

## Conflicts of interest and disclosure duties of non-Martian arbitrators

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In the ICSID case *Suez, Agbar v. Argentina*, when Argentina challenged one arbitrator on the grounds that she was a director at Swiss bank UBS -which held a 2% stake in one of the claimant companies-, her fellow co-arbitrators dismissed the challenge on 12 May 2008<sup>2</sup> drawing on a well-known argument<sup>3</sup>:

*“Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions. It has been asserted by some scholars that there are only “six degrees of separation” between one person and any other person on earth. The theory of six degrees of separation holds that if a person is one step or “degree” away from each person he or she knows, and two steps or two degrees away from each person known by one of the people he or she knows, then everyone is an average of six steps or six degrees away from each person on the globe. While the validity of this theory certainly remains to be proven, its application does demonstrate how easily one may make connections between one person and another through the process of identifying real or alleged links.”*<sup>4</sup>

The Tribunal's decision and, especially, the fact that the challenged arbitrator worked simultaneously as arbitrator and independent director of a major international bank attracted a stern rebuke from the “ad hoc” Committee which heard the request for the annulment of the award:

*“The positions of a director of such a bank, and that of an international arbitrator, may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined. ... The complications that have subsequently arisen in terms of agony, ICSID credibility, and cost, not only in this case, provide a vivid and abject example of the consequences when an arbitrator accepts a board position in a major international bank without properly investigating and*

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<sup>2</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. c. Argentina* (ICSID Case no. ARB/03/17 y Núm. ARB/03/19), Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008 (Suez II), § 29.

<sup>3</sup> We quote from Karel Daele's excellent book “*Challenge and Disqualification of Arbitrators in International Arbitration*”, Wolters Kluwer Law & Business, 2012, pg.279.

<sup>4</sup> Further details of this well-known empirical law of “six degrees of separation” which is also known as the “small world effect”, was enunciated by the American psychologist Stanley Milgram in Mark Buchanan's, *Small World*, Phoenix, London, 2002; Albert-László Barabási's, *Linked. The New Science of Networks*, Perseus Publishing, Cambridge, Massachusetts, 2002 or Duncan J. Watts', *Six Degrees. The Science of a Connected Age*, Norton & Company, New York, 2003.

*disclosing any connections between the bank and parties to its arbitrations and also neglects its information duties."*

However, after a long deliberation the Committee decided not to annul the award, since the challenged arbitrator was unaware of the bank's investment in the claimant company and the annulment of the award would have unfairly prejudiced the claimants.

### **Bounded Ethicality**

In light of the divergence of views between the ICSID Tribunal and the "ad hoc" Committee, we wonder how they would have reacted to a different potential conflict of interest, which involved a US Supreme Court judge and is discussed by the business ethics Professors Max H. Bazerman and Ann E. Tenbrunsel in their book "*Blind Spots*"<sup>5</sup>.

It was the challenge made by the environmental organisation "Sierra Club" against Judge Antonin Scalia in March 2004, when the Supreme Court had to decide whether Vice-President Dick Cheney was under an obligation to disclose information concerning the members of a working group which had advised him on energy policy. The challenge was based on the judge's close friendship with Vice-President Cheney, with whom he went on a duck hunting trip to Louisiana in January 2004 in the Vice-President's official aircraft, "*Air Force Two*".

Scalia did not literally say that he was not from Mars, but got very close when he argued that he was indeed an old friend of Cheney, but what the Supreme Court had to consider were the latter's acts in his capacity as Vice-President; and if Supreme Court judges had to recuse themselves for attending social events with members of the Government, the court would not be able to function. He further mentioned that President Truman used to play poker regularly with the President of the Supreme Court and that a famous Attorney General, Robert Kennedy, used to go skiing with a Supreme Court judge. To top off his refusal to step down, he added: "*If it is reasonable to think a Supreme Court Justice can be bought so cheap then this nation is in deeper trouble than I thought.*"

Bazerman y Tenbrunsel criticize Scalia's stance:

*"He rejects or is unaware of the unambiguous evidence on the psychological aspects of conflicts of interest. Even more troubling than his lack of understanding are the Supreme Court's rules, which, like most guidelines and laws that are intended to protect against conflicts of interest, guard only against intentional corruption. Yet most instances of corruption and unethical behaviour in general, are unintentional, a product of bounded ethicality and the fading of the ethical dimension of the problem".*

Judge Scalia's lack of awareness of the subtle psychological aspects which underpin conflicts of interests is not limited to renowned judges: it also applies to other prestigious law professionals when they act as arbitrators, as evidenced by the decision of the Madrid Provincial Court on 30 June 2011. The judgment annulled a decision rendered by an arbitral tribunal chaired by a well-known Spanish civil law professor because he failed to disclose information pertaining to his relationship with the law firm representing one of the parties (his son-in-law worked for the law firm in question, the managing partner of the firm had been his intern 30 years ago, he was a member of the firm's advisory committee on a Master's in Business Law, etc). These aspects, in

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<sup>5</sup> "*Blind spots. Why We Fail to Do What's Right and What to Do about it*", Max H. Bazerman and Ann E. Tenbrunsel, Princeton University Press, 2011.

the Madrid Provincial Court's view, "*on the whole, highlighted the existence of a relationship between the Arbitrator and the said law firm which goes beyond an isolated and sporadic relationship and reveals a relationship of understanding, closeness and cooperation providing sufficient motive to create reasonable doubts with respect to his independence and impartiality*"<sup>6</sup>.

The right premise that arbitrators do not come from Mars – or, in the case of women, from Venus- justifies that our condition of social beings excludes the existence of a genuine conflict of interest in some cases. But the same premise ought to make us guard against other subtle conflicts of interest which, unthinkable in a perfectly rational Martian, could affect an Earthling arbitrator made of flesh and bone.

What are those subtle psychological factors which can influence arbitrators, even if they themselves remain unaware?

There are many, most of them addressed by the 2004 IBA Guidelines on Conflicts of Interests in International Arbitration, but we will focus on three:

- The “law of reciprocity”, that is, our desire to reward those who have acted favourably towards us;
- Economic incentives and "self-serving bias", i.e. our tendency to take a favourable view on anything that is of benefit to us;
- Confirmatory bias or "biased assimilation" -i.e. our tendency to pay special attention to information that confirms our beliefs - and our desire for consistency and attachment to ideas that we have expressed in the past.

The two inclinations reinforce our "belief perseverance", which lends particular weight to our doctrinal predispositions and previously expressed opinions and, thus, as discussed below, may create "issue conflicts".

As is common with most biases, those who suffer them rarely perceive them – which explains the title "*Blind Spots*" of Bazerman and Tenbrunsel’s book-. A corollary in the case of arbitrators' conflicts of interests is, as Jan Paulsson has written, that "*self-policing by arbitrators has its limits*"<sup>7</sup> and, consequently, it is preferable that the ultimate decision as to the existence of such conflicts is left to national courts, as is the case with practically all arbitration courts, with the notable exception of ICSID.

### **Law of Reciprocity vs. “Beckett effect”**

The term "law of reciprocity" was coined by Robert Cialdini, a famous American psychologist and consultant, and an expert in marketing and the art of persuasion<sup>8</sup>. He sees the law of

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<sup>6</sup> The ruling of the Madrid Provincial Court has been analysed by Fernando Mantilla-Serrano and Philippe Pinsole in “La independencia del árbitro y su obligación de revelación”, in Volume II of “Arbitraje Internacional: Pasado, Presente y Futuro. Homenaje a Bernardo Cremades e Yves Derains”, Instituto Peruano de Arbitraje, Lima, 2013.

<sup>7</sup> Jan Paulsson, prologue to Karel Daele's “Challenge and Disqualification...”, op.cit, pgs ixx a xxi.

<sup>8</sup> Robert B. Cialdini, “*Influence. The Psychology of Persuasion*”, 5th edition, Pearson, 2008. Many of his ideas are developed in another book written by Cialdini with Noah J. Goldstein, Steve J. Martin “*Yes! 50 Secrets from the Science of Persuasion*”, Profile Books, 2007.

reciprocity as one of the most powerful influences over human conduct: when someone does us a favour, even if unsolicited, we feel an intense desire to repay the favour and a deep feeling of guilt and ungratefulness if we do not.

