

# ETHICS IN INTERNATIONAL ARBITRATION: NEW CONSIDERATIONS FOR ARBITRATORS AND COUNSEL

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## INTRODUCTION

Considerations regarding the ethics of arbitrators are imperative in international commercial arbitration decisions. In an evaluation of such arbitrator bias, partiality, or misconduct, two influential decisions define the legal horizon: the questionable, unnecessarily complicated, and quite possibly flawed decision issued by English Courts in *AT&T v. Saudi Cable Company*<sup>2</sup> and the U.S. Supreme Court's straightforward decision in *Commonwealth Coatings Corporation*.<sup>3</sup> When compared with the rationale of the *AT&T* case, the strict approach in *Commonwealth Coatings Corporation* reveals a list of clear advantages. Under this strict scrutiny approach, arbitrators must disclose all prior relations or dealings with any of the parties to the dispute as an effective method of

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<sup>2</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All ER (Comm.) 625.

<sup>3</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

preserving fairness, integrity, confidentiality, and neutrality during the arbitration proceedings.

The strict approach also provides a myriad of indirect benefits in its application. Primarily, mandating full disclosure is an effective way to avoid judicial misinterpretation in case the dispute ends up in court. This clarity is especially useful when the parties disagree on the impartiality of an appointed arbitrator in light of his relationships with one of the parties to the arbitration or a related third party, as such a relationship could potentially undermine the validity of the appointment process and the legitimacy of the award.<sup>4</sup> The strict approach may also be beneficial when the parties disagree on the neutrality and validity of the award itself when issued by a potentially biased arbitrator or panel due to an undisclosed detail, which may have generated an impartial award or broadened the risk of bias within the circumstances of the disputed event.

First, this Article argues in favour of strict scrutiny for arbitrators and discusses the benefits of requiring their full disclosure of any prior relations or dealings with any of the parties to the dispute. Accordingly, the Article explores the advantages of a strict application of domestic (ABA) and international (IBA) rules in this area. This Article also highlights common law standards that are applied to assess arbitrator bias, partiality, fraud and misconduct, all of which support the full disclosure approach. Lastly, this Article discusses the utility of a new and internationally standardized code of ethics for international arbitration and whether it should be developed and applied for counsel involved in international arbitration proceedings. As such, the Article concludes that an international code of arbitration ethics would be valuable, particularly because of limitations that practitioners and arbitral institutions face in applying existing national codes of professional conduct.

## **I. Arbitrator Ethics**

### **A. Basic Notions of Bias: The Strict Approach**

A claim of partiality or bias against a party-appointed arbitrator, based on an alleged non-disclosure,<sup>5</sup> is subject to determination under

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<sup>4</sup> *Id.* at 147.

<sup>5</sup> *See Commonwealth Coatings*, 393 U.S. at 147-50 (holding that Congress did not intend parties to submit cases to arbitration boards that might be reasonably thought biased).

the objective “reasonable person” standard.<sup>6</sup> Such a standard is exemplified in the case, *Commonwealth Coatings Corporation*, in which a dispute arose when a prime contractor refused to pay his subcontractor money owed for a painting job.<sup>7</sup> The dispute was eventually submitted to arbitration, where each side appointed an arbitrator and the two selected arbitrators appointed a final third “neutral” arbitrator for the arbitral panel.<sup>8</sup> After the award was rendered, the losing subcontractor discovered that the primary contractor was a client of the third arbitrator and had paid him several thousand dollars in fees for engineering consulting, including services on some of projects involved in the arbitration.<sup>9</sup> As a result, the subcontractor challenged the award in the U.S. District Court for the District of Puerto Rico. However, the court held that the arbitration proceedings were fair and impartial and refused to set aside the award.<sup>10</sup> The Court of Appeals for the First Circuit affirmed.<sup>11</sup> On certiorari, however, the U.S. Supreme Court reversed the decision. Expressing the view of the six-member Court, Justice Black concluded that the arbitral award should be set aside because, under a strict interpretation and application of § 10 of the Federal Arbitration Act (“FAA”),<sup>12</sup> the failure of an arbitrator to disclose business dealings of any kind with any of the parties constitutes a manifest violation of

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<sup>6</sup> *Id.* at 151; *see also* *Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (rejecting application of subjective appearance of bias standard).

<sup>7</sup> *Commonwealth Coatings*, 393 U.S. at 146; *see also* W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* (1997) 590.

<sup>8</sup> *Commonwealth Coatings*, 393 U.S. at 146.

<sup>9</sup> *Id.* (noting that the work referred to was “from time to time” and involved “fees of about \$12,000 over . . . four to five years.”)

<sup>10</sup> *Id.*

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

<sup>12</sup> Federal Arbitration Act (FAA), 9 U.S.C.A. § 10 (2002).

the strict morality and fairness that Congress expects of them.<sup>13</sup> This application illustrates Congress's intent behind the Act, requiring arbitrators to fully disclose any dealings they might have had with the parties before they are even appointed.

The Court's strict application of the FAA illustrates the effectiveness of the straightforward approach intended by Congress, which requires arbitrators to fully disclose any dealings they may have had with the parties to the dispute *before* they are appointed.<sup>14</sup> While the Court did not conclude that the standard of an arbitrator's impartiality should be equal to that of judges', the concurring opinion noted a different standard in evaluating them; namely, the concurring opinion conceded that arbitrators, as "men of affairs not apart from, but of the marketplace," are "quite effective in their adjudicatory function" because of such business knowledge.<sup>15</sup> While the courts would not overlook any "chicanery" or danger of bias, arbitrators should "not [be] automatically disqualified by prior business relationships with parties, if both parties are informed in advance, or if they are unaware of the facts and the relationship is trivial."<sup>16</sup> Thus, in the event of "voluntary disclosure at the outset" of any financial dealings with the parties to the dispute, the Court found no

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<sup>13</sup> *Commonwealth Coatings*, 393 U.S. at 147 (interpreting 9 U.S.C. § 10 (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration— (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.).

<sup>14</sup> *Commonwealth Coatings*, 393 U.S. at 150; *see also United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585–86 (1960) (" . . . [A]rbitrators are private judges chosen by the parties to decide particular matters specifically submitted").

