WHITE & CASE

Barristers from the Same Chambers Appearing as Counsel and Arbitrator: Independence Revisited?

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The English system of barristers' chambers is a creature familiar to common law lawyers, but much less so to those trained in the civil law tradition. While in England, for example, people generally assume that barristers in a given set of chambers consider themselves, and indeed are, independent of their colleagues, this concept is harder to accept for people lacking familiarity with such a system.

International arbitration, by definition, involves parties (and frequently counsel) from different legal cultures. The question thus arises as to how far one can take this assumption of independence once outside the confines of a purely English or common law set of circumstances. As John Kendall put it (citing Pierre Lalive): 'the international arbitrator… must be neutral with regard not only to the countries of the parties and their political systems, but also to the *legal systems and concepts* of both parties...'[1]

The most obvious manifestation of this issue is where members of the same chambers appear as counsel and arbitrator in the same case. How far can one take this presumption of independence, and what is the test to be employed?

This situation has, it will be seen, given rise to much debate among international arbitration scholars and practitioners.[2] There have indeed been attempts to establish working groups to look into the question, and the ICC (UK) went so far as to hold a (well attended) seminar on the subject in June of this year. So what is the position today?

In addition to the (already broadly debated) cultural issue, a new source of controversy has recently arisen. Barristers' chambers are now marketing themselves collectively, thereby undercutting the idea that barristers from the same chambers are independent. Confronted by a number of challenges to arbitrators' independence,[3] the position taken by courts and arbitral institutions appears to be evolving. Formerly quite deferential towards the barristers' 'cultural exception', courts and arbitral institutions now appear more reluctant to consider barristers as a breed apart.

This is not to suggest uniformity of approach. As will be seen, there remains some (minor) divergence in the English camp, and different continental states have different views as well (although as will be seen, when looking at this in chronological terms, their decisions may themselves simply be indicative of an evolving trend). One need only consider a couple of judgments of the Swiss Federal Tribunal and the (Italian) Tribunal of Genoa. The Swiss Federal Tribunal – in a case involving an arbitrator and a counsel who were partners in the same *firm* – held (in 1998) that '… the fact that two lawyers, one as arbitrator the other one as counsel, owned together a law firm… is not in itself a ground for revocation'.[4] On the other hand, the Tribunal of Genoa found (in 2006) that the fact that an arbitrator and one of the parties' counsel shared the same *premises* (and that the grandfather of the counsel was a friend of the arbitrator's father), were sufficient reasons to revoke the arbitrator's appointment.[5]

As will hopefully be seen, there is a trend developing, and the news, alas, is not particularly cheerful for the English Bar.

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Principles applicable to the assessment of barristers'

Independence and impartiality

Arbitral Rules

In addition to the professional guidelines and the various national statutes applicable to the question of arbitrators' independence (too many to mention here), institutional arbitration rules usually require both independence and impartiality. Independence is usually considered as an objective standard, and impartiality a subjective one. According to Fouchard, Gaillard and Goldman:

> '… Independence is a situation of fact or law, capable of objective verification. Impartiality, on the other hand, is more a mental state, which will necessarily be subjective.'[6]

While there is some variance in the terminology used in the rules regarding impartiality and independence, it is suggested that the test remains by and large the same.[7]

The Duty to Disclose

Institutional rules also require some form of disclosure of relevant relationships. Some variations again arise, although these are not – it is suggested – overly material.[8]

To illustrate, the IBA Guidelines 'Orange List' suggests disclosure where 'the arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers'[9] but thereby posits that this is not a situation calling for automatic recusal.

Yet, according to Turner and Mohtashami, in 2009, the IBA Guidelines do not reflect fully the position of the London Court of International Arbitration (LCIA). They considered that:

> 'The fact of an arbitrator's being in the same chambers as counsel for one of the parties is… regarded as a matter for disclosure by the working party that drafted the IBA Guidelines, but not as a matter for automatic disqualification. It is not the position of the LCIA Court to regard a barrister's sitting as arbitrator… in a matter in which a member of his chambers appears as counsel for one of the parties as evidence of a lack of independence or impartiality, whatever the differing cultural backgrounds and expectations of the other party or parties.'[10]

As a consequence, the way institutions enforce the institutional rules on disclosure could introduce some variation in the situations in which arbitrators consider they have to disclose. (The various institutional rules remain, however, similar in substance, and we suggest would almost certainly require barristers sharing chambers to disclose this fact.)