A classical application of the law is giving a gift to a potential customer- the flowers of Hare Krishna, a free sample at a supermarket or even an affectionate greeting at a shop's entrance-, since those who accept it will feel morally obliged to make a donation or buy something in return. Negotiators also use the law to their benefit when, starting with an unreasonable demand, they then lower their initial claim expecting something in return, even though the second demand is still completely unjustified.

This psychological law explains why criminal law punishes the mere acceptance of gifts or favours by judges, Government officials or legislators, as does article 426 of Spain's Criminal Code, which punishes the "authority or public official who accepts a gift or present being offered by reason of his position, or to undertake an act not prohibited by law". Note that the crime does not require the public official to commit any unlawful act: the sole acceptance of a gift made on account of his position will suffice.

Not by chance, Guy Kawasaki, another famous consultant and marketing expert, illustrates the "art of charming" with a story on reciprocity. One night, towards the end of the 1980s, a group of fired-up military armed men from the Philippines Communist Party went to the village where Karin Muller, the Swiss writer and traveller, was working as a volunteer for the Peace Corps, with the intention of interrogating her in a hostile manner. But she disarmed them psychologically with her cunning welcome: *"Thank God you're here. I've been waiting all day. Please have some coffee. Leave your guns..."*. The leader of the group, once he had overcome his bewilderment, put down his weapons and sat down to have some coffee. He abandoned his intention to intimidate her with questions because, as Muller said, *"you cannot question someone with whom you are having coffee"*.<sup>9</sup>

How does the law of reciprocity affect arbitrators?

The relationship derives from a fact formulated by British philosopher and jurist Jeremy Bentham in his *"Book of Fallacies"*: praise creates a subtle psychological link between the appraiser and the appraised and makes the latter feel an inexorable sense of gratitude towards the former<sup>10</sup>.

Now, if mere praise creates a link, the influence will be even stronger when praise has a tangible manifestation: the appointment to a position attractive to the nominee –e.g. chair or member of a public body, director, auditor or rating agency of a public company, journalist provided with a scoop, intermediary in an important transaction, judge of the Supreme Court or arbitrator in a high value case-. In all these cases a subtle and invisible psychological link will create in the nominee a sense of gratitude towards the nominator, who in turn would expect some degree of loyalty: the former will find it difficult to be impartial and not comply with the wishes of the person who appointed him; the latter will regard inconsiderate any decision by "his" nominee which runs counter to the nominators' interests.

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<sup>9</sup> Guy Kawasaki, *"Enchantment. The Art of Changing Hearts, Minds, and Actions"*, Portfolio Penguin, 2011.

<sup>10</sup> Jeremy Bentham, *"The Book of Fallacies: From Unfinished Papers of Jeremy Bentham"*.

Such psychological links explain, for example, why elected politicians, as soon as they come into power, replace those occupying important positions in ministries and public institutions, regardless of their qualifications: they have an interest in making their own appointments not only as a favour to friends, but also to ensure that the nominee feels the natural sense of gratitude and reciprocity described by Cialdini.

Can we get rid of the "spell" cast by our natural instinct to be grateful towards those who appointed us as arbitrator or to another attractive post?

This debate has a long tradition in a German institution, the Central Bank (*Bundesbank*), which has always been proud of its independence *vis a vis* the Government, notwithstanding the fact that every member of its Council is appointed by the Government, and that traditionally the President and Vice-president of the institution have served previously as high level officials- for example, Secretary of State for Economy and Finance- who enjoyed the trust of the Chancellor who appointed them.

An old member of the Council of the *Bundesbank*- and subsequently of the Executive Committee of the European Central Bank- professor Otmar Issing, coined the term "Beckett effect" to describe the spirit of independence felt by those appointed by the Government to become members of an independent institution like the Central Bank. In a famous speech in 1991, he expressed the idea as follows:

*"The influence, prestige and the task entrusted to the Central Bank can produce in the newly arrived a transformation in his perception which can provoke in some case surprise and frustration, and even indignation, towards his political sponsor. I would call that phenomenon "Beckett effect", remembering the experience of Henry II of England when he designated his trusted Chancellor as the Archbishop of Canterbury, and saw how the assumed representative of the King's interests transformed himself into a genuine defender of the interests of the Church. I won't say whether [the effect] also requires a disposition to suffer martyrdom".<sup>11</sup>*

The "Beckett effect" is necessary in all independent institutions and in all those people entrusted to exercise a role with impartiality. But it is contrary to our spontaneous human inclinations.

