Guidelines are a tool, an initial yet incomplete guide to categories of relationships for deciding conflicts of interest. The IBA Guidelines are clear in reminding users that the general criteria should always prevail. Hence the notable omissions from the lists of certain types of relationships that are frequently encountered by practitioners of international law and arbitration. Thus, the IBA Guidelines do not mention (or no longer mention) academic connections, work in professional interest groups, charities, or public institutions.

The general criterion of the IBA Guidelines is that an arbitrator should be disqualified if there are objective justifiable doubts about the arbitrator's independence or impartiality.

> Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision. (IBA Guidelines, General Standard 2(c)).

Cultural background in the application of this general rule could be relevant in at least two respects. The first is virtually of the essence of international arbitration. Where it falls to an institution or to the members of an arbitral tribunal to apply the general rule, the individuals who participate in that process will almost invariably bring to bear the influences of different cultural backgrounds. Nationality and national origin are likely the most overt manifestations of those backgrounds.

The second aspect in which cultural background may be relevant is as a specific factor for assessing the relative importance of the circumstances underlying a bid for disqualification. Take, for example, a conference at which an arbitrator sits on a panel of presenters along with the counsel for the party who appointed the arbitrator on a topic unrelated to the proceeding. Should the arbitrator refuse to participate upon discovering counsel as a co-panellist? Should the arbitrator disclose this fact to the parties? Before or after the conference panel? How quickly? What if a party raises an objection? What if this happens more than once in the course of the proceeding? The question for the decision-maker who assesses a challenge based on these circumstances is whether, and if so, to what degree is it relevant to take into account the cultural background of the arbitrator and the parties. The premise is still the application of the general rule.

In other words, is it necessary or appropriate for the decision-maker to attribute, consider or discount any particular cultural background of the hypothetical "reasonable third person" under this standard? The general conclusion offered here is that there is no specific evidence that cultural background has been articulated as a factor in deciding upon conflicts of interest based on interpersonal relationships. This does not mean, however, that arbitrators and practitioners should not seek to understand the potential importance of cultural backgrounds for the integrity of the arbitration process.

3 HIGH CONTEXT RELATIONSHIPS: CLOSE PERSONAL FRIENDSHIP AND ENMITY

As these remarks are modest in scope, they will attempt to focus on conflicts of interest for which context is of heightened relevance.

The IBA Guidelines mention certain categories of potential conflicts that seem to be the most qualified by context within the IBA lists: (i) "a close personal friendship" between an arbitrator and a party, an entity identified with a party or

its counsel (IBA Guidelines 3.3.6 and 3.4.3); and (ii) "enmity" between an arbitrator and a party, an entity identified with a party or its counsel (IBA Guidelines 3.3.7 and 3.4.4).

These two categories might seem to be residual grounds of perhaps secondary importance among the many listed in the IBA Guidelines. Like many legal precepts, however, their simplicity hides a delicate balance. On the one hand, litigating parties are concerned about the relationship arbitrators have with other participants. On the other hand, they rely to a certain degree on the relationships surrounding the arbitrators they appoint. Perhaps it is not possible to prescribe a standard for the required judgment in applying these categories under the general IBA standard. It is possible, however, to reflect on its application.

The 2004 IBA Guidelines (3.3.6) suggested a high threshold for establishing close personal friendship in respect of an arbitrator. Close personal friendship would be "demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations." This considerable time together needed to be unrelated to such things as the activities of "social organizations." On the face of the language, the "considerable time" spent also needs to occur simultaneously with the appointment and tenure of the arbitrator.

The 2014 IBA Guidelines did not retain this language. At least one leading commentary has observed that the language in the 2004 Guidelines rendered the ground too narrow.[2] This commentator proposed that close personal friendship and enmity should be assessed considering all circumstances. The deletion of the definition in the 2014 IBA Guidelines leads in effect to this result.

3.1 The General Context for Assessing Conflicts of Interest Based on Friendship or Enmity

The general standards of the IBA Guidelines tell us that conflicts are to be viewed from an objective standpoint. This might not seem straightforward for assessing "friendship" that is both "personal" and "close" or for assessing "enmity." As discussed below, however, recent examples of disqualification decisions seem to be in conformity with ~~to~~ this requirement.

