

INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Dissertation submitted in fulfilment of the requirements for the degree
Magister Legum at the North-West University (Potchefstroom Campus)

by

Tania Steenkamp
11321652

Study supervisor: Prof. SP le R de la Harpe
Study co-supervisor: Mrs T van der Walt

April 2007

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION	1
CHAPTER 2 SOUTH AFRICAN LAW ON INDEPENDENCE AND IMPARTIALITY.....	13
2.1 The pre 1994 era.....	16
2.1.1 Independence.....	16
2.1.2 Impartiality	18
2.2 Constitutional era.....	21
2.2.1 Independence.....	22
2.2.1.1 Personal Independence.....	23
2.2.1.2 Institutional Independence.....	24
2.2.1.3 Impartiality	27
2.3 Arbitration.....	30
2.3.1 Independence.....	33
2.3.2 Impartiality	34
2.4 Reforms suggested by the SALC.....	35
2.4.1 International Commercial Arbitration.....	35
2.4.2 Domestic Arbitration	37
2.5 Conclusion.....	38
CHAPTER 3 ENGLISH LAW ON INDEPENDENCE AND IMPARTIALITY.....	40
3.1 Common Law Position.....	42
3.1.1 Independence.....	42
3.1.1.1 Structural independence.....	42
3.1.1.2 Personal independence.....	45
3.1.2 Impartiality	46
3.2 Human Rights Act.....	54
3.2.1 Independence.....	55
3.2.2 Impartiality	57
3.3 Arbitration.....	59
3.3.1 Independence.....	60
3.3.2 Impartiality	63
3.4 Conclusion.....	65

CHAPTER 4 INDEPENDENCE AND IMPARTIALITY AS APPLIED IN THE EUROPEAN COURT OF HUMAN RIGHTS AND COMMONLY USED ARBITRATION RULES	67
4.1 European Court of Human Rights.....	68
4.2 International Arbitration Rules.....	74
4.2.1 International Bar Association	77
4.2.2 United Nations Committee on International Trade Law (UNCITRAL) Arbitration Rules	80
4.2.2.1 Appointment	81
4.2.2.2 Challenge	82
4.2.2.3 Conclusion.....	86
4.2.3 International Chamber of Commerce.....	86
4.2.3.1 Appointment	88
4.2.3.2 Challenge	92
4.2.3.3 Human Rights.....	94
4.2.3.4 Conclusion.....	95
4.2.4 London Court of International Arbitration	96
4.2.4.1 Appointment	97
4.2.4.2 Challenge	98
4.2.4.3 Conclusion.....	99
4.2.5 American Arbitration Association	99
4.2.5.1 Appointment	100
4.2.5.2 Challenge	101
4.2.5.3 Conclusion.....	102
4.2.6 ICSID	103
4.2.6.1 Disqualification at any time before the close of proceedings	105
4.2.6.2 Annulment of award after close of proceedings.....	107
4.2.6.3 Timely objection.....	109
4.2.6.4 Conclusion.....	109
4.3 Conclusion.....	109
CHAPTER 5 INDEPENDENCE, IMPARTIALITY AND THE PUBLIC POLICY EXCEPTION OF THE NEW YORK CONVENTION	113
5.1.1 Hebei Import & Export Corp v Polytek Engineering Co Ltd...	119
5.1.2 Public Policy in South African Law.....	121
5.1.3 Public Policy in English Law	123
5.2 Conclusion.....	124
CHAPTER 6 CONCLUSIONS	126
BIBLIOGRAPHY	134

Opsomming/Summary

Die reg tot 'n vrye en regverdige verhoor is een van die mees gevestigde internasionale fundamentele regte.¹ Die reg om verhoor te word deur 'n onafhanklike en onpartydige hof of tribunaal vorm deel van die reg tot 'n vrye en regverdige verhoor. Beide Suid-Afrika en Groot Brittanje erken hierdie reg as 'n fundamentele reg. Alhoewel dit duidelik is dat hierdie reg afdwingbaar is in die gewone howe van state wat die relevante konvensies geratifiseer het, bly die vraag steeds tot watter mate die reg tot 'n onafhanklike en onpartydige tribunaal toepassing vind in internasionale kommersiële arbitrasie verrigtinge. Verder is die vraag hoe die toepassing daarvan vergelyk met die toepassing van die reg in die gewone howe. Is dit dus moontlik om te sê dat dieselfde toets wat in die gewone howe gebruik word om die onpartydigheid en onafhanklikheid van 'n voorsittende beampte te bepaal, ook gebruik word om die onpartydigheid en onafhanklikheid van 'n arbiter te bepaal?

In die nasionale sfeer verwys onafhanklikheid na twee onderskeibare konsepte. Eerstens verwys dit na die onafhanklikheid van die regsprekende gesag met betrekking tot die wetgewende- en uitvoerende gesag soos vervat in die leerstuk van die skeiding van magte. Tweedens verwys dit na die persoonlike onafhanklikheid van 'n voorsittende beampte. In internasionale kommersiële arbitrasie is slegs die tweede konsep van toepassing. Internasionale kommersiële arbitrasie funksioneer normaalweg onafhanklik van enige regeringsinstelling. Slegs die persoonlike onafhanklikheid en onpartydigheid van die arbiter is dus van belang.

Wanneer die toetse, om die persoonlike onpartydigheid en onafhanklikheid van regters en arbiters te bepaal, met mekaar vergelyk word, is daar drie verskillende toetse wat van belang is. Sover dit

¹ Sien, *inter alia*, artikel 6 van die *European Convention on Human Rights and Fundamental Freedoms* en artikel 10 van die *Universal Declaration on Human Rights*.

menseregte op 'n internasionale vlak betref, pas die Europese Hof vir Menseregte die geregverdigde twyfel (legitimate doubt) toets toe. Die arbitrasie instellings wat ingesluit is in hierdie verhandeling² pas die regverdigbare twyfel (justifiable doubt) toets toe. Op nasionale vlak pas beide Suid-Afrika en Groot Brittanje die redelike vrees van vooroordeel (reasonable apprehension of bias) toets toe.

Die gevolgtrekking word gemaak dat die toetse vir onpartydigheid en onafhanklikheid wat toegepas word in die nasionale howe van Suid-Afrika en Groot Brittanje, die toetse wat op internasionale vlak toegepas word in die Europese Hof vir Menseregte en die toetse wat toegepas word deur die onafhanklike internasionale arbitrasie instellings wat in die verhandeling bestudeer is, tot dieselfde resultaat lei. Gevolglik sal arbitrasie verrigtinge wat in Suid-Afrika die toets van onafhanklikheid en onpartydigheid slaag in alle waarskynlikheid ook die toets in Engeland slaag. Net so sal arbitrasie verrigtinge wat plaasvind in terme van die belangrikse arbitrasie tribunale en arbitrasie reëls, synde UNCITRAL, die ICC, die LCIA, die AAA en die ICSID, ook na alle waarskynlikheid die toets van onafhanklikheid en onpartydigheid van arbiters in beide Suid-Afrika en Engeland slaag indien die toets wat toegepas word deur hierdie reëls en instansies dieselfde is as die toets wat in Suid-Afrika en Engeland toegepas word.

² Arbitrasie in terme van die reëls van die International Chamber of Commerce, die United Nations Committee on International Trade Law, die London Court of International Arbitration, die American Arbitration Association en die International Convention on the Settlement of Investment Disputes.

Sleutelwoorde/Keywords

Arbiter

Arbitration

European Court of Human Rights

Independence and Impartiality

International Arbitral Institutions

International Commercial Arbitration

Separation of Powers

South Africa

United Kingdom

CHAPTER 1

Introduction

Since the end of World War II, human rights have played an increasingly important role in international law.³ The right to a free and fair trial has formed one of the basic human rights since its inclusion in the 1948 *Universal Declaration on Human Rights*⁴ and its subsequent inclusion in most international human rights treaties such as the *International Covenant on Civil and Political Rights*,⁵ the *European Convention on Human Rights and Fundamental Freedoms*,⁶ the *American Convention on Human Rights*⁷ and the *African Convention on Human and Peoples Rights*.⁸ Respected authors such as Dugard even regard it as forming part of customary international law.⁹ The right to a free and fair trial is

3 Dugard J *International Law – a South African Perspective* 2nd ed (Juta Cape Town 2001) 234 (hereafter "Dugard").

4 Article 10, *Universal Declaration of Human Rights* G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (hereafter "Universal Declaration").

5 Article 14, *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (hereafter "ICCPR").

6 Article 6, *European Convention on Human Rights and Fundamental Freedoms* 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively (hereafter "European Convention").

7 Article 8, *American Convention on Human Rights* O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (hereafter "American Convention").

8 Articles 7 and 26, *African Convention on Human and Peoples' Rights* adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 (hereafter "African Convention").

9 Dugard at p. 241. For a right or rule to form part of customary international law, it has to comply with two requirements, as set out by the International Court of Justice in the *North Sea Continental Shelf* case. These requirements are *usus*, or settled practice, which refer to the widespread acceptance of the right by the international community and *opinion juris*, which refers to the intention of states to be bound by the rule. Whereas a state can normally only be bound by rules it has expressly agreed to be bound by through ratification of a treaty containing the rule, customary international law rules or norms bind all states, irrespective of whether or not the state has ratified a treaty in which the rule is codified.

included in the South African Constitution,¹⁰ although it is not certain if this right extends to commercial arbitration proceedings.¹¹

Part of the right to a free and fair trial is the right to be heard by an independent and impartial court or tribunal.¹² This right applies to criminal proceedings and proceedings concerning civil rights and obligations.¹³ The right to a free and fair trial, *per se*, as protected by the numerous international and national legal instruments,¹⁴ does not fall within the scope of this study. This study is only concerned with the right to a free and fair trial insofar as it encompasses the right to be heard by an independent and impartial court or tribunal.

Generally, independence and impartiality can be defined as:¹⁵

An "independent" tribunal means that decision-makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise. An "impartial" tribunal demands that each of the decision-makers, whether they are professional or lay judges or juries, be unbiased, having no interest or stake in the case. Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice.

10 Section 34, Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

11 *Total Support Management (Pty) Ltd v Diversified Health Systems SA* 2002 (4) SA 661 (HHA) at 674 B – H).

12 See: Article 6 of the European Convention, Article 26 of the African Charter, Article 8(1) of the American Convention and Section 34 of the Constitution Skinnider E "Counter-Terrorism Measures and the Impact on International Human Rights Standards in the Field of Criminal Justice" Paper presented at the 18th Conference of the International Society for the reform of Criminal Law, Montreal, Canada August 2004p 36.
Incal v Turkey (ECHR) Application number 41/1997/825/1031.

13 See, *inter alia*, article 6(1) of the European Convention and Article 8(1) of the American Convention. With regard to South African law, while Section 35 of the Constitution applies only to criminal proceedings, Section 34 applies to criminal and civil proceedings.

14 In South Africa this right is embodied in Section 34 of the Constitution. With regard to international protection of the right to a free and fair trial, see the international legal instruments quoted *supra*.

15 Skinnider E "Counter-Terrorism Measures and the Impact on International Human Rights Standards in the Field of Criminal Justice" Paper presented at the 18th Conference of the International Society for the reform of Criminal Law, Montreal, Canada August 2004 (unpublished) at p. 36.

Independence and impartiality are important concepts in international commercial arbitration, as a domestic court can deny the recognition and enforcement of a foreign arbitral award through the application of article V(2)(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁶ In terms of this article, a domestic court may deny the recognition and enforcement of a foreign arbitral award where such recognition and enforcement would be contrary to the public policy of the state. In South Africa, as in many other jurisdictions, it is contrary to domestic public policy to enforce a court order or arbitral award where the court or tribunal in question lacked independence and impartiality.¹⁷

The public policy exception will not find application, however, if the lack of independence and impartiality on the part of a court or tribunal is merely against South African public policy. According to leading authority with regard to the standard required by the New York Convention,¹⁸ public policy refers to an “international public policy” rather than a restrictive “domestic public policy”. It is, therefore, necessary to compare the South African position with regard to independence and impartiality of courts and tribunals to the position under foreign and international law. If the South African standards for independence and impartiality are comparable to international standards and the standards of South Africa’s major trading partners, it can be presumed that, at least amongst these states, the effect of the public policy against the recognition and enforcement of a judgment or award rendered by a court or tribunal lacking independence and impartiality will similarly be the

16 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter “New York Convention” or “NYC”).

17 In this regard, see Chapters 2 and 3 *infra*. These Chapters discuss the position in South African and British law respectively.

18 *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier* 508 F. 2d 969 (1974). Similarly, in the United Kingdom, the Civil Division of the Court of Appeal in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 1 All ER (Comm) 865 at 876 held that a British court will only deny the recognition and enforcement of a foreign arbitral award on the basis of public policy if the award is contrary both to the public policy of the United Kingdom and of the country where the contract would have been performed. See also Chapter 5 in this regard.

same. If this is the case, it will contribute to improved trade amongst these countries as there will be legal certainty that an arbitral award rendered by an independent and impartial arbitral tribunal in terms of the domestic law of one country cannot be successfully challenged on the basis of the tribunal's alleged lack of independence and impartiality in the domestic courts of the other country.

In terms of foreign law, the South African position with regard to independence and impartiality will be compared with that of the United Kingdom. Not only is South African procedural law similar to British common law on procedure,¹⁹ but South Africa also applied the doctrine of parliamentary sovereignty until 1994.²⁰ This doctrine is still applied in the United Kingdom. The United Kingdom, as part of the European Union, is a major trading partner of South Africa. As international commercial arbitration is often used as a method to settle disputes in cases where the contracting parties do not have the same nationality, it will play an important role in the trade relations between these two states. London also serves as seat of the London Court of International Arbitration ("LCIA").²¹

In order to determine the tests for independence and impartiality in arbitration proceedings, it is important to first determine the tests applied in the ordinary courts. The ordinary courts, as one of the three arms of the *trias politica*, forms part of the state in that the state is involved in, *inter alia*, regulating court procedure and appointing court officials. In contrast, arbitration proceedings, even where such proceedings are directed by the state through legislation, are conducted independently from the state.²² As such, it is assumed that the test for independence

19 De Vos W le R "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings" 1997 *TSAR* 444.

20 De Waal *et al* *The Bill of Rights Handbook* 4th ed (Juta Cape Town 2001) at 2 (hereafter "De Waal").

21 Hereafter "LCIA".

22 With regard to the CCMA, a statutory body that provides for, *inter alia*, the settlement of disputes by means of arbitration, the arbitrators (or commissioners) are appointed by the Governing Body of the CCMA in accordance with the

and impartiality in the ordinary courts will, in certain respects, be more stringent than the test applied to arbitration proceedings, due to an arbitral tribunal's inherent independence from the state.

In terms of international law, this study will seek to determine whether the position in South African law with regard to independence and impartiality is in accordance with and comparable to the standards applied by the UK, the European Court of Human Rights (hereinafter "ECHR") and the most important international arbitral rules.²³

Such comparison will be indicative whether arbitral awards rendered in terms of South African law will be enforced in the United Kingdom in terms of the New York Convention, and whether South African courts will enforce arbitral awards rendered in terms of English law under rules of the most commonly used international arbitral rules, specifically with regard to the independence and impartiality of the arbitrators involved. It will also indicate whether an arbitral award which will withstand the scrutiny of the European Convention (thus, an arbitral award rendered in terms of the domestic law of any of the states parties to the European Convention) could be successfully challenged on the grounds that the arbitral Tribunal lacked independence and impartiality.

To achieve this, the tests for independence and impartiality in the ordinary courts and the tests for independence and impartiality in arbitration proceedings in South Africa, the United Kingdom, the ECHR and the mentioned international arbitration rules will be compared. Such comparison will show whether parties to arbitration proceedings in these jurisdictions can rely on the same level of protection as parties to disputes adjudicated by the ordinary courts. The tests for independence

relevant legislation and not by the executive body of the state, as is the case for judges and magistrates. See: website of the CCMA: <http://www.ccma.org.za>.

23 The arbitration rules included in this study are the rules of the International Chamber of Commerce ("ICC"), the International Convention on the Settlement of Commercial Investment Disputes ("ICSID"), the International Bar Association ("IBA"), the LCIA, the American Arbitration Association ("AAA"), and the UNCITRAL Arbitration Rules.

and impartiality in these jurisdictions are frequently determined with reference to human rights standards (hence the discussion of section 34 of the Constitution, the UK Human Rights Act and article 6 of the European Convention).

While South Africa is still in the process of reforming its domestic and international arbitration laws,²⁴ the United Kingdom introduced a new Arbitration Act in 1996.²⁵ This Act is based to a large extent on the UNCITRAL Model Law on International Commercial Arbitration.²⁶ The South African Law Commission²⁷ relies heavily on both the UK Arbitration Act and the UNCITRAL Model Law in its Reports as to the reform of the South African Legislation.²⁸

Chapter 4 will focus on the position with regard to independence and impartiality at international level. The scope and content of the right to be heard by an independent and impartial court or tribunal has been dealt with extensively by the European Human Rights system, mostly within the context of military tribunals. The ECHR provides the clearest exposition of this right for the purposes of this study.²⁹ The test applied by the ECHR is particularly helpful for the purposes of this study, as the ECHR:

24 Both domestic and international arbitration in South Africa is currently regulated through the Arbitration Act 42 of 1965. The South African Law Commission ("SALC") is currently undertaking studies as to how best reform South Africa's legislation with respect to arbitration. It has published a report incorporating a draft international arbitration act for South Africa. See: South African Law Commission Project 94 "Arbitration: An International Arbitration Act for South Africa" Report July 1998 (hereafter "SALC International Arbitration Report"). It also published report with regard to a new domestic arbitration act for South Africa. See: South African Law Commission Project 94 "Domestic Arbitration" Report May 2001 (hereafter "SALC Domestic Arbitration Report"). Both reports are publicly available on the website of the SALC at <http://www.law.wits.ac.za/salc/salc.html>.

25 United Kingdom Arbitration Act 1996 (hereafter "Arbitration Act").

26 Hereafter "UNCITRAL Model Law".

27 Hereafter "SALC".

28 See, for example, paragraph 2.6 of the SALC International Arbitration Report, as well as the commentary to the Draft Bill (par 2.20 *et seq.* of the SALC International Arbitration Report), which frequently uses the English Arbitration Act as point of reference.

29 In this regard see, *inter alia*, *McGonnell v United Kingdom* 28488/95 (ECHR) § 48.

- applies the same test for independence and impartiality to arbitration cases as it does to cases decided in the ordinary courts of the States that are parties to the European Convention,³⁰
- decides on matters pertaining to the European Convention, which has been incorporated into domestic law in the United Kingdom through the incorporation of the Human Rights Act 1998,³¹
- decides on matters pertaining to the European Convention, which, in many cases, has substantively similar provisions to the fundamental rights provisions contained in the Constitution of the Republic of South Africa.³²

Furthermore, at international level, international arbitration tribunals acting in terms of the rules of a specific international arbitral institution, or *ad hoc* arbitral rules generally require arbitration tribunals to be independent and impartial.³³ Such arbitral tribunals can be required to apply any of a number of legal regimes – from international law to the domestic law chosen by the parties – to the merits of the dispute, depending, *inter alia*, on the nature of the dispute and the source of the arbitral provision (i.e., if the arbitral clause forms part of a contract or of a treaty).

The ECHR takes a dynamic approach to the interpretation of the European Convention, which allows it to respond to newly emerging threats against rights guaranteed by the European Convention.³⁴ In *Tyrer v. the United Kingdom* the ECHR held that:³⁵

30 See, for example, the case of *Suovaneimi and others v Finland* (Application No 31737/96) where the ECHR considered that there was no reason to doubt the decision of the domestic courts of Finland that the arbitrator in the dispute was biased. The claimant in the matter argued that the arbitrator's behaviour showed that he was "both subjectively and objectively partial." This is the same test as applied for cases concerning partiality in the ordinary courts. See further Chapter 4 in this regard.

31 This matter is discussed further in Chapter 3 pertaining to the United Kingdom;

32 Compare, in this regard, the provisions of the European Convention with the fundamental rights contained in Chapter 2 of the Constitution.

33 See Chapter 4 in this regard.

34 Lawson RA and Schemers HG *Leading Cases of the European Court of Human Rights* 2nd ed (Ars Aequi Libri Nijmegen 1999) p. 16.

35 *Tyrer v United Kingdom* (ECHR) A-26 at § 31.

[T]he [European Convention on Human Rights] is a living instrument which ... must be interpreted in the light of present day conditions ... the Court cannot but be influenced by the developments and commonly accepted standards ... of Member States.

The ECHR applies the same standard of independence and impartiality to arbitration proceedings as it does to the ordinary courts and other tribunals.³⁶ The ECHR held that voluntary commercial arbitration falls within the scope of the "*determination of ... civil rights*",³⁷ bringing it within the ambit of article 6 of the European Convention.³⁸

The extent to which parties to arbitration proceedings can rely on the right to be heard by an independent and impartial tribunal is relevant as more and more parties to international commercial agreements choose to have disputes in terms of such agreements resolved by means of arbitration, rather than to litigate in national courts.³⁹ Reasons for the

increasing popularity of arbitration include:⁴⁰

- the fact that arbitration is perceived to provide a genuinely neutral decision maker in disputes between parties from different countries;

36 *Ibid.* However, there are fewer ECHR cases dealing with arbitration proceedings compared with the number of cases concerning proceedings in ordinary courts.

37 Article 6(1) of the European Convention.

38 Haydn-Williams J "Arbitration and the Human Rights Act" 2001 *Journal of the Chartered Institute of Arbitrators* 289 (hereafter "Haydn-Williams").

39 In South Africa, the Constitution of the Republic of South Africa, 108 of 1996 (hereafter "the Constitution") ensures the right to be heard by an independent and impartial court or tribunal in both criminal and civil matters. Section 34 of the Constitution extends the right to be heard by an independent and impartial court or tribunal to arbitration proceedings (see in this regard *Total Support Management (Pty) Ltd v Diversified Health Systems SA* 2002 (4) SA 661 (HHA) at par 674 B – H), see further Chapter 2 relating to the South African position with regard to independence and impartiality. In the United Kingdom the right to be heard by an independent and impartial court or tribunal is entrenched in section 6 Schedule 1 of the Human Rights Act of 1998. This right has been extended to arbitration proceedings even before incorporation of the Human Rights Act. In this regard see, *inter alia*, *Laker Airways Inc. v Fls Aerospace Ltd. and Burnton Fls Aearospace Ltd. v Lake Airways Inc.* (1999) 2 Lloyd's Rep 45. See further Chapter 3 which relates to the United Kingdom.

40 Born G *International Commercial Arbitration* 2nd ed (Kluwer Law International The Hague 2001) at 7.

- that the arbitrators in the dispute are perceived to be genuinely competent to decide the matter;
- the fact that arbitration awards are generally more easily enforced in foreign states; and
- the fact that arbitration tends to be procedurally less formal and rigid than litigation in national courts.

A major difference between judicial proceedings and arbitration proceedings lies in the test for independence. For ordinary court proceedings, the concept of independence is twofold. It refers both to the personal independence of the judge and the doctrine of the separation of powers whereby the judiciary needs to be independent from the executive and legislative branches of government.⁴¹ International commercial arbitration, contrary to ordinary court proceedings, is a private form of dispute settlement chosen by the parties themselves.⁴² Private arbitration is, therefore, by definition independent from the state.⁴³ Consequently, the test for independence in arbitration proceedings only applies to the personal independence of the arbitrator.

Although the arbitration process differs greatly from the more conventional court procedure, arbitration still needs to comply with certain prerequisites for the award to be valid and enforceable. Most arbitration rules applied by international arbitration institutions provide that arbitrators need to be independent and impartial,⁴⁴ while others

41 *Bulut v Austria* (ECHR) Application Number 59/1994/506/588 at §31 – 33.

42 Redfern A and Hunter M *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell London 2003) 1.

43 While the State does regulate arbitration by means of legislation and through enforcing arbitral awards, the level of State involvement in arbitration is negligible when compared to the State's involvement in ordinary court proceedings.

44 See, *inter alia*, articles 8 and 9 of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules; article 5 of the Rules of the London Court of International Arbitration ("LCIA").

require only independence.⁴⁵ In this regard, Gaillard and Savage stated:⁴⁶

[A]s it is rarely possible to provide direct proof of impartiality, the arbitrators should at least be required to be independent, which is easier to prove and which, in principle, guarantees the arbitrators' freedom of judgment. Whereas the bias of arbitrators will very rarely be revealed by their conduct, links of dependence with one of the parties – even though they will not necessarily lead the arbitrator to be biased – will provide a sufficient basis on which to consider that they do not satisfy the conditions required of a judge.

After appointment of the tribunal, a party to international commercial arbitration generally has two remedies available to it should there be doubt as to an arbitrator's independence or impartiality. Firstly, in terms of the rules of the specific tribunal, the party may challenge the appointment of the arbitrator (or apply for disqualification of the arbitrator) based on alleged bias on the part of the arbitrator.⁴⁷ Secondly, at the completion of the arbitration proceedings, the party may contest the recognition and enforcement of the award in the national courts of the country where enforcement is sought.⁴⁸ The test for independence and impartiality applied by the specific arbitral tribunals is important for the first remedy and is normally decided on by the tribunal itself or by the governing body in cases where the arbitration is conducted under the auspices of an international arbitration institution. Where the second remedy is sought in domestic courts, the exceptions provided for by the New York Convention become relevant.⁴⁹

This study is conducted from the hypothesis that if the standards for independence and impartiality in various domestic legal systems comply

45 See, *inter alia*, article 9 of the International Chamber of Commerce ("ICC") Rules of Arbitration; article 14 of the International Convention on the Settlement of Investment Disputes ("ICSID").

46 Gaillard E and Savage J (ed) *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer Law International The Hague 1999) 564.

47 Korland L "What an Arbitrator should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act" 2003 *Case Western Reserve Law Review* 815.

48 See, *inter alia*, article V of the New York Convention; article 24 of the UK Arbitration Act 1996.

49 See Chapter 5 relating to the provisions of the NYC.

with the international standards, awards rendered under the laws of such domestic system cannot be challenged in another state on grounds of lack of independence or impartiality of the arbitral tribunal.

The question this study seeks to answer is whether or not the tests for independence and impartiality applied in South Africa, the United Kingdom, the ECHR and in terms of the provisions of the major arbitral rules, are similar enough to ensure that, in terms of the provisions of the New York Convention, there will be no bar to recognising and enforcing foreign arbitral awards rendered in South Africa in the United Kingdom, or arbitral awards rendered in the United Kingdom in South Africa. Furthermore, if the South African tests for independence and impartiality are the same as the tests applied in terms of the major arbitral rules, arbitral awards rendered in terms of such rules should not, irrespective of the nationality of the parties involved, be denied recognition and enforcement in South Africa on the grounds that an arbitrator lacked independence or impartiality.

The legal position with regard to independence and impartiality of courts and arbitration tribunals in South Africa will be discussed first. In this regard, the position in the ordinary courts, the position in the Labour Court in regard to compulsory arbitration, the provisions of the Arbitration Act and the recommendations by the SALC with regard to arbitration, will be discussed.

Thereafter, the position in the United Kingdom with regard to independence and impartiality of courts and arbitral tribunals will be determined.⁵⁰ The jurisprudence of the ECHR, with regard to both arbitration and ordinary court proceedings, will be discussed. Thereafter the applicable rules of the major international arbitration rules will be reviewed.⁵¹ The effect of these different tests on foreign arbitral awards will be considered in view of the provisions of the New York Convention,

50 Chapter 3, *infra*.

51 Chapter 4, *infra*.

specifically with regard to the public policy exception to recognition and enforcement.⁵² Finally, some remarks will be made in conclusion.

⁵² Chapter 5, *infra*.

CHAPTER 2

South African Law on Independence and Impartiality

In this chapter I deal with the South African legal position with regard to independence and impartiality in ordinary courts and arbitral tribunals. I will focus on the post 1994 position, and the effect of the Constitution on the tests for independence and impartiality. It is, however, also necessary to briefly set out the position before the introduction of the Constitution.

Even though this study is primarily concerned with the tests for independence and impartiality in arbitration proceedings, it is necessary to determine the tests for independence and impartiality as applied by the ordinary courts of South Africa, I will work from the hypothesis that if the tests for independence and impartiality, in the ordinary courts, are not the same as the tests applied in arbitration proceedings, the tests applied in the ordinary courts, and specifically in criminal proceedings, will be more stringent than the tests applied in arbitration proceedings.⁵³ It is not the aim of this study to determine to what extent parties to arbitration proceedings can claim the right to be heard by an independent and impartial tribunal and to what extent section 34 of the Constitution is applicable to arbitration proceedings. It is, however, unavoidable that the approach of the Courts to the right to be heard by an independent and impartial court or tribunal and the extent to which that applies to arbitration will be touched upon.⁵⁴

53 Even though the actual tests may be the same for the ordinary courts and arbitration proceedings, in this study I work from the hypothesis that the application of the tests in the ordinary courts, and specifically in criminal proceedings, will be more stringent than in arbitration proceedings. This is a result of, *inter alia*, the severity of the punishment involved in criminal matters (i.e., the fact that in criminal proceedings the sanction upon being found guilty may include a restriction of one's freedom, whereas in civil matters, and in arbitration proceedings, the penalty will only be of a pecuniary nature).

