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Procedural and Ethical Dimensions of Independence and Impartiality in International Commercial Arbitration – Do the 'IBA Guidelines on Conflicts of Interest' Stand Credible?

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ABSTRACT

Independence and impartiality of an arbitrator are the hallmarks of any arbitration proceeding. The efficacy of the arbitration procedure is rooted in the quality of the arbitrators. However, in the multidimensional scope of international commercial arbitrators, often partisan tendencies arise, leading to 'conflicts of interest' in the arbitral procedure. In this regard, the International Bar Association (IBA) has coined the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, serving as a soft law instrument to examine potential circumstances leading to conflicts of interest. Furthermore, the paper dwells on the applicability of the said IBA Guidelines to harmonize standards safeguarding the independence and impartiality of the arbitrators. In conclusion, the author seeks to illustrate the notions of independence and impartiality in international commercial arbitration and best practices that cater to them through this paper.

I. INTRODUCTION

Arbitration is built on consensual agreements between the disputing parties that ostensibly provides for a neutral, private and efficacious forum to resolve their disputes.[2] Nevertheless, uncertainties tend to arise as to whether certain situations may be construed as a 'conflict of interest or not, keeping in pace with the complex structure of multinational corporations and the globalization of international law firms in the sphere of international commercial arbitration.[3] Moreover, the differing standards to determine the core requirement of

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[2] Ronan Feebily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice*, 7 PENN St. J.L. & INT'L AFF. 88, 89 (2019).

[3] Peter W. Egger, *Independence, Impartiality and Disclosure in International Arbitration: Recent Developments*, 1 Y.B. on INT'L ARB. 103, 104 (2010). [*hereinafter* "Egger"].

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'independence and impartiality' lead to ethical inconsistency. In the absence of extensive norms which are legally enforceable in this arena, the International Bar Association (IBA) stepped up and promulgated the 2014 Guidelines on Conflicts of Interest in International Arbitration[4] (*hereinafter* "IBA Guidelines") in order to promote a cohesive development of practice. Although the IBA Guidelines are not legally binding[5] and do not overwrite any applicable national laws[6], they embody the best international practice to safeguard neutrality.

This paper deals with the ethical aspects of International Arbitration in two parts: first, the notion of independence and impartiality of arbitrators is characterized in the realm of procedural law by dwelling into the relevant jurisprudence and practice; and second, the question of the applicability of the IBA Guidelines as a soft law instrument in domestic and institutional proceedings is dealt with.

II. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS AND RELATED CONCEPTS

A. The assumption of neutrality

Arbitration works as an efficacious method of dispute resolution because it provides neutrality.[7] The assumption of neutrality right from the arbitral appointment is a prerequisite for the independence and impartiality of arbitrators. Essentially, neutrality relates to an arbitrator's predisposition towards a disputing party's position.

In several jurisdictions such as the United States, there exists a presumption of neutrality for all arbitrators, including party-appointed arbitrators, to be applied unless applicable laws, rules or agreements provide otherwise.[8] The principle of neutrality entails the rule against bias. Arbitrators must abide by the natural justice rule of *nemo debet esse judex in propria causa*, which necessitates that only a person who has no significant interest in the case, and no preference with respect to the parties involved, may adjudicate or determine a case.[9]

Pragmatically, the first facet of neutrality is understood as the neural forum of dispute settlement, that the parties choose arbitration with neither party having the advantage of their

[4] IBA Council, IBA Guidelines on Conflicts of Interest in International Arbitration, (adopted 23 Oct. 2014) [*hereinafter* "IBA Guidelines"].
[5] IBA Guidelines, Introduction.
[6] *Id.*
[7] Michael D. Schafler, Deepshikha Dutt & Alexander Eckler, *The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law*, 5 INDIAN J. ARB. L. 150 (2017).
[8] Nigel Blackbay and Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Oxford, New York: Oxford University Press, (2009) 6th Ed, 361 [*hereinafter* "BLACKBAY AND PARTASIDES"].
[9] Kuo, Houchi, *The Issue of Repeat Arbitrators: Is it a Problem and How Should the Arbitration Institutions Respond?*, Contemporary Asia Arbitration Journal, Vol. 4, No. 2, 247-271, (November 2011).