The decision-maker called upon to decide upon an allegation of a conflict of interest must themselves be free of conflict, i.e., independent and impartial. They

[2] R. Mullerat, "The IBA Guidelines on Conflicts of Interest Revisited: Another Contribution to the Revision of an Excellent Instrument, Which Needs a Slight Daltonism Treatment," Spain Arbitration Review / *Revista del Club Español del Arbitraje*, vol. 2012, no. 14, pp. 61-99, p. 86.

will normally be expected to apply an objective test. They will know that international law and international arbitration are or aspire to be universal.

Lack of bias is not a requirement, by contrast, for an interested party in the proceeding. In addition to their own interest in the outcome of the proceeding, each of the parties will have its own views of "close personal friendship" and of "enmity." The parties will have views about how other relationships of an arbitrator may affect an appointed arbitrator's independence and impartiality. Those views may or may not always be rational or even consistent with the party's own behaviour in the arbitration. They may be informed by various factors to which many adjectives may apply (i.e., they may be "cultural" in a political, historical, economic, or legal sense).

The fundamental point is that a party's views will not be dispositive unless they meet the standard applied by the neutral decision-maker, which we can take as requiring objective justifiable doubts with respect to an arbitrator's impartiality and independence. The party's views are, however, the starting point. The party's viewpoint is what triggers the arbitrator's duty of disclosure.[3]

Societies order themselves in comparable but different ways. Each may have a different view about the legal profession and about the proper, permissible, or tolerable dispensation of justice. Each may harbour different expectations as to the integrity and honesty of legal practitioners. Each may have different views on how much lawyers can be trusted.

International law and international arbitration seek to transcend the idiosyncratic aspects of those views. It can be said that they seek to establish a shared and common expectation as to the behaviour of legal practitioners in this field. The IBA Guidelines are significant because they articulate the general standards in this respect as well as providing an indicative (i.e., non-conclusive) list of categories, and of specific instances within those categories, for the application of the standards.

The IBA Guidelines provide the general rules and, to an extent, the benchmarks for disclosure in international arbitration. Because the lists are indicative, they are not meant to excuse non-disclosure where disclosure would be called for under the general rules. It is probably not productive to speculate about instances of friendship (or for that matter, enmity) that would require disclosure. These remarks will instead focus on certain published instances of decisions concerning these categories to see what lessons they may provide.

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[3] IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, Part I, General Standard 3 (Disclosure by the Arbitrator), pp. 6-9.

3.2 Specific Examples of Conflicts Allegations Based on Friendship

The obvious cases are not difficult to identify. A conflict was found where the arbitrator shared hotel accommodation with a lawyer for one of the parties.[4] The same result would be expected "where the arbitrator's spouse or other close relative is acting for one of the parties, or is a partner in the law firm that represents that party"[5] or where the arbitrator is romantically involved with a sibling of a party's counsel.[6]

Social entertainment of an arbitrator by a party's counsel has been held to be "censurable" and in flagrant cases has led to the vacation of the award.[7] By contrast, social activities taking place within a professional context (e.g., conferences, lectures) would likely not rise to censurable forms of entertainment.

Relationships involving legal representation of related parties normally fall under other categories. It seems to be rare for that type of relationship to be evidence of a "close friendship."[8] Acquaintance during law school similarly falls short of amounting to close personal friendship.[9]

There is a distinction between the social context in which arbitrators perform their duties from that of judges in national judiciaries. Judges are full-time officers vested with general jurisdiction with applying the law to all eligible parties who appear before them. The jurisdiction of arbitrators, by contrast, is based on consent. The parties typically agree that each party may appoint an arbitrator, or that either may nominate arbitrators for appointment by an institution, and that in the absence of a nomination an appointing authority may appoint for the parties.

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4 R.B. Schmitt, "Suite Sharing: Arbitrator's Friendship With Winning Lawyer Imperils Huge Victory," Wall Street Journal, 14 February 1990, A1, cited *inter alia* in S. Luttrell, *Bias Challenges in International Commercial Arbitration: The Need For a 'Real Danger' Test*, International Arbitration Law Library (Kluwer Law International, 2009) p. 159, fn. 152.