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

<sup>16</sup> *Id.*

reason to set aside awards, noting that arbitration “functions best when an amicable and trusting atmosphere is preserved.”<sup>17</sup>

Finally, the *Commonwealth Coatings Corporation* Court advanced the theory that the judiciary’s role in deciding the partiality of arbitrators should be minimal since determinations of bias are best left to the parties, who are the “true architects of their own arbitration processes.”<sup>18</sup> It noted that the parties are also in a better position to address the ethical standards in their own industries.<sup>19</sup> Accordingly, the Court held that the statute requires full disclosure at the outset of the proceedings and that non-disclosure of dealings between the parties and arbitrators may not be imputed after the fact.<sup>20</sup> The law must be strictly applied to avoid having judges decide on evident partiality when the parties could have applied the reasonable person test to decide such partiality at the outset of the case.<sup>21</sup> Once the parties know the relevant facts, they are free to accept or reject the appointment of arbitrators. For the parties to do so, however, an arbitrator should disclose facts that “even he himself may not consider as calling into question” his independence.<sup>22</sup> Furthermore, the Court noted that it does not expect arbitrators to reveal their entire biographies, but does expect them to reveal “more than trivial” relations

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<sup>17</sup> *Id.* at 151; *see also* *Lattimer-Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990) (noting that the standard of review for arbitration awards and arbitrator disqualification is exceptionally narrow).

<sup>18</sup> *Commonwealth Coatings*, 393 U.S. at 151.

<sup>19</sup> *Id.*; *see also* *Dawa v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (interpreting 9 U.S.C. § 10 (a)(1)–(4)) (“A court may vacate an arbitration award in the following situations: (1) where the award was procured by fraud, (2) where the arbitrators were evidently partial or corrupt, (3) where the arbitrators misbehaved so that a party’s rights were prejudiced, or (4) where the arbitrators exceeded their powers or executed them so that a final, definite award was not made.”).

<sup>20</sup> *Commonwealth Coatings*, 393 U.S. at 151 (White, J. concurring).

<sup>21</sup> *See, e.g.,* *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (applying the reasonable person standard) (citing to *Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984) (holding that it is “evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”)).

<sup>22</sup> *Commonwealth Coatings*, 393 U.S. at 152; *see also* Stephen R. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 ARB. INT’L. 300, 304–05 (1988) (describing disclosure obligations under the ICC Rules).

or business dealings with a party, including any relationships between arbitrators and lawyers appearing in the dispute.<sup>23</sup>

Until the ruling in *Commonwealth*, the law did not require that courts vacate awards on the basis of the failure of arbitrators to disclose prior business relationships with one of the parties; instead, courts required proof of a calculated non-disclosure.<sup>24</sup> However, although the dissenting justices in *Commonwealth* seemed to imply that a strict interpretation of § 10 of the FAA is unnecessary where there is no claim of impartiality or misconduct, a strict interpretation is required when an individual is permitted to act as arbitrator in the adjudication of unusually large sums of monetary damages and when such a dispute goes before a court of law.<sup>25</sup> Under the FAA, Congress intended to mandate full disclosure at the outset of proceedings; as a result, courts must adhere to this requirement.<sup>26</sup> Informal and “after-the-fact” determinations on issues of impartiality are simply a waste of resources, especially since they can be raised at the outset.<sup>27</sup> With this in mind, the inappropriate exercise of judicial discretion goes against the principles of separation of powers.<sup>28</sup> Thus, striking down laws and reading words or meanings

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<sup>23</sup> International Bar Association, *Rules of Ethics for International Arbitrators*, Art. 4.2.

<sup>24</sup> See, e.g., *Fireman's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F.2d 533 (4th Cir. 1935); *Texas Eastern Transmission Corp. v. Barnard*, 177 F.Supp. 123, 128–29 (D.C.E.D.Ky 1959) (overruled on other grounds (285 F.2d 536 (6th Cir. 1960))); *Ilios Shipping & Trading Corp. v. American Anth. & Bitmus & Coal Corp.*, 148 F. Supp. 698, 700 (D.C.S.D.N.Y.), aff'd, 245 F.2d 873 (1957).

<sup>25</sup> See *Commonwealth Coatings*, 393 U.S. at 154 (Fortas, J., dissenting).

<sup>26</sup> 9 U.S.C. §§ 1-14 (1976).

<sup>27</sup> The NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 21 U.S.C. 2517 (1970) (holding that arbitration is a consensual, neutral, and confidential procedure in which a dispute is submitted by agreement of the parties to one or more impartial arbitrators, who make a binding decision on the dispute. In choosing arbitration, parties opt for private dispute resolution instead of a public court. The decision of the arbitral tribunal is final and enforceable in 140 countries under the New York Convention). See generally World Intellectual Property Organization <http://www.wipo.int/about-wipo/en/>; and the American Association of Arbitration website: <http://www.adr.org/> (providing a complete list of national and international legislation, rules, and treatise which govern arbitration).

<sup>28</sup> See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the Judiciary has the power to find laws unconstitutional).

into legislation can go against the original intent of legislators and has even been called “judicial vandalism” in foreign jurisdictions.<sup>29</sup>

## B. Independence, Good Faith, and Impartiality

Arbitrator neutrality, independence, and impartiality go to the core of the arbitrator’s function, known as a noble task, and are thus seriously considered. Failure to follow these preconditions may result in the termination or removal of an arbitrator for misconduct and breach of trust. Additionally, an arbitrator may be removed for mere non-disclosure of any prepaid retainer fees that may be offset later against an arbitrator’s remuneration at the close of the proceedings.<sup>30</sup>

The importance an arbitrator’s strict duty to be independent and impartial has been explained and reinforced in American cases. For instance, *Positive Software*<sup>31</sup> exemplifies a case where the duty was strict, but the rule of “evident partiality” was applied. “Evident partiality” states that when an arbitrator fails to disclose his employment “prior professional association with a member of on of the law firms,” there is a clear indication to the reasonable person that he may be biased. Other

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<sup>29</sup> See, e.g., *R. v. A.*, [2001] UKHL 25, [2002] 1 A.C. 45 (rejecting activist approach to judicial interpretation); see also *Ghaidan v. Mendoza*, [2004] UKHL 30; *Bellinger v. Bellinger*, [2003] UKHL 21 (calling it “judicial vandalism” for implying that the British Courts should take on the “activist North American model,” and for declaring that “black could be white” unless Parliament had “expressly determined this to be outside the range of the possible” in any legislation at issue). In this case, Lord Steyn had attempted to use § 3 of the U.K.’s Human Rights Act of 1998 (HRA 1998) as power for the British Courts to read words into the law, and insisted that “anything was possible” as long as the words read into to an Act did not specifically declare an intention to depart from the demands of the original Act. Lord Bingham asserted that § 4 of the HRA should be applied instead, as the HRA dictates, and which requires the British Courts to make a declaration of incompatibility, and then send the issue back to Parliament for their reconsideration and possible amendment of any pertinent legislation. In the U.K., Parliament is sovereign, and is the only body that can enact, amend, or strike-down legislation.