domestic court.[10] The second facet concerns the nationality of arbitrators. Therefore, it is advisable that the nationality of the appointed individual be independent of the nationalities of the appointing parties, be it the sole arbitrator, presiding arbitrator or in some cases the party-appointed arbitrator. This requisite is reflected in several institutional rules for international arbitration, including Rule 6.7 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,[11] Art. 13.5 of the International Chamber of Commerce (ICC) Arbitration Rules,[12] Art. 6 of the London Court of International Arbitration (LCIA) Rules[13] and Art. 20 of the World Intellectual Property Organisation (WIPO) Arbitration Rules.[14]

B. The *Kompetenz-Kompetenz* Principle

International courts and tribunals may apply reviewability standards by virtue of *kompetenz-kompetenz* principle, i.e., the competence to determine its jurisdiction.[15] This principle, in international arbitration, emphasizes minimal interference of the courts, which is reflected in Art. 5 of the UNCITRAL Model Law on International Commercial Arbitration.[16] In arbitral cases, the excessive intervention of courts amounts to judicial overreach, defeating the purpose of maintaining party autonomy in arbitral proceedings.[17] Additionally, the arbitral awards issued at the international level are far more effective than the judgements rendered by national courts of law by virtue of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[18] currently in force in 157 States, obliges state parties to recognize and enforce awards issued in other contracting States, unless restrictive circumstances stipulated therein take place.[19] Though domestic legislative safeguards are applicable and respected, their judicial scope shall not hinder independence and impartiality to truly maintain the fair spirit of arbitral proceedings.

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[10] Margaret L. Moses, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION,140-41 (3rd ed. 2017), 1 [*hereinafter "*Moses"].

[11] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, U.N.G.A. Res. 68/109, (Dec. 16, 2013) [*hereinafter* "UNCITRAL Arbitration Rules"].

[12] Int'l Chamber of Commerce, Arbitration Rules (2017), Art. 13.5 [*hereinafter* "ICC Arbitration Rules"].

[13] London Court of Int'l Arbitration, Arbitration Rules (2014), Art. 6 [*hereinafter* "LCIA Rules"].

[14] World Intellectual Property Organisation, Arbitration Rules (2014), Art. 20 (2014) [*hereinafter* "WIPO Arbitration Rules"].

[15] *Case of Certain Norwegians Loans (France v. Norway),* ICJ, (Preliminary Objections) (Sep Op Judge Sir Hersch Lauterpacht), [1957] ICJ Rep 1957, 9, 43-44.

[16] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006), Art. 5 [*hereinafter* "UNCITRAL Model Law"].

[17] Udian Sharma, *Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments*, 9 INDIAN J. ARB. L. 121 (2020), 31 [*hereinafter* "Sharma"].

[18] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3.

[19] David Arias, *Soft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6 INDIAN J. ARB. L. 29 (2018).

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C. Independence and impartiality of arbitrators – synonymously used yet distinct notions

The requirements of independence and impartiality represent the core obligations of an arbitrator and are *"so widely recognized that they amount to general international principles and are therefore incumbent on any arbitrator in all circumstances."*[20] Consequently, rules or provisions in procedural law concerning the assessment of bias tend to use the notions of impartiality and independence as a "package".[21]

'Independence' is generally regarded with questions concerning the relationship between an arbitrator and one of the parties, whether financial or otherwise. As articulated in the ICSID (International Centre for Settlement of Investment Disputes) decision of *Suez v. Argentina,*[22] independence relates to the lack of relations with a party that might influence an arbitrator's decision. However, this is susceptible to an objective test since it hardly has anything to do with an arbitrator's state of mind.[23] Thus, a challenge on the grounds of doubts over the independence of an arbitrator can be sustained as early as the appointment stage.