5 Mullerat, *op. cit.*, fn 2, p. 86 (citing an unnamed publication by Ronnie King and David Cave).

6 *La Serena Props. v. Weisbach*, 112 Cal. Rptr. 3d 597 (Cal. Ct. App. 2010), cited in G.B. Born, *International Commercial Arbitration,* 3rd ed. (2021) p. 272, fn. 1398. The judgment on a civil action against the arbitrator can be found at: https://caselaw.findlaw.com/ca-court-of-appeal/1531500.html (accessed 27 December 2021).

7 *Karlseng v. Cooke*, 346 S.W. 3d 85 (Tex. App. 2011), cited in Born, *op. cit.*, fn 6, p. 272, fn. 1398. Available at: https://casetext.com/case/karlseng-v-cooke (accessed 27 December 2021).

8 *See*, *e.g.*, *Koshigi Ltd and another v. Donna Union Foundation and Another* [2019] EWHC 122 (Comm), 55 ("Reference is made to a 'warm and friendly relationship' with [the claimants'] solicitor but this is a long way from the 'close personal friendship' referred to in the Orange List."), cited in P. Hodges, "The View from the English Courts on Conflicts of Interest: Halliburton and Beyond," in F. Dasser, ed., *Clear Path or Jungle in Commercial Arbitrators' Conflict of Interest?*, ASA Special Series, vol. 48 (2021) pp. 91-108, p. 103. Available at: https://www.casemine.com/judgement/uk/5c57c70d2c94e079deca6b18 (accessed 28 February 2022).

9 *Alpha Projektholding GmbH v. Ukraine*, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (ICSID Case No. ARB/07/16), 19 March 2010, ¶ 66, p. 24.

Certain jurisdictions may prescribe demanding standards of conduct for judges in their social interactions.[10] Those standards may not apply in the same way to arbitrators.[11] As stated in a well-known ruling on the probity of arbitrator conduct in investor-State arbitration:

> Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.[12]

An overlap of social connections (e.g., involvement in local civic affairs or remote acquaintance) with no bearing on the matter before an arbitrator will not normally be sufficient to uphold a challenge.[13]

The same approach is generally taken with respect to professional activities conducted in a transparent manner.[14] In international arbitration, tolerable professional activities may involve more than occasional collaborations. Thus, the

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10 *See*, *e.g.*, Code of Conduct for U.S. Judges (effective March 12, 2019), commentary to Canon 4, at p. 16: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities." Available at: https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (accessed 27 December 2021).

11 *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145, 89 S. Ct 337, 21 L. Ed. 2d. 30. (1968)), Justice White's concurring opinion, joined by Justice Marshall. Available at: https://www.law.cornell.edu/supremecourt/text/393/145 (accessed 27 December 2021). *See*, *e.g.*, commentary in C.N. Brower, "Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator," Berkeley Journal of International Law Publicist, vol. 5 (2010) pp. 1-31, pp. 6-7.

12 *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina* (ICSID Case No. ARB/03/17 and ICSID Case No. ARB/03/19), Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, ¶ 32, p. 18. One of the claimants sought to enforce the resulting award in the United States. The respondent resisted enforcement based on the alleged conflict. The U.S. Court of Appeals for the District of Columbia discussed the U.S. Supreme Court's *Commonwealth Coatings* opinion, Justice White's concurring opinion and the latter's application by the U.S. Court of Appeals in deciding the respondent's objection, *Republic of Argentina v. AWG Group Ltd.*, No. 16-7134, Judgment of 3 July 2018, pp. 8-14.

13 *See*, *Wilson v. Dan McCabe's Creative Carpeting Inc.*, 417 N.E. 2d 49, 11 Mass. App. Ct. 956 (1981) ("the plaintiff's argument of an 'impression of partiality' because the arbitrator and the defendant's president had been active in affairs of the town and because the arbitrator knew the father-in-law of the defendant's president is without merit." *Compare, Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 146-148 (1968)). Available at: https://cite.case.law/mass-app-ct/11/956/3965238/ (accessed 27 December 2021).