<sup>30</sup> Lawrence F. Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, in *THE AMERICAN REVIEW OF INTL ARBITRATION: ESSAYS IN HONOR OF HANS SMIT* 3, 177, 181–90 (1992) (summarizing *State of Israel v Desert Exploration 1976 Incident*); see also *Nojari A/S v. Hyundai Heavy Industries Co., Ltd.*, [1991] 3 All ER 211.

<sup>31</sup> *Positive Software v. New Century Mortgage*, 476 F.3d 278 (5th Cir. 2007) (finding that “evident partiality” alone was not grounds to vacate an award “unless bias was clearly evident in the decisionmakers [sic].”).

cases on this topic from the early 1980s and 1990s, namely *Sunkist Soft Drinks*<sup>32</sup> and *Merit Insurance Company*,<sup>33</sup> have also led to the application of the evident partiality test and provided the foundational principles for the later holdings in *Commonwealth* and most similarly in *AT&T v. Saudi Cable Co.* These cases demonstrates that an arbitration award could not be vacated solely on an arbitrator's failure to disclose a trivial or insubstantial prior relationship. Doing so would warrant a draconian vacatur of an arbitral award based on the evident partiality theory, especially where the arbitrator and an attorney had not interacted, met, or spoken with each other prior to the arbitration.<sup>34</sup>

The Code of Ethics for Commercial Arbitrators adopted by the American Arbitration Association and the American Bar Association ("AAA-ABA Code") also confronts the issue of party-appointed arbitrators' biases and goes to great lengths to tell parties how to protect themselves.<sup>35</sup> For instance, the AAA-ABA Code states that in arbitration proceedings where there are two or more party-appointed arbitrators, it is important to determine from the start whether the appointed arbitrators are expected to be "neutral" or "non-neutral." In such arbitration proceedings, the two party-appointed arbitrators should be considered non-neutral unless both parties inform the arbitrators and agree that all three arbitrators are to be neutral or unless the contract or applicable arbitration rules (or any governing law) require that all three arbitrators are to be neutral.<sup>36</sup> If an arbitrator communicates before or during arbitration proceedings with any party other than as part of the proceedings, she should advise the other arbitrators and parties that she has done so.<sup>37</sup> The arbitrator must fully disclose any relations or prior dealings

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<sup>32</sup> *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993).

<sup>33</sup> *Merit Insurance Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983).

<sup>34</sup> *Positive Software*, 476 F.3d at 283; 9 USC § 10(a)(2).

<sup>35</sup> Robert Coulson, *Do We Know How Arbitration Panels Decide?*, 6 J. INT'L. ARB., 7, 10–11 (1989).

<sup>36</sup> American Arbitration Association, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon IX.

<sup>37</sup> *Id.* at Canon X(3).



beforehand or he risks removal,<sup>38</sup> following a strict application of the Federal Arbitration Act (1925), 9 U.S.C. § 10, and in accordance with the arbitrator removal rule in *Commonwealth* for failure to disclose.<sup>39</sup>

Moreover, it is vital for arbitrators to disclose all possible facts that may affect their independence early in the proceedings. Oftentimes, arbitrators are also required to disclose in writing and in good faith. For example, arbitrators must disclose any facts of circumstances “which might be of such a nature as to call in question the arbitrator’s independence in the eyes of the parties” to the International Chamber of Commerce Court’s Secretariat General in ICC arbitration cases.<sup>40</sup> By disclosing, arbitrators limit the risk of subsequently being challenged and the risk of petitioned forums’ refusal to enforce the award.<sup>41</sup> The 1988 ICC’s disclosure and independence requirement was amended in 1990, and it now requires potential arbitrators to take into account “whether there exists a past or present relationship, direct or indirect, with any of the parties, or with any of their counsel, whether financial, professional, or of another kind, and whether the nature of any such relationship is such that disclosure is called for.”<sup>42</sup> Some commentators view the newly amended requirements as excessive.<sup>43</sup> However, decisions such as the one in *Certain Softwood Lumber Products from Canada* affirm that the obligations of independence, good faith, and

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<sup>38</sup> *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F.Supp.2d 1118 (D. Haw. 2000) (involving an arbitrator that failed to disclose discussion with plaintiff’s attorney concerning service as a mediator in an upcoming unrelated action); see also *Morgan Guaranty Trust Co. of N.Y. v. Solow Bldg. Co.*, 279 A.D.2d 431 (N.Y. App. Div. 2001) (involving defendant-appointed arbitrator who failed to disclose involvement with plaintiff’s counsel on prior arbitrations.).

<sup>39</sup> 393 U.S. at 149–50.

<sup>40</sup> International Chamber of Commerce (ICC), Rules of Conciliation and Arbitration, Art. 11(2)–(3) (2012).

<sup>41</sup> International Chamber of Commerce (ICC), Rules of Conciliation and Arbitration, Art. 2(7) (1988), superseded by ICC Rules of International Arbitration, Art. 11(2)–(3) (2012) (Rules regarding specific requirements of arbitrator disclosure and independence); see generally Mohammed Bedjaoui, *The Arbitrator: One Man-Three Roles*, 5 J. INT’L ARB. 7, 9–10 (1988) (Suggesting that arbitrators take additional measures to ensure that their award is enforced).