'Impartiality', on the other hand, entails the absence of any bias towards a party or the matter in dispute. It involves a subjective appraisal, and hence, is likely to come to light later during the arbitral proceeding.[24] Further, impartiality implies that arbitrators must not hold preconceptions concerning specific matters of the dispute presented to them. The arbitrator must not engage in any conduct that may or may perceive to promote the interest of one of the disputing parties. The lack of independence may hint towards potential partiality.[25] These tenets of independence and impartiality, though distinguishable, are inextricably linked to each other.[26]

III. Notions of Independence and Impartiality as Reflected in Institutional Rules and Legislative Instruments

The wording' impartiality or independence is derived from the broadly adopted Art.12 of the UNCITRAL Model Law.[27] Article 6(7) of the UNCITRAL Arbitration Rules provides that the appointing authority shall have regard to such considerations as are likely to secure the

[20] Simon Greenberg et al, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE (New York: Cambridge University Press, 2011) 270.
[21] BLACKBAY AND PARTASIDES, *supra* note 8, 201.
[22] Decision on the proposal for the Disqualification of a member of the arbitral tribunal, 22 Oct. 2007, *Suez et al. v Argentina*, ICSID Case No. ARB/03/17, at 13-14.
[23] BLACKBAY AND PARTASIDES, *supra* note 8, 262.
[24] Hong-Lin Yu/Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators -US and English perspectives*, International & Comparative Law Quarterly, 52 (2003), 935.
[25] Egger, *supra* note 3, 106.
[26] *Id.*
[27] UNCITRAL Model Law, Art. 12.

appointment of an independent and impartial arbitrator. Art. 5(3) of the LCIA Rules, 2014 and Art. 11 of the ICC Arbitration Rules, 2012 similarly reflects the notion of independence and impartiality. The ICC requires all prospective arbitrators to submit their statement of acceptance, availability, impartiality and independence with the relevant disclosures. The ICC Rules further require an arbitrator to "*be and remain independent of the parties involved in the arbitration*".

Additionally, ICC tribunals possess an overriding duty to "act fairly and impartially".[28] The ICC rules further stipulate that an arbitrator can be challenged on the grounds of "*lack of independence or otherwise*".[29] When it comes to the ICSID, the qualities required in the said Art. 14(1) include the ability to "exercise independent judgment".[30] However, the threshold for a challenge contesting for the disqualification or removal of an arbitrator is relatively high, requiring circumstances signifying a "manifest lack" of the qualities required under the ICSID Convention.[31]

IV. NOTIONS OF INDEPENDENCE AND IMPARTIALITY AS REFLECTED IN NATIONAL LEGISLATIONS AND RULINGS

Some recent judgements from domestic courts of law highlight the notions of independence and impartiality within national procedures. In this regard, as Gary Born has well-articulated, "*the trend in recent years has ... been a move away from equating or linking standards of impartiality of international arbitrators to those of national court judges.*"[32] For instance, the Supreme Court of India, in the case of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*,[33] has commendably underlined the significance of independence and impartiality of arbitrators, observing that:

"*...arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest*

[28] ICC Arbitration Rules, Art. 15(2).
[29] ICC Arbitration Rules, Art. 11(1).
[30] ICSID Convention, Art. 38 and 39.
[31] ICSID Convention, Article 58.
[32] Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed., 2014), 1787 [*hereinafter* "Born"]
[33] AIR 2017 SC 939 (India).

of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial."[34]

The United Kingdom Supreme Court highlighted this aspect in *Hashwani v. Jivraj*[35] , observing that "*the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.*"[36]

The Supreme Court of the United States, in the coveted case of *Commonwealth Coatings Corp. v. Continental Casualty Co*.,[37] held that *"We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."*[38]