Principles applied by arbitral institutions and national courts to the issue of challenge of barristers

Timing and jurisdiction

Timing

All arbitration rules provide a time frame for challenge. The challenging party generally has 14,[11] 15[12] or 30[13] days from the notice of appointment of the arbitrator,[14] or from when they become aware of the circumstances giving rise to the challenge.

The stage of the proceedings at which the challenge is submitted to the competent jurisdiction can also conceivably (and to some, somewhat surprisingly) have an influence on its success.

According to the Working Group on the IBA Guidelines, institutions make a distinction depending on the moment during the arbitration when the challenge is submitted. Nevertheless, the Group clearly states that:

> '… [it] believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.'[15]

Jurisdiction

The body competent to hear a challenge can change, depending on the type of arbitration (institutional or ad hoc) as well as the moment when that challenge takes place (during the arbitration or after the award has been made).

During the proceedings

Most institutional rules provide a mechanism for an internal review of challenges.[16]

In ad hoc arbitrations, on the other hand, the parties will either have agreed to the application of a particular set of rules (such as the UNCITRAL rules), or the arbitration law of the seat of arbitration will set the standard.

In the former case, the UNCITRAL rules designate the appointing authority who should rule on challenges.[17] In other ad hoc cases, the application will usually be made to the courts of the place of arbitration.

In ICSID cases, the decision is left to the other members of the tribunal or, in certain circumstances, the Chairman of the Administrative Council.[18]

After the award has been made

The challenge can also arise after the award has been made. Article V(2) (b) of the New York Convention[19] allows courts to refuse enforcement of awards if it would be contrary to public policy. In most convention countries parties, lack of independence of an arbitrator is considered to be caught under this rubric.[20]

However, as emphasised by Mallett and Allen, the evidentiary bar at this later stage is usually stricter than during the arbitration. And for those complainants 'holding their fire' until they see the result of a given case, it need obviously be kept in mind that most national courts allow challenges only where, during the arbitration, the relevant evidence was not, and could not reasonably have been, known during the proceedings.[21] This all suggests that challenges after an award is rendered involve higher standards for the complainant (at least as to proof of ignorance).

The question of challenge: from a tolerant approach to a more recent, stricter, approach?

The tolerant approach

The general rule under English law appeared to be that in the absence of a personal connection between the two barristers, a barrister could quite properly accept an appointment as arbitrator even though a colleague from the same set of chambers is representing one of the parties. The leading English decision on this issue, the 1999 *Laker* case, confirmed this and described the relevant test as 'whether circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality'.[22]

The fact that a barrister-arbitrator was a member of the same set of chambers as an advocate representing one of the parties was not itself considered sufficient to constitute a conflict of interest or to justify doubts as to the arbitrator's impartiality.

This position was not confined to English law; the French Court of Appeal in the 1990 case of *Kuwait Foreign Trading Contract & Investment Co v Icora Estero SpA* heard expert evidence as to the independent nature of a barrister's practice.[23] It found that there was no objective basis on which to question a chairman's independence merely because he belonged to the same set of chambers as a party's counsel. This decision provided some assurance that the English courts' position was not wholly at odds with the views of foreigners.

A change?

The number of challenges in all the major institutions in the past decade indicates a trend that – whatever the true motives – accords less respect to a given arbitrator's protestations of independence.

By way of example (and while still a comparatively small number), the LCIA has registered a marked increase in challenges. The court registered 14 challenges between 2001 and 2005 (slightly less than four per year),[24] four challenges for 2008, and ten challenges per year for 2009, and 2010, respectively.[25]

While the published statistics are less recent, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) recorded a growing number of challenges, with a peak in 2004 and 2005. It seems, however, that the number of challenges decreased again in 2006 and 2007. In 1999, the SCC registered five challenges to an arbitrator's independence, four in 2000, two in 2001 and 2002,[26] ten in 2004,[27] 11 in 2005, six in 2006, and five in 2007.[28] (Of course any drop in the number of challenges may be attributed to a growing awareness of the issue and hence already take this into account in the initial selection of a given arbitrator.)