54 There is still uncertainty if the right to be heard by an independent and impartial court or tribunal provided for in section 34 of the Constitution extends to arbitration proceedings. It has been held in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) that the right to be heard by an independent and impartial court or tribunal

If the tests applied in South Africa are the same as the tests applied in the United Kingdom, the ECHR and by the major arbitral rules,⁵⁵ there should be no bar to the recognition and enforcement of South African arbitral awards in the United Kingdom, or the recognition and enforcement of British arbitral awards (or, for that matter, arbitral awards of any of South Africa's major trading partners rendered in terms of the arbitral rules discussed *infra*) in South Africa in terms of the New York Convention.⁵⁶

Before 1994, South Africa applied the British system of parliamentary sovereignty.⁵⁷ South Africa had no supreme constitution and the courts had no power to protect citizens' human rights.⁵⁸ Common law provided little protection of human rights,⁵⁹ such as the right to be heard by an independent and impartial court or tribunal. The negotiation and acceptance of the interim Constitution⁶⁰ and, consequently, the Constitution resulted in South Africa becoming a constitutional state "*in which the law is supreme*".⁶¹ The Constitution enshrines the right to a fair trial by an independent and impartial court or tribunal in the Bill of Rights.⁶² While impartiality refers exclusively to the personal impartiality of the judicial officer, independence comprises of two separate concepts.

definitely extends to compulsory arbitration that is required by legislation. The Court did not make any comment on the position with regard to voluntary arbitration. If the tests for independence and impartiality in arbitration proceedings and in the ordinary courts are the same, it is possible to conclude (at least as far as the right to be heard by an independent and impartial court or tribunal is concerned) that the constitutional right to be heard by an independent and impartial tribunal is *de facto* protected in arbitration proceedings.

55 See Chapters 3 and 4 *infra*.

56 See Chapter 5 *infra*.

57 De Waal (n.21) at p. 2. See also Motala Z "Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in a new South African order: towards an alternative judicial structure" XXIV *CILSA* (1991) 285 at 290 (hereafter "Motala").

58 De Waal at p. 2 – 3.

59 *Ibid*.

60 *The Constitution of the Republic of South Africa* 200 of 1993.

61 Section 2 of the Constitution provides: "This Constitution is the supreme law of the Republic ...".

62 Section 34 of the Constitution. This study, however, focuses only on the right to be heard by an independent and impartial court or tribunal, and only in so far as this right affects the test for independence and impartiality.

It firstly refers to the separation of powers between the legislative, executive and judicial branches of government and, secondly, to the personal independence of judicial officers.⁶³

The 1965 Arbitration Act currently governs voluntary arbitration in South Africa,⁶⁴ while a number of acts, including the *Labour Relations Act*⁶⁵ and the *Banks Act*,⁶⁶ provide for compulsory arbitration of disputes arising in terms of either of these acts. This study will largely focus only on the provisions of the Arbitration Act with regard to the independence and impartiality of arbitrators. The SALC recommended that South Africa adopt new arbitration legislation with regard to both domestic and international arbitration. With regard to international arbitration, the SALC specifically recommends that South Africa's new international arbitration legislation closely follow the provisions of the UNCITRAL Model Law on International Commercial Arbitration.⁶⁷

The South African legal position in the ordinary courts prior to 1994 will be considered first and then the position since the Constitution came into force. Thereafter, the current position in terms of the Arbitration Act will be considered (including any changes that may have been brought about by the Constitution). Lastly an overview of the conclusions and recommendations of the SALC with regard to both domestic and international arbitration will be given.⁶⁸

63 Discussed *infra*.

64 *Arbitration Act* 45 of 1965.

65 *Labour Relations Act* 66 of 1995 Chapter VII.

66 *Banks Act* 94 of 1990 Chapter V.

67 The SALC has published reports on both domestic and international arbitration, *supra* at fn. 25. This is discussed in more detail *infra*.

68 The South African position with regard to public policy as a bar to recognition and enforcement of foreign arbitral awards is discussed *infra* in Chapter 5.

2.1 The pre-1994 era

2.1.1 Independence

The issue of the independence of the ordinary courts prior to 1994 is not frequently addressed in literature. *Prima facie*, it seems that South Africa complied with all the requirements of an independent judiciary during its time as a Union under the control of the United Kingdom. Authors apparently accepted that the ordinary courts of South Africa were independent. This acceptance also may be due to the system of parliamentary sovereignty that applied in South Africa at the time whereby the courts were not empowered to question the actions of parliament, but merely had to interpret such legislation.⁶⁹ At the time, South Africa did not have any international or other obligation to ensure the independence of the judiciary.⁷⁰ Van der Heever J remarked in *Minister of the Interior and Another v Harris and others*:⁷¹

Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the State.

After South Africa became a Republic in 1961 the situation continued in much the same way. It was suggested that at the time:⁷²

the government [was] comfortable with an independent judiciary because it [was] sure that by and large the judiciary will not examine the substance of law or rule on the government's policy issues.

In the period after South Africa became a Republic in 1961 and before the Constitution came into effect, no cases regarding judicial independence were reported. The topic was, however, discussed,

69 Motala at 291.

70 South Africa only ratified the ICCPR on 10 March 1999 and the African Charter on 9 June 1996 (see the website of the University of Minnesota Human Rights Library at <http://www1.umn.edu/humanrts/research/ratification-southafrica.html>).

71 *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) at 789.

72 Motala at 291.

although not in great depth, in academic writings. Cameron remarked that.⁷³

The South African judiciary has a fine tradition. Despite criticism of its performance in resisting the implementation of government policy ... and despite grievous breaches of the tradition of unpartisan appointments which existed when the [government of President FW de Klerk] took office, the South African judiciary can still look to an overall record of professionalism and relative autonomy which few would seek to pass off as discreditable... Judges are proud of this record. The government especially is proud of it, and cabinet ministers often make a point of vaunting the independence and integrity of the South African bench. And indeed the reputation of our judges and public confidence in their impartiality are prizes which all who care about our future should guard with a jealous passion.

The manner in which judges are appointed serves as an important control measure ("check") to ensure judicial independence.⁷⁴ Prior to 1994, judges were appointed exclusively by the State President. As Cameron stated above, these appointments were not always independent, as at times judges were appointed on the basis of their support of the government of the day. According to Motala:⁷⁵

a number of eminent jurists have alluded to the government appointing judges in terms of political preferences both prior to and during the Nationalist Party era. There have been several complaints that political factors have been given greater priority than merit with better qualified persons being passed over in preference of candidates who favour the government's views.

As a result of the political situation in South Africa prior to 1994, the independence of the judiciary may be questioned, specifically with regard to cases of political importance. Nothing indicates, however, that similar doubts existed with regard to matters of a commercial nature. For the purposes of this study it is sufficient to note that the personal independence of judges was determined having regard to, *inter alia*, the

73 Cameron E "Nude Monarchy: the case of South Africa's Judges" 1987 (3) *South African Journal of Human Rights* 339.

74 De Waal at 22.

75 Motala at 294.

judge's security of tenure and the personal interest of the judge in the matter before him.⁷⁶

2.1.2 Impartiality

The rule against bias forms part of the common law. The origins of this rule can be "*derived from one of a number of rules of natural justice*".⁷⁷

These are:

- the rule that "*justice must not only be done, but also be seen to be done*";⁷⁸ and
- the principle that no man may be judge in his own cause (*nemo judex in sua causa*).⁷⁹

The Roman Dutch law test to determine bias was described as whether.⁸⁰

[a judge's actions inspire] a very just fear, and give rise to a suspicion in one of the litigants that they will not judge according to the dictates of justice and the sense of duty of an upright mind.

South African common law does not allow for frivolous reasons as reasonable grounds for recusal. The main categories that may constitute reasonable grounds for bias is provided for by Roman Dutch law and include animosity, relation and familiarity with any of the parties.⁸¹ Under any of these circumstances, a judge is disqualified from hearing the

76 *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) *Supra*.

77 *Council of Review, South African Defence Force, and Others v Mönning and Others* 1992 (3) SA 482 (C).

78 *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) (hereafter "*BTR v Metal and Allied Workers' Union*"); *S v Mathabathe* 2003(2) SACR 25 (TPD).

79 In *South African Motor Acceptance Corporation (Edms) Bpk. v Oberholzer* 1974 (4) SA 808 (T) at 811 the High Court referred with approval to the statement of Ulpianus that "*no judicial officer may judge his own cause, that of his wife, children or another with whom he associates.*" (own translation)

80 *South African Motor Acceptance Corporation (Edms) Bpk. v Oberholzer* 1974 (4) SA 808 (T) at p. 812.

81 *Ibid* at p. 813.

matter, unless the interest is "so trivial in nature as to be disregarded under the *de minimis* principle".⁸²

The ordinary courts of South Africa make provision for two different manifestations of a lack of impartiality, namely actual (real) bias and alleged bias. Actual bias will exist where a judge has a pecuniary or other substantial interest in the outcome of a case. The Supreme Court held that:⁸³

[W]here there is no pecuniary interest the mere possibility or suspicion that a justice may be biased is not sufficient; he must be substantially interested in the proceedings so as to have a real bias.

The test to be applied in cases of alleged bias was clearly enunciated by the Appellate Division (now the Supreme Court of Appeal) in the case of *BTR v Metal and Allied Workers' Union*.⁸⁴ At the time of this decision there existed some uncertainty in South African courts whether to apply the real likelihood of bias test or the reasonable suspicion of bias test in cases of alleged bias.⁸⁵ The difference between the two tests lies therein that while the real likelihood of bias test deals with the probability of bias and requires a "*stronger than 50 per cent prospect*"⁸⁶ of bias, the reasonable suspicion test deals with the possibility of bias.⁸⁷ The court

82 *BTR v Metal and Allied Workers' Union* at 694 I.

83 *City and Suburban Transport (Pty.) Ltd v Local Road Transportation Board, Johannesburg* 1932 W.L.D. 100 at 104.

84 *Supra* fn. 79.

85 The "reasonable apprehension of bias" test has been applied in, *inter alia*, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); *BTR v Metal and Allied Workers' Union, supra*; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); *S v Basson* 2005 (1) SA 171 (CC); *Silwana and Another v Magistrate, District of Piketberg, and Another* 2003 (5) SA 597 (C); *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA); and *Nat-Cole Properties CC v Van Deventer and another* [2001] JOL 8450 (C).

86 *BTR v Metal and Allied Workers' Union* at 690 G.

87 *Ibid* at 694 A.

applied the reasonable suspicion of bias test in South Africa, holding that it:⁸⁸

consider[s] that those very objects which the 'reasonable suspicion test' are calculated to achieve are frustrated by grafting onto it the further requirement that the probability of partiality must be foreseen.

[...]

to investigate the probability of bias, even though governed by the requirement of reasonable apprehension [suspicion], would take the Courts back into the kind of speculative inquiries that the focus on appearance is calculated to obviate. If the party challenging the decision-maker claims to have a reasonable apprehension of bias, the question arises, under the [real likelihood of bias] test, whether the bias apprehended is merely possible or really probable. To answer that question may well take the Court directly into the mind of the decision maker, and compel it to make judgments about his or her probity, and his or her willingness and ability to exclude the influence of interest or prejudice from the operative thought processes. These are precisely the kinds of judgments that an appearance-orientated approach is designed ... to spare the Court. If the point of the [real likelihood of bias] test is to exclude trivial objections, that is achieved perfectly adequately in the reasonable apprehension test by the requirement of reasonableness.

The reasonable suspicion of bias test is objective in nature, asking whether the reasonable person – "*someone endowed with ordinary intelligence, knowledge and common sense*"⁸⁹ – in the same circumstances as that of the litigant would suspect bias on the part of the judicial officer.

Where a party has been aware of circumstances that may raise doubts as to a judicial officer's impartiality, yet failed to object thereto, such party is *prima facie* estopped from later raising the matter.⁹⁰ The Supreme Court (as it was then called) held:⁹¹

A Judge who has a bias for or against a party litigant and yet undertakes the duty of deciding the issue is liable to have his decision set aside at the instance of a person aggrieved, provided

88 *Ibid* at 694 A - E.

89 *BTR v Metal And Allied Workers' Union* at 695 C – D.

90 *Snyman and others v Liquor Licensing Court, Windhoek and Another* 1963 (1) SA 460 (SWA) at 465 D.

91 *Liebenberg and Others v Brakpan Liquor Licensing Board and Another* 1944 W.L.D. 52.

there has been no acceptance of or acquiescence in the jurisdiction.

By requiring the possibility of bias as opposed to the probability of bias, the reasonable suspicion of bias test gives wider protection to the right to be heard by an independent and impartial court or tribunal than the real likelihood of bias test. Given South Africa's political history and the suspicion with which the judiciary may still be regarded in some quarters, the Supreme Court's decision strengthens the integrity of the judiciary as an independent and impartial body.

2.2 Constitutional era

The Constitution guarantees the right to be heard by an independent and impartial court or tribunal.⁹² Section 34 of the Constitution reads:⁹³

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

Although the provision does not expressly provide for the right to be heard by an independent and impartial court, this can reasonably be inferred from *inter alia*, the text of the provision, together with section 176 of the Constitution which provides for an independent and impartial judiciary.⁹⁴

92 While section 34 of the Constitution relates to any "*dispute that can be resolved by the application of law*", one's right to be heard by an independent and impartial court or tribunal also is specifically guaranteed in administrative actions by means of section 33 of the Constitution. Section 33 reads, in relevant part: National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
It should be noted that Section 33 in itself has no bearing on the subject matter of this study. It is included for the sake of completeness. The meaning of "tribunal" within the context of section 34 is discussed *infra* with regard to arbitration.

93 Section 34 of the Constitution.

94 De Vos W le R "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings" 1997 (3) *TSAR* 455; Erasmus HJ "n Billike Siviele Verhoor" 1996 *Obiter* 296.

2.2.1 Independence

Independence refers to both the independence of the judiciary as a whole (judicial independence) as well as the independence of judicial officers individually (personal independence). It was held in *Van Rooyen v The State*:⁹⁵

Judicial officers must act independently and impartially in the discharge of their duties. In addition ... the courts in which they hold office must exhibit institutional independence. That involves an independence in the relationship between the courts and other arms of government.

This concept is set out more elaborately by O'Regan J in the Constitutional Court case of *De Lange v Smuts*:⁹⁶

In addition to the independence and impartiality of the presiding officer, it seems to me that the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the judicial sense. As Le Dain J held in *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at 171:

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a Judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government ... The relationship between these two aspects of judicial independence is that an individual Judge must enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

Personal independence comprises of two requirements, namely:⁹⁷

The first [requirement is] security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, 'secure against interference by the Executive or other appointing authority'. The second [is] a basic

95 *Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening)* 2002(5) SA 246 (CC) at 31 (hereafter "*Van Rooyen v The State*").

96 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) at 159 (hereafter "*De Lange v Smuts*").

97 *De Lange v Smuts* at 70.

degree of financial security free from arbitrary interference by the Executive in a manner that could affect judicial independence.

Institutional independence is required.⁹⁸

with respect to matters that relate directly to the exercise of the tribunal's judicial function ... judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial functions.

The Constitution guarantees both personal and institutional independence. I first will consider the personal independence of judges as guaranteed by the Constitution and thereafter the institutional independence guaranteed in the ordinary courts.

2.2.1.1 Personal Independence

Section 176 of the Constitution provides judges with security of tenure and financial security, while section 177 determines the conditions under which judges may be removed from office.⁹⁹

Terms of office and remuneration

176. (1) A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70. Other judges hold office until they are discharged from active service in terms of an Act of Parliament. The salaries, allowances and benefits of judges may not be reduced.

Removal

177. (1) A judge may be removed from office only if –
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

98 *Ibid.*

99 Sections 176 and 177 of the Constitution.

As far as permanently appointed judges are concerned, it is clear that South African legislation complies with the requirements for individual independence of judges. In the case of temporary judges, that is judges appointed for a short period of time at any level of the court hierarchy, the Constitutional Court held that the Constitution provides for adequate checks and balances to ensure these judges' independence. Even though temporary judges are appointed by the executive, the executive has no influence over the cases that these judges will hear and can, therefore, not have any influence on the result of a case.¹⁰⁰

2.2.1.2 Institutional Independence¹⁰¹

The Constitutional Court has described the principle of judicial independence as follows:¹⁰²

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another Judge – should interfere in face, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision.

Judicial independence is in itself a Constitutional principle. Part of the purpose of judicial independence is to safeguard the rights contained in the Bill of Rights. Judicial independence cannot, therefore, be subject to limitation in terms of section 36 of the Constitution, relating to the limitation of rights contained in the Bill of Rights.¹⁰³

100 *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at par. 131 - 132.

101 Institutional independence of the judiciary is discussed for the sake of completeness. Arbitration, specifically commercial arbitration, is conducted separately from the state and is not subject to the rules and principles of judicial independence. For the purposes of arbitration, the relevant tests relates to the personal independence of arbitrators. This is discussed further *infra*.

102 *De Lange v Smuts* at 70.

103 *Van Rooyen v The State* at 35; section 36 of the 1996 Constitution provides that the rights contained in the Bill of Rights may be limited. Such limitation is in terms of a law of general application and complies with the requirements set out in that section.

Judicial independence is part of the doctrine of the Separation of Powers between the legislative, executive and judicial branches of government,¹⁰⁴ as well as implicit in the concept of Rule of Law.¹⁰⁵ The Constitutional Court referred with approval to the definitions of Rule of Law by Dicey and Wade respectively in *De Lange v Smuts*:¹⁰⁶

Dicey [...] in propounding his concept of the Rule of Law, explains that in the first instance it means:

“ ... that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”

Wade’s interpretation [...] of this aspect of the rule of law is that:

“... disputes as to the legality of acts of government are to be decided by judges who are independent of the executive. In Britain, as in the principal countries of the Commonwealth and in the United States of America, such disputes are adjudicated by the ordinary courts of law. Although many disputes may be taken before special tribunals (‘administrative tribunals’), these tribunals are themselves subject to control by the ordinary courts and so the rule of law is preserved.”

Respect and compliance with the doctrine of Separation of Powers is of fundamental importance in a democratic society. The Constitutional Court stated in *South African Association of Personal Injury Lawyers v Heath and Others*:¹⁰⁷

The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution will be undermined.

104 *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at 123.

105 *Van Rooyen v The State* at 17.

106 *De Lange v Smuts* at par. 46.

107 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at 26.

Section 165 of the Constitution, which explicitly guarantees judicial independence and provides that:

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

No person or organ of state may interfere with the functioning of the courts;

Organs of state, through legislative and other measures, must assist and protect the court to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts; (own emphasis)

Not only should a tribunal be free from interference from the executive and legislative branches of government, but also from other external forces "*such as business or corporate interests or other pressure groups*".¹⁰⁸

The test to determine whether or not a court or tribunal is institutionally independent was determined by the South African Constitutional Court. The test is an objective one, requiring an inquiry as to:¹⁰⁹

whether the court or tribunal 'from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence'.

This test is similar to the test adopted by the Canadian Supreme Court and the South African test for determining whether grounds exist for the recusal of a judge.¹¹⁰ As is the case with the ECHR, the test deals with the perception of the individual as well as public confidence in the administration of justice.¹¹¹ The Constitutional Court approved the test applied by the Canadian Supreme Court, a test

108 *De Lange v Smuts* at par. 72.

109 *Van Rooyen v The State* at 32.

110 *Van Rooyen v The State* at 33.

111 *Van Rooyen v The State* at 32.

applicable both to the independence and impartiality of judges.¹¹²

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal ... that test "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude"

In this regard, a reasonable person is considered as a "*well informed, thoughtful and objective observer*" rather than a "*hypersensitive, cynical and suspicious person*".¹¹³ This distinction is especially important in the South African context, as regard must be had to:¹¹⁴

the diversity of our society ... [t]he well informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of Constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.

Further factors that have to be taken into account are the core protection given to all courts by the Constitution, the particular functions that the court in question performs and the court's place in the court hierarchy.¹¹⁵

2.2.1.3 Impartiality

Since the Constitution has come into force, the source for the rule against bias is no longer limited to the common law. Therefore, in considering the legal position with regard to impartiality in South Africa after 1994, regard must be had to the relevant provisions of the Constitution.¹¹⁶ The impartiality of judicial officers now also is a

112 *Van Rooyen v The State* at 33.

113 *Van Rooyen v The State* at 34.

114 *Van Rooyen v The State* at 34.

115 *Van Rooyen v The State* at 23.

116 The provisions of the 1996 Constitution is in essence similar to the provisions of the Interim Constitution. Reference is made to the provisions of the Constitution, as these are the provisions considered by the Constitutional Court in cases relevant to this study.

constitutional matter through its inclusion in three separate constitutional provisions.¹¹⁷

The right to be heard by an impartial tribunal is implicit to the right to a fair trial, which is guaranteed by section 35(3) of the Constitution.¹¹⁸ Furthermore, this right is guaranteed by section 34 of the Constitution, while section 165(2) places a duty on the courts to apply the law "*impartially and without fear, favour or prejudice*". This duty is confirmed by the prescribed oath of office in Schedule 2 of the Constitution. The Constitutional Court held that impartiality includes:¹¹⁹

that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication.

Impartiality must be distinguished from neutrality as the absolute neutrality of a judicial officer can "*hardly ever be achieved*".¹²⁰ According to the Constitutional Court in *President of the RSA v SARFU*:¹²¹

[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the Bench ... Indeed, Judges must rely on their background knowledge in fulfilling their adjudicative function.

The pre-constitutional reasonable apprehension of bias test determined in *BTR v Metal and Allied Workers' Union*¹²² was approved and applied by the Constitutional Court in *President of the RSA v SARFU*. The court

117 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at par. 28 (hereafter "*President of the RSA v SARFU*").

118 *Van Rooyen v The State* at 35.

119 *South African Commercial Catering and allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC).

120 *President of the RSA v SARFU* at par. 42.

121 *Ibid.*

122 *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A). See also section 3.1.2 *supra*.

stated this test as follows:¹²³

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude".

The party claiming bias carries the burden of proof to prove, on a balance of probabilities, the alleged bias on the part of the tribunal or judicial officer.¹²⁴ A *prima facie* presumption exists that judicial officers are impartial in adjudicating disputes.¹²⁵ The court must then balance the judge's duty to act impartially and the accompanying presumption that he or she will act impartially, with the general public's right to an impartial tribunal as part of the right to a free and fair trial. The court in *President of the RSA v SARFU* held:¹²⁶

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

Similarly, as was the situation in pre-constitutional law, one can still waive the right to raise objections as to a judge's independence or impartiality, as long as such a waiver is unambiguous.¹²⁷

123 *President of the RSA v SARFU* at par. 45.

124 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 12 - 13.

125 *President of the RSA v SARFU* at 40.

126 *President of the RSA v. SARFU* at par. 48.

127 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 4.

2.3 Arbitration

The right to be heard by an independent and impartial court or tribunal, as guaranteed by article 34 of the Constitution, extends further than just the ordinary courts. The court in *President of the RSA v SARFU* stated:¹²⁸

A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings.

Furthermore, the Court in *BTR v Metal and Allied Workers' Union* noted *obiter dicta* that:¹²⁹

Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals – other than courts of law – which have all the attributes of a court of law and are expected by the public to behave exactly as a court of law does.

The Supreme Court of Appeal noted, also *obiter dicta*, that the question whether article 34 applies to private proceedings before an arbitrator has not yet been decided.¹³⁰ The right to be heard by an independent and impartial court or tribunal cannot be limited only to statutorily instituted adjudicatory bodies.¹³¹ The court did not, however, further consider the applicability of article 34 to voluntary arbitration. In *Telcordia Technologies Inc. v Telkom SA*¹³², the Supreme Court of Appeal held that section 34 of the Constitution applied to International Commercial Arbitration. Harms JA further held that the right to an independent and impartial tribunal can be waived, and that parties to arbitration, by agreeing to international commercial arbitration, waives its rights under

128 *President of the RSA v SARFU* at par. 35.

129 *BTR v Metal and Allied Workers' Union* *Supra* at 692 H – I.

130 *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) Pty Ltd and Another* (2002) 4 SA 661 (SCA) at 674 C – F (Hereafter "*Total Support Management v Diversified Health Systems*).

131 *Ibid.*

132 *Telcordia Technologies Inc. v Telkom SA* (2007) 3 SA 266 (SCA) at par. 46.

section 34, unless “the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores*”.¹³³ Specifically, the Court refers to the fact that the right to a public hearing and the right to an independent tribunal can be waived. It further held that this approach is in line with that of the ECHR.¹³⁴

The common law tests for independence and impartiality in the ordinary courts have not been changed by the Constitution. Consequently, should the tests for independence and impartiality have been the same in arbitration proceedings as in the ordinary courts, these tests would similarly not have changed with the entry into force of the Constitution. Arbitration legislation has not changed since the entry into force of the Constitution. Voluntary arbitration in South Africa is still regulated by the Arbitration Act.¹³⁵

There is a difference in terms of the powers of review of a court in terms of the Labour Relations Act and the Arbitration Act.¹³⁶ However, voluntary arbitrations, even when reviewed by the Labour Court, have to be reviewed in terms of article 33(1) of the Arbitration Act.¹³⁷ This article provides that a court cannot review the merits of an arbitration award. It can only review (and potentially set aside) an award based on very limited grounds provided for by article 33(1) of the Arbitration Act.¹³⁸

The Labour Court of Appeals, in interpreting section 33 of the Arbitration Act, held that, since there is an implied agreement for the arbitrator to

133 *Ibid* at par 48.

134 For a discussion on the approach of the ECHR see Chapter 4

135 This has been confirmed by the Labour Appeals Court in 2002 in *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 3 BLLR 189 (LAC) at par 23 (Hereafter “*Stocks v Rip*”).

136 *Stocks v Rip* at par. 24 *et seq.*

137 *Ibid.*

138 *Stocks v Rip, supra.* See also *Total Support Management v Diversified Health Systems* at 671 A – J. Section 33(1) of the Arbitration Act provides four grounds for the review of an arbitral award:

- (i) Misconduct by the arbitrator in relation to his duties as arbitrator;
- (ii) Where the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings;
- (iii) Where the arbitrator has exceeded his powers; and
- (iv) Where the award has been improperly obtained.

conduct a fair hearing, the basis of the court's powers of review is the absence of a fair trial.¹³⁹ Lack of independence and/or impartiality on the part of the arbitrator are just some of the manifestations of an unfair trial.¹⁴⁰

The criteria to be applied in determining the presence of misconduct on the part of the arbitrator in terms of section 33(1)(a) of the Arbitration Act was considered by the Labour Appeal Court in *Stocks Civil Engineering v Rip*.¹⁴¹ The Court held that:¹⁴²

[a] court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.

In turn, "*gross irregularity in the conduct of ... proceedings*" in terms of paragraph (ii) has been found to refer to the right to a fair trial. The Labour Appeal Court in *Stocks v Rip* stated:¹⁴³

The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the inquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.

139 *Stocks v Rip* at par. 34.

140 *Ibid.*

141 *Supra* fn 133.

142 *Stocks v Rip* at par. 52.

143 *Stocks v Rip* at par. 53, referring to the decision in *Goldfields Investments Ltd v City Council of Johannesburg & Another* 1938 TPD 551.

Further on the Court held that:¹⁴⁴

irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.

An arbitrator may be removed while the arbitration is still in process, in terms of section 13 of the Arbitration Act:¹⁴⁵

- (a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.
- (b) For the purposes of this subsection, the expression 'good cause', includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering in and proceeding with the reference and making an award, or in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.

"Good cause" has been found to include situations where bias can be proven on the part of the arbitrator.¹⁴⁶

2.3.1 Independence

The current Arbitration Act¹⁴⁷ does not contain an express provision providing for the removal of an arbitrator where doubts as to his or her independence exist. Removal of an arbitrator by the court is governed by section 13(2), which includes a "*gross irregularity in the conduct of ... proceedings*" as grounds for removal. As this ground has been interpreted to provide for the guarantees of a fair trial,¹⁴⁸ it is submitted that

144 *Stocks v Rip* at par. 54, referring to the decision in *Ellis v Morgan and Dessai* 1909 TS 576.

145 Section 13(2) of the *Arbitration Act*.

146 *Infra* section 3.3.1.

147 *Arbitration Act* 45 of 1965.