14 *See*, *F.D.I.C. v. IIG Capital LLC*, 525 F. App'x 904 (11th Cir. 2013) (rejecting the award-debtor's request for an evidentiary hearing invoking an arbitrator's failure to disclose his prior and ongoing contacts with counsel for award-creditor because none of the contacts went "beyond the kind of professional interactions that one would expect of successful lawyers active in the specialized area"), cited in Born, *op. cit.*, fn 6, p. 272, fn. 1398. Available at: https://folkman.law/wp-content/uploads/2013/08/IIG.pdf (accessed 27 December 2021).

Hong Kong International Arbitration Centre (HKIAC) dismissed a challenge based on the fact that the challenged arbitrator had agreed prior to appointment to collaborate free of charge in a book project alongside counsel for the appointing party. "The HKIAC rejected the challenge on the ground that the relationship did not equate to the existence of a close personal friendship between the challenged arbitrator and the claimant'" counsel."[15]

There are situations, however, which even in a professional context are deemed to go too far.

In a judgment of 30 June 2011, the Madrid Provincial Court held that the circumstances disclosed by the challenged arbitrator, considered individually, were not sufficient to disqualify him. But when those circumstances were considered collectively, they raised justifiable doubts as to his impartiality because they showed a close and cooperative relationship between the arbitrator and the law firm representing a party. Those circumstances included the fact that the arbitrator's son-in-law worked at the firm representing the party; the arbitrator was a board member of an educational institution sponsored by that law firm; and the arbitrator had dedicated a publication to the name partner of that law firm.[16] The Court restated the principle that the standard was not the actual existence of bias or lack of impartiality, but the existence of circumstances that could give rise to justifiable doubts.

In contrast, a judgment of 29 July 2014 of the Superior Court of Justice of Catalonia considered that the challenged arbitrator's service on the juridical commission of the Catalonian regional government, which led to his friendship with lawyers for one of the parties, did not rise to a justified ground for challenge. The Superior Court held that the friendship in question was a "generic" one "derived from their relationships as lawyers within professional practice" and marked by "courtesy." It did not involve a personal interest or danger of bias.[17]

Similar contrasts can be found merely on the exercise of judgment based on the facts of the case. A U.S. federal appeals court, for example, vacated an award because the challenged arbitrator was a close personal friend of a lawyer who was a

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15 J. Santiago, "Challenges Against Arbitrators: The HKIAC Way," Asian Dispute Review (Weeramantry and Choong, eds.), vol. 19 no. 2, (Apr. 2017) pp. 60-66, p. 64.

16 *Delforca 2008, Sociedad de Valores, SA v. Banco Santander, SA*, Case No. 3/2009, *Sentencia de la Audiencia Provincial de Madrid* (*Sección Decimosegunda*), N° 506/2011, 30 June 2011, in *Arbitraje: Revista de Arbitraje Comercial y de Inversiones*, vol. 5, no. 2, pp. 528-546.

17 *Barcelona Investments, S.L. v. Livirr, S.A., Sentencia No. 57 del Tribunal Superior de Justicia de Cataluña* (*Sala de lo Civil y Penal, Sección Primera*), N° 57/2014 (STSJ CAT 9129/2014), 29 July 2014, p. 6 ("*la amistad referida del árbitro con el Letrado de una de las partes (de LUVIRR), es la derivada de las relaciones como Abogados, dentro del ejercicio de la profesión. Se trata de una amistad genérica y de cortesía que comporta el desempeño del ejercicio de la Abogacía a la que se une el dilatado ejercicio profesional*").

partner in the firm that was representing a party.[18] In contrast, the SCC Court rejected the challenge of an arbitrator who for decades had been a partner in the law firm representing a party and had had a close relationship with one of the counsel on record.[19] The allegations were similar in both cases but in the second there was no issue of non-disclosure. In addition, the relationships invoked in the second case (which the challenging party said raised a significant risk that the arbitrator harboured a deep sense of loyalty towards the firm in question) had existed seven years prior to the arbitration.