The number of challenges registered by the ICC in 2000–2010 is also high compared to the 1980s and 1990s, peaking at around 40 challenges per year. In 2000 and 2001 the ICC registered 33 challenges each year, 17 in 2002,[29] 20 in 2003,[30] 37 in 2004,[31] 40 in 2005,[32] 38 in 2006,[33] 22 in 2007,[34] 23 in 2008[35] and 34 in 2009.[36]

A recent decision by an ICSID tribunal in the case *Hrvatska Elektroprivreda v The Republic of Slovenia* has itself thrown the former tolerant trend into doubt. In this case, at a late stage in the proceedings, the Republic of Slovenia instructed, as advocate, a member of the barrister-chairman's chambers. This led the claimant to challenge Slovenia's right to use that barrister as advocate, because it had justifiable concerns about the chairman's impartiality.

> The tribunal found in favour of the claimant, concluding that:
> '… Chambers themselves have evolved in the modern market place for professional services with the consequence that they often present themselves with a collective connotation.'
> …
> 'The justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include… the fact that the London Chambers system is wholly foreign to the Claimant…'[37]

Barristers from the Same Chambers Appearing as Counsel and Arbitrator: Independence Revisited?

National courts' attitudes seem to be changing as well, even in English cases regarding purely national parties (influenced, in large part it seems, by the chambers' new marketing techniques). While in the (English) *Nye Saunders*[38] and *Lawal*[39] cases, it was perfectly acceptable for a Recorder acting as part-time judge to be a barrister from the chambers of one of the counsel, concerns have elsewhere been expressed. In the 2006 case, *Smith v Kvaerner*, where the part-time judge was also the head of chambers of one of the two counsel arguing the case, the Court of Appeal held that:

> 'Judges in this jurisdiction, whether full time or part time, frequently have present or past close professional connections with those who appear before them and it has long been recognised that this, of itself, creates no risk of bias nor, to those with experience of our system, any appearance of bias… At the same time we can see the force of Mr Speaight's submission that changes in the way that some chambers fund their expenses and the fact that counsel can now act under a conditional fee agreement mean that, in some cases at least, there may be grounds for arguing that a Recorder should not sit in a case in which one or more of the advocates are members of his chambers.'[40]

Consequently, the court allowed the appeal, quashed the Recorder's decision and held that the issue be re-tried by another judge.[41]

The arbitral community has also weighed in.

Gary Born underlines the necessity to re-examine the situation of barristers, taking into account their new practices:

> 'English courts have generally rejected claims that a barrister, nominated as an arbitrator, should be removed because he or she was in the same chambers as counsel to one of the parties. Foreign courts have also reached similar results. These conclusions rest, however, on conclusions regarding the commercial structure of barristers' chambers and, *insofar as this structure alters, holdings regarding bar risters' independence must be re-examined.*'[42]

William W Park also expresses concern over the new marketing structures. He argues that:

> 'Most barristers seem to reject application of the conflict of interest rules that would normally be relevant to practice within a law firm. Considering themselves independent and self-employed, sharing expenses but not revenues, barristers see no reason why two members of the same chambers should refrain from acting for opposite sides of an arbitration or why one should not sit as arbitrator in a case where another serves as advocate. Not all are convinced, however, that the integrity of proceedings remains uncompromised when barristers from one set of chambers serve as arbitrator and counsel in the same arbitration. Shared profits are not the only type of professional relationships that can create potential conflicts. Senior barristers often have significant influence on the progress of junior colleagues' careers. *Moreover, London chambers increasingly brand themselves as specialists in particular fields, with senior "clerks" taking on marketing roles for the chambers, sometimes travelling to stimulate collective business.* Moreover, a barrister's success means an enhanced reputation, which in turn reflects on the chambers as a whole.
>
> In response to doubts about the ethics of their practice, some barristers suggest that outsiders just do not understand the system, characterizing the critiques as naïve… Often, however, outsiders do understand the mechanics of chambers. They simply evaluate the dangers differently.'[43]

Buhler and Webster also referred to the IBA Guidelines in 2008 and these new marketing techniques:

> 'With respect to barristers, the background paper notes that the general rule is that barristers in chambers share expenses and not revenue. However, it also notes that chambers, perhaps increasingly, issue marketing material and then comments that "the Working Group considers that full disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. Thus, barristers (including persons who are 'door tenants' or other wise affiliated to the same chambers) should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity." The treatment of barristers will of course depend on the place of arbitration as discussed in Art 11. If the place of arbitration is England, then based on the *Laker* case, there appears to be no issue with respect to barristers from the same chambers acting as counsel and arbitrator in the same arbitration. The problem remains for parties coming from jurisdictions where the chambers' system of barristers is unfamiliar to them, and where parties are therefore likely to have some difficulty, at least initially, to understand and accept this unique situation.'[44]

According to a survey recently carried out by the UK-based law firm Berwin Leighton Paisner, who canvassed a cross-section of law firms in respect of the practice of having arbitrators and advocates from the same set of barristers, chambers, it seems

that many clients remain suspicious of those situations. Of the key findings, a couple stand out:

> 'The survey attracted a broad response from firms with established arbitration practices and from firms whose partners had experience of sitting as arbitrators.
>
> Over half of firms responding have handled arbitrations in which an English barrister had either sat on the arbitral tribunal or appeared as advocate for one side.
>
> A significant majority of lawyers responding considered it to be inappropriate for there to be a barrister on the tribunal from the same set of barristers' chambers as the advocate for one of the parties.
>
> The over whelming majority of lawyers (78%) believed their clients would regard such an arrangement in a negative light.
>
> The geographical origin of clients made little difference to this view, although clients from jurisdictions familiar with the English model of the split profession were likely to be less concerned.
>
> Clients would be more relaxed about the risk of conflict if assured that there were strict information barriers in place between arbitrator and advocate.
>
> The lack of a financial interest in each other's fees was felt also to make clients more comfortable.
>
> Clients were also likely to be more comfortable if the barrister sitting as arbitrator and the barrister appearing as advocate were not well known to each other.
>
> The lawyers responding felt that their clients would be more concerned if roles were reversed and the barrister appearing as advocate regularly sat in a judicial or arbitral capacity with the other barrister appearing before him or her.
>
> Clients would also be more likely to be troubled about the risk of conflict if the barrister sitting as arbitrator and the barrister appearing as advocate had previously worked together on a contentious matter.
>
> Clients would be far more likely to react adversely where they saw sets of chambers marketing themselves as a single entity, even though the barristers themselves were not sharing profits.
>
> …
>
> Almost all firms responding indicated that their domestic law would uphold a challenge to an arbitrator on the grounds of a lack of independence or impartiality.
>
> A sizeable majority (65%) felt that a challenge to an arbitrator on the grounds that he or she came from the same set of barristers' chambers as one of the advocates in the case was likely to succeed under the relevant domestic law.'

It therefore seems that from a client's prospective, choosing an arbitrator who shares chambers with their counsel is increasingly perceived as a risk.

Concluding remarks

An increasing trend towards challenges, and the change in marketing practices, will almost certainly result in a move towards a stricter standard of judgment on the independence of barristers sharing chambers. Without supporting the automatic application of a stricter rule, it appears to the writers that the barristers' 'particularity' will be progressively more difficult to defend, notably given the courts' propensity to be stricter in the rule applied to many similar issues involving – for example – 'Of-Counsel' arrangements.[45]

It seems clear from the authorities that the enquiry remains fact-based, looking at chambers' membership as one element to consider, unlike law firm membership, which in many jurisdictions seems to be per se fatal. Time will tell if the sharing of costs and promotional activities of many chambers will ring a similar death-knell for barristers. In the meantime, might we find different results depending on whether both parties are English (and hence more familiar with the practice) and those cases where one and/or the other party is not?

In terms of trends, the words of one in-house counsel in the *Laker* case are illuminating:

> 'Some years ago, my company was the claimant in a case in London in which the sole arbitrator selected by the parties was a retired Court of Appeal judge sitting in the same chambers as our counsel. During the hearings, which lasted several weeks, each party organised daily lunches for its lawyers and witnesses. At first, the sole arbitrator alternated between having lunch with one party and the other. Soon, however, he gave up entirely lunching with the other side and came exclusively to our lunches. There was never even the slightest suggestion that these daily ex parte meetings were in any way improper or cast any doubt on the arbitrator's impartiality. One cannot help but contrast this with a recent LCIA decision in which a sole arbitrator was disqualified because, "during a short adjournment for lunch, the sole arbitrator and counsel for the claimant held a private meeting of approximately 15 minutes in the arbitrator's private retiring room, behind closed doors."'[46]

Endnotes:

1 John Kendall, 'Barristers, Independence and Disclosure' (1992) *Arbitration International* 8(3), 297–298, emphasis added.