148 *Supra* at ftn 139.

where it can be proven that an arbitrator is not independent, he/she may be removed in terms of this section.¹⁴⁹

2.3.2 *Impartiality*

As mentioned above, an arbitrator can be removed at any time or his or her appointment can be set aside by a court of law where "good cause" can be shown to support such a removal.¹⁵⁰ The term "good cause" has been interpreted by the High Court to include cases where bias can be shown on the part of the arbitrator.¹⁵¹ Furthermore, an arbitration award can be set aside where it can be shown that there was misconduct on the part of a member of the arbitral tribunal.¹⁵² The South African Supreme Court of Appeal found that the term misconduct refers to dishonesty on the part of the arbitrator, and as such:¹⁵³

even a gross mistake, unless it establishes *mala fides* or partiality would be insufficient to warrant interference.

The South African Labour Court has found that, similar to cases of alleged bias of judges, it need not be shown that an arbitrator (in this case a commissioner of the Council of Conciliation, Mediation and Arbitration – "CCMA") was in fact biased, but only that the actions of the arbitrator create a perception of bias.¹⁵⁴ The Labour Court also found that it was not necessary to show a real likelihood of bias, but that there should be a reasonable suspicion of bias.¹⁵⁵ This test is the same as the test applied by the South African Court of Appeals in cases before the

149 "Independence" in this context refers to the personal independence of the arbitrator and not to the structural independence of the arbitral tribunals. Structural independence relates to the independence of the judiciary from the executive and legislative arms of government. This clearly does not apply to arbitration proceedings.

150 Section 13 of the *Arbitration Act* 45 of 1965.

151 *Nat-Cole Properties CC v Van Deventer and another* (2001) JOL 8450 (C) at p 5.

152 Section 33(1) of the *Arbitration Act* 45 of 1965, Section 145 of the *Labour Relations Act* 66 of 1995.

153 *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA)(Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at 17.

154 *Mutual and Federal Insurance Co. Ltd. v CCMA and Others* (1997) 12 BLLR 1610 (LC) at p 16.

155 *Afrox Ltd v Adv Laka and others* (1999) 5 BLLR 467 (LC) at 31.

ordinary courts.¹⁵⁶ One can, therefore, conclude that the test for bias in arbitration, as in the ordinary courts, is the reasonable suspicion, or reasonable apprehension of bias test. This test is the common law test for bias, and has not been altered by the provisions of the Constitution.

2.4 Reforms suggested by the SALC

As discussed *supra*, the current arbitration legislation does not provide expressly for a lack of independence and impartiality of the arbitrator as grounds to challenge an arbitration award. The SALC has indicated that the current legislation is dated and suggested legislative reforms with regard to both domestic and international arbitration. These recommendations, with specific reference to independence and impartiality, are discussed here in later.

2.4.1 International Commercial Arbitration

The SALC recommends that the UNCITRAL Model Law on International Commercial Arbitration (hereafter "Model Law"), be adopted in South Africa with as little amendment as possible.¹⁵⁷ The provisions relating to independence and impartiality can be summarised as follows:

- An obligation must be placed on arbitrators to disclose circumstances that are likely to affect the arbitrator's independence and impartiality. This duty applies throughout the proceedings.¹⁵⁸
- The appointment of an arbitrator may be challenged where justifiable doubts exist as to his/her independence or impartiality, or if the arbitrator does not possess the qualifications agreed upon by the parties.¹⁵⁹ Although the SALC did consider the wording of the

156 *BTR v Metal and Allied Workers' Union, supra.*

157 SALC Report on Project 94 "Arbitration: An International Arbitration Act for South Africa" of July 1998 (hereafter SALC International Arbitration Report") par. 1.13.

158 SALC International Arbitration Report as par. 2.165.

159 SALC International Arbitration Report as par. 2.166.

United Kingdom Arbitration Act in this regard,¹⁶⁰ it decided to keep to the wording of the UNCITRAL Model Law and included both independence and impartiality, as, *inter alia*, this would be in line with the provisions of section 34 of the 1996 Constitution, which provides for disputes that can be resolved by application of law decided by a court or "*where appropriate, another independent and impartial tribunal*".¹⁶¹

- The right to waive one's right to object to procedural irregularities is provided for by legislation and does not form part only of the common law. A party who knows that a non-mandatory provision of the UNCITRAL Model Law or of the arbitration agreement has not been complied with and does not object, will be considered to have waived its right to object, should an objection be raised later.¹⁶² This rule also applies to challenges brought against the appointment of arbitrators for non-disclosed information that might be perceived to affect the arbitrator's independence and impartiality. Such challenge can only be brought if the reasons for the challenge were unknown to the party bringing the challenge at the time the appointment was made.¹⁶³
- Lastly, the proposal regarding grounds for the setting aside of arbitral awards do not differ substantially from section 33(1) of the current Arbitration Act,¹⁶⁴ although "public policy" has been added as a ground for the setting aside of an award. Public policy has been specified to include "*a breach of the arbitral tribunal's duty to act fairly ...*"¹⁶⁵ This wording has been chosen to be in line with section 34 of the 1996 Constitution which provides for a "fair" hearing.¹⁶⁶

160 The British Arbitration Act 1996 only makes provision for challenges to be brought based on lack of impartiality, *infra* Chapter 3.

161 SALC International Arbitration Report at fn 206, p. 90.

162 SALC International Arbitration Report at par. 2.115.

163 SALC International Arbitration Report as par. 2.166.

164 *Supra* section 2.3.

165 SALC International Arbitration Report par. 2.261.

166 SALC International Arbitration Reports at par 2.262.

2.4.2 Domestic Arbitration

The SALC further published a report on the desirability of adopting the Model Law for domestic arbitrations.¹⁶⁷ The SALC states that the objects of any modern arbitration act are:¹⁶⁸

the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the reference effectively. It is clear that the existing Arbitration Act 42 of 1965 fails to meet these objectives adequately.

Butler points out that any good arbitration legislation needs to comply with the following principles:¹⁶⁹

First, the parties must be allowed the greatest freedom possible to tailor the procedure to be followed to meet the ends of their particular dispute. In other words any procedural rules in the arbitration statute should be of a regulatory nature, which may therefore be excluded or modified by the parties in their arbitration agreement.

Secondly, the legislation should give substantial powers to the arbitrator, and where the parties' agreement is silent, a wide procedural discretion, so that the arbitrator can use a procedure which will determine the dispute without unnecessary delay and expense, while still doing justice between the parties.

Thirdly, in exchange for the court's support for the arbitral process, the court must have sufficient supervisory powers to ensure fairness and due process in the proceedings.

These findings of the SALC are similar to their findings with regard to International Commercial Arbitration.¹⁷⁰ Although the SALC recommends that South Africa do not adopt the UNCITRAL Model Law for domestic arbitrations,¹⁷¹ many of the provisions of the current Draft Bill are based on Model Law provisions, as well as on the provisions of the English

167 SALC Report on Project 94 "Domestic Arbitration" May 2001 (Hereafter "SALC Report on Domestic Arbitration").

168 SALC Discussion Paper 83 on Project 94 "Domestic Arbitration" July 1999 p 3 (hereafter "SALC Discussion Paper").

169 Butler D "South African arbitration legislation – the need for reform" (1994) 27 *CILSA* 122.

170 *Supra* section 2.4.1.

171 SALC Report on Domestic Arbitration p IX.

Arbitration Act. This is certainly the case with section 22 of the Draft Bill, which is proposed to replace section 13 of the current Arbitration Act. The relevant part provides:¹⁷²

Power of court to remove arbitrator

A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and, where applicable, to any other member of the tribunal) apply to the court to remove an arbitrator from office in any of the following instances –

- (a) that reasonable grounds exist to doubt the arbitrator's independence or impartiality;
- (b) that the arbitrator does not possess the qualifications required by the arbitration agreement.

Although this provision is based on section 24 of the British Arbitration Act,¹⁷³ it provides for both independence and impartiality as grounds for removal of an arbitrator, contrary to the provisions of said British Act. The reason for this is, as with the proposed International Commercial Arbitration Act, to bring the statute in line with the provisions of section 34 of the 1996 Constitution, and in conformity with current South African case law on independence and impartiality.¹⁷⁴

2.5 Conclusion

The jurisprudence of the Constitutional Court has contributed greatly to establish legal certainty with regard to the test and standard for independence and impartiality of both ordinary courts and arbitral tribunals.

In *Telcordia Technologies Inc. v Telkom SA*¹⁷⁵, the Supreme Court of Appeal held that section 34 of the Constitution applied to International Commercial Arbitration.

172 SALC Report on Domestic Arbitration p 142-143.

173 SALC Discussion paper p 77.

174 SALC Report on Domestic Arbitration p. 33 – 34.

175 *Telcordia Technologies Inc. v Telkom SA* (2007) 3 SA 266 (SCA) at para 46.

While the provisions of the Arbitration Act have been interpreted in such a way as to include independence and impartiality as requirements for enforceable arbitration proceedings, it is necessary to modernise current arbitration legislation to bring it in line with foreign arbitration legislation, the UNCITRAL Model Law and also to ensure the independence and impartiality of arbitrators. The recommendations by the SALC with regard to new arbitration legislation will solve this problem. Not only have these recommendations been made with the provisions of the Bill of Rights in mind, but also with reference to international standards. The recommended bills for international and domestic arbitration provides for arbitration tribunals to be independent and impartial. This clear and unambiguous provision for the right to be heard by an independent and impartial arbitral tribunal will reflect international accepted standards for domestic and international arbitration proceedings.

CHAPTER 3

English Law on Independence and Impartiality

The aim of this chapter is to determine the tests used by the courts of the United Kingdom with regard to independence and impartiality of arbitrators. If the British tests are the same as the tests applied by the ordinary courts in South Africa, one could conclude that the recognition and enforcement of foreign arbitral awards rendered in South Africa would not be barred by the effect of article V(2)(a) of the New York Convention,¹⁷⁶ and *vice versa*. The position with regard to independence and impartiality in the British courts as well as in arbitration proceedings will be considered. The aim is to determine whether or not the United Kingdom applies the same standards in proceedings in the ordinary courts as in arbitration proceedings. It will be determined if parties to arbitration, at least as far as the independence and impartiality of arbitrators are concerned, are entitled to the same protection, as prescribed by the Human Rights Act,¹⁷⁷ as parties to proceedings in the ordinary courts.

The legal position with regard to independence and impartiality forms part of the Common Law. The British Court of Appeal held:¹⁷⁸

The requirement that [a] tribunal should be independent and impartial is one that has long been recognized by English common law. An appellate or reviewing court will set aside a decision affected by bias.

The British test for impartiality has been defined by the House of Lords, the highest court in Britain.¹⁷⁹ Similarly, the courts have clearly set out the test for personal independence.¹⁸⁰ The extension of these tests to

176 *Infra*, Chapter 5.

177 Human Rights Act 1998. Discussed in more detail *infra*.

178 *Director General of Fair Trading v Proprietary Association of Great Britain and Proprietary Articles Trade Associations Re Medicaments and Related Classes of Goods (No. 2)* Case No. C/2000/2582 C.A. at para 35.

179 See discussion of *R v Gough* (1993) AC 646, *infra*.

180 See, *inter alia*, *EAT/980/99 Scanfuture UK Ltd*, *EAT/1353/99 Mrs J M Link v EAT/980/99 Mr K Bird, Mrs J M Link, Mr C J Bennet, Secretary of State for*

arbitration proceedings has also been established.¹⁸¹ The major problem with regard to independence and impartiality in the United Kingdom lies with the structural independence of the judiciary. The United Kingdom does not apply the doctrine of separation of powers strictly. This may create doubt about the independence of the British judiciary from the executive and legislative branches of government. The judges of the House of Lords are also members of parliament (the legislature), while the Lord Chancellor holds positions in the executive, legislative and judicial branches of government.

Recently, as a result of the adoption of the Human Rights Act,¹⁸² a number of changes have been introduced to the judicial structure. These changes range from changes to the structure of the ordinary courts of the United Kingdom to ensure the appearance of independence, to the adjustment of the traditional test for impartiality to ensure compliance with the new Human Rights Act.

This chapter is divided into three main parts. The first will examine the traditional concepts of independence and impartiality as part of British Common Law. Secondly, the changes brought about by the introduction of the Human Rights Act will be considered. Lastly, the standards applied by the British Courts to arbitration proceedings brought before it in terms of the Arbitration Act¹⁸³ will be compared to the standards applied in judicial proceedings.

Department of Trade & Industry, EAT/1353/99 Secretary of State for Department of Trade and Industry No. EAT/980/99 EAT/1353/99 2001 WL 395198, discussed infra.

181 See discussion of *Laker Airways Inc. v Fls Aerospace Ltd. and Burnton Fls Aerospace Ltd. v Laker Airways Inc* (1999) 2 Lloyd's Rep 45 *infra*.

182 Human Rights Act 1998, discussed in more detail *infra*.

183 Arbitration Act 1996, discussed in more detail *infra*.

3.1 Common Law Position

3.1.1 Independence

3.1.1.1 Structural independence

The concept of judicial independence as part of the doctrine of separation of powers, as it is accepted today, is still in its early stages in the United Kingdom.¹⁸⁴ Currently there are high ranking officials in the judiciary who also hold positions in the executive and legislative branches of government. Specifically two aspects of the judiciary stand out in this regard. The first is the position of Lord Chancellor and the second the position of the Lords of Appeal in Ordinary (better known as the "Law Lords").

Lord Chancellor

The position of Lord Chancellor originated as secretary to the medieval Kings of England.¹⁸⁵ Through the centuries, the Lord Chancellor's responsibilities have increased to such an extent that it now includes duties in all three branches of government. The most important roles of the Lord Chancellor for the purpose of this study include:¹⁸⁶

- the Lord Chancellor is a senior Judge and is Head of the Judiciary in England, Wales and Northern Ireland. The Lord Chancellor is entitled to sit as Chairman in both the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council;¹⁸⁷

184 Stevens R "A Loss of Innocence?: Judicial Independence and the Separation of Powers" 1999 (19) *Oxford Journal of Legal Studies* 365 (hereafter "Stevens")

185 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> 23 August 2004 p. 12.

186 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> 23 August 2004 p. 16-18.

187 See further: Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 p. 11.

- the Lord Chancellor is responsible for the appointment of, or making recommendations for the appointment of a large number of full-time and part-time judicial posts, as well as dealing with judicial discipline and complaints against judges;
- the Lord Chancellor has a duty to safeguard the independence of the judiciary;
- he is *ex officio* Speaker of the House of Lords;
- he is a Departmental Minister responsible for the administration of the courts and tribunals, legal aid and legal services, civil and family law reform in England and Wales and constitutional matters.

Law Lords

The highest courts in the United Kingdom are divided between two judicial bodies:¹⁸⁸

- the Appellate Committee of the House of Lords ("House of Lords"), which receives criminal appeals from England, Wales and Northern Ireland and civil appeals from England, Wales, Northern Ireland and Scotland; and
- the Judicial Committee of the Privy Council, which decides on questions with regard to whether the devolved administrations (Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly) are acting within their legal powers.

Both of these judicial bodies also form part of the legislative branch of government. The Law Lords, judges in the House of Lords, also hold positions in the United Kingdom Parliament (also the "House of Lords"). As such, the Law Lords have the authority to take part in political debates and can also vote on matters presented in parliament.

188 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 p. 10.

Although in the period prior to the Human Rights Act the United Kingdom did not have a strict separation of powers, it has been generally accepted that the political culture of the United Kingdom provided for the protection of the independence of the judiciary, where such protection was not provided for by legislation.¹⁸⁹ The process of constitutional reform is still ongoing, and it has been stated that, even though the structure of the judiciary does not fully comply with the traditional doctrine of separation of powers, the judiciary is still independent in the sense that the individual judges are independent.¹⁹⁰

It is acceptable ... to say that England has independence of the judiciary in the sense of independence of an individual judge. To take what are conventionally seen as the hallmarks of such independence – security of tenure, fiscal independence, impartiality and freedom from executive pressure – at the core, there is little doubt that England qualifies under any reasonable standard of judicial independence with respect to individual judges.

This position is contrary to that of the ECHR which has indicated that it is unacceptable for a person to hold positions in two or more branches of government.¹⁹¹ This decision is especially relevant in light of the United Kingdom's adoption of the Human Rights Act,¹⁹² which requires United Kingdom courts to take the jurisprudence of the ECHR into account whenever it may be relevant to the case before the court.

This situation is currently being reviewed through the constitutional changes currently in progress in the United Kingdom. The office of Lord Chancellor already has been abolished and replaced with the Department of Constitutional Affairs. It is suggested that a United Kingdom Supreme Court be created in order to solve the situation where

189 Stevens at 365.

190 Stevens at 370.

191 *Procola v Luxembourg* (ECHR) Application number 14570/89 at par. 45 states:

"[T]he fact that certain persons successively performed these two types of functions [legislative and adjudicative] in respect of the same decisions is capable of casting doubt on the institution's structural impartiality."

See also: Masterman R "A Supreme Court for the United Kingdom: Two Steps Forward, but One Step back on Judicial Independence" 2004 Spring *Public Law* 51 (hereafter "Masterman")

192 Discussed in detail *infra*.

the Law Lords form part of both the judiciary and legislature.¹⁹³ The judges of the Supreme Court will then be completely independent from the legislature. Discussions are underway on how best to achieve this. Such reform will contribute to establish the appearance of independence of the British courts, especially in jurisdictions that are not familiar with the functioning of the United Kingdom court system. These changes are discussed in more detail hereunder.

3.1.1.2 Personal independence

Despite the fact that there are some aspects of the formal structure (structural independence) of the United Kingdom judiciary that do not comply with the doctrine of the separation of powers, there is a very strict personal independence between the executive and judicial branches of state. It has been said that:¹⁹⁴

There is ... an effective separation of the judicial power from the [administrative and executive branches]. Judges may not sit in the House of Commons and they are protected from summary removal under the Act of Settlement 1701. By convention lay peers may not take part in the deliberations of the House of Lords as an appeal court. On the other hand, the position of the Lord Chancellor and the freedom, increasingly exploited, of the Law Lords to participate in the legislative debates of the Upper House, contravene the principle [of separation of powers], albeit moderately and perhaps acceptably.

There can be no doubt as to the personal independence of the Law Lords. These judges are appointed in terms of the Appellate Jurisdiction Act¹⁹⁵ and their salaries are paid from the Consolidated Fund which is separate from the budget of the House of Lords.¹⁹⁶ Law Lords have security of tenure through application of the Act of Settlement,¹⁹⁷ which provides that judges may be removed only through impeachment by

193 Department of Constitutional Affairs Paper 2004

<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August.

194 Barendt E "Separation of Powers and Constitutional Government" 1995 Winter *Public Law* at 615.

195 *Appellate Jurisdiction Act* of 1876.

196 Department of Constitutional Affairs Paper 2004

<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 p 14.

197 *Act of Settlement* 1701.

parliament. Non-judicial members of the House of Lords do not participate in judgments of the Appellate Committee¹⁹⁸ and in practice the Law Lords refrain from engaging in matters with strong elements of party political controversy while sitting in parliament.¹⁹⁹ Furthermore, in the past the courts have interpreted legislation in order to safeguard the judiciary from interference by the executive.²⁰⁰ Still, there is a perception that the independence of the judiciary may be compromised by the Law Lord's membership of the House of Lords.²⁰¹

3.1.2 *Impartiality*

The rule against biased (partial) tribunals has long been established in jurisprudence. This right is considered as fundamental by the English Court of Appeal.²⁰² Sir Christopher Staughton wrote:²⁰³ "*Confidence in the judiciary is a fragile creature at the best of times, and any genuine hint of bias is to be avoided.*"²⁰⁴ Confidence in the judicial system is so highly regarded that the United Kingdom Court of Appeal held that:²⁰⁵

[I]f in any case there is real ground for doubt, that doubt should be resolved in favour of recusal [of the judge].

The rule against bias is founded in the rules of natural justice. Two rules apply. First and foremost, as stated by Lord Hewart CJ,²⁰⁶ it is

-
- 198 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 at p 10.
- 199 Department of Constitutional Affairs Paper 2004
<http://www.parliament.uk/documents/upload/HoLBpJudicial.pdf> 23 August 2004 at p 2.
- 200 Barendt E "Separation of Powers and Constitutional Government" 1995 Winter *Public Law* at 616.
- 201 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 at p 11.
- 202 *Locabail (UK) Ltd v Bayfield Properties Ltd and Snotter; Locabail (UK) Ltd and Another v Waldorf Investment Corp and others; Timmins v HM Inspector of Taxes and Others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan* [2000] QB 451 at 2 (hereafter "*Locabail v Bayfield*").
- 203 Staughton C "Bias for Judges – and Arbitrators?" 16(2) *Arbitration International* 2000 215.
- 204 *Supra* par. 2.1.1 and par. 2.2.1.
- 205 *Locabail v Bayfield* at 22.
- 206 *R v Sussex Justices, ex p McCarthy* (1924) 1 KB 256; (1923) All ER Rep 233.

of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Secondly, as held by Lord Cottenham, it is important that:²⁰⁷

the maxim that no man is to be a judge in his own cause should be held sacred.

There are three general common law principles in terms of which a judge, jury or lay judge's findings can be challenged on the grounds of bias. These are:²⁰⁸

1. the principle against actual bias;
2. the principle that no one may be a judge in his/her own cause ("automatic disqualification"); and
3. the principle against apparent bias.²⁰⁹

Actual bias

Cases of actual bias on the part of the judicial officer arise very rarely. This may be because actual bias very rarely exists or because actual bias is very difficult to prove.²¹⁰ Whatever the reason may be, where a party can prove actual bias on the part of the judicial officer he or she will always be disqualified from hearing the dispute.

207 *Dimes v Grand Junction Canal* (1853) 3 HL Cas 759, 10 ER 301.

208 Eastwood G "A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators" 17(3) 2001 *Arbitration International* 302 (hereafter "Eastwood").

209 Note that the categories "automatic disqualification" and "an apprehension of bias" only apply in circumstances where actual bias does not exist, but where a judge can be perceived to be biased as a result of surrounding circumstances.

210 Eastwood at 288.

Automatic disqualification

The rule of automatic disqualification is based on the rule that "*no man may be judge in his own cause*" or *nemo iudex in sua causa*. The rule applies where the judicial officer has an interest in the outcome of the case, whether such interest is pecuniary or non-pecuniary.

This rule was first formulated with reference to a judge's financial interest in the outcome of a case. That case, which concerned a judge's shareholding in a company that was party to the case, Blackburn J held that:²¹¹

any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.

This finding was confirmed by the Court of Appeal in *Locabail (U.K) v Bayfield Properties*.²¹² The court held that a judicial decision-maker will be disqualified automatically where he has a direct pecuniary or proprietary interest in the parties to, or the subject-matter of, the proceedings.²¹³ The rule also extends to partners and family members of the judicial officer.²¹⁴ Where such an interest exists, it is irrelevant whether or not the judicial officer actually is biased. Bias will be presumed and the judicial officer will be disqualified.²¹⁵

In the case of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)*,²¹⁶ the House of Lords for the first time expanded the application of the automatic disqualification rule to cases

211 *R v Rand* (1866) LR 1 QB 230.

212 *Supra* fn 199.

213 Gearing M "'A Judge in his Own Cause?' – Actual or Unconscious Bias of Arbitrators" 3(2) 2000 *International Arbitration Law Review* 46 (hereafter "Gearing").

214 *Locabail v Bayfield* at 10; *Gearing* at 46.

215 *Ibid*.

216 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 97 (HL).

where the judge has a non-pecuniary interest in the outcome of the case.

Senator Pinochet Ugarte appealed against a decision by the House of Lords to allow his extradition to Spain on charges of, *inter alia*, crimes against humanity and torture. The appeal was upheld on the basis that Lord Hoffman, one of the Law Lords who decided the matter, was biased as a result of his links with Amnesty International. Lord Hoffman was a Director of Amnesty International's charity branch, Amnesty International Charity Limited. Amnesty International was a party to the initial proceedings in the capacity of *amicus curiae*, supporting the position that Senator Pinochet should be extradited. The House of Lords pointed out that there were no allegations of actual bias against Lord Hoffman, but held that:

[i]f the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organization as is a party to the suit.

One can conclude that where it is found that proof exists that a judge has an interest in the outcome of a case, whether it be pecuniary or non-pecuniary, the court will presume the existence of bias and no further enquiry into the matter need be made. The question is not whether a judge has some link with a party involved in a cause before him or her, the question is rather whether the outcome of the case could, realistically, affect the judge's interest.²¹⁷ Such a situation calls for immediate disqualification, unless the right to object to such judge hearing the case has been waived.²¹⁸

217 *Locabail v Bayfield* at 8.

218 *Locabail v Bayfield* at 15.

The test for "apparent bias"

The leading authority for the test for bias is that of *R v Gough*.²¹⁹ This test determines whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand.²²⁰

Prior to the finding in *R v Gough*, there was some confusion as to which test should be applied to cases where there is no proof of actual bias, but where there is a realistic doubt as to the impartiality of the judicial officer involved. Courts applied a different test to cases where there was an allegation of bias on the part of a judge, as opposed to cases where a member of the jury allegedly was biased.

In setting out the law as it stood at the time, the House of Lords stated in *R v Gough* that the majority of authorities indicated that the appropriate test for bias in cases concerning judges was if there is a "real likelihood" of bias. An impression must exist that the circumstances of the case give rise to a real likelihood that the judge(s) were biased.²²¹ In effect, this test aims to determine if there is a probability that the judge or member of a judicial tribunal was biased.²²² In jury trials, there need to be a real danger that, under the circumstances, a party's position had been prejudiced by the bias of one of the jury members.²²³

The House of Lords then went on to hold that it is desirable that the same test be applied in all cases of apparent bias. No distinction needs to be made between justices, jurors or arbitrators.²²⁴ The appropriate

219 *R v Gough* [1993] AC 646.

220 *Ibid.*

221 *Ibid.*

222 Compare this to the discussion of the South African Supreme Court of Appeal in *BTR v Metal and Allied Workers' Union*, *supra* Chapter 2, where the real likelihood of bias test was held to refer to the probability of bias, as opposed to the possibility of bias.

223 *R v Spencer* [1986] 2 All ER 928; [1987] AC 128.

224 *Supra* fn 216.

test, according to the House of Lords, is that of a "real danger of bias".

The test involves whether:

having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might have unfairly regarded with favour, or disfavour, the case of a party to the issue under consideration by him.

The findings of the court in *R v Gough* were confirmed in the case of *Locabail (UK) Ltd v Bayfield Propertied Ltd and Another; Locabail (UK) Ltd and Another v Waldorf Investment Corp and Others; Timmins v HM Inspector of Taxes and Others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan*²²⁵ (hereafter "*Locabail v Bayfield Prpertied*"), heard in the United Kingdom Court of Appeals (Civil Division). The court laid down certain guidelines to determine the existence of alleged bias. It held that:

We cannot ... conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or response to consultation papers); or previous receipt of instructions to act for or against a party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers.

Concerning factors that might indicate bias, the judges held that:

By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the

²²⁵ *Locabail (UK) Ltd v Bayfield Propertied Ltd and Another; Locabail (UK) Ltd and Another v Waldorf Investment Corp and Others; Timmins v HM Inspector of Taxes and Others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan* [2000] QB 451.

judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind ...; or if, for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

However, the judges qualified these factors, by cautioning that:²²⁶

The mere fact that a judge earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection ... The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

A party can waive its right to be heard by an impartial court or tribunal. This would be the case where such party was aware of the circumstances giving rise to doubts as to the judge's impartiality, yet did not object to the judge hearing the dispute.²²⁷

The test applied by the House of Lord is different from the test applied by the ECHR. The Court of Appeal indicated that the ECHR applied the reasonable suspicion of bias test, whereas the United Kingdom courts apply the real danger of bias test.²²⁸ The reasonable suspicion of bias test requires an inquiry as to whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have a reasonable suspicion that a fair trial by the defendant was not possible.²²⁹ The application of this test in the United Kingdom was

226 *Ibid.*

227 *Locabail v Bayfield Properties* at 26.

228 *Ibid.*

229 *R v Gough, supra.* The reasonable suspicion of bias test is the same as the test for bias applied in the South African courts. See *BTR v Metal and Allied Workers Union, supra* Chapter 2.

rejected on the basis that.²³⁰

it [is] unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

In a seemingly contradictory statement, the judge added.²³¹

I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias.

The Court of Appeal interpreted the "real danger" test to be more stringent than the "reasonable suspicion" test.²³² The British Court of Appeal held:²³³

A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.

Although *R v Gough* is still the leading authority for the test of bias, the Court of Appeals has indicated that the "real danger" test may need to be altered in light of the impact of the Human Rights Act.²³⁴ Still, the test applied by the South African courts is a wider and more encompassing test than the test applied by the courts of the United Kingdom, in that the "real danger" test deals with the probability of bias rather than the possibility thereof.²³⁵

230 *R v Gough, supra*.

231 *Ibid.*

232 *R v Inner West London Coroner, ex parte Dallaglio and another* (1994) 4 All ER 139.