The IBA Guidelines on Conflicts of Interest reflect this principle in several of its sections, such as 2.3.6 which includes in the waivable red list having a significant commercial relationship with one of the parties to the dispute or an affiliate of one of the parties. The same principle probably underpins the conflicts included in the Guidelines' orange list derived from "repeat appointments"- more than two by the same party or more than three by the same law firm in the past three years, contained in section 3.1.3 and 3.3.7, respectively.

There is another situation, different to the ones mentioned above and not set out in the IBA Guidelines, which, in our opinion, raises another potential conflict of interest related to reciprocity: should the person acting as sole arbitrator or chair of an arbitral tribunal accept, while still exercising that role, any appointment by the lawyers or parties in that case to serve as arbitrator in a different proceedings? In our view, he or she should not, since the appointment,

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<sup>11</sup> (A.T) Otmar Issing, "*Geldpolitik im Spannungsfeld von Politik und Wissenschaft*", speech in a round table in tribute to Professor Norbert Kloten, Stuttgart, 15 March 1991.

even if it is the first one and falls outside sections 3.1.3 and 3.3.7 of the Guidelines, could give rise to a subtle influence on the sole arbitrator or chair.

As we will explain later, the delicate task of passing judgment on these conflicts of interest potentially affecting one arbitrator must not be entrusted to his colleagues in the arbitral Tribunal: they will have difficulty alerting him of the risk of partiality that the affected arbitrator failed to perceive; besides, they might give in to the natural tendency to show him support and even share his "bounded ethicality", being themselves subject to another influence which we will analyse next: self-interest.

### **Economic incentives and self-complacency**

In his memoirs, written after stepping down as president of the US Securities Exchange Commission, Arthur Levitt points out that the solemn assertion by the American writer and reformist Upton Sinclair-"*It is difficult to get a man to understand something, when his salary depends upon his not understanding it!*"- is applicable to financial analysts, to investment banks and, in general, to all participants in capital markets.<sup>12</sup> Levitt's term finished long before the subprime mortgage crisis began in 2008, but there are many who, like Sinclair and Levitt, have attributed the international financial crisis to the greed and money-driven attitude of the creators of subprime mortgages, investment banks, rating agencies and many other financial agents.

Fortunately, professionals are not always driven solely by economic interests, but, in general terms, it is difficult for all of us to resist the influence of self-interest and economic incentives and "*understand something when our salary depends upon us not understanding it*". The idea was described in 1975 by an expert in business management, Steven Kerr, in an eloquent paper: "*On the folly of rewarding A, while hoping for B*".

Kerr indicated that in many social organisations there is a mismatch between conduct which is in theory desired, and the real everyday behaviour of people which results from the incentive system.

Written shortly after the Vietnam War, the article recalls that during both World Wars, American soldiers fighting in Europe knew that they would only return home after victory, and that insubordination would make this objective more difficult; consequently, whether or not they were inspired by patriotic ideals, it was rational for them to obey orders and seek victory. In Vietnam, by contrast, American soldiers knew that they would return home on a given date, regardless of the outcome of the war; and that insubordination would result in them being sent to centres of rehabilitation and rest, because their insubordination would be attributed to fatigue caused by the war. Thus, "was the military not implementing a system which rewarded disobedience, while hoping that soldiers (despite the reward system) would obey orders?"