Apart from judicial rulings, several domestic legislations have imbibed the concerned notions. For instance. Section 1033 of the Netherlands Arbitration Act, 1986, provides for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts about the arbitrator's independence or impartiality. Along the same lines, section 24(1) of the English Arbitration Act, 1996 provides that party to arbitral proceedings may apply to the court to remove an arbitrator because circumstances exist that give rise to justifiable doubts about his impartiality. Parallelly, art. 1456(2) of the French Code of Civil Procedure necessitates that "*an arbitrator to disclose any circumstance that may affect his or her independence or impartiality*." In the United States, section 10(a) of the Federal Arbitration Act of 1925 provides the duty to avoid evidence.

In all of the above instances of legislative prowess and judicial rulings, independence and impartiality are invariably linked with the question of 'justifiable doubts' and the question of 'disclosures'. The said issues are subsequently discussed in consonance with the second part of this paper. The IBA Guidelines have been used as illustrations to analyze the standards for

[34] *Id.* para 20.
[35] (2011) 1 WLR 1872: 2011 UKSC 40 (U.K.).
[36] *Id.* para 45.
[37] *Commonw. Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968) (U.S.).
[38] *Id.* para 3.

justifiable doubts and the extent of disclosures.

V. Applicability of the IBA Guidelines on Conflicts of Interest in International Arbitration

The arbitral process alone cannot ensure neutrality coupled with objectivity in resolving disputes if there is any doubt about the integrity of arbitrators. Moreover, there exists no regulatory body to enforce ethical rules internationally. The IBA Guidelines are coined as soft laws that tribunals look to in order to check the disclosure of information to the parties in a given proceeding. [39] They seek to harmonize the standards of disclosure and act as a tool to lead parties towards the best practice regarding impartiality and independence in international commercial arbitration.

The IBA Guidelines have revised in 2014, accounting for the experiences since its initial promulgation in 2004. The first part of IBA Guidelines provides seven General Standards. In contrast, the second part enumerates situations of possible conflicts of interest, divided into three lists, viz. the Red List, which is further classified into waivable and non-waivable lists, the Orange List, and the Green List.[40] The IBA guidelines' general principle states that an arbitrator must be independent and impartial at all stages of the proceedings.[41] If doubt for the same, if arbitration has already been commenced, the individual concerned shall refuse to continue to act as an arbitrator.

Further, the scope of the IBA guidelines applies to party-appointed arbitrators.[42] This is in furtherance to the 1987 IBA Rules for Ethics of Arbitrators,[43] which lays down that international arbitrator should be impartial, independent, competent, diligent, and discreet.[44] Accordingly, the IBA Guidelines supersede these rules regarding matters indulged in the Guidelines, such as arbitrators' impartiality, independence, and duty of disclosure.[45]

The IBA Guidelines have found broad acceptance in international arbitral practice. For instance, the practice of the tribunals applying the ICSID Convention[46] reflects the recognition

[39] IBA Guidelines, Introduction.
[40] Khaled Moyeed, Clare Montgomery & Neal Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest*, KLUWER ARB. BLOG (Jan. 29, 2015), available at http://arbitrationblog.kluwerarbitration.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/?doingwpcron-1596221860.2151229381561279296875.
[41] IBA Guidelines, General Standard 1.
[42] *Id.* General Standard 5.
[43] IBA Council, IBA Rules for Ethics of Arbitrators (1987).
[44] IBA rules, Introductory note, para 1.
[45] *Id.*
[46] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (International Centre for Settlement of Investment Disputes [ICSID]), 575 UNTS 159.

of the persuasive authority of the IBA Guidelines in several cases.[47] However, on the flip side of the coin, their effectiveness has been questioned on a few occasions.[48]

A. IBA Guidelines as a soft law instrument

"Soft law" entails quasi-legal instruments whose binding force is somewhat weaker than the binding force of traditional law or "hard law".[49] The norms enshrined in soft law can also emanate from non-state actors, including private institutions and professionals.[50]