233 *R v Inner West London Coroner, ex parte Dallaglio and another* (1994) 4 All ER 139.

234 Section 4.2, *infra*.

235 *BTR v Metal and Allied Worker's Union, supra* Chapter 2.

3.2 Human Rights Act

There has already been changes to the common law position with regard to independence and impartiality, in large part due to the effect of the Human Rights Act 1998 (hereafter "the Act"), which came into effect on 2 October 2000.

The Act, which incorporates certain provisions of the European Convention into British law,²³⁶ provides in article 6 of Schedule I thereof for the right to a free and fair trial. This provides for the right to be heard by an "*independent and impartial court or tribunal*". The Act further places a duty on the state, in Article 3 thereof, to provide for primary and subordinate legislation to be interpreted in a manner that is compatible with the rights provided for in the Act.²³⁷ Article 2 of the Act determines that in interpreting the rights provided for in the Act, a British court must take into account any jurisprudence of the ECHR (own emphasis).²³⁸ Furthermore, courts should read and give effect to primary and subordinate legislation (as far as possible) to be compatible with Convention rights.²³⁹ Should a court find that a provision of an Act of parliament is incompatible with the Human Rights Act, the courts have the necessary jurisdiction to declare such provision incompatible.²⁴⁰ However, a finding of incompatibility does not affect the validity, continuing operation or enforcement of such an incompatible provision.²⁴¹ An incompatible provision may be amended by order of government to remove the incompatibility.²⁴² Such order will only be

236 The Human Rights Act incorporates articles 2-12, 14, 16-18 of the European Convention on Human Rights, as well as articles 1-3 of the First Protocol to the European Convention on Human Rights and articles 1-2 of the Sixth Protocol to the European Convention on Human Rights into domestic law.

237 Article 3(1) of the Act.

238 Article 2(1)(a) of the Act.

239 Article 3(1) of the Act.

240 Article 4(2) of the Act.

241 Article 4(6)(a) of the Act.

242 Article 10 of the Act.

effective once approved by both Houses of Parliament, except in matters of urgency.²⁴³

3.2.1 Independence

The right to be heard by an independent tribunal in terms of article 6(1) of the European Convention has been interpreted by the House of Lords to mean "*independent of the parties to the case and also of the executive*".²⁴⁴

On 12 June 2003, Parliament announced drastic constitutional reform measures with regard to the judiciary. The aim of these measures is to:²⁴⁵

put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system.

These measures include, but are not limited to:

- the abolition of the position of Lord Chancellor and establishment of the Department of Constitutional Affairs. This government department will take over only the responsibilities of the former Lord Chancellor in his/her capacity as Minister of the Crown;²⁴⁶ and
- the establishment of a Supreme Court for the United Kingdom, separate from the House of Lords (Parliament).²⁴⁷

243 Haydn-Williams J "Arbitration and the Human Rights Act 1998" *Journal of the Chartered Institute of Arbitrators* Nov 2001 p 292.

244 *R v Secretary of State for the Home Department* [2003] 1 A.C. 837 at 861.

245 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 at p. 10.

246 Department for Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> 23 August 2004 at p. 18.

247 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 at p. 19.

The motivation for this change is attributed partly to the introduction of the Human Rights Act. As is noted in the Department for Constitutional Affairs' report on the matter:²⁴⁸

The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues and more aware of the anomaly of the position whereby the highest court of appeal is situated within one of the chambers of Parliament.

[...]

The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.

In his foreword to the Department for Constitutional Affairs' Departmental Paper concerning reform of the Office of the Lord Chancellor, the current Secretary of State for Constitutional Affairs and Lord Chancellor notes.²⁴⁹

Our existing arrangements have become increasingly hard to sustain, even as we seek to persuade developing countries to adopt clearer constitutional mechanisms and provide for the insulation of the judiciary from political pressures. But we have hitherto not followed our own advice. The Government believes that it is time to separate out the different roles of the Lord Chancellor to bring greater transparency and increased public confidence.

Since incorporation of the Human Rights Act, British courts have applied the same test for independence as the test applied in the jurisprudence of the ECHR, namely:²⁵⁰

[T]he criteria to which the Court has regard in assessing the independence of Tribunals, in particular from the parties ... include, the manner of appointment of Members, the duration of

248 Department of Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> 23 August 2004 at p. 11.

249 Department for Constitutional Affairs Paper 2004
<http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> 23 August 2004 at p. 5.

250 *EAT/980/99 Scanfuture UK Ltd*, *EAT/1353/99 Mrs J M Link v EAT/980/99 Mr K Bird*, *Mrs J M Link*, *Mr C J Bennet*, *Secretary of State for Department of Trade & Industry*, *EAT/1353/99 Secretary of State for Department of Trade and Industry No. EAT/980 /99 EAT/1353/99* 2001 WL 395198 at par. 23. See also *Lawtel v. Northern Spirit Ltd* [2004] 1 All ER 187 at p. 193.

their terms of office, the guarantees afforded by the procedure against outside pressures and whether the body presents an appearance of independence.

In determining if a body presents an appearance of independence, the British VAT and Duties Tribunal applied the test relating to impartiality,²⁵¹ to determine if a likelihood of bias exists:²⁵²

It must then [be] ask[ed] whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

The present reform measures are necessary in light of, *inter alia*, the Human Rights Act. Although it has been suggested that more needs to be done to comply with the requirements of article 6(1) of the European Convention,²⁵³ the United Kingdom addresses all the necessary aspects of independence to ensure that it complies with the standards set by the European Convention and ECHR. By ensuring a stricter separation of powers and adapting the test for independence to comply with that of the ECHR, the United Kingdom ensures that the judiciary and its individual members are not only seen to be independent by those who have knowledge of the functioning of the judiciary, but also by the reasonable lay person with no knowledge of the functioning of the judiciary.²⁵⁴

3.2.2 *Impartiality*

In view of the adoption of the *Human Rights Act*, the difference between the test for impartiality set out in *R v Gough* and the ECHR test, may be problematic, as pointed out in *Locabail v Bayfield Properties*.²⁵⁵ Although the court in *Locabail* found that in the overwhelming majority of

251 *Ibid* at par. 4.1

252 *N Ali and S Begum (T/A Shapla Tandoori Restaurant), N Ali and S Ali (T/A Shapla Tandoori Restaurant A S Fanning, M Latif and A Rafiq, S O Lee (T/A The Chinese Lantern), B I Imaging Limited v The Commissioners of Customs and Excise No. 17681 2002 WL 1310948* at 44.

253 Masterman at 58.

254 This matter is discussed further *infra*.

255 *Locabail v Bayfield Properties*, *supra* at fn. 221.

cases the two tests would lead to the same outcome,²⁵⁶ there still will be cases where this will not be true. It is, therefore, suggested that the reasonable suspicion test provides wider protection against bias than the real danger test. The effect thereof will be that in all cases where bias is found in terms of the real danger test, bias will also be found in terms of the reasonable suspicion test. Contrary hereto, where a court finds that bias exists according to the reasonable suspicion test, the same will not necessarily be the case when applying the real danger test to the same set of facts. It is submitted further that the ECHR may find a violation of the right to a free and fair trial by an independent court or tribunal more easily than will the courts of the United Kingdom. This leaves the United Kingdom vulnerable to numerous possible violations of article 6 of the European Convention. The real danger of bias test was also found to be incompatible with the Human Rights Act by the British Court of Appeals. It found that the test formulated in *R v Gough* needs to be altered to be brought in line with the requirements of the Act:²⁵⁷

[The approach of the ECHR] comes close to that in *Gough*. The difference is that when the Strasbourg court considers whether the material circumstances give rise to a reasonable apprehension of bias, it makes it plain that it is applying an objective test to the circumstances, not passing judgment on the likelihood that the particular tribunal under review was in fact biased.

When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

Since then, the test has been adjusted further, with the result that the test for apparent bias applied in the ordinary courts of the United Kingdom is now the same as the test applied in the ECHR. In the case of

256 *Locabail v Bayfield Properties* at 17.

257 *Director General of Fair Trading v Proprietary Association of Great Britain and Proprietary Articles Trade Association Re Medicaments and Related Classes of Goods (No. 2)* Case No. C/2000/2582 C.A. at 84 – 86.

Porter v. Magill Lord Hope held that the test for apparent bias, in light of the requirements of the Human Rights Act should be what:²⁵⁸

... the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias.

The test applied in *R v Gough* required the ordinary courts to judge the matter not from the point of view of a reasonable person (in other words from the point of view of a reasonable lay person), but from the point of a reasonable court or judge. The *Porter* test now has changed this position in such a way that an ordinary court now has to decide the question of apparent bias from the point of view of a reasonable lay person, which is the same test as applied by the EHCR.²⁵⁹

3.3 Arbitration

Section 24 of the Arbitration Act²⁶⁰ only allows for lack of impartiality as a ground for removal of an arbitrator by the court, and not lack of independence.²⁶¹ Similarly, section 68 of the same Act allows for a party to bring a challenge against the award rendered on the basis that:²⁶²

... a lack of impartiality of the arbitrator led to serious irregularity in that the award or the way it was obtained is contrary to public policy.

The Arbitration Act is modelled on the UNCITRAL Model Law for International Commercial Arbitration, which includes both independence and impartiality as prerequisites for arbitrators. Consequently, it has been suggested that the provisions of the Arbitration Act are incompatible with the provisions of the Human Rights Act which provides

258 *Porter v. Magill* [2001] UKHL 67 at par 105 per Hope LJ.

259 Sandy D "Independence, Impartiality, Arbitration and the Human Rights Act in England" *Arbitration International* Vol. 20 No. 3 (2004) 305.

260 Arbitration Act 1996.

261 Article 24(1)(a) of the Arbitration Act provides for the removal of an arbitrator where "circumstances exist to give rise to doubts as to his impartiality".

262 Gearing at 47.

for the right to a free and fair trial by an independent and impartial court or tribunal.²⁶³

3.3.1 Independence

The Arbitration Act contains no provision requiring arbitrators to act independently. In fact, it seems as though the omission of independence as an express ground for the removal of an arbitrator from an arbitral tribunal was a deliberate action on the part of the Departmental Advisory Committee on Arbitration Law (hereafter the "Committee").²⁶⁴ The Committee found that lack of independence as a ground for the removal of an arbitrator is already covered by section 24(1)(a), which provides for lack of impartiality as a ground for the removal of an arbitrator. The Committee stated:²⁶⁵

It seems ... that the lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance ... Lack of [independence] may well give rise to justifiable doubts about impartiality, which is covered, but if it does not, then we cannot at present see anything of significance that we have omitted by not using this term.

The effect of this recommendation is that the courts will not be able to review an arbitral award on the basis of lack of independence of the arbitrator unless the lack of independence is proof of the arbitrator's lack of impartiality. This was what happened in the case of *AT&T and Others v Saudi Cable Company*²⁶⁶ in the Court of Appeal. The court refused to review an ICC Court decision on the alleged lack of independence of an arbitrator on the basis that 'independence' was not included as a

263 Haydn-Williams J "Arbitration and the Human Rights Act 1998" *Journal of the Chartered Institute of Arbitrators* Nov 2001 at p 301.

264 Haydn-Williams J "Arbitration and the Human Rights Act 1998". *Journal of the Chartered Institute of Arbitrators* Nov 2001 at p. 300.

265 Departmental Advisory Committee on Arbitration Law, par. 101 and 104, as quoted *obiter dictum* in *Laker Airways Inc. v Fls Aerospace Ltd. and Burnton Fls Aerospace Ltd. v Laker Airways Inc* [1999] 2 Lloyd's Rep 45 at 49-50. The decision in the *Laker* case related to whether or not a barrister, who acted as the arbitrator in a dispute, can be considered partial because he shares chambers with the barrister who acted as counsel for one of the parties to the dispute. The court held that this cannot be the case.

266 *AT&T and others v Saudi Cable Company* [2000] 1 Lloyd's Rep. 22.

separate ground for removal of an arbitrator in the Arbitration Act. The court did, however, proceed to review the findings of the ICC Court on the basis that the alleged lack of independence gave rise to doubts as to the arbitrator's impartiality.²⁶⁷ The ICC Arbitration rules do not expressly require arbitrators to be impartial.²⁶⁸

The fact that lack of independence is not included in the Arbitration Act as an independent ground for removal of an arbitrator does not in itself create a problem. It has, however, been argued that an additional safeguard should be put in place in the form of an obligation to disclose matters which may give rise to doubts as to the arbitrator's independence and impartiality at the appointment stage of proceedings.²⁶⁹ Currently, the Arbitration Act does not make provision for such obligation.²⁷⁰

It has been suggested that by excluding independence as a requirement from the Arbitration Act, either in the form of an obligation to disclose at the beginning of proceedings, or as a separate ground for removal of an arbitrator after proceedings have started, suggests that a higher threshold of proof is required to remove an arbitrator for lack of independence than is required to remove a judge in court proceedings.²⁷¹ For an arbitrator to be removed from an arbitration tribunal, his/her lack of independence needs to reach such a level that it would raise doubts as to the arbitrator's impartiality. This is supported by the findings of the Departmental Advisory Committee on Arbitration Law who were of the opinion that where lack of independence does not give rise to doubts as to the arbitrator's impartiality, there is no good reason for including lack of independence separately to cover the incidences not covered by the lack of impartiality provision.²⁷²

267 *Ibid* at 26.

268 The ICC, ICC Court and ICC rules are discussed in Chapter 4, *infra*.

269 Eastwood at 296.

270 Eastwood at 300.

271 Gearing at 48.

272 Departmental Advisory Committee on Arbitration Law, par 101 and 104, as quoted *obiter dictum* in *Laker Airways Inc. v Fls Aerospace Ltd. and Burnton Fls*

However, an obligation to disclose any relationship between the arbitrator and any other parties will enable parties to the arbitration to timely disqualify arbitrators who may not be independent. Should any facts subsequently arise which create the impression of bias, the arbitrator could be removed in terms of section 24. The British VAT and Duties Tribunal stated that "[i]ndependence' plainly includes independence from the parties".²⁷³ In arbitration proceedings, where the parties themselves generally appoint some members of the tribunal, more often than not such members will have some ties to the party appointing them. The inclusion in the Arbitration Act of an obligation to disclose, can prevent situations where an arbitrator, although acting impartially, has such close ties to one of the parties or their representatives that the tribunal does not have the appearance of impartiality, which would render an award challengeable in the courts.

Furthermore, in terms of the Human Rights Act, ordinary courts and tribunals are required to be independent and impartial. This act may have an indirect horizontal effect (i.e., that European Convention rights are enforceable between private entities) on arbitration proceedings.²⁷⁴ The Human Rights Act requires the ordinary courts to take the jurisprudence of the ECHR into account in their judgments. The jurisprudence of the ECHR indicates that parties to voluntary arbitration are still entitled to be heard by an independent and impartial tribunal.²⁷⁵ The failure of the Arbitration Act to require the same standard of personal independence from arbitrators as is required from judges in terms of the common law (and the jurisprudence of the ECHR) may well be incompatible with the Human Rights Act.

Aerospace Ltd. v Laker Airways Inc (1999) 2 Lloyd's Rep 45 at 49-50; Eastwood at 295.

273 *EAT/980/99 Scanfuture UK Ltd, EAT/1353/99 Mrs J M Link v EAT/980/99 Mr K Bird, Mrs J M Link, Mr C J Bennet, Secretary of State for Department of Trade & Industry, EAT/1353/99 Secretary of State for Department of Trade and Industry No. EAT/980/99 EAT/1353/99* 2001 WL 395198 at 23.

274 Eastwood at 297; Gearing at 50.

275 Haydn-Williams at 289, see also Chapter 4, *infra*.

3.3.2 *Impartiality*

Courts are vested with a limited supervisory jurisdiction over arbitration.²⁷⁶ In *Laker Airways v FLS*, Rix J found that the same common law principles which apply to court proceedings, also apply to arbitration proceedings, namely:²⁷⁷

1. the principle against actual bias;
2. the principle that no one may be a judge in his/her own cause ("automatic disqualification"); and
3. the principle against apparent bias.

With regard to apparent bias, it was found that the real danger of bias test applies equally to domestic and international arbitration tribunals (where the arbitration is conducted in accordance with English law),²⁷⁸ as it does to the ordinary courts. The test is held to be objective and requires an investigation as to whether circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality.²⁷⁹ Rix J stated:²⁸⁰

The test is thus objective in at least two respects: the Court must find that circumstances exist, and are not merely believed to exist (although I suppose that a belief may itself be a circumstance); and secondly, those circumstances must justify doubts as to impartiality...This test appears to me to reflect the common law in England regarding questions of bias. Indeed, it would be strange if the test in arbitration were different from that which applies generally in the administration of justice.

While it is acceptable for barristers from the same chambers to act as arbitrator and counsel respectively in the same arbitration, the same rule does not apply where the arbitrator and counsel are from the same law firm (solicitors). In such circumstances, the automatic disqualification

²⁷⁶ *Laker Airways Inc. v FLS Aerospace Ltd. and Burnton FLS Aerospace Ltd. v Laker Airways Inc* [1999] 2 Lloyd's Rep 45 at 48.

²⁷⁷ Eastwood at 302.

²⁷⁸ *AT&T Corporation and Another v Audi Cable Co.* [2000] 2 Lloyd's Rep 127 at 39.

²⁷⁹ *Supra* fn. 273 at 48.

²⁸⁰ *Supra* fn. 48 - 49.

rule with regard to bias will apply, as solicitors from the same firm have mutual financial interests.²⁸¹

A party to a dispute that was referred to arbitration, who is aware of, or suspects circumstances that may raise doubt as to an arbitrator's impartiality is required by section 73 of the Arbitration Act to raise such doubts promptly. Failure thereof will lead thereto that the party may lose the right to object to such circumstances, unless he/she.²⁸²

did not know and would not with reasonable diligence have discovered the grounds for the objection.

This provision places the burden of proof on the parties themselves to discover facts which may cause doubt about the arbitrator's impartiality.²⁸³

When reviewing applications with regard to bias in arbitration proceedings, courts apply the same test for bias as is applied in judicial proceedings. It seems to follow that the recent changes to the test for bias will also apply to review of arbitration proceedings. It has been suggested that the test, although the same as the test applied to the ordinary courts, will be applied more strictly than in proceedings before the ordinary courts²⁸⁴ as one can impute a higher level of knowledge about the functioning of the adversarial system to the reasonable person involved in arbitration proceedings than in the ordinary courts.²⁸⁵ The test for bias in the ordinary courts, as adapted by the application of the Human Rights Act, has also been extended to arbitration recently.²⁸⁶

281 Gearing at 49.

282 Section 73 of the *Arbitration Act*.

283 Eastwood at 300.

284 Sandy D "Independence, Impartiality, Arbitration and the Human Rights Act in England" 2004 20(3) *Arbitration International* 305 at 318.

285 *Sengupta and another v. Holmes and others* [2002] EWCA Civ.1104, separate opinion of Laws LJ at par 37.

286 *ASM Shipping Ltd of India v. TTMI Ltd of England* [2005] All ER (D) 271; *Norbrook Laboratories Ltd. v. Tank* [2006] 2 Lloyd's Rep. 485.

3.4 Conclusion

The Human Rights Act already has had a significant impact on the scope and application of the standards of independence and impartiality in the ordinary courts. As a result of the application of the Human Rights Act, the British tests for independence and impartiality in the ordinary courts are essentially similar to the tests applied in South Africa, as well as to the tests applied by the ECHR.²⁸⁷

The reasonable apprehension or likelihood of bias test is a more encompassing test than the real danger of bias test previously applied by the British courts and is therefore stricter. This test will provide litigants (and parties to arbitration, should the test be applied to arbitration) with greater protection against a biased judge than the real danger of bias test, despite the *obiter dictum* remark by the British Court of Appeal that:²⁸⁸

... in the overwhelming majority of cases ... application of the two tests would lead to the same outcome.

In light of the effect that the Human Rights Act has already had on the test for bias and changes brought about in the structure of the British judiciary (even though this is not a direct result of the Human Rights Act, or directly relevant to arbitration), it is possible that the British courts will find the exclusion of the requirement of independence from the Arbitration Act to be incompatible with the provisions of the Human Rights Act. At present, it is unclear at which point the lack of independence of an arbitrator will result in doubts about his/her impartiality. It is also unclear what relationships will be acceptable between arbitrators and the parties to the disputes without compromising the arbitrator's independence. Although an arbitrator's expertise is one of the reasons why he/she is appointed to a specific arbitral tribunal, such

²⁸⁷ For the South African tests for independence and impartiality, see Chapter 2 *supra*, for the tests applied in the ECHR, see Chapter 4 *infra*.

²⁸⁸ *Locabail* at 17.

expertise could cause him to be acquainted with the parties to the dispute. It is always necessary to uphold the highest possible level of independence to ensure the credibility of the arbitration process.

As far as proceedings in ordinary courts are concerned, the South African and British position with regard to independence and impartiality is similar. Once South Africa's reform of its arbitration legislation is complete, the position with regard to arbitration between these two countries will probably also be similar, particularly in view of the SALC's reliance on the British Arbitration Act in forming its recommendations for domestic arbitration legislation and its reliance on the UNCITRAL Model Law in reforming its international Arbitration Act. In drafting its Arbitration Act, the United Kingdom also relied heavily on the UNCITRAL Model Law. Furthermore, both states extend the same test for impartiality to arbitration proceedings. In light of the similar tests applied in the ordinary courts, it is reasonable to conclude that the same test will also be applied to arbitration proceedings in the two states. This should lead thereto that, in the courts of either South Africa or the United Kingdom, the recognition and enforcement of a foreign arbitral award rendered in either one of these two states should not be hindered in the other state by the application of Article V(2)(a) of the New York Convention.

CHAPTER 4

Independence and Impartiality as applied in the European Court of Human Rights and commonly used Arbitration Rules

This Chapter deals with the right to an independent and impartial court or tribunal within the context of the European Human Rights system as well as within the context of some of the most commonly used international arbitration rules. The jurisprudence of the ECHR will be discussed first. Secondly, the International Bar Association's ("IBA") *Ethics for International Arbitrators*,²⁸⁹ as well as the UNCITRAL Arbitration Rules, the rules of the Arbitration Court of the International Chamber of Commerce ("ICC"), the arbitration rules of the London Court of International Arbitration ("LCIA"), the American Arbitration Association ("AAA") as well as arbitration in terms of the International Convention on the Settlement of Investment Disputes ("ICSID") will be discussed. These arbitration rules represent the most utilised and recognised arbitration rules in practice. Awards rendered under the auspices of these rules are the awards that most generally have to be recognised and enforced in terms of the New York Convention.

The ECHR applies the European Convention on Human Rights – a regional human rights treaty ratified by most European States, including the United Kingdom. Article 6 of the European Convention provides for the right to be heard by an independent and impartial court or tribunal. The ECHR has dealt with this provision extensively, including in the context of arbitral tribunals.²⁹⁰ The European Commission found that this right only places an obligation on state parties to ensure the

289 While the IBA's *Ethics for International Arbitrators* are not arbitration rules *per se*, it does codify ethical rules that should be considered by arbitrators in international arbitration.

290 See, for example, *Suovaneimi and others v Finland* (Application No 31737/96) in which the ECHR applied article 6 of the European Convention to arbitration proceedings.

independence and impartiality of arbitrators if national legislation requires arbitrators to be independent and impartial.²⁹¹

International human rights treaties, such as the European Convention, do not bind international arbitral tribunals. The arbitration rules discussed in this chapter all require arbitrators acting in terms of such rules to be either independent, impartial or both independent and impartial. If the standard and test for independence and impartiality applied by South African law, British law and these arbitration rules are similar, a challenge in terms of the New York Convention to the recognition and enforcement of an arbitration award rendered in either of these jurisdictions of an award rendered in terms of any of the arbitral rules, based on the alleged lack of independence and impartiality of an arbitrator, ought not to succeed in the courts of South Africa or the United Kingdom.

4.1 European Court of Human Rights

Of the three regional human rights institutions,²⁹² the jurisprudence of the ECHR is the most relevant for the purposes of this study, as the African and Inter-American Human Rights systems thus far have only dealt with the right to be heard by an independent and impartial court or tribunal within the framework of military courts or military tribunals. The ECHR, however, has dealt with this right with reference to both ordinary

291 *Nordström-Janzon v Netherlands*, Application No 28101/95, European Commission on Human Rights), where it was found that it is permissible for a party to waive its right to an independent and impartial arbitral tribunal. In so far as the UK Arbitration Act requires arbitrators to be impartial, there is an obligation now on the United Kingdom in terms of the Human Rights Act to ensure that arbitrators are, in fact, impartial. See *supra*, Chapter 3. It is irrelevant, for the purposes of this study whether each Member State to the European Convention is required to ensure the independence and impartiality of arbitrators by means of legislation. This chapter only focuses on whether the ECHR applies the same test for independence and impartiality where a state party does require arbitrators to act independent and impartial.

292 The ECHR, the African Commission on Human and Peoples' Rights together with the newly established African Court on Human and Peoples' Rights and the Inter-American Court on Human Rights.

courts and arbitral tribunals.²⁹³ Article 6 of the European Convention provides for the right to be heard by an independent and impartial court or tribunal. Article 6(1) specifically refers to independence and impartiality and reads:²⁹⁴

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

4.1.1 Prerequisites for the application of article 6 of the European Convention

Before the ECHR can apply article 6 of the European Convention to a case, it determine first must whether or not the matter refers to either "civil rights and obligations" or to a "criminal charge". If it does not, the subject matter in dispute falls outside the scope of article 6. In deciding if a dispute relates to "civil rights and obligations", the ECHR looks at the legal classification of the right in the domestic law of the state concerned, although this classification is not decisive. The ECHR held that:²⁹⁵

Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must take account of the object and purpose of the Convention and of the national legal systems of the other contracting States.

293 The right to be heard by an independent and impartial court or tribunal has not, however, been discussed as frequently and extensively with reference to arbitral tribunals as it has with reference to the ordinary courts. See discussion further on, *infra*.

294 Note that in this regard it is accepted that by agreeing to arbitration, parties expressly waive their right to a public hearing. This does not, however, necessarily preclude the application of the remainder of the rights guaranteed by this article. See the discussions *supra* in the introduction, and *infra* relating to the waiver of rights. This section is not primarily concerned with whether or not, and to what extent, parties can waive their right to a fair trial, but concerns the tests for independence and impartiality as applied by the ECHR.

295 *König v Germany* (ECHR) A-27 at par. 89.

The ECHR held that matters that do not fall under article 6 include.²⁹⁶

- tax disputes,²⁹⁷ unless such dispute contains a punitive element;²⁹⁸
- social insurance, including welfare assistance;²⁹⁹
- disputes relating to the recruitment, employment and retirement of public servants, excluding pension disputes.³⁰⁰

Once it is established that the matter in dispute indeed concerns a criminal charge or civil rights and obligations, the court will proceed to the substantive part of the complaint.

For a right to be considered as a “civil” right it has to be pecuniary in nature, or the outcome of the dispute has to be “*decisive for private rights and obligations*”.³⁰¹ The ECHR has held on more than one occasion that the subject matter of voluntary arbitrations, with specific reference to commercial matters, concerns the “*determination of ... civil rights and obligations*”.³⁰²

4.1.2 Waiver of article 6 rights in terms of arbitration

The ECHR held that, at least in terms of voluntary arbitration, one can waive one’s right to be heard in an ordinary court,³⁰³ but that this waiver should not necessarily be considered as a waiver of all rights in terms of article 6(1).³⁰⁴ Furthermore, while one is still guaranteed the rights to a

296 Note that this is not an exhaustive list.

297 *Schouten and Meldrum v The Netherlands* (ECHR) A-304 at par. 50.

298 *Bendenoun v France* (ECHR) A-284 at par. 44-48.

299 *Salesi v Italy* (ECHR) A-257-E at par. 19.

300 *Francesco Lombardo v Italy* (ECHR) A-159-B at par. 17; *Giancarlo Lombardo v Italy* (ECHR) A-249-C at § 16; *Massa v Italy* (ECHR) A-265-B at par. 26.

301 *Waight and Kennedy v. Germany* (European Commission) Application No. 26083/94

302 The ECHR has decided a number of cases in this regard, including *Deweert v Belgium* (ECHR) A-35 and *Stran Greek Refineries and Stratis Andreadi v Greece* 19 ECHR 293.

303 *Scarth v. the United Kingdom* (Application No. 33745/96, European Commission).