It may be that the personal relationship will be secondary to another factor such as a failure to disclose. In a judgment of 10 January 2008, a German federal court removed a presiding arbitrator because he did not disclose that he leased an office from a party's counsel with whom he was on close personal terms. The closeness of his relationship with counsel was reflected, among other things, in their use of familiar "*du*" with one another.[20]

Does attending the wedding of an arbitrator reveal close personal friendship of a kind that may sustain a challenge? A committee of the Danish Arbitration Institute seemed to think so in 2015, isolating attendance of the wedding from other professional activities shared between an arbitrator and counsel.[21] One could question whether this conclusion would result in all cases. As with the prior examples, social context is important. It would seem to be important, therefore, for the decision-maker to be in a position to appreciate the social importance of the event said to demonstrate close personal friendship, both for the individuals involved and for the other participants (counsel, parties, co-arbitrators) in the proceeding.

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[18] *William C. Vick Constr. Co. v. N.C. Farm Bureau Fed'n*, 472 S.E. 2d 346, 348 (N.C. App. 1996), cited in Born, *op. cit.*, fn 6, p. 272, fn. 1398. Available at: https://law.justia.com/cases/north-carolina/court-of-appeals/1996/coa95-964-1.html (accessed 28 December 2021) ("we find that Mr. Kirby, the sole appointed arbitrator, did not disclose numerous social, business, and professional relationships with partners in the law firm representing Farm Bureau, except for his description of his relationship with Mr. Aldridge. Additionally, we find that these relationships were likely to affect impartiality or reasonably create an appearance of partiality or bias. We also note that the relationships involved in the case before us are not merely trivial in nature. . . . Indeed, Mr. Kirby had significant business relationships and friendships with Farm Bureau's counsel.")

[19] Decision in SCC Arbitration 2017/089, described in A. Ipp, R. Carè and V. Dubeshka, "SCC Practice Note: SCC Board Decisions on Challenges to Arbitrators 2016-2018" (August 2019) p. 17, cited in Born, *op. cit.*, fn 6, p. 272, fn. 1398. Available at: https://sccinstitute.com/media/795278/scc-practice-note_scc-decisions-on-challenges-to-arbitrators-2016-2018.pdf (accessed 28 December 2021).

[20] 2008 Schieds VZ 199, 200 (Oberlandesgericht Frankfurt), cited in Born, *op. cit.*, fn 6, p. 272, fn. 1398.

[21] Decision D-2245, 5 February 2015, in S. Pihlblad and J. Tufte-Kristensen, "Challenge Decisions at the Danish Institute of Arbitration," Journal of International Arbitration, vol. 33, no. 6 (2016) pp. 577-652, pp. 606-607.

3.3 Specific Examples of Conflicts Allegations Based on Enmity

Although analogous to friendship, conflicts arising out of enmity can be expected to have a different dynamic. Lawyers who practise in international arbitration usually know that exchanges in the forum should not detract from professional and personal respect, and *vice versa*. In addition, those lawyers will usually be aware that grudges and resentment are rarely productive in a profession that relies on interpersonal relations. From this it follows that expression of enmity are considerably fewer than expressions of close friendship.[22]

It may therefore not be surprising that the few published instances in which enmity has been at the heart of a challenge mainly concern strained relations between an arbitrator and counsel arising out of the arbitration proceeding itself or from prior proceedings. The decisions of two institutions stand out. They are the Danish Institute of Arbitration and ICSID. The following paragraphs consider each in turn.

In a decision dated 6 March 2008, a Committee of the Danish Institute of Arbitration dismissed a challenge which "concerned alleged enmity between an arbitrator and a party's counsel. According to the party's counsel, the two were enemies, but according to the arbitrator, there was no hostile relation between them."[23] The underlying facts are of note.

The challenging counsel relied principally on the fact that he and the arbitrator had represented opposing parties in several matters, and they had on several occasions reported each other to the Disciplinary Board of the Danish Bar and Law Society. The counsel alleged that the arbitrator had, in addition, reported the counsel to the police. The arbitrator acknowledged their opposing representations and their mutual reports to the Danish Bar and Law Society. The arbitrator indicated, however, that all reports had been made on behalf of his clients, not in a personal capacity. He noted that all his reports against counsel had resulted in sanctions whereas none of the counsel's report had resulted in a sanction against the arbitrator. The arbitrator denied reporting counsel to the police. He had instead reported the opposing party to the police for what he considered to be wrongdoing without mentioning counsel.