In Medicine, adds Kerr, we expect that doctors will apply the same degree of care (1) in not diagnosing a healthy patient with non-existent illnesses ("type I error")- so as to not cause unnecessary anguish or waste of resources- and (2) in not overlooking genuine illnesses ("type II error"). However, for a doctor, the consequences of this second error will be much more serious than for the first one: the "medical error" will be a cause of disrepute which could lead to a loss of prestige, a reprimand or legal proceedings; whereas, undertaking several expensive

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<sup>12</sup> Arthur Levitt, "*Take on the Street: What Wall Street and Corporate America Don't Want You to Know*", Pantheon, 2002.

tests and treatments to detect or combat non-existent illnesses will increase the private doctor's revenue.

He concluded that many organisations expect their employees to seek long term growth, develop team spirit, set themselves ambitious objectives, save costs, strive for quality in service and communicate every piece of information to their superiors, including bad news; but they have established a practical regime of incentives which directs the attention of their employees towards quarterly benefits, individual promotion, fulfilling modest objectives, growing their units, meeting deadlines and not communicating bad news to their boss.

In the world of arbitration, does the system of appointment-retribution of arbitrators (A) promote the generally accepted objective of impartiality (B)?

A few years ago, a well-known Spanish litigator, Fernando Pantaleón, deeply sceptical about the virtues of domestic commercial arbitration- but not so of international arbitration, where the search of a neutral forum provides a natural justification for arbitration- stated, scandalising present arbitrators, that the "*Kompetenz-Kompetenz*" principle gives rise in arbitrators to an economic conflict of interest which, in the world of the judiciary, would justify the recusal of a judge. How could it be sustained- asserted Pantaleón- that the arbitrator or arbitral Tribunal should decide whether or not they are competent to rule upon a case, when their decision will determine whether the arbitrators will receive professional fees for their services which in some cases can be quite substantial?<sup>13</sup>

The critique, although unpopular within the arbitral community, is well grounded, except in the case of arbitrators with an established reputation and prestige, whose real problem is having an excess of nominations. It is well grounded because although arbitrators do not have any interest in the outcome of the arbitration, they normally have a professional and economic interest in the commencement of the arbitration, and in that it proceeds and concludes with an award.

An arbitration practitioner who has great experience in mediation and psychology, Sophie Nappert, has made a disguised reference to the difficulty encountered by many arbitrators to reconcile two contradictory objectives: keeping a high level of impartiality and independence while, at the same time, increasing your chances of being nominated again. Conventional wisdom is that that conflict does not really exist because the parties tend to look for arbitrators of the highest quality. For Sophie Nappert however, that common hypothesis about the harmony between full impartiality and the desire to be appointed is a "complex premise".<sup>14</sup>

We should note, however, that the potential disturbing effect that economic incentives- in particular, the desire to be appointed as arbitrator- can have over the impartiality of the arbitrator will be weaker as his prestige and the number of nominations he receives increases. The reason is that, as the number increases, the economic impact of accepting or rejecting a nomination or declaring oneself incompetent will be weaker, because each one will only represent a small proportion of his professional fees and, consequently, it will be much more

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<sup>13</sup> Professor Pantaleón has not expressed his idea in writing, but it was enunciated during an arbitration seminar in Madrid organised by the Fundación para la Investigación del Derecho de la Empresa (FIDE). He has authorised the authors to cite him in this article.

<sup>14</sup> See Sophie Nappert y Dieter Flader, "*A Psychological Perspective on the Facilitation of Settlement in International Arbitration-Examining the CEDR Rules*", *Journal of International Dispute Settlement*, August 2011.

important for the arbitrator to defend his good reputation instead of pursuing fees in the short term.

The same reasoning has led international financial regulators to require audit companies to have a sufficiently diversified client base, so that they can preserve their independence from clients who may threaten to replace them or to stop giving them work if they are excessively rigorous when auditing their accounts.

Hence, it is natural for arbitrators who already enjoy international prestige to inspire more confidence among arbitration users, in the same way as international financial investors and creditors are more confident about a public company whose accounts have been audited by one of the "big four", and not by a small unknown auditor.

Thus, like in many other economic activities, "*nothing succeeds like success*", and the goodwill and international reputation produce a cumulative effect or "virtuous circle" which tends to focus arbitral nominations within a limited circle of reputable arbitrators and creates inevitably an "entry barrier" for those who aspire to enter into that reputed Olympus.