304 *Suovaneimi and others v Finland* (Application No 31737/96). The ECHR found the application in *Suovaneimi and others v Finland* to be inadmissible. While the court accepts that article 6(1) is applicable to voluntary arbitrations, it finds that the parties have unequivocally waived their right to an impartial arbitrator through

fair hearing within a reasonable time and by an independent and impartial tribunal, parties to voluntary arbitration can waive their right to an impartial tribunal through failing to challenge an arbitrator, despite having knowledge of facts giving rise to doubts as to the arbitrator's impartiality.³⁰⁵

Compulsory arbitration (arbitration required by law) was held not to amount to a valid waiver of any rights guaranteed by article 6(1). All the rights included in the said article must be provided for by state parties to the European Convention.³⁰⁶

Regardless of whether the arbitration is compulsory or voluntary, the domestic courts of the Member States of the European Convention still have a duty to guarantee the fairness and correctness of arbitral proceedings and to ensure that it is carried out in accordance with fundamental rights.³⁰⁷ The ECHR applies the same test for independence and impartiality to arbitrators³⁰⁸ as it does to judges.³⁰⁹

despite having knowledge of the facts giving rise to the arbitrator's lack of impartiality, expressly allowing the arbitrator to continue adjudicating the dispute. See also Hayden-Williams 297.

305 *Ibid.* See also Hayden-Williams 298.

306 *Bramelid and Malstrom v Sweden* Applications Nos 8588/79, 8589/79, Report and Opinion of Commission of 12 December 1983.

307 *Jakob Boss Sohne KG v Germany* Application No 18479/91, Decision of Commission as to Admissibility of 2 December. In this case the Applicant alleged that its article 6 rights were violated as the arbitrator in the ICC arbitration that the Claimant was a party to was not independent and impartial. The European Commission declared the application inadmissible as it found that there was no indication that Germany violated its obligations under Article 6 of the European Convention.

308 For the test applicable in arbitration proceedings, see the decision of the European Commission on Human Rights in *Bramelid and Malstrom v Sweden* Applications Nos 8588/79, 8589/79, Report and Opinion of Commission of 12 December 1983.

309 Compare the test applied in arbitration with the decision of the ECHR as to judicial proceedings in, *inter alia*, *McGonnell v United Kingdom* 28488/95 (ECHR) par 48.

4.1.3 *Independence*

The ECHR has consistently held that the test for independence is twofold. It encompasses both judicial independence (structural independence) and the independence of the tribunal itself.³¹⁰

Firstly, judicial independence implies that the court must act without bias or prejudice, in accordance with legal principles. The ECHR held that:³¹¹

[T]he principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.

Secondly, when determining the independence of a tribunal, the ECHR has compiled a non-exhaustive list of requirements that needs to be taken into account. These include the manner of appointment of the members, their term of office, the existence of guarantees against outside pressures and whether the body presents an appearance of independence.³¹² The right to be heard by an independent tribunal inherently includes the right that the findings of the tribunal be final. A non-judicial authority cannot alter such finding to the detriment of an individual party.³¹³ Similarly, the ECHR held that this right includes the duty of the tribunal to give reasons for its findings.³¹⁴

4.1.4 *Impartiality*

The ECHR held that impartiality "*denotes absence of prejudice or bias*".³¹⁵ The test for impartiality is applied to ordinary courts and arbitral

310 See, *inter alia*, *McGonnell v United Kingdom* 28488/95 (ECHR) par 48; *Findlay v United Kingdom* 110/1995/616/706 (ECHR) par 73.

311 *Stan Greek Refineries A-301-A* at par. 49.

312 See, *inter alia*, *McGonnell v United Kingdom* 28488/95 (ECHR) par 50; *Findlay v United Kingdom* 110/1995/616/706 (ECHR) par 76.

313 *Van de Hurk v The Netherlands* (ECHR) A-288 at par. 45. This is not directly relevant to this study and therefore is not expounded on.

314 *Van de Hurk v The Netherlands* (ECHR) A-288 at par. 61. This is not directly relevant to this study and therefore is not expounded on.

315 *Piersack v Belgium* (ECHR) 8692/79 at par 30.

tribunals and is twofold, namely a subjective and an objective inquiry.³¹⁶

In terms of the subjective part of the test, the personal convictions of a particular judge in a given case are determined. It entails that no individual member of the court/tribunal shall hold any personal prejudice or bias. There exists a *prima facie* presumption in favour of the personal impartiality of a judge/arbitrator. The onus is on a party claiming partiality to prove that the judge/arbitrator was not impartial.³¹⁷

The objective part of the test is referred to as the "legitimate doubt" test.³¹⁸ The United Kingdom court of Appeals held this test to be identical to the "reasonable apprehension, or suspicion of bias" test as applied by, *inter alia*, South African and British courts.³¹⁹ It aims to determine if, apart from a judge's personal conduct, there are ascertainable facts that may raise doubts as to his or her impartiality. It requires a court to offer guarantees that are sufficient to exclude any legitimate doubt of impartiality. The ECHR held that any doubt (no matter how slight the justification therefor) is sufficient to vitiate the impartiality of the court. This doubt, however, must be justified objectively.³²⁰ The ECHR did not elaborate further on the test for impartiality. It also did not lay down specific circumstances under which a judge or arbitrator will be considered as partial. Each case must, therefore, be decided in terms of its own particular circumstances.

316 *Findlay v United Kingdom* (ECHR) Application Number 22107/93; *Academy Trading Ltd v Greece* (ECHR) Application Number 30342/96; *McGonnell v United Kingdom* (ECHR) Application Number 28488/95; *Thomann v Switzerland* (ECHR) Application Number 17602/91; *Bulut v Austria* (ECHR) Application Number 59/1994/506/588 (hereafter "*Bulut v Austria*").

317 *Hauschildt v Denmark* (ECHR) 10486/83 at par 47 ("*Hauschildt*").

318 See, *inter alia*, *McGonnell v United Kingdom*, *supra*.

319 *Locabail (UK) Ltd v Bayfield Properties Ltd and another*; *Locabail (UK) Ltd and another v Waldorf Investment Corp and others*; *Timmins v HM Inspector of Taxes and others*; *R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan* 2000 QB 451, (2000) 1 All ER 65, (2000) 2 WLR 870, (2000) IRLR 96 at 17. See also Sandy D "Independence, Impartiality, Arbitration and the Human Rights Act in the United Kingdom" 2004 20(3) *Arbitration International* 305 at 308.

320 *Bulut v Austria* at par. 33.

In taking account of the possible appearance of partiality by the court, the ECHR acts in accordance with the rule that *justice must not only be done, it must also be seen to be done*.³²¹ Both cases of *Hauschildt* and *De Cubber* held that the basis for this is that.³²²

[w]hat is at stake is the confidence which the court in a democratic society must inspire in the public. ... Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

In light of the current changes to in English law relating to the tests for independence and impartiality, and the statement by the British Court of Appeal in *Locabail v Bayfield*, it is clear that the tests for independence and impartiality applied by the ECHR, the United Kingdom and South Africa are now all the same. The tests applied in these countries apply to both the ordinary courts and arbitration tribunals.³²³

4.2 International Arbitration Rules

In this section the rules and standards for the independence and impartiality of arbitrators as applied by the International Bar Association (hereafter "IBA") in its Code of Ethics for International Arbitrators (hereafter "IBA Code of Ethics") and Guidelines on Conflicts of Interests in International Commercial Arbitration ("IBA Guidelines") are discussed. Thereafter, the rules and practices relating to independence and impartiality as applied by the major arbitral institutes and arbitration rules are discussed. The institutions and rules that will be discussed are those that are most commonly resorted to by parties to international arbitration and all the rules refer to the fact that arbitrators should not be biased. These rules are the UNCITRAL Arbitration Rules, the Arbitration Court of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the American Arbitration Association

321 *De Cubber v Belgium* (ECHR) 9186/80 at par 26 ("*De Cubber*").

322 *Hauschildt* at par 48; *De Cubber* at par 26.

323 With the exception that UK legislation does not require arbitrators to be independent. Lack of independence of an arbitrator is only relevant in so far as it gives evidence of the arbitrator's bias.

("AAA") and lastly, arbitration in terms of the International Convention on the Settlement of Investment Disputes ("ICSID"). Arbitral awards rendered in terms of these rules are the awards that most often will have to be recognised and enforced in terms of the New York Convention. Due to the confidential nature of arbitration proceedings, comprehensive information on the standards applied by these arbitral tribunals as well as concrete examples are not always readily available.³²⁴

As a general requirement, independence and impartiality are two of the fundamental characteristics that all arbitrators should possess.³²⁵ As these two concepts are not interchangeable,³²⁶ it is also relevant, firstly, to define independence and impartiality generally as it applies to international arbitration.

Independence exclusively concerns the absence of a financial or other relationship between the arbitrator and one of the parties.³²⁷ It is defined and explained as follows by Kock:³²⁸

"Independence" means that an arbitrator must be free from any involvement or relationship with any of the parties. An arbitrator who has acted or continues to act in some professional capacity for one of the parties in the dispute will certainly not pass the independence test. Similarly, if an arbitrator were to be materially interested in the financial fortunes of one of the parties involved, i.e. by owning shares in that company, the "independence" standard would not be met and that person could be disqualified from being an arbitrator. Nor would an arbitrator with family ties or another emotional connection to one of the parties be considered "independent".

324 Note that the fact that arbitration proceedings are mostly confidential is not a violation of the right to a "public hearing" as guaranteed by, *inter alia*, article 6 of the European Convention and mentioned *supra*. As this is not, however, the focus of this study, this aspect will not be discussed in any further detail.

325 Kock C "Standards and Procedures for Disqualifying Arbitrators" 20(4) *Journal of International Arbitration* 327 (Hereafter "Kock"); Redfern A and Hunter M at 210.

326 Redfern and Hunter at 214.

327 Redfern and Hunter at 212.

328 Kock at 327.

Similarly, Kock defines impartiality as:³²⁹

the arbitrator's mental predisposition toward the parties or the subject matter or controversy at hand. It is the interior frame of mind that the arbitrator brings to the reference ... Bias or partiality may ... result from an arbitrator's relationship with one of the parties or a party's counsel, it can also be a function of an arbitrator's prior involvement in a similar case, or his previously published opinions.

The difference between independence and impartiality lies therein that the test to determine independence requires the application of an objective standard, whereas the standard for impartiality is subjective in nature. The authors do not discuss the difference between the objective and subjective standards in detail, but Redfern and Hunter define impartiality as much more of an "*abstract concept*" than independence, referring to an arbitrator's "*state of mind*",³³⁰ and Kock differentiates between the concepts as follows.³³¹

Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind.

All of the arbitration rules included in this study require arbitrators to be either independent or impartial, whether these requirements are expressly mentioned or implied in their arbitration rules.³³² In terms of arbitration, independence and impartiality refer exclusively to the personal independence and impartiality of the arbitrator. This differs from the position in judicial proceedings where judges not only are required to be independent in their personal capacity, but the court itself is also required to be independent from the executive and legislative branches of government.³³³ As international arbitration rules exist independently from any government, the doctrine of separation of powers does not apply to international commercial arbitration.

329 Kock at 328 and at 331.

330 Redfern and Hunter at 212.

331 Kock at 332.

332 See discussion *supra* 4.2.1 *et seq.*

333 See the discussion on independence and impartiality in South Africa and the United Kingdom, *infra*.

In practice, arbitration tribunals hardly ever distinguish between the standards and tests to determine independence and impartiality respectively. Arbitral tribunals mostly refer to the comprehensive term bias,³³⁴ or treat independence and impartiality as one ground for the challenge or removal of an arbitrator. For this reason the discussion about international arbitration rules will focus on the standards and tests applicable to determine bias, unless expressly stated otherwise. In arbitration proceedings there are two stages at which parties to the arbitration may object to an arbitrator's apparent bias. These are, first, at the appointment stage, where an arbitrator may be prevented from being appointed due to lack of independence or impartiality and, second, after appointment, when an arbitrator may be removed for being biased. It is necessary to distinguish between these two stages as the tests for independence and impartiality applied at each stage are not always the same.

4.2.1 *International Bar Association*

The first sentence of the introductory note to the IBA Code of Ethics provides that "[i]nternational arbitrators should be impartial [and] independent ...".³³⁵ It further provides that, as a fundamental rule, arbitrators "... shall be and shall remain free from bias".³³⁶ The IBA Guidelines provides a similar principal and specifically extends this duty until after a final award has been rendered by the Tribunal, or the proceedings have been ended otherwise (for example through settlement of the dispute).³³⁷ Bias incorporates both dependence and

334 Unless otherwise stated, this term includes both independence and impartiality; as used by the International Bar Association's *Ethics for International Arbitrators*, discussed *infra*.

335 International Bar Association *Ethics for International Arbitrators* Introductory Note (Hereafter "IBA Code of Ethics").

336 IBA Code of Ethics, section 1.

337 IBA Guidelines, General Principal 1.

partiality. Dependence and partiality is defined as follows:³³⁸

Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.

In terms of the IBA Code of Ethics, the standard that has to be applied to determine if an arbitrator is biased is that of a reasonable person. More specifically.³³⁹

Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias.

The IBA Guidelines provide a more detailed test for bias in stating that:³⁴⁰

Doubts are justifiable is a reasonably informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

A legal presumption exists that an arbitrator is biased where he has a material interest in the outcome of the arbitration or if he already has taken a position with regard to the dispute.³⁴¹ Situations that may suggest bias on the part of the arbitrator include any current direct or indirect business relationship with one of the parties or with a potential important witness.³⁴² Should an arbitrator have such connections to the mentioned persons, he should not accept appointment unless the parties agree for him to do so after full disclosure of the nature of the relationship.³⁴³ Past business relationships also may bar a person from accepting an appointment as arbitrator, but only if the relationship is

338 IBA Code of Ethics, section 3.1.

339 IBA Code of Ethics, section 3.2.

340 IBA Guidelines, General Principal 2(c).

341 *Supra*. See also the "Non-waivable Red List" to the IBA Guidelines.

342 IBA Code of Ethics, section 3.3.

343 IBA Code of Ethics, section 3.3.

such as to "*be likely to affect a prospective arbitrator's judgment*".³⁴⁴ As a general rule, continuous and substantial social or professional relationships with one of the parties mentioned *supra*, also will give rise to justifiable doubts as to the independence and impartiality of a prospective arbitrator.³⁴⁵

In order to ensure an arbitrator's independence and impartiality, the IBA Code of Ethics and the IBA Guidelines place a duty of disclosure on all prospective arbitrators.³⁴⁶ This entails that a prospective arbitrator has to disclose any relationship which may give rise to justifiable doubts as to his/her independence and impartiality.³⁴⁷ Arbitrators should disclose the following:³⁴⁸

- Past or present business relationships (direct or indirect) with anyone involved in the arbitration (parties, representatives of parties or important witnesses);
- The nature and duration of any substantial social relationships with any of the persons mentioned above;
- The nature of any previous relationship with any fellow arbitrator;
- Extent of prior knowledge about the dispute; and
- Extent of any commitments which may affect his ability to perform his duties as arbitrator or anything else that he might reasonably be expected to disclose.

Failure to disclose any relationship falling within the above-mentioned categories will create an appearance of bias and result in disqualification, regardless of the actual nature of the relationship that was not disclosed.³⁴⁹

344 IBA Code of Ethics, section 3.4.

345 IBA Code of Ethics, section 3.5.

346 IBA Code of Ethics, section 4, IBA Guidelines General Principal 3.

347 IBA Code of Ethics, section 4.1.

348 IBA Code of Ethics, section 4.2.

349 *Ibid.*

4.2.2 *United Nations Committee on International Trade Law (UNCITRAL) Arbitration Rules*

The UNCITRAL Arbitration Rules (hereafter "UNCITRAL Rules") are mostly used in *ad hoc* arbitrations where the parties make provision for it, although some multilateral treaties such as the North American Free Trade Agreement (NAFTA) make provision for the use of the UNCITRAL Rules for the settlement of disputes. The UNCITRAL Rules also were used, with limited amendments, to settle disputes brought before the Iran – United States Claims Tribunal (hereafter "Iran – US tribunal").³⁵⁰

This forum provided the most accessible information on the application of the UNCITRAL Rules. The jurisprudence of the Iran–US Tribunal is used in this section to provide examples of the practical application of the UNCITRAL Rules, with specific reference to the provisions concerning independence and impartiality. Where applicable, the amendments made to the UNCITRAL Rules will be indicated.

The UNCITRAL Rules expressly provide that arbitrators settling disputes in terms of these rules must be independent and impartial. Article 6.4 of the UNCITRAL Rules provides:³⁵¹

[T]he appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

³⁵⁰ Pellonpää M and Caron DD *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Finnish Lawyers' Publishing Helsinki 1994), in which the authors discuss the application of the UNCITRAL Arbitration Rules by the US – Iran claims tribunal (hereafter "Pellonpää and Caron"). See also article III(2) of the *Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran* of 19 January 1981.

³⁵¹ Article 6(4) of the UNCITRAL Rules.

4.2.2.1 Appointment

In terms of the UNCITRAL Rules, arbitrators are appointed by the appointing authority designated by the parties, or failing that, by the Secretary-General of the Permanent Court of Arbitration at The Hague in the Netherlands.³⁵² The appointing authority has to apply the procedure set out in article 6.3 of the UNCITRAL Rules, unless this procedure is not appropriate for the case or both parties agree that it should not be used. This procedure entails that the appointing authority sends a list to the parties that contains at least three names of prospective arbitrators. The parties place these names in order of preference. The appointing authority will then appoint the arbitrator(s) in the order of preference of the parties. Should this for any reason not be possible, the appointing authority can exercise its discretion in making the appointment.³⁵³

Prospective arbitrators have a duty to disclose any circumstances "*likely to give rise to justifiable doubts as to his impartiality or independence*" to anyone approaching him/her in connection with his possible appointment.³⁵⁴ This obligation to disclose continues after appointment. The Iran–US Tribunal adopted the text of article 9 with the addition of another paragraph.³⁵⁵ This addition is procedural in nature and sheds no light on the type of information that should be disclosed by the arbitrator. The UNCITRAL Rules in effect require an arbitrator to disclose any information which "*might support a challenge under article 10(1) of the [UNCITRAL] rules*".³⁵⁶ Although there are no precedents to support this, Pellonpää and Caron suggest that a failure to disclose may lead to

352 Aaron S "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" (1991) 108 SALJ 317 (hereafter "Aaron").

353 Aaron at 317.

354 Article 9 of the UNCITRAL Rules.

355 The additional paragraph requires the party to the dispute who obtains information which may cast justifiable doubt on the independence and impartiality of an arbitrator to report such information to the appointing authority, who will disclose the information to the president of the tribunal. See Pellonpää and Caron at 149.

356 Pellonpää and Caron at 151. Article 10 of the UNCITRAL Rules refers to the grounds for any challenges brought against an arbitrator, article 10(1) referring to "justifiable doubts as to [the arbitrator's] independence and impartiality" as a ground for challenge.

justifiable doubt as to the arbitrator's independence and impartiality, but that such failure does not in itself establish justifiable doubt.³⁵⁷

This appointment procedure effectively prevents a biased arbitrator from being appointed to adjudicate the dispute. Candidates are first selected by the independent appointing authority, whereafter the parties to the dispute also have the opportunity to indicate their preferred arbitrator. If an arbitrator is included in the list of arbitrators by the appointing authority who does not comply with the required independence and impartiality, the parties can point this out before the appointment is made.

4.2.2.2 Challenge

Should an appointed arbitrator not comply with the required standards of independence and impartiality in terms of the UNCITRAL Rules and this comes to the knowledge of the parties, such arbitrator can be challenged in terms of the UNCITRAL Rules. Such challenge may be brought against any arbitrator, save that a party may only challenge an arbitrator appointed by himself for reasons which came to the party's attention after the appointment had been made.³⁵⁸ The party who intends to challenge the appointment of an arbitrator has to give notice of such a challenge within 15 days of becoming aware of the facts on which the challenge is based. Such notification has to be in writing and must disclose the reasons for the challenge. The notice will then be communicated to the arbitrator involved, as well as to the other arbitrators on the panel.³⁵⁹

357 Pellonpää and Caron at 172.

358 Article 10 of the UNCITRAL Rules.

359 Article 11(2) of the UNICTRAL Rules.

A challenge may be brought at any time. The standard to determine whether the circumstances on which the challenge is based is justifiable or not, is not dependent on the time at which the challenge is brought.³⁶⁰

The grounds for challenge are set out in article 10 of the UNCITRAL Rules. Article 10(1) in particular provides that:³⁶¹

[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The onus of proof rests with the party bringing the challenge against the arbitrator to show that such justifiable doubts exist. The standard applied is that of the reasonable person and the test is whether or not.³⁶²

a reasonable person, after reviewing the evidence adduced in support of the challenge, would conclude that justifiable doubts existed.

Although the reasonable person test is not defined further, the drafters of the UNCITRAL Rules identified a number of specified circumstances that would disqualify an arbitrator from participating in an arbitration dispute. Specific mention was made of two aspects, namely where the arbitrator has a financial or personal interest in the outcome of the arbitration or where the arbitrator has family or commercial ties with either party or with a party's counsel or agent.³⁶³ Ultimately, it was decided not to include a list of specific circumstances, as such a list would need to be exhaustive and it is impossible to identify an exhaustive list of circumstances which may give rise to justifiable doubts as to an arbitrator's independence and impartiality.³⁶⁴ The practices of the Iran–US tribunal, however, have assisted in clarifying the test for lack of

360 Pellonpää and Caron at 171.

361 Article 10(1) of the UNCITRAL Rules.

362 Pellonpää and Caron at 165.

363 Pellonpää and Caron at 162, referring to the commentaries on the UNCITRAL Arbitration Rules.

364 *Ibid.*

independence and impartiality applicable to arbitrators:

- Judge Briner withdrew from an arbitration before a decision on his independence was made by the appointing authority where one of the parties to the dispute brought a challenge as to his independence after he failed to disclose that he remained the Sole Director of a subsidiary of the company serving as an expert in the dispute;³⁶⁵
- The appointing authority found that it did not give rise to justifiable doubts as to an arbitrator's independence and impartiality where he had failed to disclose that he had previously served as General Counsel of the parent corporation of the Respondent in the case. Justice Moons (serving as Appointing Authority) held that the challenged person should be given the benefit of the doubt as to the allegations in support of the challenge;³⁶⁶
- Relating to impartiality, two Iranian arbitrators (Judges Kashani and Shafeiei) withdrew from a case where their independence and impartiality were challenged after they physically assaulted the third arbitrator (Judge Mangård), who was, in their view, opposed to the interests of the party who appointed them;³⁶⁷
- The alleged criminal activity of a member of an arbitral tribunal in a third country that is not a party to the arbitration was not considered to raise justifiable doubts as to the arbitrator's independence and impartiality to judge the dispute before the Tribunal;³⁶⁸ and

365 Case No. 248 (*Amoco Iran Oil Company v The Government of Islamic Republic of Iran*) before the Iran – US tribunal, concerning the challenge of the American appointed Judge Briner. See Letter from Mohammed K Eshragh, Agent of Iran to Charles Moons, Appointing Authority 13 September 1988 20 Iran-U.S. C.T.R. 181.

366 Decision of the Appointing Authority 31 August 1990 21 Iran-U.S. C.T.R. 314.

367 These facts are from the challenge to judges Kashani and Shafeiei by the United States Government, reported in *Iranian Assets Litigation Reporter* at 9178 (14 Sept 1984), discussed by Pellonpää and Caron at 140 and 168, also discussed by Brower CN and Brueschke JD *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers The Hague 1998) at 169 – 170.

368 Decision of the Appointing Authority on the Third Challenge by Iran of Judge Briner 25 September 1989 21 Iran-U.S. C.T.R. 395.

- lastly, also relating to impartiality, a challenge based solely on an arbitrator's conduct of arbitral proceedings is likely to fail.³⁶⁹ Justice Moon, the appointing authority for the Iran–US tribunal remarked that:³⁷⁰

[t]he appointing authority is not competent to assess the correctness of the arbitrator's judgment whether evidence is or is not convincing nor of their decision to accept some evidence as a basis for their award and put other evidence aside ... Given the freedom granted arbitrators ... to make their awards to the best of their knowledge and conviction, it cannot be concluded from an arbitrator's choices in this area that he is not impartial or independent.

Justice Moon further stated that the arbitrator's conduct of the arbitral proceedings can serve as support for a contention of justifiable doubt as to his independence or impartiality, but only if:³⁷¹

the infringement or misapplication admits of no other explanation that it has its cause in lack of impartiality or independence on the part of the challenged arbitrator and that any other cause, such as an error or misunderstanding ... can be ruled out.

The challenged arbitrator may withdraw from the panel when a challenge is brought against him and must withdraw where both parties agree to the challenge.³⁷² In neither case will his withdrawal be considered to imply acceptance of the validity of the challenge. Where the opposing party does not agree to the challenge and the arbitrator does not withdraw, the decision on the withdrawal of the arbitrator shall be taken by the appointing authority provided for in the agreement or in the UNCITRAL Rules.³⁷³

369 Decision of the appointing Authority on the Second Challenge by Iran of Judge Briner, 19 Sep. 1989(1) 21 Iran-U.S. C.T.R. 384

370 Decision of the appointing Authority on the Second Challenge by Iran of Judge Briner, 19 Sep. 1989(1) 21 Iran-U.S. C.T.R. 384 at 388.

371 Pellonpää and Caron at 170.

372 Article 11(3) of the UNCITRAL Rules.

373 Article 12(1) of the UNCITRAL Rules.

4.2.2.3 Conclusion

Even though the UNCITRAL Rules refer expressly to independence and impartiality as qualities that arbitrators should possess, in practice no distinction between the concepts is made. In order to challenge an arbitrator for lack of independence or impartiality a party to the arbitration has to show that there exists justifiable doubt in the mind of the reasonable person as to the arbitrator's independence and/or impartiality. Although the UNCITRAL Rules do not provide comprehensive guidelines on what circumstances will lead to justifiable doubts as to an arbitrator's independence and impartiality, the practical application of the Rules indicates the common ground between the UNCITRAL Rules and the IBA Code of Ethics. This contention is further supported by the US–Iran Tribunal's occasional reference to the IBA Code of Ethics for guidance to determine if certain circumstances give rise to justifiable doubts concerning an arbitrator's independence and impartiality.³⁷⁴

4.2.3 *International Chamber of Commerce*

The International Chamber of Commerce's Rules of Conciliation and Arbitration (hereafter "ICC Rules") determines the procedure for arbitrations by the ICC's International Court of Arbitration (hereafter "ICC Court"). In terms of the ICC Rules, a dispute referred to arbitration may be decided by a panel of three arbitrators, or by a single arbitrator, as per the agreement of the parties.³⁷⁵ Where the dispute is to be decided by a three person panel, the parties to the dispute will each appoint one arbitrator, while the chairman of the tribunal shall be appointed by the ICC Court.³⁷⁶ The ICC Court also appoints the sole arbitrator, should the dispute be decided as such.³⁷⁷

374 Pellonpää and Caron at 165.

375 Article 8(1) and 8(2) of the ICC Rules.

376 Article 8(4) of the ICC Rules

377 Article 8(2) of the ICC Rules.

Arbitrators appointed to decide disputes brought to the ICC are expressly required to be independent from the parties to the arbitration,³⁷⁸ but the ICC Rules do not provide expressly for impartiality as a requirement a prospective arbitrator has to meet. This does not mean, however, that the ICC approves of biased arbitrators. According to Bond, the reason why impartiality is not included as a requirement that a prospective arbitrator has to meet is that the ICC has not been able to find a satisfactory definition of impartiality.³⁷⁹ He suggests that impartiality is, however, included implicitly in the ICC rules through the requirement of article 11(1) of the ICC rules that an arbitrator could be challenged "*for a lack of independence or otherwise*" (emphasis added).³⁸⁰ "Otherwise" may be interpreted to refer to the arbitrator's availability and ability to conduct an arbitration, which in turn refers to, *inter alia*, the arbitrator's/arbitral tribunal's duty to "*act fairly and impartially*".³⁸¹

The procedure to be followed by the ICC Court in the appointment of an arbitrator, as well as the rules for determining an arbitrator's independence, is determined by article 2 of its Rules. Article 2, however, does not identify specific standards for such appointment or for the standards to be applied to determine independence.³⁸² The ICC Rules impose an obligation on prospective arbitrators to disclose facts relating to their independence in order to determine if any grounds exist that may raise justifiable doubt about the arbitrator's independence.³⁸³ Should a prospective arbitrator provide information which will raise such doubts at the outset of proceedings, a challenge may be brought to prevent him from being appointed as arbitrator to the dispute in question. Any

378 Article 7(1) of the ICC Rules.

379 Bond SR "The Experience of the ICC in the Confirmation / Appointment State of an Arbitration" in ICC Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing Paris France) 1991 at 11 (hereafter "Bond").