2 Lucy Reed and Jonathan Sutcliffe, 'The "Americanization" of International Arbitration?' (2001) *Mealey's International Arbitration Report* 11 (2001) 16(4); Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' *Arbitration International* (1998) 14(4) 419–420; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, Third Edition, 2000) footnote 56, 228; Julian M Lew, Loukas A Mistelis and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ¶ 11–24; Yves Derains and Eric Schwartz, *Guide to the ICC Rules on Arbitration* (Kluwer Law International, Second Edition, 2005) 127–128; David Edwards and David Foster, 'Challenges to Arbitrators' (2008) *The European & Middle Eastern Arbitration Review*, 15.

3 See below, Section 3.

4 *Tribunal Fédéral Suisse*, Cour civile (9 Februar y 1998) ASA Bulletin (1998), 16(3), 646. (Free translation) *Query*: this decision may reflect the fact that there was no fee sharing in many Swiss firms at the time (which appears – if correct in this case – to place this decision in a context analogous to that of barristers).

5 *Tribunale di Genova* (4 May 2006) Foro Italiano (2006), 9, 2559. The strict approach taken by Italian jurisdictions of questions related to arbitrators' independence seems to be confirmed by article 55, 'On Arbitration', paragraph II, of the Italian National Bar Council, which provides that: 'The lawyer cannot accept to be chosen as arbitrator where one of the parties to the proceedings is assisted by another professional who is either the partner under whom he is working, or a co-partner, or other wise who shares the same premises.' (Free translation). However, two earlier Italian decisions provide an opposite view (*Tribunale di Busto Arsizio*, (18 June 2000) and *Corte di Cassazione*, (28 August 2004), Number: 17192) and therefore illustrate the differences that can arise even within a particular country. See the article by Pietro Ferrario, 'Challenges to Arbitrators: where a Counsel and an Arbitrator Share the Same Office – The Italian Perspective' in Michael Moser and Dominique Hascher (eds), *Journal of International Arbitration* (2010) 27(4), 421–426.

6 Emmanuel Gaillard and John Savage (eds), Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, *On International Arbitration* (Kluwer Law International, 1999),1028. See also Yves Derains, Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, Second Edition, 2005), 118: 'Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind….'

7 Article 7(1) of the AAA/ICDR Arbitration Rules provides:

> 'Arbitrators acting under these Rules shall be impartial and independent…'

Article 5(2) of the LCIA Arbitration Rules provides:

> 'All arbitrators conducting an arbitration under these Rules shall be and *remain at all times impartial and independent* of the parties; and none shall act in the arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.' [Emphasis added]

Article 7(1) of the ICC Arbitration Rules provides:

> 'Every arbitrator must *be and remain independent of* the parties involved in the arbitration.' [Emphasis added]

Article 10(1) of the SIAC Arbitration Rules provides:

> 'Any arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules *shall be and remain at all times independent and impartial*, and shall not act as advocate for any party.' [Emphasis added]

Article 14(1) of the SCC Arbitration Rules provides:

> 'Every arbitrator must *be impartial and independent*.' [Emphasis added]

Article 7(1) of the ICC Rules does not make any reference to impartiality. However, according to Derains and Schwartz, 'The absence of an express reference to impartiality… should not be construed as meaning that an arbitrator's partiality is to be tolerated'. (Derains and Schwartz, *A Guide to the ICC Rules of Arbitration*, see note 6 above, 119). See also Lew, Mistelis, et al, *Comparative International Commercial Arbitration*, see note 2 above, ¶ 11-7: 'While the latter is the case for the omission of "impartiality" in Article 7(1) ICC Rules, the reference to impartiality only in section 24 English Arbitration Act is the result of a decision against imposing the requirement of independence. As a consequence both principles should be distinguished though *in practice they are often used interchangeably.*' [Emphasis added]

8 Article 7(1) of the AAA/ICDR Arbitration Rules provides:

> '… Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and to the administrator. Upon receipt of such information from an arbitrator or a party, the administrator shall communicate it to the other parties and to the tribunal.'