Soft law tends to be applied primarily in the sphere of Public International Law. For example, the resolutions and declarations of the United Nations General Assembly serve as soft law. Here, the argument for IBA Guidelines constituting soft law is two faceted. First, from the angle of Public International Law, institutional practice for the IBA Rules and Guidelines often resembles the two elements of 'custom', being 'state practice' and '*opinion juris'*, which was laid down by the International Court of Justice (ICJ) in the *North Sea Shelf Continental Cases.*[51] Custom, as per Art. 38(1)(b) of the statute of the ICJ[52] is a prominent source of law. In furtherance to the said, tribunals' decisions coupled with scholars' writings constitute a supplementary source of law as per Art. 38(1)(d)[53] of the ICJ statute. The decisions of several judicial bodies and the broad acceptance of these rules and guidelines make them viable to further qualify as a source. Here, the argument certainly can be made IBA is a credible international body, whose writings constitute as a supplementary source of law to either arbitration agreements or treaty law (within the meaning of Art. 38(1)(a) of the ICJ statute), or as a supplementary source of law to custom (within the meaning of Art. 38(1)(b) of the ICJ statute).

Additionally, the notions enshrined in the IBA Guidelines may be viewed as resonating in conformity with the 'good faith principle.' Good faith qualifies as a source of law as per Art. 38(1)(c) of the ICJ statute as a 'general principle of law', which if further raised by the

[47] For example, *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of 1 September 2009, para 263; *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Disqualification of 12 November 2009, para 15.
[48] Chartered Institute of Arbitrators, WEAKNESSES IN THE 2014 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (May 6, 2016).
[49] Felix Liith & Philipp K. Wagner, *Soft Law in International Arbitration - Some Thoughts on legitimacy*, STUDZR 409, 411 (2012).
[50] Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. INT'L. DISP. SETTLEMENT 283, 284 (2010).
[51] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3.
[52] Statute of the International Court of Justice, 1945, 59 Stat. 1055, Art. 38(1)(b). [*hereinafter "ICJ Statute*]
[53] *Id.* Art. 38(1)(d).

customary *pacta sunt servanda* obligation.[54] In this light, the IBA rules are construed as a source of law.

However, the above argument can be considered farfetched. Public International Law, including its elements like treaty law and custom, apply to state parties as primary actors. Applying such general interpretations to international commercial arbitration, especially matters that are not inter-state disputes but private disputes, can be problematic.

The second facet of the argument concerns the legitimacy of IBA Guidelines, specifically in the field of international commercial arbitration. Alexis Mourre aptly characterizes legitimacy as relying on the three factors of experience, inclusion, and internationality.[55] The IBA, established in 1947, consists of over 80000 lawyers and over 190 bar associations as members. It is the leading body acting as an association of legal professionals and bar associations, one of the most active bodies for amalgamating soft law instruments in international arbitration.[56] It has created various instruments that are frequently used in arbitration practice. IBA's Arbitration Committee has more than 2500 members from over 90 states.[57] The IBA Guidelines' propagation was certainly inclusive, as it was framed by an expert working group including arbitration professionals, arbitrators, jurists and users of the institution from over 18 States.[58] The group took into account the initial developments of the 2004 Guidelines and incorporated the best available practice into the Guidelines' standards. Therefore, it can be said that IBA complies with all requirements of legitimacy and can certainly be relied upon.