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[22] *See*, *e.g.*, N. Voser and A.M. Petti, "The Revised IBA Guidelines on Conflicts of Interest in International Arbitration," ASA Bulletin, vol. 33, no.1 (2015) pp. 6-36, p. 26 ("Although this addition could be considered an interesting development, one would wonder whether this would be a piece of information which an arbitrator is willing to disclose since once the information is released into the small community of international arbitration practitioners, it is difficult to retrieve. Thus, it is unlikely that this new circumstance will have a high practical impact.")

[23] Decision E-1111, 6 March 2008, in Pihlblad and Tufte-Kristensen, *op cit.*, fn 21, pp. 577-652, pp. 648-649.

Accepting the arbitrator's comments, the Committee held that "the facts and circumstances described by the claimant's counsel did not demonstrate a hostile relation between the claimant's counsel" and the arbitrator. The counsel had also invoked his representation of the arbitrator's uncle in a bitter family dispute against the arbitrator's father. The arbitrator indicated that he had never associated the counsel with that dispute. The Committee accepted the explanation and dismissed the challenge.

In a decision dated 15 July 2013, a Committee of the Danish Institute of Arbitration rejected the challenge of a presiding arbitrator, based among other things on his expressions in reaction to the initial grounds of challenge, on an abrupt communication by the arbitrator to counsel, and on the arbitrator's communication to a co-arbitrator that the latter should consider disclosing a professional relationship with the challenging counsel.

The initial allegation was that the presiding arbitrator and the counsel had represented opposing sides in prior cases. The Committee held that this circumstance could not sustain a challenge. The allegation, however, had "triggered a long and heated correspondence between [the presiding arbitrator] and the respondent's counsel." The Committee considered that too strong a reaction to a challenge could serve to disqualify an arbitrator, but that in this case the presiding arbitrator had only disassociated himself from the allegations, "which does not generally give rise to justifiable doubts about the arbitrator's impartiality and independence."

The respondent's counsel also alleged that the presiding arbitration had addressed him in a rude and unintelligible manner. The Committee, however, considered the presiding arbitrator's communication and found it to be "neither partial nor unfair." Finally, the Committee did not consider that the presiding arbitrator's communication to his co-arbitrator raised justifiable doubts as to the former's impartiality or independence.

The Committee's decision, therefore, found no grounds for upholding the challenge due to the forceful terms used by the presiding arbitrator to oppose the challenge because they amounted to no more than a "disassociation" from the allegations against him. It also found no grounds in the less than courteous language directed at the challenging counsel because, in the Committee's view, it did not reveal partiality and was not "unfair." In other words, the Committee considered the substance of the arbitrator's expressions and concluded they were within acceptable bounds.

The second institution to provide insight into enmity as a ground for challenge is ICSID.

Under the ICSID Convention, the Chairman of the ICSID Administrative Council (*ex officio*, the President of the World Bank) decides on a proposal to

disqualify an arbitrator when the proposal affects the majority of the members of a Tribunal or when the other, non-challenged members of the Tribunal are evenly divided on the proposal.[24] There are two interrelated published decisions by the ICSID Administrative Council Chairman deciding on challenges based on enmity between an arbitrator and counsel.

In a 13 December 2013 decision,[25] the ICSID Chairman upheld a challenge against Professor Francisco Orrego Vicuña. The initial challenge alleged repeated appointments by the same law firm and Professor Orrego Vicuña's alleged failure to disclose those appointments. Professor Orrego Vicuña addressed in certain detail each of the allegations raised in the challenge. The ICSID Chairman's decision discloses that the terms of both the challenge and Professor Orrego Vicuña's response were vigorous. With respect to the initial grounds of challenge, the Chairman found that they did not justify the disqualification of Professor Orrego Vicuña.

In his response to the challenge, however, Professor Orrego Vicuña added a final paragraph. It began: "Lastly there are some ethical assertions that cannot be left unanswered." He referred to a letter from respondent's counsel that invited him to resign on ethical grounds. In addition to denying the alleged grounds, Professor Orrego Vicuña questioned the conduct of the respondent's counsel in making the challenge. In the final round of commentary, the respondent's counsel objected to Professor Orrego Vicuña's remarks, whereas claimant's counsel argued that he "simply exercised his right to respond under the ICSID system."