### **Confirmatory bias, consistency and issue conflict**

The third and final influence over arbitrators that we want to analyse is a human tendency described by the British philosopher Francis Bacon:

“The human understanding, when it has once adopted an opinion (...) draws all things else to support and agree with it.”<sup>15</sup>

This spontaneous human inclination to pay attention to facts that confirm our beliefs and to ignore, or pay less attention, to those that contradict them is known as "confirmatory bias", "bias assimilation" or "positive test strategy".

One of the many corollaries to that natural inclination is the spontaneous inertia or belief perseverance, since we will need conclusive and incontrovertible proof to revise our beliefs compared to what would be sufficient to stick to them.

There is a well-known historical episode which is a glaring manifestation of this phenomenon and took place before the philosopher Francis Bacon made the quoted assertion above: Christopher Columbus "*for a long time, did not suspect that the lands he had discovered were a new continent. For years, he led himself to believe that they were the lands which he set out to discover as the aim of his voyage: the oriental coasts of Asia. And during all that time he tried to identify them according to whatever the historical, geographical and cosmographical sources of his voyage said they were.*"<sup>16</sup> That is why Fray Bartolomé de las Casas ironically wrote about Columbus: "*Having made up his mind, everything that the Indians told him, although it was as removed as the sky from the ground, he would twist and mould it to what he wanted.*"<sup>17</sup>

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<sup>15</sup> F. Bacon, "Novum Organum" (1620) Book I, 109, point 46.

<sup>16</sup> Beatriz Pastor, "El segundo descubrimiento. La Conquista de América narrada por sus coetáneos (1492-1589)", Edhasa, Madrid, 2008, pg. 27.

<sup>17</sup> (A.T.) Beatriz Pastor, op.cit. pg. 72.

In the 1970s, the social psychologists Charles Lord, Less Ross and Mark Lepper carried out a celebrated experiment which corroborated the phenomenon of "biased assimilation".<sup>18</sup>

They began by compiling the attitudes of a wide group of students with regards to a controversial question: the efficacy of the death penalty in deterring potential killers. Immediately afterwards, they presented the students with a study which showed, in an impartial and neutral way, the arguments in favour and against the deterring effect of death penalty and provided information about a multitude of empirical studies – all invented – from which it was not possible to extract a clear conclusion. Finally, following their reading of the study, the psychologists returned to measure the attitudes of the students. They noted that their attitudes were now more extreme, and the group had become polarized between those that were for and others that were against the death penalty. This surprising polarising effect, caused by bestowing the same information on people harbouring opposing opinions, has been demonstrated again in more recent studies.<sup>19</sup>

The psychologists believe that this phenomenon is the result of two tendencies:

- We pay more attention to information that confirms our beliefs ("*positive test*").
- We are more willing to accept evidence corroborating our beliefs than evidence attempting to disprove them, unless such evidence is overwhelming.

Although the "confirmatory bias" and the "perseverance of beliefs" are dangers always lurking- which will oblige arbitrators to make a deliberate effort to keep an "open mind" and not succumb, for example, to stereotyping- they are directly related to an issue which the IBA Guidelines partly address and has become a "hot topic": to what extent can an arbitrator be challenged on the basis that he has written articles, given conferences or expressed opinions on issues directly relevant for the award.<sup>20</sup>

This question can be illustrated by the challenge which the Spanish companies Urbaser S.A and "Consortio de Aguas de Bilbao-Bizkaia" raised against a New Zealand professor in the investment arbitration against Argentina ICSID No ARB/07/26. The Spanish companies argued that the arbitrator had adopted a position in the book "*International Arbitration, Substantive Principles*" – which he had co-authored – on two substantive issues which were of direct relevance to the arbitration: the scope of the Most Favoured Nation clause in Bilateral Investment Treaties; and the admissibility of the "state of necessity" as a factor excluding the responsibility of the State for adopting measures which are detrimental to the interests of the private investor. The challenged professor's colleagues rejected the claimant's petition, holding

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<sup>18</sup> Charles, G. Lord, Lee Ross and Mark R. Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence", *Journal of Personality and Social Psychology*, 1979, Vol. 37, n° 11, pages 2098-2109.