<sup>42</sup> J. Paulsson, “*Ethics for International Arbitrators: How have the 1987 (ICC) Guidelines Fared?*” Speech delivered to the 23<sup>rd</sup> International Bar Association Conference, at 7-12 (Sept. 1990).

<sup>43</sup> Guy Danet, *L’indépendance des arbitres dans le système CCI*, 9 BULL. SWISS AR. ASSOC. 45, 46, 47 (1991).

disclosure, when “properly fulfilled,” will leave arbitrators “free from worry and future embarrassments.”<sup>44</sup>

A list of the general standards that arbitrators must follow regarding impartiality, independence, good faith, and disclosure can also be found within the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).<sup>45</sup> Part I § 1 of the IBA Guidelines clearly states the general principle as the following: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or until the proceeding is otherwise fully terminated.”<sup>46</sup>

### C. A Questionable Interpretation of Real Danger of Bias

*AT&T Corporation v. Saudi Cable Company*<sup>47</sup> presents a unique interpretation of the various tests that may be utilized by the courts in determining arbitrator bias, impartiality, and misconduct, as well as in determining removal of an arbitrator and setting aside an arbitral tribunal’s award. AT&T and Nortel were among seven international telecommunications companies selected to bid on a project in Saudi Arabia that required that the cable for the project be acquired from the Saudi Cable Company (SCC). AT&T was awarded the project contract but failed to agree to terms with SCC. It commenced arbitration in London and sought a declaration that the PBA was validly terminated. Each party appointed an arbitrator under ICC Rules, and agreed to appoint a Canadian lawyer as third arbitrator and Chairman of the tribunal. Unbeknownst to AT&T, the Canadian lawyer held Nortel common shares and was a non-executive director of Nortel (a direct competitor to AT&T).<sup>48</sup>

The Canadian lawyer signed an ICC statement of independence, as is required under the ICC Rules Art. 2(7) (now under Art. 11(2)). The rules require not only a signature on a form, but also complete and full disclosure by arbitrators of “any facts or circumstances which might

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<sup>44</sup> *In re Certain Softwood Lumber Products from Canada*, (U.S. v. Canada), No. ECC-94-1904-01USA (Extraordinary Challenge Comm., U.S.-Can Free Trade Agreement, Aug. 3, 1994) at 81 (Wilkey, J., dissenting).

<sup>45</sup> IBA Guidelines on Conflicts of Interest in Int’l Arb. (2004).

<sup>46</sup> *Id.* at Art. I.

<sup>47</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] C.L.C. 1309, 1309.

<sup>48</sup> *Id.*

be of a nature as to call into question the arbitrator's independence in the eyes of the parties" before any "appointment or confirmation by the Court" [...] and "before notification of the final award."<sup>49</sup> The Canadian lawyer had been mutually confirmed as the impartial Chairman of the tribunal based on his incorrect submissions and omissions on the required ICC disclosure form and on his personal CV submitted before appointment. Before his appointment as Chairman of the tribunal, the Canadian lawyer failed to disclose his relations with Nortel, even checking the wrong box on the submitted ICC disclosure form as to whether he had any such facts to disclose. He also submitted two different versions of his CV during the selection process. The versions varied in only one single area: the omission of his prior business dealings and relations with Nortel.

The ICC arbitral panel took an unconventional stance in *AT&T* that directly contrasts with the ICC Rules, specifically Article 2(7) on bias and disclosure and Article 2(8) on impartiality and neutrality. In addition, the arbitral decision and the Supreme Court decision both appear to ignore the application of the well-established common law tests for arbitrator bias, misconduct, and confidentiality. However, the two rulings may also be considered justifiable by several commentators<sup>50</sup> via the application of tests for "actual bias" and "*real danger of bias*."<sup>51</sup>

The ICC's decision, and the later decisions by Justice Longmore and the Court of Appeals in *AT&T*, bizarrely held that the tribunal Chairman's CV and ICC disclosure form omissions were possible "secretarial errors" committed unintentionally by the Chairman's assisting staff during the submission. They also held that his relations with Nortel should be viewed as merely "trivial" and not a demonstration of any actual bias, primarily because Nortel was not a party to the arbitration and the Chairman had no personal interest in the outcome. Both panel and court further held that the Canadian arbitrator had only an "indirect interest due to shareholdings" and that a "contract of the size of that

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<sup>49</sup> *Id.* at 1312.

<sup>50</sup> See, e.g., Julian Miller, *How the 'Real Danger' Test Got the AT&T Arbitrator Off the Hook*, EURO. LAW. 2000, 1(4), 72–74; (suggesting that the court's approach in *AT&T* will likely continue to be relevant, given that the court has since applied in other cases); see generally Khawar Qureshi, *Passing the Bias Test*, (2006) 156 N.L.J. (No. 7223) 744, 774–75 (noting that, after *AT&T*, the UK now places more focus on impartiality rather than a lack of independence).

<sup>51</sup> See *R. v. Gough* [1993] AC 646; *Sumukan Ltd v. Commonwealth Secretariat* [2007] EWCA Civ. 1140; *Laker Airways Ltd. v. FLS Aerospace Ltd.* [1999] CLC 1124.

project could not have been of an interest to the Chairman, since he was not a judge of his own cause.”<sup>52</sup> Furthermore, they declared that there was no “real danger” of bias, even unconscious bias, and both courts held that the correct test for apparent bias, as set out in *R. v. Gough*, had been applied.<sup>53</sup> The Court of Appeals went even further<sup>54</sup> and declared that there was no real danger of bias because Chairman’s non-disclosure of director-level relations with Nortel was merely “innocent” and that the same test should be applied in both arbitration and judicial proceedings. It cited the *R. v. Gough* ruling,<sup>55</sup> *Locabail v. Bayfield*,<sup>56</sup> and *Laker Airways v. FLS*<sup>57</sup> as the proper authorities for the use of the new objective “real danger of bias” test as the correct standard to apply.<sup>58</sup> The Court of Appeals in *AT&T*<sup>59</sup> also held that even if a “simple procedural mishap,” it was not appropriate to remove the Canadian lawyer in this instance, because the Court determined there was an absence of any “actual bias,” and it was inappropriate to set aside the awards because the arbitrator was a “well-respected and experienced arbitrator in his field.”<sup>60</sup>

#### D. Duty of Confidentiality and Duty of Full Disclosure

The Court of Appeals ruling in *AT&T* is unique in that the judges took a wide approach on whether the Canadian arbitrator’s initial omissions and failures to disclose were violations and the various common

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<sup>52</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All ER (Comm.) 625; see *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 119, 135 (Lord Brown-Wilkinson) (“The rationale of the whole rule is that a man cannot be a judge in his own cause”).