The IBA Guidelines truly hold their ground as a soft law instrument. The success in terms of the applicability of soft law instruments can only be determined by its extensive and benevolent practice. This legitimacy of the IBA coupled with the proficiency the IBA Guidelines bring to the table has led to the extensive use of the IBA Guidelines. In accordance with one of the IBA subcommittee's reports of 2016, the IBA Guidelines (ever since initial promulgation in 2004), the IBA Guidelines were resorted to in 57% of proceedings where a conflict of interest arises.[59] They are frequently cited by arbitral institutions in their adjudications on decisions concerning on conflicts of interest (67% of decisions).[60]

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[54] Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331, Art. 26.
[55] Alexis Mourre, *Soft law as a condition for the development of trust in international arbitration*, 13 REVISTA BRASILEIRA DE ARBITRAGEM 82, 89 (2016).
[56] David Arias, *Soft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6 INDIAN J. ARB. L. 29, 38 (2018).
[57] *Id.*
[58] *Id.*
[59] The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products IBA Arbitration projects*, paras 110, 111, 113 (2016) [*hereinafter* "Reception Report"].
[60] *Id.*

Lastly, we view the persuasive value of the IBA Guidelines and the acceptance it has received. Consistent with the principles embodied in the IBA Guidelines, as per both national statutes and most institutional rules, an arbitrator may be challenged because of the maintenance of the requisite independence or impartiality.[61] For example, domestic courts in the United States, Belgium, Austria, Spain, and Switzerland have resorted to the IBA Guidelines as persuasive authority.[62] The IBA Guidelines in the United States "*are referred to frequently by arbitrators in practice*".[63] They have already been adopted by United Kingdom's Courts[64] and have received general acceptance in the international community.[65]

The IBA Guidelines have been tantamount to directing national norms and influencing legislation. This is illustrated by the case of the Indian legislative landscape. The 246th Law Commission Report[66] *inter alia* proposed enactments to maintain independence and impartiality of the arbitral process. Thereafter, the Arbitration and Conciliation (Amendment) Act,[67] 2015, was introduced. The said 2015 Amendment Act provided that an arbitrator may be challenged on failure to make necessary disclosures when approached for the appointment and broadened the scope of challenges to the composition of the arbitral tribunal[68] under Section 12 of the Principal Act of 1996 Act.[69] In consonance with the IBA Guidelines, the said 2015 Amendment Act added the fifth, sixth, and seventh schedules in the Principal Act of 1996, encompassing a mechanism for checks and balances for conflicts of interest. The Fifth Schedule lays down circumstances that may stem justifiable doubts as to the independence or impartiality of an arbitrator. The Sixth Schedule entails the disclosure made by arbitrators and prospective arbitrators. The Seventh Schedule laid down the categories concerning ineligibility for arbitrator appointments.

All in all, soft law instruments play a key role in arbitration, and they are being increasingly used by several tribunals and institutions. Jan Paulsson has emphasized that "*the future clearly lies in the emergence of fundamental best practices*."[70] The IBA Guidelines certainly embody

[61] Born, *supra* note 33, 1762.
[62] Reception Report, *supra* note 61, paras 164 and 169.
[63] Moses, *supra* note 10, 147.
[64] Hew Dundas, *Arbitral Rarities: Recent Arbitration Cases in the Engsh Courts with a Scottish Postscript*, 81 ARB. 332 (2015).
[65] BLACKBAY AND PARTASIDES, *supra* note 8, 258.
[66] Law Commission of India, Report No. 246 - Amendments to the Arbitration and Conciliation Act, 1996 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.
[67] Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India) [*hereinafter* "2015 Amendment Act"].
[68] Sharma, *supra note* 17, 121.
[69] Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Principal Act"].
[70] Jan Paulsson, THE IDEA OF ARBITRATION 284 (2013).

the best practices and are aptly applicable as a soft law instrument.