Article 5(3) of the LCIA Arbitration Rules provides:

> 'Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written résumé of his past and present professional positions; he shall agree in writing upon fee rates conforming to the Schedule of Costs; and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.'

Articles 7(2) and 7(3) of the ICC Arbitration Rules provide:

> '(2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
>
> (3) An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.'

Articles 10(4) and 10(5) of the SIAC Arbitration Rules provide:

'(4) An arbitrator shall disclose to the parties and to the Registrar any circumstance that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before appointment by the Chairman.

(5) An arbitrator shall immediately disclose to the parties, to the other arbitrators and to the Registrar any circumstance of a similar nature that may arise during the arbitration.'

Articles 14(2) and 14(3) of the SCC Arbitration Rules provide:

'(2) Before being appointed as arbitrator, a person shall disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence. If the person is appointed as arbitrator, he/she shall submit to the Secretariat a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to that person's impartiality or independence. The Secretariat shall send a copy of the statement of impartiality and independence to the parties and the other arbitrators.

(3) An arbitrator shall immediately inform the parties and the other arbitrators in writing where any circumstances referred to in paragraph (2) arise during the course of the arbitration.'

9 *IBA Guidelines on Conflicts of Interest in International Arbitration*, approved on 22 May 2004, Orange List, 3.3.2., 23.

10 Peter Turner and Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press, 2009), ¶¶ 4.27–4.28. [Emphasis added]

11 SIAC Rules, article 12(1).

12 AAA/ICDR Rules, article 8(1); LCIA Rules, article 10(4); SCC Rules, article 15(2).

13 ICC Rules, article 11(2).

14 Under article 10(4) of the LCIA Rules the starting point is the moment of formation of the arbitral tribunal rather than the time of appointment. SCC Rules, article 15(2) only refers to the moment following the party's awareness of the circumstances giving rise to the challenge.

15 *IBA Guidelines on Conflicts of Interest in International Arbitration*, approved on 22 May 2004, Explanation to General Standard 3(d), 10. [Emphasis added]; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009), 1514, criticises the institutions' approach, stating that: '[such] approach will substitute for real analysis, leading to a strong presumption of removal at the outset of proceedings and an effectively irrebuttable presumption against annulling an award at the end of the proceedings.'

16 See AAA/ICDR Rules, article 9, which designates the AAA/ICDR administrator; ICC Rules, article 11(3), which designates the ICC Court; LCIA Rules, article 10(4), which designates the LCIA Court; SIAC Rules, article 13(1), which designates a Committee of the SIAC Board; SCC Rules, article 15(4), which designates the SCC Board. See, however, DIS Arbitration Rules, article 18(2), which provides that the arbitral tribunal itself will make the decision on challenge.

17 See UNCITRAL Rules, articles 6 and 12.

18 See ICSID Rules, articles 57 and 58.

19 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

20 Daisy Mallett and Nathalie Allen, 'Party Instigated Arbitrator Challenges: a Practical Guide'(2011) *Arbitration* 77(1), 68.

21 *Ibid.*

22 Queen's Bench Division, *Laker Airways Inc v FLS Aerospace Ltd and another* (16 April 1999) *Weekly Law Reports* (28 Januar y 2000), 1, 113 ff.

23 Cour d'appel de Paris, *KFTCIC v Icori Estero* (28 June 1991) *Revue de l'Arbitrage* (1992), 4, 568–571.

24 Quoted by Lord David Hacking, 'Arbitration Challenges: Theirs is to Reason Why' (December 2006) *Global Arbitration Review* 1(6), 26, available at: **www.lordhacking.com/Documentation/Hacking%20Article%20on%20Arbitrator%20Challenges%20II.pdf**.

25 Information provided by the LCIA.

26 1999–2002 statistics by Marie Öhrström, 'Decisions by the SCC Institute Regarding Challenge of Arbitrators' (2002) *Stockholm Arbitration Report*, 1, 38.