<sup>53</sup> *R. v. Gough* [1993] AC 646, 652 (defining the “real danger of bias” test as whether a judge should discharge the juror if he feels “there is a real danger of bias affection the mind of the relevant juror.”).

<sup>54</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All ER (Comm.) 625.

<sup>55</sup> *R. v. Gough* [1993] AC 646.

<sup>56</sup> *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451.

<sup>57</sup> *Laker Airways Ltd. v. FLS Aerospace Ltd.* [1999] CLC 1124.

<sup>58</sup> *Sumukan Ltd v. Commonwealth Secretariat* [2007] EWCA Civ. 1140; and by *Glencot Development & Design Co. Ltd. v. Ben Barrett & Son (Contractors) Ltd.* [2001] B.L.R. 207 (Upholding the decision in *AT&T Corp. v. Saudi Cable Co.*, [2000] WL 571190, of the *R. v. Gough* “Real Danger of Bias” test being the correct test for actual and unconscious arbitrator bias and misconduct).

<sup>59</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All ER (Comm.) 625.

<sup>60</sup> *Sumukan Ltd v. Commonwealth Secretariat* [2007] EWCA Civ. 1140; *AT&T Corp. v. Saudi Cable Co.*, [2000] WL 571190.

law tests for bias and misconduct laid-out by the British Courts.<sup>61</sup> In particular, the Court of Appeal's reasoning in *AT&T* seems to be a lax approach in avoiding the strict application of such well-established rules and common law tests that require strict scrutiny for "apparent bias" when considering the removal of an arbitrator, as established in *ex-parte Dallaglio*.<sup>62</sup> The ruling in *R. v. Gough* required a strict application of the objective test for real and actual bias as viewed in the eyes of a "reasonable man."<sup>63</sup> A reasonable man would most definitely view an arbitrator with an undisclosed directorship at a known competitor as presenting a true and real danger of bias. The Court of Appeals in this instance, however, seemed to disagree with common sense, and let the Canadian lawyer "off the hook!"<sup>64</sup>

Furthermore, the Court of Appeals in *AT&T* seemed willing to circumvent the issue of high risk of any confidentiality concerns in its ruling, especially during a period of great instability in the telecommunications sector (1998-2003), when any information obtained could be used to gain an edge over the struggling competition. At the time, the market was tight, volatile, and fiercely competitive and sliding heavily downwards. This period was marked by bankruptcy, scandals, and the default filings of *WorldCom*, a giant in the telecoms industry that collapsed in mid-2003. Confidentiality should have been, and always should be, a major concern in international business, especially in realms of complex international commercial arbitration. While there is still heated debate over arbitration's confidentiality requirements, confidentiality must remain at the forefront, especially for arbitrators

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<sup>61</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All ER (Comm.) 625 (declaring that when the dispute is at the final stage of being resolved, "the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was unconscious bias.").

<sup>62</sup> *R. v. Inner West London Council, ex-parte Dallaglio*, [1994] AC 646, at 670 (Lord Goff.).

<sup>63</sup> *R. v. Gough* [1993] AC 646, 652.

<sup>64</sup> Miller, "Court of Appeal Refuses to Remove Arbitrator for Alleged Misconduct", Vol. 15, No. 6 (2000), p. 28.

and judges presiding over dispute proceedings of this magnitude.<sup>65</sup> The extreme importance of confidentiality is further established in subsequent cases, such as *Ali Shipping*<sup>66</sup> and *A.S.M. Shipping Ltd. of India*.<sup>67</sup> Public interests may at times outweigh confidentiality in arbitration, as held in *West Tankers*.<sup>68</sup> By far, however, many commentators are suggesting that confidentiality is too important to overlook, since an arbitration proceeding is usually mutually agreed upon by parties as a way to privately settle their disputes in confidential proceedings in a private forum against the prying eyes of any direct competitors.<sup>69</sup>

Additionally, judges dealing with applications to set aside arbitration proceedings for bias and misconduct also have difficulty formulating an applicable objective test. It has not always been as easy as applying the

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<sup>65</sup> The UNCITRAL Model Law on International Commercial *Arbitration*, lists “Matters for Possible Consideration in Organizing Arbitral Proceedings,” s.6, 31-32. The ICC Rules of Arbitration contain confidentiality rules in Appendix II s. 1-4. (Note that arbitrators and the parties may also have contractual confidentiality clauses.) Switzerland has no provisions on confidentiality, as reflected in Chapter 12 PILS. The UK has no provisions on confidentiality in its Arbitration Act, but there are common law implied duties via the holdings in *Ali Shipping* and in *A.S.M. Shipping* cited below. France also has no provisions on confidentiality in its Civil Code (except if parties have agreed under French law that deliberations should take place privately *in camera*). But there is prevailing case law in favour of confidentiality due to arbitration being a “private procedure with a confidential nature,” as held in *Aïta v. Ojeh*, [1986] Rev. Arb., Paris Court of Appeal. The United States has no provisions on confidentiality in its Federal Arbitration Act, but the tendency of the U.S. courts is that there is no implied duty of confidentiality, and asserting that confidentiality must be contracted (*United States v. Panhandle E. Corp.*) Also according to the recently revised American Arbitration Assoc. Code of Ethics for Arbitrators (2004), Canon VI, arbitrators “should be faithful to the relationship of trust and confidentiality inherent in that office.” Note that the ICSID Convention and *Rules* also do not comprehensively cover the question of the *confidentiality* and transparency in the area of investment arbitration *proceedings*.

<sup>66</sup> *Ali Shipping Corp. v. Ipyard Trogir*, [1997] EWCA (Civ) 3054 [1999] 1 W.L.R. 314 (Eng.).

<sup>67</sup> *A.S.L. Shipping of India v. T.T.M.I. of England Ltd.*, [2005] EWHC 2238 (Comm) [2006] 2 All E.R. (Comm) 122.