380 *Ibid.*

381 Calvo MA "The Challenge of the ICC Arbitrators" 15(4) *Journal of International Arbitration* 65 (hereafter "Calvo").

382 Smit RH "An inside view of the ICC Court" (1994) 10 *Arbitration International* 61 (hereafter "Smit").

383 Rule 11 of the ICC Rules.

information which may raise doubt about the arbitrator's independence which comes to light after the appointment of the arbitrator can lead to a challenge being brought by one of the parties to the dispute for the arbitrator's disqualification.³⁸⁴

The ICC does not publish its findings with regard to challenges or the non-confirmation of arbitrators.³⁸⁵ The reason for the lack of publication of these decisions is that there is no right of appeal against the decisions of the ICC Court.³⁸⁶ Also, the ICC Court does not want established "case law" on its decisions and wishes to judge each case based on the specific facts of that case.³⁸⁷ The only readily available source of examples of the actions taken by the ICC in this regard is academic writings.

4.2.3.1 Appointment

According to the ICC Rules, the ICC Court will appoint:³⁸⁸

- the arbitrator, where the parties fail to appoint an arbitrator even though they have a right to do so;
- the president of a three person tribunal; and
- the sole arbitrator, where applicable.

In the first instance mentioned above, the ICC rules provide that the arbitrator must be appointed from the country of which the party who failed to make the appointment is a national.³⁸⁹ In the second and third cases, the ICC Court will seek nominations from a National Committee other than the committees of the states of which the parties are

384 Rule 11(1) of the ICC Rules.

385 Bond at 12 and 14. See also Hascher D "ICC Practice in Relation to the Appointment, Confirmations, Challenge and replacement of Arbitrators" 6 *ICC Bulletin* 2 November 1995 at 4 (hereafter "Hascher D").

386 Hascher D at 4.

387 Bond at 14.

388 Articles 8(3) and 8(4) of the ICC Rules.

389 Article 6(6) of the ICC Rules.

nationals.³⁹⁰ The ICC Court will determine which nationality is most desirable for the arbitrator of the dispute to have and ask that National Committee for a nomination. The criteria to determine the most desirable nationality of the arbitrator includes the place of arbitration, governing law and restrictions imposed by the ICC Rules with respect to nationality of the arbitrator/chairman.³⁹¹ The National Committee has to propose an arbitrator of the nationality of the country where that Committee is based and provide the ICC Court with enough information about the case, parties to the case, counsel and other arbitrators to "*identify an independent, impartial and qualified candidate*".³⁹² The ICC Court may accept this proposal or ask the National Committee to propose another candidate should the first candidate be found to lack an essential characteristic, such as independence.³⁹³ Although the ICC Court is not obliged to accept the candidate proposed by the National Committee, it normally does.³⁹⁴

A prospective arbitrator must sign a statement of independence as part of the nomination and confirmation process, stating that he is independent from each of the parties to the arbitration and intends to remain so.³⁹⁵ Such arbitrator is obliged to disclose:³⁹⁶

any facts or circumstances which might be of such a nature as to call into question [his] independence in the eyes of the parties.

and also:³⁹⁷

whether there exists any past or present relationship, direct or indirect, with any of the parties, their counsel, whether financial, professional or of another kind.

390 Aaron at 316.

391 Smit at 61.

392 Smit at 61.

393 *Ibid.*

394 Aaron at 315.

395 Calvo at 67.

396 Article 7(2) ICC Rules.

397 Calvo at 67.

The relationships that have to be disclosed include family or social relationships with the parties or their lawyers and relationships involving members of their families and their current employers, partners or business associates. Furthermore, it also includes prior appointments as arbitrators with any party involved in the dispute or any representative of a party, or any person considered to be an important witness.³⁹⁸ The disclosed information is then communicated to the ICC Secretariat who, in turn, communicates the information to the parties.³⁹⁹

The test to determine if an arbitrator complies with the required standard of independence is applied at the nomination stage of proceedings.⁴⁰⁰ The test is subjective as it relates to the perception of the parties of the facts rather than to the actual facts themselves. The arbitrator is required to disclose relationships not solely on the basis that they might appear objectionable in the eyes of a reasonable person or a court, but also those which he considers may be of concern to the parties themselves.⁴⁰¹

Where a party does not object to the appointment of an arbitrator who would, upon objection, be considered to be "*morally, professionally or financially dependent*", the ICC Court will generally proceed to appoint such a candidate and not demand a greater degree of independence from the arbitrator than that which the parties themselves require.⁴⁰²

Calvo refers to a number of successful challenges brought against prospective arbitrators at the appointment phase of proceedings.⁴⁰³ All the challenges relate to a relationship between the arbitrator and one of

398 Calvo at 68.

399 Smit at 64.

400 Eastwood G "A Real Danger of Confusion: The English Law Relating to Bias in Arbitrators" Vol 17 No. 3 (2001) *Arbitration International* 292 (hereafter "Eastwood").

401 Eastwood at 295.

402 Calvo at 68.

403 Calvo at 68-69.

the parties and, therefore, to the lack of independence on the part of the arbitrator:

- the ICC Court refused to confirm the appointment of an arbitrator employed by the same law firm that represented one of the parties. He was suggested as arbitrator by the party whom his firm was representing;
- the appointment of a candidate arbitrator who previously provided legal advice to one of the parties to the dispute was not confirmed by the ICC Court;
- the appointment of a lawyer from a law firm that provided legal services to a party to the arbitration was not confirmed, even though he was suggested as arbitrator by the opposing party in the dispute;
- the appointment of an acting Advocate-General as arbitrator was refused as he was working for the Ministry of Justice of a state involved in the arbitration. At the time his superior (the Attorney-General) was representing the state concerned in the arbitration. This was despite the Advocate General's declaration in his Statement of Independence that he had no jurisdiction over matters of international character; and
- an arbitrator's candidature was rejected after it came to light that the arbitrator, appointed by one of the defending parties, was the legal representative of another defendant in the same case.

Calvo further refers to the following examples of unsuccessful challenges (relating to an alleged lack of independence) brought against prospective arbitrators at the appointment stage of proceedings:⁴⁰⁴

- an arbitrator who previously worked as an associate in a law firm representing one of the parties to the dispute was not barred from arbitrating a dispute;

404 Calvo at 68-69.

- similarly, a prospective arbitrator was not denied appointment after it was disclosed that he previously was a partner in a law firm, where one of his former partners was acting on behalf of a subsidiary of the party that appointed him as arbitrator;
- the ICC Court has accepted the candidature of an arbitrator who was a former civil servant of the state that appointed him as arbitrator;
- an arbitrator's candidature was accepted even though he held shares in a company that was a party to the arbitration. The ICC Court held that the amount of shares held by the arbitrator was not significant. The result of the arbitration could not have a significant influence on the price of the shares on the stock market;
- the ICC Court held that an arbitrator is not morally bound by precedent decisions. It rejected a challenge against, and appointed a co-arbitrator who was proposed as arbitrator in two related arbitrations between the same parties;
- the ICC court rejected an objection against the confirmation of a co-arbitrator who was alleged not to be independent and impartial due to an alleged acquaintance with a member of the ICC Court; and
- the ICC Court accepted the formal independence of suggested arbitrators who were members of an independent government agency and appointed them as arbitrators.

4.2.3.2 Challenge

The obligation to disclose any facts which may, in the eyes of the parties, call the arbitrator's independence into question, remains throughout the proceedings.⁴⁰⁵ Once an arbitrator has been appointed, the ICC Rules provide that he may be disqualified for "*an alleged lack of independence or otherwise*".⁴⁰⁶ A party wishing to initiate the disqualification proceedings has to file a written statement with the Secretariat

⁴⁰⁵ Articles 7(1) and (3) ICC Rules.

⁴⁰⁶ *Ibid.*.

specifying the circumstances on which the challenge is based.⁴⁰⁷ The challenged arbitrator, the other members of the tribunal and the adverse party in the proceedings will be then invited to submit written communications on the challenge.⁴⁰⁸ The ruling on the challenge is made by the ICC Court at one of its monthly Plenary Sessions.⁴⁰⁹ The rules of the ICC Court provide that the reasons for the ICC Court's decision as to the challenge of an arbitrator are not communicated to the parties.⁴¹⁰ The reason for this provision is unclear, but it is possible that it is to ensure that every challenge is judged on the specific circumstances of the case. By not communicating its reasons to the parties, it is possible that the ICC Court is preventing a generalised standard from forming that will force it to disqualify an arbitrator, irrespective of the particular circumstances of the arbitrator.

There are no promulgated standards available, either for internal use or for public dissemination, to determine which standards are applied by the ICC Court in deciding on whether or not an arbitrator should be disqualified for bias.⁴¹¹ The ICC Court itself refers to its previous decisions on disqualification, thereby ensuring consistency in their decisions. The lack of public knowledge of these decisions leads to uncertainty of the parties as to the likelihood of an arbitrator's disqualification.⁴¹² Smit argues that if such standards were publicly articulated it would lead to certainty for parties to ICC arbitrations as well as discouraging inappropriate nominations and challenges without merit.⁴¹³

Hascher refers to some examples of successful challenges brought

407 Smit *supra* at fn. 395.

408 Article 8(2) of the ICC Rules.

409 Smit *supra* at fn. 403.

409 Article 2(13) of the ICC Rules; Smit *supra*.

410 Smit *supra* at fn. 405.

411 Smit at 65.

412 *Ibid.*

413 *Ibid.*

against arbitrators:⁴¹⁴

- an arbitrator was replaced after a party challenged him for being biased based on the fact that the arbitrator had published a legal article allegedly concerning the subject matter in dispute between the parties in the arbitration;
- the ICC Court replaced the remaining arbitrators on the arbitration panel after the resignation of some arbitrators where the parties alleged that the remaining arbitrators' opinions had been affected by the opinion of the arbitrators that had resigned; and
- an arbitrator who allegedly was on bad terms with the parties was replaced by the ICC court as it may have created an appearance of bias to the extent that the arbitrator decided the case on his feelings rather than based on a search for the truth.

Similarly, Hascher refers to some unsuccessful challenges brought against arbitrators:⁴¹⁵

- challenges have been rejected where it was based on the fact that the same arbitrator is deciding two different cases between the same parties; and
- the ICC Court rejected a challenge that an arbitrator was prejudiced since he had already rendered a decision against a party in a first arbitration whilst a second arbitration between the same parties and with the same arbitrator was still ongoing.

4.2.3.3 Human Rights

The provisions of the ICC Court that relates to independence and impartiality complies with the provisions of international human rights instruments such as the Universal Declaration of Human Rights and the

414 Hascher D at 14 *et seq.*

415 *Ibid.*

International Covenant on Civil and Political Rights.⁴¹⁶ It is suggested that in considering challenges brought against arbitrators or arbitral tribunals as a whole, the ICC Court:⁴¹⁷

verify the aspects inherent in due process and more generally the respect for Human Rights conventions [such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights].

Previously, there has been a challenge brought before the ICC Court that a tribunal, as a result of its alleged lack of independence and impartiality, violated the human rights of the parties to the dispute.⁴¹⁸ Although this particular case was settled, it is submitted that the willingness of the ICC to consider this challenge indicates the relevance of human rights standards not only to arbitrations conducted in terms of the ICC Rules, but also to international arbitration in general.

4.2.3.4 Conclusion

The ICC rules expressly only provide that arbitrators who act in terms of these rules must be independent. The requirement of impartiality is tacitly provided for. The findings of the ICC Court indicate that both independence and impartiality is required from arbitrators and that an arbitrator will be disqualified from hearing a dispute where such arbitrator lacks either independence or impartiality.

The practice of the ICC Court not to publish its findings where an arbitrator's independence or impartiality has been challenged by a party to a dispute creates uncertainty as to the test applied by the ICC Court in this regard.⁴¹⁹ There are, however, some examples available to indicate

416 Calvo at 65.

417 *Ibid.*

418 Calvo at 71.

419 The ICC has published guidelines as to what circumstances will constitute lack of independence or impartiality. This publication was, however, not available in South Africa at the time when this dissertation was written.

circumstances under which an arbitrator will be considered not independent or impartial.

The practices of the ICC Court indicate that it considers independence and impartiality to be fundamental requirements in international arbitration proceedings. The fact that the ICC Court considers the provisions with regard to due process included in international human rights instruments, indicates that it considers these provisions, which includes the right to an independent and impartial court or tribunal, applicable to international commercial arbitration.

4.2.4 *London Court of International Arbitration*

The London Court of International Arbitration (hereafter "LCIA") does not in itself adjudicate disputes referred to the institution, but appoints arbitrators to settle such disputes in terms of the LCIA Rules. The Court itself handles all matters that have to be settled by it according to the rules, including challenge proceedings brought against arbitrators.⁴²⁰ The LCIA consists of 26 members, all appointed by its Board of Directors, and includes a president and three vice-presidents.⁴²¹ All members are acknowledged legal experts in international arbitration law.⁴²² For matters referred to the LCIA in terms of the rules, the president will appoint a panel, usually consisting of three members, including the president himself or one of the vice-presidents, to hear the matter.⁴²³

The LCIA Rules expressly requires its arbitrators to act independently

420 Aaron at 312.

421 Aaron at 312.

422 *Supra*.

423 For a more detailed discussion about the structure of the LCIA, see Aaron at 312 – 313.

and impartially:⁴²⁴

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.

4.2.4.1 Appointment

The president of the LCIA appoints the arbitrator who will conduct arbitration where the parties decided to have their dispute settled by a sole arbitrator. Where there are three arbitrators deciding a dispute, two arbitrators are appointed by the parties (and confirmed by the LCIA) and the LCIA appoints the president of the tribunal.⁴²⁵ This usually happens after consultation with the secretariat or a vice-president, or another appropriate member of the LCIA where one of the disputants is a foreign party. In selecting an arbitrator, consideration is given to the nationality, location and language of the parties to the dispute, as well as to the nature of the contract and the circumstances of the dispute.⁴²⁶ Article 3.3 of the LCIA Rules provides that the arbitrators who are appointed shall not have the same nationality as the parties to the dispute where such parties have different nationalities.⁴²⁷

The arbitrators selected to hear a dispute must first sign a declaration to the effect that there are no circumstances known to them likely to give rise to any justifiable doubts as to their impartiality or independence, other than any circumstance disclosed by them in the declaration.⁴²⁸

Where the LCIA decides that any nominated arbitrator is not independent or impartial, it shall have an unfettered discretion to

424 Article 5.2 of the Rules of the London Court of International Arbitration (hereafter "LCIA Rules").

425 See article 5 of the LCIA Rules.

426 Aaron at 316.

427 Aaron at 317 and Article 3.3 of the LCIA Rules.

428 Article 5.3 of the LCIA Rules.

determine the procedure for re-nomination or appointing of arbitrator(s).⁴²⁹

4.2.4.2 Challenge

The LCIA may revoke the appointment of an arbitrator when such arbitrator is challenged by one of the parties or when such arbitrator becomes unfit to act as arbitrator.⁴³⁰ The LCIA Rules determine that an arbitrator will be considered unfit where the arbitrator does not act "*fairly and impartially as between the parties*".⁴³¹ A party may challenge an arbitrator:⁴³²

if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

This does not apply unqualified. The same article also provides that a party who participated in the appointment of an arbitrator may only bring a challenge against such arbitrator on grounds of which the party was not aware of at the time of appointment. From this it can be concluded that a party may waive its right to challenge an arbitrator on the grounds of lack of independence and impartiality. Such waiver will only be valid if the party was aware of any circumstances giving rise to justifiable doubts as to the arbitrator's independence or impartiality when the arbitrator was appointed, but failed to raise any objections.

A challenge must be brought within 15 days of the earliest of the formation of the tribunal or after becoming aware of the facts on which the challenge is based.⁴³³

429 Article 11.1 of the LCIA Rules.

430 Article 10.1 of the LCIA Rules.

431 Article 10.2 of the LCIA Rules.

432 Article 10.3 of the LCIA Rules.

433 Article 10.4 of the LCIA Rules.

4.2.4.3 Conclusion

Not much information is available on the test applied by the LCIA in determining the independence and impartiality of arbitrators. The only conclusion of relevance to this study is that the LCIA applies the standard of "justifiable doubt" in this regard and that this is similar to the standard applied by the other arbitration rules included in this study.⁴³⁴

The lack of available information creates legal uncertainty for legal practitioners who have to try cases in terms of the LCIA rules. It is not necessary for the LCIA to publish its jurisprudence to create legal certainty. The problem can be solved by publishing general guidelines on the application of the justifiable doubt standard. Such guidelines will assist legal practitioners while it does not compromise the confidentiality of the arbitration process.

4.2.5 American Arbitration Association

The American Arbitration Association (hereafter "AAA") adopted rules for international arbitrations in 1997.⁴³⁵ The domestic arbitration rules of the AAA simply require the non-party appointed arbitrator on a three arbitrator panel to be neutral. It is permitted for the party-appointed arbitrators to act as so-called "*inside advocates*" for the appointing party, even allowing the party and its chosen arbitrator to consult privately with each other.⁴³⁶ Currently the International Arbitration Rules of the AAA (hereafter "AAA Rules") require "[a]rbitrators acting under these rules [to]

434 See the discussion of the other arbitration rules *supra* and *infra*.

435 Friedland PD and Townsend JM "Commentary on the July 2003 Revisions to the AAA Commercial Arbitration Rules" 58 *Dispute Resolution Journal* 9 (hereafter "Friedland and Townsend").

436 Friedland and Townsend at 9 refer to the case of *Delat Mine Holding v AFC Coal Properties* 280 F.3d 815 (8th Cir. 2001), where it was held that there is "*nothing insidious*" about the practice of non-neutral arbitrators.

be impartial and independent".⁴³⁷ This new approach is attributed to the fact that in international arbitration:⁴³⁸

each party appointed arbitrator is expected to behave as impartially as the chair of the panel.

The AAA Rules place a disclosure obligation on arbitrators to disclose any facts which may cause "*justifiable doubts as to his independence or impartiality*".⁴³⁹ This is an ongoing obligation throughout the arbitration. Furthermore, in contrast to the AAA's Domestic Arbitration Rules,⁴⁴⁰ the AAA Rules expressly forbids any private consultations between a party and an arbitrator.⁴⁴¹

4.2.5.1 Appointment

The parties to the arbitration can determine their own procedure for selecting arbitrators and can appoint arbitrators without the involvement of the administrator of the AAA. The exception hereto is that if the parties have failed to determine a procedure for appointment, or agreed on a procedure, but failed to appoint arbitrators within 45 days of the commencement of the arbitration, the administrator shall determine the procedure for appointment of arbitrators and/or appoint such arbitrators.⁴⁴² The administrator is required by the AAA Rules to appoint suitable arbitrators⁴⁴³ who can be of another nationality than the parties to the dispute.⁴⁴⁴ The administrator shall, unless the parties agreed otherwise, appoint one arbitrator, or, where he deems it fit, three arbitrators to hear the dispute.⁴⁴⁵

437 Article 7(1) of the International Arbitration Rules of the American Arbitration Association (hereafter "AAA Rules").

438 Friedland and Townsend at 8 – 9.

439 Article 7(1) of the AAA Rules.

440 Friedland and Townsend at 9.

441 Article 7(2) of the AAA Rules.

442 Article 6(1), 6(2) and 6(5) of the AAA Rules.

443 Such arbitrator shall have to at least comply with the requirements of the AAA Rules, which is the requirement of independence and impartiality of article 7 of the AA Rules.

444 Article 6(4) of the AAA Rules.

445 Article 5 of the AAA Rules.

Where a party challenges the appointment of an arbitrator at this stage, the AAA (which is designated in terms of the AAA rules to adjudicate challenges)⁴⁴⁶ will generally excuse an arbitrator from serving where a disclosed relationship creates "to a reasonable person, an appearance that an award might not be fairly rendered".⁴⁴⁷ The AAA may, however, impose a stricter test at this stage if it becomes apparent that a party asserts challenges not for valid reasons, but merely to delay and obstruct the proceedings.⁴⁴⁸

4.2.5.2 Challenge

For an arbitrator to be disqualified in terms of the AAA Rules, justifiable doubt has to exist as to his/her independence or impartiality. Article 8(1) provides.⁴⁴⁹

A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The administrator of the AAA must be given notice of such a challenge within 15 days of the circumstances giving rise to the challenge becomes known to the challenging party. Such notice shall contain the reasons for the challenge and the administrator will notify the other parties of the challenge.⁴⁵⁰ The challenged arbitrator may withdraw from the arbitration where only one party challenges his/her independence or impartiality. Where both parties agree to accept the challenge, the arbitrator must withdraw.⁴⁵¹ Such withdrawal shall not, however, imply acceptance of

446 Article 19 of the AAA Rules.

447 Hoellering MF "The Experience of the American Arbitration Association (AAA) in the Selection and Appointment of Arbitrators" in ICC Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing Paris France) p 5 (Hereafter "Hoellering").

448 Hoellering, *supra* at 6.

449 Article 8(1) of the AAA Rules.

450 Articles 8(2) and 8(3) of the AAA Rules.

451 Article 8(3) of the AAA Rules.

the grounds of the challenge on the part of the challenged arbitrator.⁴⁵² Where the parties do not agree on the grounds of the challenge and the arbitrator does not voluntarily withdraw, the challenge shall be decided on by the administrator of the AAA.⁴⁵³

The standard applied by the AAA to challenges made during the course of the proceedings is stricter than the standard applied at the appointment stage of the proceedings. Where an arbitrator is challenged during the course of the proceedings on the grounds of lack of independence and impartiality, the AAA will only disqualify such arbitrator if:⁴⁵⁴

The disclosed information reflects, or a party demonstrates, [that] such interest on the part of the arbitrator ... would justify judicial vacatur of the arbitral award. In this regard, the courts have generally held that an arbitration award will not be set aside for allegations of arbitrator bias unless such bias is adequately proven.

4.2.5.3 Conclusion

Although there are some information available on the test applied by the AAA in determining an arbitrator's lack of independence and impartiality, such information does not by any means give a comprehensive overview of the practices of the AAA. It should be noted that the standard of "justifiable doubt" indicated in the AAA rules is interpreted differently at different stages of the proceedings. While an arbitrator would be disqualified from hearing a dispute before the commencement of proceedings due to the fact that a reasonable person would perceive the arbitrator to be biased, the burden of proof on the party making the challenge is more difficult if the challenge is brought during the course of the proceedings, when an arbitrator will only be removed if the bias is actually proven.⁴⁵⁵ It is suggested that the reason for this is the "*serious*

452 *Ibid.*

453 Article 9 of the AAA Rules.

454 Hoellering at 5.

455 *Supra* section 4.2.5.2.

consequences" involved with removing an arbitrator after the commencement of the proceedings.⁴⁵⁶ These consequences may include the additional delay and cost involved with replacing an arbitrator, while arbitration is intended to be a more expeditious and cost-effective forum for the settlement of disputes.

4.2.6 ICSID

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (hereafter "ICSID Convention") entered into force on 14 October 1966 with the purpose to settle investment disputes between states and nationals of other states. It provides for both arbitration and conciliation for investment disputes. The ICSID Centre has jurisdiction over any legal dispute arising directly out of an investment between a contracting state and a national of another contracting state for which consent by both parties has been submitted in writing.⁴⁵⁷

Arbitrators generally are appointed from a panel of arbitrators. The arbitrators on the panel are nominated by states, party to the ICSID Convention⁴⁵⁸ and no two members of the panel may be of the same nationality.⁴⁵⁹ Members are nominated for renewable periods of six years.⁴⁶⁰ All members of the panel must be willing to serve on the panel and must be qualified as set out in article 14(1) of the ICSID Convention.⁴⁶¹ Article 14(1) reads:⁴⁶²

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. Competence in the field of law

456 Hoellering at 5.

457 Article 25(1) of the ICSID Convention.

458 Article 13(1) of the ICSID Convention.

459 Article 13(2) of the ICSID Convention.

460 Article 15(1) of the ICSID Convention.

461 Article 12 of the ICSID Convention.

462 Article 14(1) of the ICSID Convention.

shall be of particular importance in the case of persons on the Panel of Arbitrators.

The term "[t]o show independent judgment" refers to both independence and impartiality.⁴⁶³ With relation to each particular dispute or the parties involved in such dispute, every panel member should possess the general capability to exercise independent judgment.⁴⁶⁴

As a general rule, arbitral tribunals are constituted from members of this Panel of Arbitrators, but arbitrators may be appointed from outside the Panel as long as they still comply with the requirements of article 14.⁴⁶⁵ Arbitral tribunals may consist of a sole arbitrator or of any uneven number of arbitrators.⁴⁶⁶ Where the parties fail to agree on the number of arbitrators, the tribunal will consist of three arbitrators.⁴⁶⁷ Where the parties fail to agree on the identity of the arbitrators, the arbitrators will be appointed by the chairman from the Panel of Arbitrators.⁴⁶⁸ Should a tribunal consist of more than one arbitrator, the majority of arbitrators shall be from states other than the states of the parties to the dispute.⁴⁶⁹

Where doubts arise as to the independence or impartiality of an arbitrator, two remedies are available to the parties to the dispute, depending on when such doubt first arose. Firstly, a party may ask for the disqualification of the relevant arbitrator before the proceedings are declared closed.⁴⁷⁰ Secondly, a party may request annulment of the award after conclusion of the proceedings.

463 Schreuer CH *The ICSID Convention: A Commentary* (Cambridge University Press Cambridge 2001) 57 at par. 5 (hereafter "Schreuer").

464 *Ibid.*

465 Article 40 of the ICSID Convention.

466 Article 37(2)(a) of the ICSID Convention.

467 Article 37(2)(b) of the ICSID Convention.

468 Article 40(1) of the ICSID Convention.

469 Article 39 of the ICSID Convention.

470 ICSID Arbitration Rule 9.

4.2.6.1 Disqualification at any time before the close of proceedings

Any party to a dispute may propose the disqualification of any member of the tribunal who does not conform to the standards set in article 14(1) before the arbitral proceedings are declared closed.⁴⁷¹ If a party learns of grounds for disqualification when it is too late to request the disqualification of the arbitrator, such party may request the annulment of the award.⁴⁷²

Arbitrators are required, before the first session of each tribunal to which he/she is a party, to give a statement of any professional, business or other relationship with any of the parties.⁴⁷³ Should a prospective arbitrator fail to submit such statement by the end of the tribunal's first session, he will be considered to have resigned from the panel.⁴⁷⁴ There exists a *prima facie* presumption that the arbitrators appointed to the Panel of Arbitrators possess all the qualities referred to in article 14(1).⁴⁷⁵ The burden of proof rests on the party claiming lack of independence on the part of an arbitrator and this onus is not easy to discharge as a mere appearance of partiality is not sufficient ground for disqualification. The lack of independence has to be "manifest" or highly probable and not just possible.⁴⁷⁶ The same standard will be applied whether the arbitrator was appointed by one of the parties, by mutual consent or by the appointing authority.⁴⁷⁷

Should a party, promptly after learning of the facts that give rise to doubt as to an arbitrator's impartiality, fail to request the disqualification of the arbitrator, such a party loses the right to request annulment of the award

471 Article 57 of the ICSID Convention.

472 Schreuer 1199 par. 11.

473 Rule 6 of the ICSID Arbitration Rules.

474 Shihata I "The Experience of the International Centre for the Settlement of Investment Disputes (ICSID)" in ICC Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing Paris France) 1991 at 18 (hereafter "Shihata").

475 Schreuer 1200 at par. 16.

476 *Amco Asia Corporation and others v Republic of Indonesia* (Case No. ARB/81/1) Decision on Jurisdiction of 25 September 1983.

477 Schreuer 1200 at par. 18.

on this ground.⁴⁷⁸ The remaining members of the tribunal will take the decision on an application for disqualification, or where they are divided or there is a sole arbitrator, the Chairman shall make the decision.⁴⁷⁹

Where a conflict of interests exists for an arbitrator, whether appointed by a party to the dispute or appointed by the chairman, it will serve as a bar to his/her appointment.⁴⁸⁰ Although political beliefs and philosophical orientations cannot be considered as a conflict of interest,⁴⁸¹ the following can be considered as conflicts of interests:⁴⁸²

- personal, family or business relationships;
- permanent attorney/client relationship or any other permanent or recurrent business relationship;⁴⁸³
- employment by a party, including the civil service in a state that is a party;
- substantial participation or shareholding in a company that is a party;⁴⁸⁴
- any form of relationship in which the arbitrator stands to profit directly from the financial gain of a party.

478 Schreuer 1199 at par. 11.

479 Article 58 of the ICSID Convention.

480 Schreuer 515 at par. 19.

481 Schreuer 517 at par. 24.

482 Schreuer 516 at par. 20.

483 In *Amco Asia Corporation and others v Republic of Indonesia* (Case No. ARB/81/1 Decision on Jurisdiction of 25 September 1983), a challenge to the independence of an arbitrator was denied where the arbitrator had given tax advice to one of the parties in the past and had a profit sharing agreement with the party's counsel 6 years prior to the case being brought to arbitration.