27 Quoted by Lord Hacking, 'Arbitration Challenges: Theirs *is* to Reason Why', see note 24 above.

28 2005–2007 statistics by Helena Jung, 'SCC Practice: challenge to arbitrators SCC board decisions 2005–2007' (2008) *Stockholm International Arbitration Review*, 1, 2.

29 See chart 'Challenge and replacement of arbitrators 1993–2002' (2003) *ICC International Court of Arbitration Bulletin*, 14(1), 11.

30 '2003 Statistical Report' (2004) *ICC International Court of Arbitration Bulletin* ('ICC Bulletin'), 15(1), 10.

31 '2004 Statistical Report' (2005) ICC Bulletin, 16(1), 8.

32 '2005 Statistical Report' (2006) ICC Bulletin, 17(1), 10.

33 '2006 Statistical Report' (2007) ICC Bulletin, 18(1), 9.

34 '2007 Statistical Report' (2008) ICC Bulletin, 19(1), 9.

35 '2008 Statistical Report' (2009) ICC Bulletin, 20(1), 10.

36 '2009 Statistical Report' (2010) ICC Bulletin, 21(1), 10.

37 ICSID *Hrvatska Elektroprivreda dd v The Republic of Slovenia*, Case No ARB/05/24, Order concerning the participation of a counsel (6 May 2008), ¶ 31. The test was based on article 14 of the ICSID Convention and Rule 6 'Constitution of the Tribunal' of the ICSID Arbitration Rules; the tribunal considered that: 'The ICSID Convention in Article 14 demands that arbitrators "be relied upon to exercise independent judgment". ICSID Arbitration Rule 6 requires them to "judge fairly". The objection in this case is not predicated on any actual lack of independence or impartiality, *but on apprehensions of the appearance of impropriety*. In the interest of the legitimacy of these proceedings, the arbitrators consider that the Claimant is entitled to make this objection and that it is well founded.' (¶ 22). [Emphasis added]. The tribunal also underlined that it 'does not believe there is a hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect'. (¶ 31).

38 Commented by Michael Hwang, in 'Arbitrators and Barristers in the same Chambers – an Unsuccessful Challenge' (2005) *Business Law International*, 6, 242–244.

39 House of Lords, *Lawal v Northern Spirit Ltd* (19 June 2003), in UKHL (2003), 35.

40 *Peter Smith v Kvaerner Cementation Foundations Ltd*, Case No B3/2005/1407, Court of Appeal (Civil Division), (21 March 2006), in EWCA (2006), Civ 242, ¶ 17.

41 *Ibid* ¶ 59.

42 Gary Born, *International Commercial Arbitration* [emphasis added], see note 15 above, 1520.

43 William W Park, 'Chapter 9, Arbitrator Integrity', in Michael Waibel, Asha Kaushal, et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010), 236. [Emphasis added]

44 Michael W Buhler and Tom Webster, *Handbook of ICC arbitration* (Sweet & Maxwell, Second Edition, 2008), ¶ 7–37.

45 Cour d'Appel de Paris, *J&P Avax SA v Société Tecnimont SPA* (12 Februar y 2009) and commentary by Thomas Clay, in *Revue de l'Arbitrage*, (2009), 1, 186–205. In this case, to set aside the award for lack of independence of one arbitrator, the Paris Court of Appeal did not give any weight to the fact that the arbitrator was not a regular lawyer at the law firm that had contacts with one of the parties but 'Of-Counsel' at this law firm (ie a consultant who does not work exclusively for a particular law firm). Note that the judgment of the Paris Court of Appeal was set aside by the French Supreme Court, although this was done exclusively on procedural grounds, regarding the non-respect by the Paris Court of Appeal of the time limits for challenges set by parties. (Cour de Cassation, Civ 1 (4 November 2010), Number: 0912716). Note also the case *Allaire v Sté SGS Holding France* where the Paris Court of Appeal set aside an award because one of the arbitrators had links with one of the counsel's law firms that he had not disclosed. He had given regular legal advice to this law firm but had no continuous link with it and did not benefit from any 'Of-Counsel' status (Cour d'Appel de Paris, *Allaire v Sté SGS Holding France*, (9 September 2010), Number: 09116182).

46 Louis Epstein, 'Arbitrator Independence and Bias: The View of a Corporate In-House Counsel' (2008) ICC Bulletin, 2007 Special Supplement, 55–72