<sup>68</sup> *West Tankers Inc. v. Ras Riunione Adriatica di Sicurta*, [2007] UKHL 4 [2007] 1 All E.R. (Comm) 794 (Eng.).

<sup>69</sup> Christoph Müller, *La confidentialité en arbitrage commercial internationale: un trompe-l'œil?*, 23 ASA Bull. 216, 216-40 (2005); see also Claude R. Thomson & Annie M. K. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution*, 62 Disp. Resol. J., May-June 2007; see also Francois Dessemontet, *Arbitration and Confidentiality*, 7 Am. Rev. Int'l Arb., 299, 299-318 (1996).

*Gough* test.<sup>70</sup> In an effort to promote the principle that “justice must be done,” courts also use the test of “real likelihood of bias,” shown in *Metropolitan Properties*,<sup>71</sup> when scrutinizing arbitrators’ conduct and disclosures.<sup>72</sup> As Lord May asserted in *AT&T*, a case could be viewed as an incorrect decision that sets an unreasonable precedent so much so that he “could not bring himself to hold that a decision like this may be properly allowed to stand, even though there is reasonable suspicion of bias on the part of one or more of the adjudicating body.”<sup>73</sup>

The non-disclosure of a directorship and of significant shareholdings in two varied versions of a CV by a fully licensed lawyer who also checked one or two incorrect boxes on an ICC disclosure form, on exactly the same topic of previous relations with Nortel should certainly add-up to misconduct and a real danger of arbitrator bias. One can also only hope that the courts and the ICC go back to the basics from now on to uphold the legitimate expectations of the parties involved in international arbitrations and consider any notion or appearance of bias as too important to be stepped around, even so slightly as it occurred in this instance; especially in the name of eliminating doubt, and preserving the integrity, fairness, and confidentiality of the arbitration proceedings, and most importantly, so that people do not lose faith in arbitration as a whole.

## II. Counsel Ethics

### A. “*Ethical No-man’s Land*” and the Need for a New Supra-national Authority

This is a topic plagued with many difficulties. International arbitration advocacy and the rules that govern the professional conduct and ethics for international arbitration counsel have become a controversial discussion in recent years. Professor Catherine Rogers began to address

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<sup>70</sup> *Hagop Ardahalian of Beirut v. Unifert International S.A. of Brussels (The Elissar)*, [1984] 2 Lloyd’s Rep. 84, 89 (Eng.); *Tracom S.A. v. Gibbs*, [1985] 1 Lloyd’s Rep. 586,595-96 (Eng.).

<sup>71</sup> *Metropolitan Properties Co. (FGC) Ltd. v Lannon*, [1969] 1 QB 577, 606 (Eng.) (identifying that the “real likelihood of bias” is not through looking “at the mind of . . . who sits in a judicial capacity,” but instead “at the impression which would be given to other people.”).

<sup>72</sup> *Metropolitan Properties Co. (FGC) Ltd. v Lannon*, [1969] 1 QB 577, 606 (Eng.).

<sup>73</sup> *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 All. E.R. (Comm) 625.

this topic in 2002. In her article, “Developing a Code of Conduct for International Arbitration,” Rogers asserted:

Often by design, arbitration is set in a jurisdiction where neither party’s counsel is licensed. The extraterritorial effect of national ethical codes is usually murky... there is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far ... specialized ethical norms for attorneys in international arbitration are nowhere recorded. Where ethical regulations should be, there is an abyss.<sup>74</sup>

Hence, there may be a compelling need for the development of an internationally standardized Code of Ethics for Counsel involved in International Arbitration, and a need for institutions to adopt it as well.

The International Bar Association’s (“IBA”) already uses a code of ethics for international lawyers called the “International Code of Ethics.” However, the IBA Code was last revised in 1988 and is not specific to international arbitration.<sup>75</sup> Thus, it does not address the required issues that a potential new Code for International Arbitration Counsel would and should address. A major concern, called the “Double Deontology,” is a situation where a lawyer is governed by more than one code of ethics and is raised in the very first rule of the IBA Code. This rule states, “A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted to. He shall also observe all ethical standards which apply to lawyers of the country where is working.” Should the rules of a lawyer’s home jurisdiction not align with those of the foreign jurisdiction he is working-in, which set of rules should prevail? To be safe, a lawyer should follow the rules of both his home jurisdiction and that of the foreign one; if they conflict, the arbitrator should remove himself from the procedure or make an effort to inform the tribunal that a conflict exists without trying to sacrifice either set of rules. Certainly, the client suffers in this situation and the client whose lawyer is subject to the

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<sup>74</sup> Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int’l. L. 341 (2002).

<sup>75</sup> Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, (Penn State Legal Studies Research Paper No. 18-2010).



lower standard may have an unfair advantage.<sup>76</sup> One can definitely see from this scenario that the IBA's Code is clearly lacking and that there is a true need for a new internationally adoptable and standardized Code for Counsel involved in international arbitration.

There is, however, another supra-national Code of Conduct for European Lawyers, prepared by the Council of Bars and Law Societies of Europe (CCBE Code). However, this Code only has three substantive provisions relating to a lawyer's conduct in international arbitration. The three provisions do not go far enough and do not solve many of the complex problems encountered by counsel involved in international arbitration. Recently, another provision was added to the CCBE Code that requires lawyers to comply with the rules of conduct of the tribunal they are practicing in front of.<sup>77</sup> Even in such ICSID cases as *Hrvatska v. Slovenia*<sup>78</sup> and *Rompotrol v. Romania*,<sup>79</sup> the same question remains and ICSID's Convention<sup>80</sup> and Rules<sup>81</sup> do not address any specific standard of ethics.

However, as Justice Veeder noted in a recent lecture, "because international practitioners involved in international arbitration do not usually share the same legal culture, it does not mean that they are pirates sailing under no flag; it means only that on the high seas, navigators need more than a coastal chart."<sup>82</sup> Statements like these show a compelling need for an internationally standardized code. Leaving it to the tribunals to solve ad hoc or to the courts to police, however, would prevent transparency and it would simply be a way for arbitrators to increase costs as a form of counsel control and regulation. There is a universal duty to practice and arbitrate with integrity and in good faith,<sup>83</sup> and the enforcement of

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<sup>76</sup> J.Paulsson, *Standards of Conduct for Counsel in Int'l Arbitration*, 3 Am. Rev. Int'l. Arb. 214 (1992).