B. Justifiable doubts from the lens of Reasonable Third-Person Test

The IBA Guidelines entail that "*If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties"*[71] The use of 'justifiable doubts' as the basis to assess independence and impartiality is well received in practice, as it is consistent with Art. 12(2) of UNCITRAL Model Law,[72] Art. 9 of UNCITRAL Arbitration rules[73] and rule 10(1)(iii) of the LCIA rules.[74] The 'justifiable' qualifier implies the perspective of a disinterested, reasonable person, i.e., 'the reasonable third person test'.[75] This is well explained in *Vivendi S.A. v. The Argentine Republic,* the tribunal ruled that a challenging party must place reliance on established facts rather than on "mere speculation or inference" and observed that to render a decision independently *", all the circumstances need to be considered in order to determine whether the relationship is significant enough to justify reasonable entertaining doubts as to the capacity of the arbitrator.*"[76] Further, an impartiality challenge must be based on specific facts and not be sustained by general conjectures.[77] A challenge was upheld by the Secretary-General of the Permanent Court of Arbitration (PCA) applying the reasonable third person test in *Perenco Ecuador Limited v. The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*.[78] The remarks made by the challenged arbitrator in a published interview concerning unfavourable views of Ecuador, from the point of view of a reasonable third person knowing the relevant facts, amounted to the circumstances giving rise to justifiable doubts about the arbitrator's independence or impartiality. In *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, the ICSID tribunal rejecting a similar challenge ruled that *"neither bias nor partiality will arise when an arbitrator is called upon to decide circumstances of fact close to those examined previous.*"[79]

Now, General Standard 7(c) lays down that *"an arbitrator is under a duty to make reasonable*

[71] IBA guidelines, General Standard 3(a).
[72] UNCITRAL Model Law, Art. 12(2).
[73] UNCITRAL Arbitration Rules, Art. 12(1).
[74] LCIA Rules, Art. 10.1(iii).
[75] Born, *supra* note 33, 1762.
[76] *Compalia de Aguas del Aconquia S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Challenge decision of 24 September 2001.
[77] *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) para 14, International Centre for Settlement of Investment Disputes (ICSID) Case no. ARB/12/13.
[78] *Perenco Ecuador Limited v The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, (ICSID Case No. ARB/08/6), Decision on Challenge to Arbitrator. 8 December 2009 (PCA Case No IR-2009/1).
[79] *Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No.ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator,¶13(Dec.23, 2010).

enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate."[80] This prompts the question of the extent of disclosures. For Paulsson, an arbitrator will be put in a situation of bias when the said arbitrator has given his or her opinion on the relevant case, which is legal in nature and specifically concerning the relevant case's facts and issues.[81] In *EDF International v. Argentina*, the Deciding Authority dismissed a challenge noting the general rule that *"non-disclosure itself cannot be a ground for disqualification"* and any disqualification must arise from the underlying facts of an ethical conflict.[82] All things considered, each case shall peculiarly look into disclosures, from a constructive standpoint, based on its specific facts and circumstances.

VI. CONCLUSION

In the distinguished practice of international arbitration, practitioners soon perceive any partisan tendencies' influence. Ideally, an arbitrator is broadly sympathetic to the case theory put forward but impartial when assessing the facts and evaluating the issues along with arguments on fact and law. Arbitral integrity mandates an *"optimum balance between fairness and efficiency"*[83] for all practitioners. More often than not, the reasonable apprehension of partiality and bias occurs in cases of unilateral appointments than in cases of neutral appointments.[84] Unilateralism *prima facie* makes room for doubts concerning the independence and impartiality of the proceedings.[85] Sometimes, the assumption of a 'blanket immunity of arbitrators enables them to excuse perceived misconduct.[86] However, the conduct of arbitrators should always be subject to ethical scrutiny. The IBA Guidelines serve as a harmonious standard to promote ethical consistency in view of the above. Reflecting on the best practices concerning the fundamental tenets of independence and impartiality is essential to diminish any ethical imbalance from all perspectives holistically. Though the IBA Guidelines may not completely fulfil the ethical lacunae due to its limited enforceability as soft law, it can certainly be relied on as the forefront instrument concerning neutrality standards in

[80] IBA guidelines, General Standard 7(c).
[81] Jan Paulsson, ETHICS, ELITISM, ELIGIBILITY, 14 Journal International Arbitration, 4, 13-21, 15 (1997).
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