484 In *Holiday Inns S.A. and others v Morocco* (Case No. ARB/72/1), referred to in Schreuer 517 par. 23, an arbitrator had to withdraw from the panel of arbitrators when he became a director of one of the claimants four years after registration of the request to arbitrate. The arbitration settled amicably approximately 5 and a half years after the Request for Arbitration was registered, wherefore no award was ever rendered or published. A discussion of the case, including the legal issues raised by the dispute and also referring to the withdrawal of the arbitrator was published by Lalive P "The First 'World Bank' Arbitration (*Holliday Inns v. Morocco*) – Some Legal Problems" 51 *British Yearbook of International Law* 1980 at 123. Although the author does not refer to the case by name, the fact that an arbitrator resigned in the course of the arbitral proceedings as he was made a director of the party that had designated him to the arbitral tribunal is also referred to in Shihata, *supra*.

4.2.6.2 Annulment of award after close of proceedings

After proceedings have been declared closed, a party to the dispute may apply for the annulment of the award on the grounds set out in article 52 of the ICSID Convention. These include, *inter alia*:⁴⁸⁵

- that the tribunal was not properly constituted;
- that there was corruption on the part of a member of the tribunal;
- that there has been a serious departure from a fundamental rule of procedure.

A new tribunal will be constituted by the chairman to consider the application. The new tribunal will consist of three persons, none of whom had served on the tribunal that rendered the award and none of whom may be of the same nationality of any of the members neither of the original tribunal or the parties to the dispute.⁴⁸⁶

It is highly unlikely that a party will succeed with an application for annulment based on an arbitrator's lack of independence leading to the improper constitution of the tribunal.⁴⁸⁷ Even though this is possible in theory, the ICSID secretariat's careful scrutiny of the constitution of the tribunal practically eliminates any such risk.⁴⁸⁸

A party is more likely to succeed in annulling the award based on one of the other two grounds mentioned in article 52(1). Article 52(1)(c) provides that an award may be annulled if there was "*corruption*" on the part of a member of the tribunal. "Corruption" refers to bias as a result of a member receiving improper "compensation" from a source other than those provided for by the ICSID Convention.⁴⁸⁹ This ground for annulment is connected closely to financial gain. As such, where an

485 Article 52(1).

486 Article 52(3) of the ICSID Convention.

487 Schreuer 930 at par. 126.

488 Schreuer 929 at par. 124.

489 Schreuer 967 at par. 220.

arbitrator makes incomplete or untruthful statements regarding past or present professional business or other relationships with one of the parties,⁴⁹⁰ it only may constitute corruption where an arbitrator stands to derive personal profit or loss from the outcome of the proceedings.⁴⁹¹ Examples of such relationship are where the arbitrator is a close partner of, or major shareholder of one of the parties.⁴⁹² Mere bias without improper financial gain will not qualify for annulment of the award as "corruption" of the arbitrator.⁴⁹³

Furthermore, in terms of article 52(1)(d) of the ICSID Convention, an award may be annulled where there was a "*serious departure from a fundamental rule of procedure*".⁴⁹⁴ One of these fundamental rules of procedure is that the tribunal must be impartial. As such, lack of impartiality constitutes a serious departure from a fundamental rule of procedure.⁴⁹⁵ In deciding on an application for annulment based on alleged lack of impartiality by the tribunal, the committee in *Klökner v Cameroon* noted the following:⁴⁹⁶

While the ad hoc Committee was able without hesitation to respond negatively [to the allegation of impartiality], it had to note that certain appearances, due to the Award's working and structure, may rightly or wrongly have aroused the Claimant's emotions and suspicious. This is to be regretted if we recall the English adage, from which very international arbitration could usefully take inspiration: "it is not enough that justice be done, it must be seen manifestly to be done." From this point of view, it is essential to note that an award has not fully attained its purpose if it leaves one of the parties with the feeling – no doubt mistaken but perhaps understandable in the circumstances of the case – of unequal treatment and injustice.

490 A statement in this regard is required by Arbitration Rule 6 of the ICSID Arbitration Rules.

491 Schreuer 968 at par. 222.

492 *Supra*.

493 Schreuer 967 at par. 221.

494 Article 52(1)(d) of the ICSID Convention.

495 Schreuer 972 at par. 232.

496 *Klökner industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* Case No. ARB/81/2, Decision on Annulment of 3 May 1985.

4.2.6.3 Timely objection

The general principle with regard to timely objection is set out in Rule 27 of the ICSID Arbitration Rules, which determines that objections to violations of rules and regulations must be raised promptly. Failure to do so will have the effect that a party will be considered to have waived its right to object.⁴⁹⁷ According to Schreuer, there is no reason why this rule should not be considered to extend to annulment proceedings as well.⁴⁹⁸

4.2.6.4 Conclusion

The ICSID Convention provides for independence as a characteristic that arbitrators acting in terms of this convention should possess. This term should be read to include impartiality. A party to a dispute may challenge an arbitrator either for lack of independence or lack of impartiality. The jurisprudence of ICSID tribunals indicates clear guidelines as to what circumstances will constitute lack of independence and impartiality. The publication of ICSID arbitration awards provides greater legal certainty with regard to the requirements of independence and impartiality in terms of the ICSID Convention.

4.3 Conclusion

While the ECHR does not require state parties to guarantee the independence and impartiality of arbitral tribunals, it does apply the same standard of independence and impartiality to arbitral proceedings as it does to the ordinary courts.⁴⁹⁹ This indicates that where the domestic legislation of a state party (such as the United Kingdom)

497 Rule 27 of the ICSID Arbitration Rules reads:

"A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object".

498 Schreuer 911 at par. 62.

499 See *Bramelid and Malstrom v Sweden* Applications Nos 8588/79, 8589/79, Report and Opinion of Commission of 12 December 1983, *supra* n. 306.

provides that an arbitral tribunal has to act independently, impartially, or both independent and impartially, the ECHR will require such a state party to ensure that a party to arbitration is entitled to the same level of independence and impartiality from the arbitral tribunal as a party to a dispute in the ordinary courts will be.

The tests applied by the ECHR are, for both personal independence and impartiality,⁵⁰⁰ that of justifiable doubt as to the personal independence and/or impartiality of the judge/arbitrator concerned.⁵⁰¹ Although the terminology of the test is different in the arbitration rules described here above, the test set by the various arbitration rules will have the same effect as the test of the ECHR. The arbitral rules provide that an arbitrator has an obligation to disclose facts that may give rise to justifiable doubts as to his/her independence or impartiality in all cases. This duty starts before appointment of the arbitrator and continues throughout the proceedings. It seems that, as a general rule, the obligation to disclose that exists at the outset of proceedings acts mainly as a test to determine the independence of the arbitrator. That means that at the outset an objective standard of independence must be met. The parties and the arbitral institution (where applicable) must be satisfied that there are no relationships between the arbitrator and the parties to the dispute, their counsel or important witnesses that are likely to affect the arbitrator's judgment.

The lack of published information on the practices of all the arbitration rules included in this study makes it difficult to have a clear picture of the practical application of the tests for independence and impartiality. Some common practices are apparent. These are, in short, that a person

500 This study primarily is concerned with the test for personal independence, as, in arbitration proceedings, structural independence is not a relevant factor for the parties to the dispute. An arbitral tribunal is *per se* independent from the state, which is what structural independence is concerned with within the context of the ordinary courts.

501 See, *inter alia*, *McGonnal v. United Kingdom* and *Bramelid and Malstrom v Sweden* Applications Nos 8588/79, 8589/79, Report and Opinion of Commission of 12 December 1983, *supra*.

is prevented from adjudicating a dispute, whether as judge or arbitrator, where there is a substantial financial, social or business relationship between the judicial officer and a party to the dispute. The same rule applies to the parties' legal representatives or important witnesses. It is submitted that whether a party's doubts are justifiable or not will be determined on a case by case basis. Circumstances which may constitute bias in one case may not constitute bias in other circumstances. It is possible that this is one of the reasons why arbitration rules do not provide strict guidelines as to what will constitute lack of independence and impartiality as very few general rules exist that will apply in all cases.

Another problem that becomes apparent is the failure of such institutions to distinguish between lack of independence and lack of impartiality. The tendency of the arbitration rules to treat the two concepts as one creates a situation of legal uncertainty. Independence and impartiality are two separate concepts requiring separate tests. Independence needs an objective inquiry as to the arbitrator's relation to the parties to the dispute. Impartiality relates to a subjective test to determine whether or not an arbitrator is favouring one side over another, despite there not being any financial or other significant relationship between the arbitrator and one of the parties.

It is possible to draw the following conclusions:

- Even though the arbitral rules included in this study is not bound by the European Convention, parties to arbitration under the auspices of such rules will be protected against a partial or biased arbitrator in the same way a party to litigation in the ordinary courts will be protected against a partial or biased judge; and
- As far as the New York Convention is concerned, there should not be a bar to the recognition and enforcement of an arbitral award rendered in terms of any of the arbitral rules discussed *supra* in

either South Africa or the United Kingdom as far as the independence and impartiality of the arbitrators are concerned. The tests for independence and impartiality applied by South African law, British law and the ECHR are the same.⁵⁰² The tests applied by the arbitral rules included in this study are similar enough to the tests applied in South Africa, the United Kingdom and the ECHR as to conclude that the tests applied by the arbitral tribunals will be accepted in the courts of South Africa and the United Kingdom and will not be a bar to the recognition and enforcement of an arbitral award rendered under any of these rules.

In the next chapter it is considered if the lack of independence and impartiality is such a serious violation that one can challenge the recognition and enforcement of an arbitral award under the public policy exception of the New York Convention where the arbitral tribunal lacked independence and impartiality.

⁵⁰² See Chapters 2 and 3 *supra*.

CHAPTER 5

Independence, Impartiality and the Public Policy

Exception of the New York Convention

Arbitration does not necessarily end with the award. Though the arbitral award shall be final and binding on the parties in most international commercial disputes, there are still cases where the successful party must seek judicial assistance to enjoy the fruit granted by the award⁵⁰³

Enforcement of foreign arbitral awards can be achieved through the framework provided by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "New York Convention").⁵⁰⁴ The New York Convention is currently considered to be the "*most important international treaty relating to international commercial arbitration*"⁵⁰⁵ and is, as of November 2006, ratified by 139 States, including South Africa and the United Kingdom.⁵⁰⁶ The New York Convention aims to:⁵⁰⁷

[provide] private parties who act across national borders with a fair and predictable method of adjudicating arbitration agreements
[] the Convention virtually guarantees the enforcement of procedurally correct arbitration agreements and awards through the direct coercion mechanism of national courts.

The New York Convention provides for the enforcement of both arbitration agreements and foreign arbitral awards.⁵⁰⁸ For an arbitration agreement to be enforceable under the New York Convention, it has to be in writing, whether as part of a contract or as a separate agreement, and the subject matter of the arbitration has to be capable of settlement

503 Soo G "International Enforcement of Arbitral Awards" 2000 *International Company and Commercial Law Review* 253.

504 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter "New York Convention").

505 Eliasoph IH "A Missing Link: International Arbitration And The Ability Of Private Actors To Enforce Human Rights Norms" 10 *New Eng. J. Int'l & Comp. L* at 95 (Hereafter Eliasoph).

506 An updated list of ratifications are available at the website of the International Chamber of Commerce at <http://www.iccwbo.org> or at the SICE, Foreign Trade Information System Website at http://www.sice.oas.org/DISPUTE/comarb/uncitral/nysig_e.asp.

507 Eliasoph at 106.

508 Eliasoph at 98.

by means of arbitration.⁵⁰⁹ Domestic courts have to enforce such arbitration agreement and compel a party to commence arbitration, unless it is "*null and void, inoperative or incapable of being performed*".⁵¹⁰

More relevant to this study, the New York Convention places a duty on the domestic courts of state parties to recognise and enforce all foreign arbitral awards.⁵¹¹ A "foreign" award is one which:⁵¹²

- is made in another state than the state where recognition and enforcement are sought; and
- is not considered as a domestic award in the state where recognition and enforcement are sought.

Domestic courts do not, however, have to comply with this obligation where the award falls within one of the exceptions listed in article V of the New York Convention. Where such an exception applies, the New York Convention affords domestic courts in the state where recognition and enforcement are sought, a discretion as to whether or not to enforce the award.⁵¹³ Such discretion is exercised having regard to the domestic law of the enforcing state. The onus of proof rests on the party claiming an irregularity to prove that such irregularity took place. Article V reads:⁵¹⁴

- (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - a) The parties to the [arbitration agreement] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

509 Article II of the New York Convention.

510 Article II(3) of the New York Convention.

511 Article III of the New York Convention.

512 Article I(1) of the New York Convention.

513 Eliasoph at 101.

514 Article V of the New York Convention.

- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that party of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement was not in accordance with the law of the country where the arbitration took place; or
- e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:⁵¹⁵

- The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- The recognition or enforcement of the award would be contrary to the public policy of that country.

Article V provides an exhaustive list of defences and no additional defences can be read into the New York Convention by implication.⁵¹⁶

The United States Court of Appeals stated:⁵¹⁷

[T]he [New York] Convention is ... clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the [New York] Convention.

The grounds on which enforcement of foreign arbitral awards may be refused can be divided into two groups. The first - article V(1) - refers

515 Article V(2) of the New York Convention.

516 Von Mehren R "Enforcement of Foreign Arbitral Awards in the United States" 1998 *International Arbitration Law Review* 204.

517 *Alghanim & Sons, W.L.L. v Toys "R" US* 126 F.3d 15 (1997).

exclusively to procedural aspects of the arbitration, whereas the second – article V(2) – provides for the limited grounds on which the merits of the award may be reviewed. While the first group of exceptions must be raised by the party opposing enforcement, the courts of the state where recognition and enforcement is sought may, on its own accord, invoke one of the two exceptions named in article V(2).⁵¹⁸

Although article V(2)(a) expressly refers to the reviewability of the merits of the award to determine if the subject matter is arbitrable, article V(2)(b) – the public policy exception – is not only applicable to the merits, but can also be invoked in matters of serious procedural violations.⁵¹⁹

This study focuses on the question whether or not it is possible to challenge the enforcement of a foreign arbitral award in terms of the New York Convention based on the lack of independence and/or impartiality of the tribunal as contrary to public policy.

5.1 Public Policy

Public policy has been described as:⁵²⁰

[A] nebulous and fluid concept that changes from country to country. Even with respect to a particular country, the concept is still so fluid that its contents are hardly the same over long periods of time. They are determined by the changing moods of the society in question or the political, economic and social calculations of its leaders or rulers.

It is important to distinguish between domestic public policy and international public policy for the purposes of the New York Convention. Although the public policy referred to in article V(2)(b) is that of the

518 Redfern & Hunter *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell London 2003) at 569 (Hereafter "Redfern and Hunter").

519 See discussion of the Public Policy exception, *infra*.

520 Okekeifere Al "Public Policy and Arbitrability under the UNCITRAL Model Law" *International Arbitration Law Review* 1999 2(2) p. 70-77.

enforcing state,⁵²¹ domestic courts have in practice interpreted this to refer to a so-called international or transnational public policy, that is, a public policy that is common between the applicable law of the arbitration and the law of the state where the award is to be enforced.⁵²² It is important to give an international dimension to these principles and apply a narrower interpretation of public policy when dealing with international matters as opposed to when a court deals with domestic matters.⁵²³ Probably one of the most well known decisions in this regard is that of the New York District Court in *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier* (hereafter "*Parsons & Whittemore v Société Générale*").⁵²⁴ The court held, with regard to public policy in terms of the New York Convention, that this defence needed to be construed narrowly and that it only apply:⁵²⁵

[W]here enforcement would violate the forum state's most basic notions of morality and justice.

The public policy exception provided in article V(2)(b) of the New York Convention can apply to numerous aspects of the international arbitration process:⁵²⁶

(1) the arbitration agreement may violate public policy; (2) the conduct of the arbitration may violate public policy; (3) the law the arbitrators apply may violate public policy; and (4) the enforcement of the award may violate public policy.

As far as the conduct of the arbitration is concerned, there are a number

521 Redfern & Hunter at 472.

522 See, for example, the approach of the British courts in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 1 All ER (Comm) 865. The court's decision was approved in *Omnium de Traitement et de Valorisation SA v Hilmerton Ltd* [1999] 2 All ER (Comm) 146, discussed *infra*, and the approach of the American courts in *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l'Industrie du Papier* 508 F. 2d 969 (1974), discussed *infra*.

523 Redfern & Hunter at 472 - 474.

524 *Parsons & Whittemore v Société Générale*, *supra*.

525 *Parsons & Whittemore v Société Générale* at 973; Hebei Import & Export Corp. v Polytek Engineering Co. Ltd. [1999] 1 HKLRD 665 at 691 G-H.

526 Smit H "Comments on Public Policy in International Arbitration" 13 Am. Rev. Int'l Arb 65.

of procedural safeguards that finds application. Smit states that:⁵²⁷

[] the principles of public policy can be divided into two categories: procedural and substantive. On the procedural level, there are the universally acknowledged principles of due process or natural justice, in particular the parties' rights to valid notice, equal treatment, adversarial proceedings (which includes the right to be heard), prohibition of bias and lack of independence, fraud or corruption on the part of the arbitrators, and, for the sake of orderly administration of justice, *res judicata*. (own emphasis)

This is not an exhaustive list and other principles may be added in future.⁵²⁸ However, an inconsequential violation of any of the above principles would not lead directly to a violation of public policy.⁵²⁹

[] these principles should ... be construed and applied restrictively, and a violation of public policy admitted only when the award appears manifestly unjustifiable or unconscionable.

The South African courts have not yet had to deal with the public policy defence in the context of the independence and impartiality of an arbitrator, but the defence that an arbitral tribunal was not independent and impartial and that the award, therefore, violated public policy proved successful in the courts of Hong Kong in the case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd*.⁵³⁰ Hong Kong was, at the time, a British colony, hence English law applied.⁵³¹ The case is summarised hereunder.

527 Arfazadeh H "In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception" 2002 *American Review of International Arbitration* 49 (Hereafter "Arfazadeh").

528 Arfazadeh at 50.

529 Arfazadeh at 50.

530 *Hebei Import and Export Corp v Polytek Engineering Co Ltd (No. 2)* (1998) 1 H.K.C. 192.

531 Hong Kong once again became a part of mainland China in 1999.

5.1.1 *Hebei Import & Export Corp v Polytek Engineering Co Ltd*

Hebei Import & Export Corp (Applicant) applied for an order against Polytek Engineering Co Ltd (Respondent) to enforce an arbitral award rendered against Respondent by the China International Economic and Trade Arbitration Commission. Respondent opposed this application on two procedural grounds:

- That it had been unable to present its case before the arbitral tribunal as:⁵³²
 - the Chief Arbitrator and the tribunal's experts had attended a site inspection and received briefings from the applicant's staff and technicians in the Respondent's absence;
 - no proper notice of the inspection had been given to the Respondent so that it was unable to attend the inspection and brief its own experts;
 - the contents of the briefings from the Applicant's staff had not been made known to the Respondent; and
 - the tribunal denied the Respondent a further hearing to address above matters;
- That, as a result of above-mentioned defects in procedure, the award was tainted by apparent bias, consequently it would be against public policy to enforce the award.⁵³³

The court held that it would not be appropriate to exercise its discretion in the Applicant's favour and enforce the award. It held that such enforcement would be contrary to the public policy of Hong Kong as:

⁵³² This defense is in terms of domestic legislation incorporating section V(1)(b) of the New York Convention into domestic law, see Morgan RJM "Hong Kong: Challenge to a Convention Award on Natural Justice and Public Policy Grounds and the Status of PRC Awards Straddling the Transition of Sovereignty" 1998 (1) *International Arbitration Law Review* 70 – 72 (hereafter "Morgan") fn. 3.

⁵³³ This defence is in terms domestic legislation incorporating Section V(2)(b) of the New York Convention into domestic law, see fn. 4 of Morgan.

- the tribunal's failure to give the Respondent proper notice of the site inspection and its attendance was a serious breach of natural justice and in this regard, the Respondent was unable to present its case;
- there was a real danger or possibility of bias⁵³⁴ as the Chief Arbitrator and the tribunal's experts had received unilateral communications from the Applicant's staff and technicians about which the Respondent was not informed and was, therefore, unable to comment upon. The court found that it was unlikely that the inspection had no effect on the outcome of the proceedings.

On appeal, the Court confirmed that issues such as this, concerning the opportunity of a party to present its case and the right to have his case heard by an independent and impartial tribunal that was not influenced, or seen to be influenced, by private communications were "basic to the notions of justice and morality of Hong Kong".⁵³⁵ However, the court granted the appeal and enforced the award, as it found that the facts in this case did not support the finding that the tribunal was biased.⁵³⁶

This decision complies with internationally accepted principles applied by numerous domestic courts in deciding on the enforcement of foreign arbitral awards. The Hong Kong court not only strictly applied the "*pro-enforcement bias*" to foreign arbitral awards,⁵³⁷ but also the principle that the public policy exception in the New York Convention has to be construed narrowly, refusing enforcement of an award only where such enforcement would "*violate [the] most basic notions of morality and*

534 In coming to this conclusion, the court applied the findings of the United Kingdom House of Lords in *R v Gough*, *supra* chapter 3.

535 *Hebei Import & Export Corp. v Polytek Engineering Co. Ltd.* [1999] 1 HKLRD 665 at 692A.

536 *Ibid* at 692 A-H.

537 Redfern and Hunter points out that the New York Convention creates a "pro-enforcement bias" for foreign arbitral awards and that most national courts, including the United States courts, apply this assumption.

justice", as per the standard set in *Parsons & Whittemore v Société Générale*.⁵³⁸

This case is relevant and important to this study owing to the application of the British common law test of real danger of bias by the Hong Kong courts. As discussed *supra*, this test is narrower than the test being applied in South Africa and the United Kingdom at present. This means that where a case fails to meet the standard of the "real danger" test, it will also not meet the standard of the "reasonable apprehension of bias" test. In similar circumstances, therefore, the South African and English courts should give the same judgment as was given in the Hong Kong court. The recent modification of the test for bias in the English courts has no effect on the relevance of this decision.⁵³⁹

Both South Africa and the United Kingdom consider the principles of independence and impartiality of judicial officers to form part of public policy. This is discussed in more detail in the following sections.

5.1.2 *Public Policy in South African Law*

To date, no South African court has had to decide a case that relies on the public policy exception of the New York Convention and relates to the independence and impartiality of arbitrators.⁵⁴⁰ The Transvaal Provincial Division of the High Court had to decide a case in which the public policy exception was relied on, although it was under different circumstances.⁵⁴¹ The court held that it would only refuse the enforcement of a foreign arbitral award where, on the face of the award and the arbitration agreement, it is clear that the award is contrary to public policy.⁵⁴² Should extraneous evidence be required to persuade

538 Morgan at 71.

539 See Chapter 3, *supra*.

540 The South African courts have had to decide cases with regard to public policy, but not with reference to independence and impartiality of arbitrators. To see how South African courts have dealt with the issue of public policy, one can look at, *inter alia*, *Eden and Another v. Pienaar* 2001(1) SA 158.

541 *Seton CO v Silveroak Industries Ltd* 2000 (2) SA 215 (T).

542 *Seton CO v Silveroak Industries Ltd* 2000 (2) SA 215 (T) at 230.

the court that the award is contrary to public policy, the party's remedy should be sought in the country in which the award was rendered and not where the award is sought to be enforced.⁵⁴³ A party must exhaust all available remedies in the country where the award was rendered before it can rely on one of the defences included in the New York Convention to prevent recognition and enforcement of the award.⁵⁴⁴ There has been no decision indicating that the lack of independence and impartiality of a judge or arbitrator should be excluded as grounds for not recognizing and enforcing a foreign arbitral award in South Africa. There should, therefore, be no bar for a South African Court to refuse a foreign judgement or arbitral award where such judgment or award was rendered by a biased judicial officer.

In fact, the requirement that an ordinary court or other tribunal should act independently and impartially forms part of South African public policy. The South African Court of Appeal held that:⁵⁴⁵

As a matter of policy it is important that the public should have confidence in the Courts. Upon this social order and security depend. In *R v Chondi and Another* 1933 OPD 267 Krause JP made the following observations (at 271) which in this country are as pertinent now as they were some 60 years ago:

'It is a matter of the gravest public policy that the impartiality of the Courts of Justice should not be doubted, or that the fairness of a trial should not be questioned; otherwise, the only bulwark of the liberty of the subject, in these times of revolutionary tendencies, would be undermined.'

The Labour Court of Appeal extended this principle to arbitration proceedings by noting that the requirement of fairness in arbitration is a public policy concern.⁵⁴⁶ In terms of the Constitution, independence and impartiality form part of the guarantees of a fair trial.⁵⁴⁷ The South African Law Commission, in its Report on International Commercial

543 *Ibid.*

544 *Ibid.*

545 *BTR v Metal and Allied Worker's Union, supra*, at 694. This case is discussed in more detail in Chapter 2 *supra*.

546 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 3 BLLR 189 (LAC). This case is discussed in more detail in Chapter 2 *supra*.

547 See Chapter 3, *supra*.

Arbitration, included the public policy defence in its Draft Bill on International Commercial Arbitration.⁵⁴⁸ It went further by expressly including serious procedural irregularities involving a breach of the arbitral tribunal's duty to act fairly within the scope of the public policy defence. This defence would constitute one of the grounds for the setting aside of a foreign arbitral award.⁵⁴⁹ There is an abundance of evidence indicating that South Africa considers the independence and impartiality of judges and arbitrators as an essential procedural guarantee forming part of South African public policy. One can, therefore, conclude that it is very likely that South Africa will not recognise and enforce a foreign arbitral award rendered by a biased arbitral tribunal and that such refusal can be done in terms of the public policy exception of the New York Convention.

5.1.3 Public Policy in English Law

The approach of the courts of the United Kingdom to matters of public policy in international commercial arbitration was set out in the case of *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others*.⁵⁵⁰ In this case, which concerned the “purchase of influence” (not amounting to bribery and corruption) the court held that.⁵⁵¹

there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance, but others are based on considerations which are purely domestic.

[...]

The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been

548 See *supra* Chapter 2, section 20 of the SALC's Draft Bill on International Commercial Arbitration, Annexure F to the SALC International Arbitration Report.

549 *Supra* Chapter 2, SALC International Arbitration Report at par. 1.14.

550 *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 1 All ER (Comm) 865. The court's decision was approved in *Omnium de Traitement et de Valorisation SA v Hilmerton Ltd* [1999] 2 All ER (Comm) 146.

551 *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 1 All ER (Comm) 865 at 876 - 877.

considered by the arbitral tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.

As far as the independence and impartiality of arbitrators are concerned, one can consider the rights enshrined in article 6(1) of the European Convention,⁵⁵² as incorporated into British domestic law through the Human Rights Act,⁵⁵³ to form part of British public policy.⁵⁵⁴ This will apply to both arbitrations conducted in England and foreign arbitral awards.⁵⁵⁵ The argument can be made that, as all British domestic law now has to be interpreted to be compatible with the rights set out in the European Convention on Human Rights,⁵⁵⁶ such rights now form part of British public policy.⁵⁵⁷ As such, British courts will be entitled to refuse a foreign arbitral award that does not comply with the rights set out in article 6(1) of the European Convention on Human Rights, on the basis that it does not conform to British public policy.⁵⁵⁸ One can argue further that independence and impartiality are two of the fundamental prerequisites of a fair trial. It is not only possible, but probable that a British court will refuse the enforcement of a foreign arbitral award where the arbitrator or arbitrators were not independent and impartial.

5.2 Conclusion

A party to an arbitration dispute may only rely on one of the exceptions provided for by the New York Convention to oppose recognition and enforcement once it has exhausted all available remedies. These remedies firstly will be in terms of the arbitration rules in terms of which

552 Article 6(1) of the European Convention on Human Rights incorporates the right to be heard by an independent and impartial court or tribunal, see Chapter 3, *supra*.

553 See discussion in Chapter 3, *supra*.

554 Robinson W and Kasolowsky B "Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?" 18(4) *Arbitration International* 2002 453 - 466 (Hereafter "Robinson and Kasolowsky").

555 *Ibid*.

556 *R v A* (2001) UKHL 25 at par. 44.

557 Robinson and Kasolowsky at 457 and 460.

558 Robinson and Kasolowsky at 460.

the arbitration was conducted and secondly in the country in which the award was rendered. As far as independence and impartiality is concerned, if the arbitral award was rendered by an established and widely recognised arbitral institution, it is unlikely that a party will succeed with such a defence before the domestic courts of the country where recognition and enforcement of the award is sought. All these institutions have remedies available where justifiable doubts exist about the arbitrator's independence or impartiality.

The right to be heard by an independent and impartial court or tribunal is also widely recognised in the international community. The Court of Justice of the European Communities⁵⁵⁹ held that European Convention rights, including the right to a free and fair trial by an independent and impartial court or tribunal, forms part of public policy of the European Economic Community.⁵⁶⁰ A number of international arbitral institutions also require the qualities of independence and impartiality from arbitrators adjudicating disputes in terms of such institution's arbitration rules.⁵⁶¹ It is possible to conclude that, at least as far as the jurisdictions included in this study are concerned, there exists a common standard that forms part of public policy in terms of which an arbitrator must be independent and impartial. As can be seen from the previous chapters, the tests for personal independence and impartiality are essentially the same in South Africa, the United Kingdom, the ECHR and a number of the most commonly used international arbitration rules. One can, therefore, conclude that, with regard to the jurisdictions included in this study, there exist an international public policy whereby arbitrators should be independent and impartial from the parties to the dispute.