<sup>77</sup> CCBE Rule 4.1, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Code\\_of\\_conductp1\\_1306748215.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf).

<sup>78</sup> *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (May 6, 2008).

<sup>79</sup> *Rompotrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Jan. 14, 2010).

<sup>80</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T 1270.

<sup>81</sup> ICSID Additional Facility Rules, Fact-finding (Schedule A), Conciliation (Schedule B), and Arbitration (Schedule C) (Apr. 2006).

<sup>82</sup> Johnny Veeder, *The 2001 Goff Lecture- The Paramount Objective of Fairness: The Duty to Arbitrate in Good Faith*, 18 *Arbitration International*, 431, 438 (2002).

<sup>83</sup> William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 San Diego L.Rev. 629, 657 (2009).

any future standardized code should be done by the major arbitral institutions. Thus, any new Counsel Code of Conduct would be expressly binding as a condition of the parties consent.<sup>84</sup>

The IBA appointed a task force in 2008 to investigate the possibility of a new standardized Code for Counsel Ethics. It is currently chaired by Ms. Julie Bedard, Counsel at Skadden, Arps, Slate, Meagher & Flom LLP.<sup>85</sup> The task force, however, does not investigate arbitrator conflicts of interest. Instead, another IBA subcommittee undertook this hot topic. The mandate of the IBA Task Force on Counsel Ethics focuses on whether the “lack of international rules and conflicting norms on counsel ethics undermines the fundamental protections of fairness, equality and the integrity of international arbitration proceedings.” The one main question is “what if anything, should the Task Force present so as to mitigate such an adverse situation, if it exists?”<sup>86</sup> Additionally, the IBA Task Force has circulated a survey asking whether it should formulate a specific Code of Ethics for Counsel involved in International Arbitration that mimics the IBA Code of Ethics in International Arbitration. Their hope is to get vital practitioner and institutional feedback before deciding on whether to formulate a new standardized code.<sup>87</sup> Ultimately, though, the questions still remains as to whether we can actually wait for a new code.

Traditionally, lawyers are all subject to ethical rules that are created and enforced by national and state regulatory authorities. Since arbitration has now become a global practice, codified ethics rules for attorneys in this area are lacking; however, practitioners and regulators alike are still uncertain as to whether “*home-state*” regulations on conduct and ethics extend internationally into arbitration proceedings outside of

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<sup>84</sup> Doak Bishop, Keynote Address to the ICCA Congress at the Int'l Arb. Conf. in Rio de Janeiro, Brazil, *Ethics in International Arbitration* (May 23-26 2010).

<sup>85</sup> IBA Arb. Committee, *Counsel Ethics in International Arbitration*, Arb. Survey 75329-5 p. 1 (2008). <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45ae-8c3a-70dfdb2274a5>

<sup>86</sup> IBA Arb. Committee, *Counsel Ethics in International Arbitration*, Arb. Survey 75329-5 p.1-24 (2008).

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610BBF6E-CF02-45AE-8C3A-70DFDB2274A5>

<sup>87</sup> IBA Arb. Committee, *Counsel Ethics in International Arbitration*, Arb. Survey 75329-5 p. 22 (2008). <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610BBF6E-CF02-45AE-8C3A-70DFDB2274A5>

an attorney's home jurisdiction.<sup>88</sup> Even when home state ethical rules are applied extraterritorially, they often conflict with the opposing counsel's governing rules from another jurisdiction. Therefore, at best, attorneys involved in international arbitrations are abiding by different national rules, and at worst, they are operating in what has become the notorious "ethical no man's land."<sup>89</sup> Many important scholars have called for new ethical rules for counsel as well and have recognized that an international standard governing attorney conduct in the context of international tribunals, and more specifically, international arbitration, is required in order to prevent the conflict of national rules.<sup>90</sup>

A new standardized code for Counsel would increase the confidence in the international arbitration system as a whole and increase jurisdictional access for foreign attorneys. A uniform code would ensure integrity and allows larger law firms to provide their clients with a "one-stop-shop" solution of sorts; clients would no longer be forced to select local counsel to represent them in foreign jurisdictions.<sup>91</sup> Interestingly, the United States implemented the Sarbanes-Oxley Act of 2002 ("Act"), which is a milestone in the efforts of improving corporate governance and ethics in general. However, the ABA has raised concerns in § 307 of the Act, which may have the potential to harm the attorney-client rela-

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<sup>88</sup> Tom Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *Lex Mercatoria and Arbitration*, 23, 23-41 (T. Carbonneau, ed., 1998); see also Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 *J.L. & Comm.* 301, 305 (1998) (noting that a bar opinion permits parties to international arbitration to be represented by non-state-licensed attorneys).

<sup>89</sup> Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, (Penn State Legal Studies Research Paper No. 18-2010) (Boccioni Legal Studies Research Paper No. 1559012).

<sup>90</sup> Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct before International Arbitral Tribunals*, in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, 488, 488-509 (Cambridge University Press, 2010); Pierre Heitzmann, *Confidentiality and Privileges in Cross-border Legal Practice: the Need for Global Standards?*, 26 *ASA Bull.* 205 (2008); Carrie Meadow, *Are cross-cultural Ethics Standards Possible or Desirable in International Arbitration?*, (Georgetown Public Law Research Paper No. 2008-02, at 19) (University of California, Irvine School of Law Research Paper No. 2008-2); Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 *Am. Rev. Int'l. Arb.* 214 (1992).