The ICSID Chairman's decision held that the final paragraph in Professor Orrego Vicuña's remarks "do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations" of the challenging party. The Chairman concluded:

> In the Chairman's view, a third party undertaking a reasonable evaluation of [Professor Orrego Vicuña's] explanations would conclude that the paragraph quoted above manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel. Therefore, on the facts of this case, the Chairman upholds the challenge.[26]

The ICSID Chairman indicated, in the 2021 decision described below, that the above conclusion was based on the existence of an appearance of enmity.

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24 ICSID Convention, Article 58.

25 *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Proposal for Disqualification, of Professor Francisco Orrego Vicuña, 13 December 2013.

26 *Ibid.*, ¶¶ 79-80.

In a 15 July 2021 decision,[27] the ICSID Chairman dismissed a challenge whose first ground was an allegation of enmity of arbitrator Prof. Dr. Klaus Sachs with respect to claimant's counsel. This allegation was based on the publication of a successful challenge decision against Prof. Dr. Sachs in a parallel ICC arbitration. Claimant's counsel argued that this would have "reputational" implications and thus provoke enmity on the part of Prof. Dr. Sachs towards the claimant and its counsel. However, in his observations on the disqualification proposal, Prof. Dr. Sachs stated that he harboured "no feeling of enmity towards Mr. Meijer or his counsel. Being challenged is part of life as an arbitrator and there is nothing personal about such matters."[28]

The ICSID Chairman contrasted this statement with the situation in *Burlington*, where "it was Prof. Orrego Vicuña's own statements that were found to manifestly evidence an appearance of lack of impartiality towards Ecuador and its counsel."[29] The Chairman concluded that he did not believe that either the statements of Prof. Dr. Sachs or the surrounding circumstances suggested an absence or created the appearance of a lack of impartiality.

These two sets of decisions help to illustrate the context and dynamics within which international arbitration approaches conflicts of interest based upon interpersonal relationships.

Arbitration practitioners, being litigators, will be faced with legal issues and stances that may be sensitive, delicate, complex or far reaching. In the context of a challenge, those issues and stances may allege the appearance of or even actual absence of impartiality or independence. Arbitration practitioners may be expected and are entitled to deal with issues of this kind within professional bounds even if exchanges are vigorous or heated or uncomfortable to the participants.

In these situations, arbitrators are arguably in a unique position, both as compared to judges and as compared to the counsel who appear before them.

There is at least a basis for the view that arbitrators are allowed greater latitude in their interpersonal relations than judges in jurisdictions where the judiciary is most regulated.

Within a given case, however, an arbitrator's conduct will be scrutinized by the parties and by the relevant institution or appointing authority. This will include scrutiny of the arbitrator's communications with a party or counsel both before and during the arbitration proceeding. The appointing authority can be expected to examine whether the arbitrator's communications remain within the bounds of professional duty both in form and in substance. Such an examination should

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[27] *Mr. Bob Meijer v. Republic of Georgia* (ICSID Case No. ARB/20/28), Decision on a Proposal to Disqualify Professor Dr. Klaus Sachs, 15 July 2021.

[28] *Ibid.*, ¶ 81.

[29] *Ibid.*, ¶ 80.

consist in an objective assessment of how the communications unfold. In the context of a challenge of an arbitrator on other grounds, it is accepted that within those bounds of professional duty an arbitrator may defend him or herself vigorously.

An arbitrator may sometimes be perceived as having stepped beyond those bounds. In these situations, there may be differences between communications made prior to and within an arbitration proceeding.

In the first example from the Danish Arbitration Institute, several factors seemed relevant to assess the mutual reporting of the arbitrator and counsel to the Danish Bar and Law Society in prior proceedings. First, the arbitrator acted on behalf of his client, not in a personal capacity. Second, the arbitrator's reports had resulted in sanctions whereas the counsel's reports had not. Third, *within* the arbitration proceeding, the arbitrator indicated that his relations with counsel making the challenge were not hostile. The Committee found that there was no enmity.

In the second example from the Danish Arbitration Institute, all relevant factors arose within the arbitral proceeding in which the challenge was made. First, in reacting to the challenge the arbitrator's expressions were limited to disassociating himself from the allegations. Second, the arbitrator's direct communication to counsel, although alleged to be "rude and unintelligible," was held to be justified because it was not partial or unfair. Although this seems to be a finer line, the attention seems to have been on what the arbitrator said rather than on how he said it. The Committee found that there was no enmity.