559 The Court of Justice of the European Communities is a separate entity from the European Court of Human Rights. While the ECHR decide cases based on the European Convention on Human Rights and Fundamental Freedoms, the Court of Justice of the European Communities decided cases on Community law.

560 See ftn 555 *supra*.

561 See Chapter 2, *supra*.

CHAPTER 6

Conclusion

The preceding chapters indicate the similarities between South Africa, the United Kingdom, the ECHR and the important international arbitration rules with regard to the independence and impartiality of arbitrators. These similarities lead to some conclusions which are especially relevant for South Africa, which is in the process of reconsidering its international arbitration legislation.

This study aimed to establish what the tests for independence and impartiality of judicial officers were in South Africa, the United Kingdom, the ECHR and some of the major international arbitration rules. These tests were set out in the preceding chapters. The reason why this study aimed to establish these tests was to determine whether or not a court in South Africa would deny the recognition and enforcement of a foreign arbitral award rendered under English law in the United Kingdom or any of the arbitral rules considered in Chapter 4 based on the public policy exception in article V of the New York Convention where it is alleged that the arbitral tribunal was not acting independently and impartially, and *vice versa*. This question will be answered in two parts.

The first part considers whether it falls within the jurisdiction of a domestic court of South Africa or the United Kingdom to consider the independence and impartiality of arbitrators as a matter of public policy in terms of article V of the New York Convention. The second part will consider the likelihood that a domestic court of South Africa or the United Kingdom will deny the recognition and enforcement of an arbitral award rendered under the law of the other country and/or the rules of one of the arbitration rules considered in Chapter 4, considering the similar tests for independence and impartiality.

6.1 Jurisdiction of the domestic courts of South Africa and the United Kingdom

The New York Convention has been ratified by both South Africa and the United Kingdom.⁵⁶² The public policy exception contained in article V(2)(b) of the New York Convention is an exception which can be considered by a domestic court. It does not function as a defence which has to be pleaded by the party opposing recognition and enforcement. Therefore, the domestic courts of South Africa and the United Kingdom have the necessary jurisdiction to deal with this matter. The remaining question is, therefore, if the independence and impartiality of arbitrators is a matter of public policy.

As set out in Chapter 5, *supra*, the independence and impartiality of arbitrators, as with all other judicial officers, is considered to be a matter of public policy in both South Africa and the United Kingdom. The application of English law to this problem has shown, in the case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd*,⁵⁶³ that it is possible to consider the independence and impartiality of arbitrators to fall within the scope of article V(2)(b) of the New York Convention. Given the standard of international or transnational public policy that is required by article V(2)(b),⁵⁶⁴ this is an indication that the domestic courts of South Africa similarly can consider the independence and impartiality of arbitrators in terms of the public policy exception of the New York Convention.

6.2 Likelihood of an award being denied recognition and enforcement based on the public policy exception of the New York Convention

Since it has now been concluded that the domestic South African courts have the jurisdiction to consider the independence and impartiality under

⁵⁶² See Chapter 5, *supra*.

⁵⁶³ See Chapter 5, *supra*, section 5.7.1.

⁵⁶⁴ See Chapter 5, *supra*, section 5.7.

the public policy, the next question arises. This concerns the likelihood that a domestic court of South Africa or the United Kingdom will refuse to recognise and enforce a foreign arbitral award in the other country or in terms of the more important international arbitration rules, based on the alleged lack of independence and impartiality of an arbitral tribunal under article V(2)(b) of the New York Convention.

First of all, it is necessary to note that the doctrine of judicial independence does not apply to arbitration. Arbitration is a private form of dispute settlement that operates independently from the state and is, therefore, per definition independent from the state. I will, therefore, focus on the tests for personal independence and impartiality.

Judicial officers in the ordinary courts in South Africa and the United Kingdom are legislatively ensured of personal independence from the executive and legislative branches of government. Both states legislatively provide for security of tenure and financial independence.⁵⁶⁵ The United Kingdom is currently considering how to address the situation where the Law Lords (the judges of the highest judicial body in the United Kingdom, the House of Lords) are also acting members of parliament. This situation is problematic, especially in light of the UK's incorporation of the European Convention into domestic law. There is, however, nothing to suggest that either South African or the English judicial officers are not independent from the state.

Neither current South African legislation nor current British legislation provides that an arbitrator must be independent from the parties. The British Arbitration Act, in fact, intentionally excluded lack of independence as a ground for removal of an arbitrator.⁵⁶⁶ This does not mean that an arbitrator is allowed to be biased, though. Where the lack of independence of the arbitrator is such that it will give rise to doubts as to his impartiality, it will be considered by a court when an application is

⁵⁶⁵ See Chapters 2 and 3, *supra*, specifically sections 2.2.1.1 and 3.2.1.

⁵⁶⁶ See Chapters 2 and 3, *supra*, specifically sections 2.3.1 and 3.3.1.

lodged for the removal of such arbitrator. The British position probably reflects the reality of the situation, which is that many international arbitrators are familiar with parties to the arbitration as well as with their legal counsel. This results from the fact that under most arbitration rules, each party to the dispute (claimants and respondents) are allowed to appoint an arbitrator of their own choice. The position in the current legislation is not ideal. While it may be so that courts should be more lenient when it applies the test for personal independence to arbitrators, arbitrators should, in principle, still be required to be independent from the parties. The SALC's Draft Bill on International Arbitration acknowledges this position.⁵⁶⁷ The United Kingdom's position may have to be reconsidered in light of the country's recent incorporation of the European Convention and the requirement of independence as part of a fair trial in Article 6 of that Convention.⁵⁶⁸

The test for lack of impartiality leads essentially to the same results in all the jurisdictions considered. South Africa applies the reasonable apprehension of bias test, whereby the court has to ask itself whether a "reasonable and right minded person" in the position of the applicant would have perceived the judicial officer to be biased.⁵⁶⁹ Since incorporation of the European Convention into domestic legislation, the British test of real danger of bias also looks at the question from the position of a reasonable person,⁵⁷⁰ as does the ECHR, which applies the legitimate doubt test.⁵⁷¹ Circumstances which will always lead to the recusal of a judge (so-called automatic disqualification) in any of these jurisdictions include:

- family relationships with any of the parties to the dispute;
- financial interest in the outcome of the dispute, unless such interest is negligible;

567 Chapter 2, *supra*, specifically section 2.4.1.

568 Chapter 3, *supra*, specifically section 3.3.1.

569 Chapter 2, *supra*, specifically section 2.2.1.3.

570 Chapter 3, *supra*, specifically section 3.2.2.

571 Chapter 4, *supra*, specifically section 4.1.3.

- business or close social relationships with any of the parties to the dispute.

The UNCITRAL rules,⁵⁷² ICC rules,⁵⁷³ LCIA rules⁵⁷⁴ and AAA rules⁵⁷⁵ all apply the justifiable doubt test for bias.⁵⁷⁶ While the ICSID rules do not refer expressly to the justifiable doubt standard, it gives clear guidelines as to what would lead to a conclusion that an arbitrator is biased.⁵⁷⁷

There are certain common factors among the arbitration institutes with reference to circumstances that will constitute justifiable doubt about an arbitrator's independence or impartiality. These include instances where the arbitrator:

- is a family member of a party to the dispute or his/her legal representative or other person in a similar position;
- has a financial interest in the outcome of the arbitration, unless such interest is negligible;
- has a business or close social relationship with any person involved in the arbitration, including where the arbitrator has previously acted as arbitrator in a dispute involving any of the parties, or where the arbitrator has a business or close social relationship with an important witness to the dispute.

The UNCITRAL Arbitration Rules apply the reasonable person standard in this regard. The reasonable person standard is also used by the IBA's Code of Ethics. Both UNCITRAL and the IBA apply the test of justifiable doubt with regard to independence and impartiality. It is not known what standard is applied by the other arbitral institutions that apply justifiable doubt test, but considering the similarities between the UNCITRAL

572 Chapter 4, *supra*, specifically section 4.2.2.1.

573 Chapter 4, *supra*, specifically section 4.2.3.

574 Chapter 4, *supra*, specifically section 4.2.4.1.

575 Chapter 4, *supra*, specifically section 4.2.5.

576 The Oxford English Dictionary considers legitimate and justifiable to be synonyms. These words can therefore be used interchangeably.

577 Chapter 4, *supra*, specifically section 4.2.6.

Arbitration Rules and the IBA Code of Ethics and the other arbitral institutions with regard to the other aspects of bias, it is reasonable to conclude that the other arbitral institutions also will apply the standard of the reasonable person to determine the presence of reasonable doubt. The decisions of the ICC and ICSID support this conclusion.

It should be noted that these arbitral institutions places a disclosure obligation on arbitrators which continues until such time that an award is rendered. This obligation requires arbitrators to, when such situation arises, give notice to the parties of any facts that may give rise to doubts as to the arbitrator's lack of bias irrespective of when it arises. Should a party discover any facts themselves which will give rise to doubts as to the arbitrator's lack of bias, such party should raise the issue within a reasonable time. If the party fails to do so, it will be considered to have waived its right to object to the arbitrator's apparent bias. Neither South African nor English legislation provides for a similar disclosure obligation.

While it is true that one of the most valued characteristics of the arbitration process is the confidentiality of the proceedings, the lack of published information makes it difficult to determine with absolute certainty what the position is with regard to the independence and impartiality of arbitrators. While institutions such as the ICSID publishes arbitration awards and many awards are available on the Internet,⁵⁷⁸ many institutions, such as the ICC, publishes very little information on the awards rendered under its rules or about its approach to issues such as independence and impartiality. It is necessary to balance the need for confidentiality against the need for legal certainty and transparency. It is possible for international arbitral institutions to be more transparent while still protecting the privacy and confidentiality of the arbitration process by, for example, publishing guidelines as to the meaning of justifiable doubt and the test to determine the existence thereof.

578 See, for example, NAFTA (North American Free Trade Agreement) decisions on websites such as www.naftaclaims.org.

Given the similar approach taken by South African law, English law, the ECHR and the arbitral rules included in this study, one can conclude that an arbitral award rendered in terms of English law probably will not be denied recognition and enforcement on the bases of the public policy exception of the New York Convention in the ordinary courts of South Africa for alleged lack of independence or impartiality on the part of the arbitration tribunal. This is especially true where such an award was first challenged in the courts of the United Kingdom, as such award would then already have been subject to the scrutiny of a court that applies the same test for impartiality that is applied by the ordinary courts of South Africa. The same will apply to an arbitration award rendered in terms of South African law and brought before the British courts for recognition and enforcement thereof.

Similarly, South African courts will, in all probability, not refuse the recognition and enforcement based on the public policy exception of the New York Convention of an arbitral award rendered under the auspices of one of the arbitral rules discussed in Chapter 4 for alleged lack of independence and impartiality on the part of the tribunal. The tests applied by these rules are sufficiently similar to the South African test for an ordinary court of South Africa not to render a contradictory judgment on the matter. The same applies to the British courts.

6.3 *Final remarks*

South Africa has a long way to catch up with the rest of the world when it comes to international commercial arbitration. South Africa has not yet ratified the ICSID Convention.⁵⁷⁹ There also does not appear to be urgency on the part of the South African legislature to expedite the legislation suggested by the SALC with regard to either domestic or international arbitration. In the light of the importance of international arbitration in modern dispute resolution, as well as South Africa's

579 See the ICSID website at <http://worldbank.org/icsid/constate/c-states-en.htm>.

importance in Africa, the South African legislature should prioritise establishing South Africa as an important international arbitration centre in Africa.

In spite of what South Africa still has to do to achieve this goal, the South African judiciary has interpreted current legislation in a manner that is comparable to international standards. This is evident from the approach taken by the ordinary courts of South Africa when one looks at the position regarding the independence and impartiality of arbitrators. Because of the approach taken by the ordinary courts of South Africa, it is highly unlikely that an international arbitration award rendered in terms of South African law will be denied recognition and enforcement in the United Kingdom based on an alleged lack of independence and impartiality of the arbitral tribunal. Such interpretation by the South African courts will go a long way to install confidence in the South African judiciary with foreign investors and other parties who rely on international arbitration.

BIBLIOGRAPHY

1 Journals

A

Aaron S "International Arbitration III: choosing an arbitration institution and a set of rules" (1991) 108 *SALJ* 317

Arfazadeh H "In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception" 2002 *American Review of International Arbitration* 49

B

Barendt E "Separation of Powers and Constitutional Government" 1995 Winter *Public Law* at 615.

Butler D "South African arbitration legislation – the need for reform" (1994) 27 *CILSA* 122

C

Calvo MA "The Challenge of the ICC Arbitrators" 15(4) *Journal of International Arbitration* 65

Cameron E "Nude Monarchy: the case of South Africa's Judges" 1987 (3) *South African Journal of Human Rights* 339

D

De Vos W le R "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings" 1997 (3) *TSAR* 455

E

Eastwood G "A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators" 17(3) 2001 *Arbitration International* 292

Eliasoph IH "A Missing Link: International Arbitration And The Ability Of Private Actors To Enforce Human Rights Norms" 10 *New Eng. J. Int'l & Comp. L* 95

Erasmus HJ "'n Billike Siviele Verhoor" 1996 *Obiter* 296

F

Friedland PD and Townsend JM "Commentary on the July 2003 Revisions to the AAA Commercial Arbitration Rules" 58 *Dispute Resolution Journal* 9

G

Gearing M "'A Judge in his Own Cause ?' – Actual or Unconscious Bias of Arbitrators" 3(2) 2000 *International Arbitration Law Review* 46

H

Hascher D "ICC Practice in Relation to the Appointment, Confirmations, Challenge and replacement of Arbitrators" 6 *ICC Bulletin* 2 November 1995 4

Haydn-Williams J "Arbitration and the Human Rights Act 1998" *Journal of the Chartered Institute of Arbitrators* Nov 2001 p 292

K

Kock C "Standards and Procedures for Disqualifying Arbitrators" 20(4) *Journal of International Arbitration* 327

Korland L "What an Arbitrator should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act" 2003 *Case Western Reserve Law Review* 815

L

Lalive P "The First 'World Bank' Arbitration (Holliday Inns v. Morocco) – Some Legal Problems" 51 *British Yearbook of International Law* 1980

M

Masterman R "A Supreme Court for the United Kingdom: Two Steps Forward, but One Step back on Judicial Independence" 2004 Spring *Public Law* 48

Morgan RJM "Hong Kong: Challenge to a Convention Award on Natural Justice and Public Policy Grounds and the Status of PRC Awards Straddling the Transition of Sovereignty" 1998 (1) *International Arbitration Law Review* 70

Motala Z "Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in a new South African order: towards an alternative judicial structure" 1991 XXIV *CILSA* 285

O

Okekeifere AI "Public Policy and Arbitrability under the UNCITRAL Model Law" 1999 2(2) *International Arbitration Law Review* 70

R

Robinson W and Kasolowsky B "Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?" 2002 18(4) *Arbitration International* 453

S

Sandy D "Independence, Impartiality, Arbitration and the Human Rights Act in England" 2004 20(3) *Arbitration International* 305

Smit H "Comments on Public Policy in International Arbitration" 13 *Am. Rev. Int'l Arb* 65

Smit RH "An inside view of the ICC Court" (1994) 10 *Arbitration International* 61

Soo G "International Enforcement of Arbitral Awards" 2000 *International Company and Commercial Law Review* 253

Staughton C "Bias for Judges – and Arbitrators?" 200 16(2) *Arbitration International* 215

Stevens R "A Loss of Innocence?: Judicial Independence and the Separation of Powers" 1999 (19) *Oxford Journal of Legal Studies* 365

V

Von Mehren R "Enforcement of Foreign Arbitral Awards in the United States" 1998 *International Arbitration Law Review* 204

2 Internet Sources

Department of Constitutional Affairs Paper 2004 [Found on Internet] <http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> [Date of use 23 August 2004]

Department of Constitutional Affairs Paper 2004 [Found on Internet] <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> [Date of use 23 August 2004]

Department of Constitutional Affairs Paper 2004 [Found on Internet] <http://www.parliament.uk/documents/upload/HoLBpJudicial.pdf> [Date of use 23 August 2004]

South African Law Commission, Discussion Paper 83 on Project 94 "Domestic Arbitration" July 1999 [Found on Internet] <http://www.law.wits.ac.za/salc/salc.html> [Date of use 15 September 2004]

South African Law Commission, Report on Project 94 "Arbitration: An International Arbitration Act for South Africa" of July 1998 [Found on Internet] <http://www.law.wits.ac.za/salc/salc.html> [Date of use 15 September 2004]

South African Law Commission, Report on Project 94 "Domestic Arbitration" May 2001 [Found on Internet] <http://www.law.wits.ac.za/salc/salc.html> [Date of use 15 September 2004]

Website of the ICSID <http://worldbank.org/icsid/constate/c-states-en.htm> [Date of use 19 November 2006]

Website with NAFTA (North American Free Trade Agreement) decisions www.naftaclaims.org [Date of use 19 November 2006]

Website of the University of Minnesota Human Rights Library at <http://www1.umn.edu/humanrts/research/ratification-southafrica.html> [Date of use 19 November 2006]

Website of the SICE, Foreign Trade Information System
http://www.sice.oas.org/DISPUTE/comarb/uncitral/nysig_e.asp
[Date of use 19 November 2006]

Website of the CCMA: <http://www.ccma.org.za> [Date of use 15 March 2006]

Website of the International Chamber of Commerce at
<http://www.iccwbo.org> [Date of use 19 November 2006]

Arbitration Rules of the London Court of International Arbitration [Found on Internet] http://www.lcia.org/ARB_folder/arb_english_main.htm
[Date of use 13 July 2004]

International Arbitration Rules of the American Arbitration Association
[Found on Internet] <http://www.adr.org/sp.asp?id=28144> [Date of use 15 July 2004]

International Bar Association *Ethics for International Arbitrators* [Found on Internet]
http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf
[Date of use 11 July 2004]

International Bar Association *Guidelines on Conflicts of Interests in International Commercial Arbitration* [Found on Internet]
<http://www.ibanet.org/images/downloads/guidelines%20text.pdf>
[Date of use 20 December 2007]

International Chamber of Commerce Rules of Arbitration [Found on Internet] <http://www.iccwbo.org/court/english/arbitration/rules.asp>
[Date of use 20 July 2004]

International Convention on the Settlement of Investment Disputes Rules of Arbitration [Found on Internet]
<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> [Date of use 1 July 2004]

United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules [Found on Internet]
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html
[Date of use 15 July 2004]

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [Found on Internet]
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html
[Date of use 13 August 2004]

3 Books

B

Brower CN and Brueschke JD *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers The Hague 1998)

Born G *International Commercial Arbitration* 2nd ed (Kluwer Law International The Hague 2001)

D

De Waal *et al* *The Bill of Rights Handbook* 4th ed (Juta Cape Town 2001)

Dugard J *International Law – a South African Perspective* 2nd ed (Juta Cape Town 2001)

G

Gaillard E and Savage J (ed) *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer Law International The Hague 1999)

L

Lawson RA and Schemers HG *Leading Cases of the European Court of Human Rights* 2nd ed (Ars Aequi Libri Nijmegen 1999)

P

Pretorius P (ed) *Dispute Resolution* (Juta Cape Town 1993).

Pellonpää M and Caron DD *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Finnish Lawyers' Publishing Helsinki 1994)

R

Redfern & Hunter *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell London 2003)

S

Schreuer CH *The ICSID Convention: A Commentary* (Cambridge University Press Cambridge 2001)

4 Contributions at Conferences

Skinnider E "Counter-Terrorism Measures and the Impact on International Human Rights Standards in the Field of Criminal Justice" (Unpublished paper presented at the 18th Conference of the International Society for the reform of Criminal Law, August 2004 Montreal, Canada) (unpublished)

5 Contributions from Collected Works

Bond SR "The Experience of the ICC in the Confirmation / Appointment State of an Arbitration" in ICC Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (1991 ICC Publishing Paris) 9 - 16

Hoellering MF "The Experience of the American Arbitration Association (AAA) in the Selection and Appointment of Arbitrators" in ICC

Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (1991 ICC Publishing Paris) 3-8

Shihata I "The Experience of the International Centre for the Settlement of Investment Disputes (ICSID)" in ICC Publication No. 472: *The Arbitral Process and the Independence of Arbitrators* (1991 ICC Publishing Paris) 17-22

6 Legislation

South Africa

Arbitration Act 42 of 1965

Banks Act 94 of 1990

Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

United Kingdom

Act of Settlement 1701

Appellate Jurisdiction Act of 1876

Human Rights Act 1998

Arbitration Act 1996

7 Case Law

South Africa

Afrox Ltd v Adv Laka and others (1999) 5 BLLR 467 (LC)

BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A)

City and Suburban Transport (Pty.) Ltd v Local Road Transportation Board, Johannesburg 1932 W.L.D. 100 at 104

Council of Review, South African Defence Force, and Others v Mönnig and Others 1992 (3) SA 482 (C)

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC)

Eden and Another v. Pienaar 2001(1) SA 158

Ellis v Morgan and Dessai 1909 TS 576

Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)

Goldfields Investments Ltd v City Council of Johannesburg & Another 1938 TPD 551

Liebenberg and Others v Brakpan Liquor Licensing Board and Another 1944 W.L.D. 52

Minister of the Interior and another v Harris and others 1952 (4) SA 769 (A)

Mutual and Federal Insurance Co. Ltd. v CCMA and Others (1997) 12 BLLR 1610 (LC)

Nat-Cole Properties CC v Van Deventer and another [2001] JOL 8450 (C)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)

S v Basson 2005 (1) SA 171 (CC)

S v Mathabathe 2003(2) SACR 25 (TPD)

Seton CO v Silveroak Industries Ltd 2000 (2) SA 215 (T)

Silwana and Another v Magistrate, District of Piketberg, and Another 2003 (5) SA 597 (C)

Snyman and others v Liquor Licensing Court, Windhoek and Another 1963 (1) SA 460 (SWA)

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)

South African Commercial Catering and allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC)

South African Motor Acceptance Corporation (Edms) Bpk. v Oberholzer 1974 (4) SA 808 (T)

Stocks Civil Engineering (Pty) Ltd v Rip NO & Another (2002) 3 BLLR 189 (LAC)

Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA)

Telcordia Technologies Inc. v. Telkom SA (2007) 3 SA 266

Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) PtyLtd and Antoher (2002) 4 SA 661 (SCA)

Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening) 2002(5) SA 246 (CC)

United Kingdom

ASM Shipping Ltd of India v. TTMI Ltd of England [2005] All ER (D) 271

AT&T and others v Saudi Cable Company (2000) 1 Lloyd's Rep. 22; [2000] All ER (D) 657 CA

Dimes v Grand Junction Canal (1853) 3 HL Cas 759, 10 ER 301.

Director General of Fair Trading v Proprietary Association of Great Britain and Proprietary Articles Trade Associations Re Medicaments and Related Classes of Goods (No. 2) Case No. C/2000/2582 C.A.

EAT/980/99 Scanfuture UK Ltd, EAT/1353/99 Mrs J M Link v EAT/980/99 Mr K Bird, Mrs J M Link, Mr C J Bennet, Secretary of State for Department of Trade & Industry, EAT/1353/99 Secretary of State for Department of Trade and Industry No. EAT/980 /99 EAT/1353/99 2001 WL 395198

Laker Airways Inc. v Fls Aerospace Ltd. and Burnton Fls Aerospace Ltd. v Laker Airways Inc [1999] 2 Lloyd's Rep 45

Lawtel v. Northern Spirit Ltd [2004] 1 All ER 187

Locabail (UK) Ltd v Bayfield Propertied Ltd and another; Locabail (UK) Ltd and another v Waldorf Investment Corp and others; Timmins v HM Inspector of Taxes and others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan [2000] QB 451

N Ali and S Begum (T/A Shapla Tandoori Restaurant), N Ali and S Ali (T/A Shapla Tandoori Restaurant A S Fanning, M Latif and A Rafiq, S O Lee (T/A The Chinese Lantern), B I Imaging Limited v The Commissioners of Customs and Excise No. 17681 2002 WL 1310948 at 44

Norbrook Laboratories Ltd. v. Tank [2006] 2 Lloyd's Rep. 485

Omnium de Traitement et de Valorisation SA v Hilmerton Ltd [1999] 2 All ER (Comm) 146

Porter v. Magill [2001] UKHL 67

R v A [2001] UKHL 25

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 97 (House of Lords)

R v Gough [1993] AC 646

R v Inner West London Coroner, ex parte Dallaglio and another [1994] 4 All ER 139

R v Rand (1866) LR 1 QB 230

R v Secretary of State for the Home Department [2003] 1 A.C. 837

R v Spencer [1986] 2 All ER 928; [1987] AC 128

R v Sussex Justices, ex p McCarthy [1924] 1 KB 256;

Sengupta and another v. Holmes and others [2002] EWCA Civ.1104

Westacre Investments Inc v Jugoisimport-SDPR Holding Co Ltd and others [1999] 1 All ER (Comm) 865

United States of America

Alghanim & Sons, W.L.L. v Toys "R" US 126 F.3d 15 (1997)
Delat Mine Holding v AFC Coal Properties 280 F.3d 815 (8th Cir. 2001)
Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier 508 F. 2d 969 (1974)

Hong Kong

Hebei Import and Export Corp v Polytek Engineering Co Ltd (No. 2)
(1998) 1 H.K.C. 192
Hebei Import & Export Corp. v Polytek Engineering Co. Ltd. [1999] 1
HKLRD 665

European Court of Human Rights and European Commission of Human Rights

Academy Trading Ltd v Greece (ECHR) Application No 30342/96
Bendenoun v France (ECHR) A-284
Bramelid and Malstrom v Sweden Applications Nos 8588/79, 8589/79
(European Commissions of Human Rights)
Bulut v Austria (ECHR) Application No 59/1994/506/588
De Cubber v Belgium (ECHR) Application No 9186/80
Deweert v Belgium (ECHR) A-35
Findlay v United Kingdom (ECHR) Application No 22107/93
Francesco Lombardo v Italy (ECHR) A-159-B
Giancarlo Lombardo v Italy (ECHR) A-249-C
Hauschildt v Denmark (ECHR) Application No 10486/83
Incal v Turkey (ECHR) Application No 41/1997/825/1031
Jakob Boss Sohne KG v Germany Application No 18479/91 (European
Commission of Human Rights)
König v Germany (ECHR) A-27
Massa v Italy (ECHR) A-265-B
McGonnel v United Kingdom (ECHR) Application No 28488/95
Nordström-Janzon v Netherlands, Application No 28101/95
Piersack v Belgium (ECHR) Application No 8692/79
Procola v Luxembourg (ECHR) Application No 14570/89
Salesi v Italy (ECHR) A-257-E
Scarth v. the United Kingdom Application No. 33745/96 (European
Commission of Human Rights)
Schouten and Meldrum v The Netherlands (ECHR) A-304

Stran Greek Refineries and Stratis Andreadi v Greece 19 ECHR 293 .
Suovaneimi and others v Finland Application No 31737/96
Thomann v Switzerland (ECHR) Application No 17602/91
Tyrer v United Kingdom (ECHR) A-26
Van de Hurk v The Netherlands (ECHR) A-288
Waight and Kennedy v. Germany Application No 26083/94 (European Commission of Human Rights)

International Court of Justice

North Sea Continental Shelf Case 1969 ICJ Rep 3

8 Arbitration Awards

Amco Asia Corporation and others v Republic of Indonesia (ICSID Case No. ARB/81/1) Decision on Jurisdiction of 25 September 1983

Amoco Iran Oil Company v The Government of Islamic Republic of Iran Case No. 248 Iran – US tribunal; Letter from Mohammed K Eshragh, Agent of Iran to Charles Moons, Appointing Authority 13 September 1988 20 Iran-U.S. C.T.R. 181

Decision of the Apointing Authority on the Third Challenge by Iran of Judge Briner 25 September 1989 21 Iran-U.S. C.T.R. 395

Decision of the Appointing Authority 31 August 1990 21 Iran-U.S. C.T.R. 314

Decision of the appointing Authority on the Second Challenge by Iran of Judge Briner, 19 Sep. 1989(1) 21 Iran-U.S. C.T.R. 384

Klökner industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2) Decision on Annulment of 3 May 1985.

9 International Instruments

African Convention on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

American Convention on Human Rights O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

Declaration of the Government of the Democratic an Popular Republic of Algeria concerning the Settlement of Claims by the Government of

the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981

European Convention on Human Rights and Fundamental Freedoms 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively

International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)