<sup>91</sup> Martha Walsh, *The International Bar Association Proposal for a Code of Professional Conduct for Counsel before the ICC*, 1 *J. Int'l. Crim. Justice* 490, 499 (2003).

tionship.<sup>92</sup> The Act's two most critical provisions are the "up the ladder" reporting requirements and the proposed "noisy withdrawal" rules governing attorney conduct. The ABA strongly opposes the noisy withdrawal rules because they believe the rules exceed the Congressional mandate of the Act. The ABA believes that attorneys should be regulated by state courts and not by the federal government. Notwithstanding these, and other, legitimate concerns, a question remains: If standardization at the federal level in the U.S. alone has such catastrophic effects and strong opposition, what confusion and/or opposition may result in any international effort to standardize counsel ethics and professional conduct rules?<sup>93</sup>

### **B. The Good-old National Rules**

Recently, Jamie Gorelick and Michael Traynor, co-chairs of the ABA Commission on Ethics 20/20, addressed an open letter to the ABA Special Forums, Task Forces, and Committees that argued for the continued use of national rules for counsel ethics in addition to working on the development and implementation of an internationally standardized code for Counsel Ethics.<sup>94</sup> They pointed out that there is no visible effort to combine the IBA Task Force investigation on Counsel Ethics with the efforts of the ABA Commission of Ethics 20/20 and that separate efforts without intense consultation between the organizations may only lead to more confusion, lack of transparency, lack of application of either sides new rules, and possible failure on both sides. They continued to assert in their open letter that the "application and continued use of national conduct rules would be best for now" and "national jurisdictions are already putting forward major efforts to ensure that a top standard of Counsel Ethics is in place."

The main challenges seem to be: overcoming recent regulatory developments; issues relating to choice of law; national evidence rules; and other related areas that may concern conduct and procedure. While the ABA makes a commitment to post the results of its efforts on its webpage, there is still an apparent lack of communication on their end with the IBA Task Force and it is still unknown whose rules and efforts

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<sup>92</sup> 15 U.S.C.A. 7245.

<sup>93</sup> Michael Greco, speech at the National Italian-American Foundation, Institute for International Law, International Legal Conference, Rome, Italy (May 10, 2005).

<sup>94</sup> J. Gorelick and M. Traynor, *Introduction and Invitation to Participate*, ABA Commission on Ethics 20/20, (October 19, 2009).

will actually prevail. The ABA promises in the open letter to consult “affiliated entities, the judiciary, the bar (including international, state, local, and specialty bar associations) and the public, in framing and discussing the related issues” on Counsel ethics, but it is still not clear whether the IBA’s Task Force is included. One can only hope that the two forces will seriously consider working closely together while analyzing this hot-topic, and before proposing any final set of rules on counsel ethics. The last thing the arbitration community needs is more confusion on the conduct to adopt inside or outside of their home jurisdictions, especially during international arbitration proceedings when their main focus should instead be on the client’s interests.

The national rules that attorneys have followed during arbitration and dispute resolution proceedings so far have served them and the arbitration community well for many years. Why cater to the large law firms seeking greater access to foreign markets and eliminate opportunities for the little man to be selected in his home jurisdiction as counsel for arbitration proceedings? Why should rules restrict the client’s freedom of choice to select a more knowledgeable local attorney, simply to give the large firms the right to bring their own foreign lawyers into the process abroad under new and untested sets of counsel rules? Rules standardization must never trump the client’s interests nor the interests of parties involved in an international arbitration.

### CONCLUSION

Strict adherence to the ethics rules for arbitrators, as set out in *Commonwealth*, by requiring full disclosure from the outset and strict adherence to the common law tests for arbitrator bias, misconduct, and impartiality reduces the risk of judicial misinterpretation should any dispute arise before a court of law. The IBA Code of Ethics for International Arbitrators also provides clear and transparent rules that should be strictly followed during arbitrator selection and throughout the arbitration process. The common law rules and ethics codes discussed above also help us draw lines between acceptable behavior and trivial actions and help define the “real danger” of arbitrator bias and misbehavior. There is also, by the author’s own estimation, a true need for a newly revised international code on arbitrator ethics. Revising and

implementing such a code would help eliminate any “grey areas” and ultimately promote confidence in the arbitration system as a whole.<sup>95</sup>

On a broader level, the IBA Rules of Ethics for International Arbitrators are more than twenty years old and, even though they are not quite obsolete, the arbitration community’s discussion on ethics is growing and has rightly moved to the area of *Counsel Ethics*. There is a need to keep such a discussion alive, and some of the Eastern European arbitral institutions have taken-up the challenge quite respectably. They have actually created standard codes of ethics for arbitrators acting under their auspices, namely in Poland and Latvia. It remains to be seen whether the other, more prominent arbitral institutions will follow suit. For the moment, the major institutions seem satisfied with leaving this issue to the international arbitration community. However, there is no reason not to aim for an updated and broad new consensus on arbitrator and counsel ethics.

The study of whether there should be a new code of ethics for *Counsel* involved in international arbitration is still in its infancy. This study requires a closer cooperation between the various rule-making organizations to be successful. There are arguments for and against a new code, and the question remains as to whether the major arbitration governing bodies and the tribunals would adopt a new and internationally standardized code, as opposed to the continued use of our respectable national ethics codes for Counsel.

The topic of a new Counsel Code of Ethics has received considerable attention to date. This is especially true of the IBA and the ILA, at a recent ICCA Congress in Rio de Janeiro, Brazil. A new code should bring greater integrity and level the playing field for practitioners from different jurisdictions. On the other hand, some practitioners are skeptical towards the real need for any such code at this point in time, noting that the recent 2010 ICC-YAF roundtable in Paris, generally concluded that such a code was “*unnecessary and would only cause more confusion.*” The IBA appears to have taken a wait-and-see approach as it investigates the topic. Nevertheless, and regardless of the outcome, an educated debate is justified and necessary at this time. If practitioners do not have the debate themselves, then legislators, regulators, and others may have it for them. The time is ripe, and the discussion is essential

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<sup>95</sup> Philipp Peters, *Can I do this? Arbitrator Ethics*, Kluwer Arb. Blog (Nov. 8, 2010). <http://kluwerarbitrationblog.com/blog/2010/11/09/can-i-do-this-%E2%80%93-arbitrator%E2%80%99s-ethics/>

to the integrity and promise of international arbitration. It is quintessential that arbitration maintains its preferred status as one of the most effective and efficient forms of dispute resolution.<sup>96</sup>

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<sup>96</sup> Gary Born & Thomas R. Snider, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Arb. Blog (Nov. 16, 2010). <http://kluwerarbitrationblog.com/blog/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration/>