In the *Burlington* case before ICSID, the decisive factor was a final remark by Prof. Orrego Vicuña in response to the challenge allegations. Instead of only denying the allegations (or invoking ethical rules which may have limited his ability to respond), the arbitrator's remark questioned the conduct of the challenging counsel placing him in that position. The ICSID Chairman held that the remark did "not serve any purpose in addressing the proposal for disqualification" and revealed a manifest appearance of lack of impartiality towards respondent's counsel. The ICSID Chairman thus found that there was an appearance of enmity based on the challenged arbitrator's criticism of respondent's counsel that did not serve the purpose of addressing the grounds invoked for the challenge.

In the *Meijer* case before ICSID, the challenged arbitrator played no active role in the events invoked for the challenge on this ground against him. He expressly denied any feelings of enmity towards the claimant or its counsel arising from the publication of a successful challenge against him in a parallel arbitration proceeding. "Being challenged is part of life as an arbitrator and there is nothing personal about such matters."

The above two sets of decisions therefore indicate certain parameters for assessing enmity as a ground for a conflict of interest that would sustain a bid for disqualification.

4 A POSSIBLE FRAMEWORK FOR ASSESSMENT

Certain conclusions may be drawn from, and proposals made, based on the above examples and principles.

The starting point is that the IBA Guidelines, although sometimes disavowed as a normative reference in decisions on disqualification, do in fact articulate a near consensus on the relevant standard for assessing conflicts of interest in international arbitration. The reservation is due to the fact that in certain jurisdictions (especially in common law jurisdictions) there has been debate about the appropriate legal standard and its implications for demonstrating and finding conflicts of interest.

On this basis, even conflicts of interest that depend heavily on context and circumstance, such as close personal friendship or enmity, must be assessed by a third party based on objective facts from the standpoint of a reasonable third party, as opposed to, for example, assumption or speculation that might be characteristic of a *litigating* interested party.

The starting point for assessing close personal friendship is disclosure by each arbitrator or arbitrator candidate. Disclosure is part of the arbitrator's process of self-assessment regarding conflicts of interest. The first step in that process is the arbitrator candidate's decision whether to accept being put forward for nomination. If the arbitrator candidate regards him or herself as free of conflicts, a decision whether to disclose should be taken from the point of view of the disputing parties. As mentioned above, a party's view is an interested view and therefore implies a much lower threshold than the threshold for finding a conflict of interest.

It is common ground that trivial circumstances need not be disclosed.

Disclosure of potential enmity by an arbitrator is rare, except where an arbitrator may disclose matters in which the arbitrator has been opposing counsel to a participant in the proceeding. Other circumstances affecting a party or its counsel will be raised by that party or counsel.

The assessment of close personal friendship and enmity would involve looking at relations that, either individually or taken together, go beyond expected professional interactions. Relationships must of course be significant, and the significance of a given circumstance will be looked at in its context. This will include closeness in time of the relationship to the proceeding. Available examples of judicial or institutional decisions suggest that most have been given within a particular national setting.

The threshold for finding a conflict seems to remain high. It would be reached where the circumstances reveal a real danger (or justifiable doubts) of bias resulting from friendship or enmity. In other words, the circumstances should indicate that the arbitrator's decision will be influenced by factors other than the merits of the case at hand. It bears repeating that speculation will not be enough in this respect. The high threshold will likely mitigate, to a degree, the importance of cultural background in assessing the behaviour of the parties.

International arbitration practice has developed through institutions with a world-wide reach or inspiration, which include the participation of qualified staff and practitioners from around the globe. Disqualification decisions by these institutions would tend to promote a convergence in the application of standards for conflicts of interest. Even in the case of high context standards such as close personal friendship or enmity, they should be in a position to appreciate possible cultural factors.

As international arbitration relies on a greater number of institutions and arbitral seats located in different regions of the world, one can expect this overall framework to be maintained. While there are likely to be instances of contrasting outcomes for various categories of facts, consistency in the overall approach would foster the aim of international arbitration as a truly universal dispute settlement mechanism that promotes commercial and economic interaction.

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