<sup>19</sup> See for example, Edward Glaeser y Cass R. Sunstein, "Why Does Balanced News Produce Unbalanced Views?", NBER Working Paper 18975, April 2013.

<sup>20</sup> This article is limited to the potential biases of arbitrators, and does not address those which could affect the parties, although they actually refer to the arbitrators themselves. Therefore, for example, an arbitrator put forward by one party who, in order to get to the bottom of the matters and positions of the parties to the dispute, is in the habit of putting many questions to the witnesses, experts and lawyers, will run the risk of being perceived as biased by the opposing party to the one who suggested him and by that side's lawyers, and so, suspicious from the outset about the impartiality of this arbitrator, they will see their suspicions confirmed by these questions which do not favour them, and they will ignore those other questions which will put their opponents in an awkward position.

that the opinions which the professor had expressed were not sufficiently clear *"so that an informed and reasonable third party could conclude that the arbitrator would rely on these opinions, without considering the facts, circumstances or arguments presented by the Parties in these proceedings."* They added that if the claimant's view prevailed, and the previous expression of an opinion by an arbitrator was considered to prejudice his subsequent stance in a particular case, potential arbitrators would never opine on controversial issues<sup>21</sup>.

The decision of the co-arbitrators above has been analysed in detail by Margie-Lys Jaime Ramírez, who shares their reasoning: *"It would be the end of university articles, no-one would dare to express their opinion or to comment on a judgement or judicial decision, for fear that this would damage their chances of potentially being appointed as an arbitrator"*.<sup>22</sup>

Francisco González de Cossío also seems to follow the same thinking in affirming that *"if any previous declaration [of the arbitrator] disqualifies him, a degree of over-sanctioning will be produced. Besides, the generation of knowledge would be restricted, because arbitrators, out of fear, would show their beliefs with less conviction."* He points out that the problem of "issue conflict" is more relevant in investment and sport arbitration than in commercial arbitrations, as arbitration clauses cannot be modified by the parties to the dispute, the same issues come up regularly and awards are public.<sup>23</sup>

A more eclectic stance is that of Hernando Díaz-Candia, who distinguishes between "predispositions" – which he considers to be legitimate – and "biases", which he characterises as strong sentiments, not based solely on reason, which lead to a prejudice and a preconceived conclusion.<sup>24</sup> Although he does not expressly describe it as such, one of the possible cases of bias could be that which led the Permanent Court of Arbitration to accept Ecuador's challenge of a well-known American arbitrator in the case ICSID No ARB/08/6, because he had made a public declaration citing Ecuador as an example of a "recalcitrant host state".

In the opinion of Díaz-Candia, *"it is illogical to assume that it is impossible to change opinion after having listened to skilful and persuasive advocates, particularly because in arbitration previous judgements are not binding"*. He adds that *"invoking an issue conflict should not be permitted as a delaying tactic or a method to disqualifying competent arbitrators"*. Besides, *"no human being can address legal problems with an absolutely clear mind and without preconceived ideas"*. However, he also states that *"issue conflicts should not be completely discarded as contrived. Sometimes they can be important, particularly when they are combined with possible economic consequences for an arbitrator"*. In the case of arbitrators, predispositions are more prone to lead to bias than in the case of judges and it is therefore crucial to determine whether a predisposition can equate to bias. He concludes: *"In our opinion, it is very unlikely, although not impossible, that previous academic works could serve as a basis to disqualify an arbitrator because of an issue conflict. It would be necessary to see whether the*

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<sup>21</sup> Urbaser S.A. y Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa c. República Argentina, ICSID Case No. ARB/07/26, Decision of Claimant's Proposal to Disqualify Professor Campbell McLachlan, Árbitro, 12 August 2010.

<sup>22</sup> (T.A.) Margie-Lys Jaime Ramírez, "El rol del árbitro en la creación de precedentes: ¿Existe un riesgo de Issue Conflict en el arbitraje de inversiones?", in Volume II in the book which has already been cited and which pays homage to Bernardo Cremades and Yves Derains "Arbitraje Internacional: Pasado, Presente y Futuro", page 1202.

<sup>23</sup> Francisco González de Cossío, "Issue Conflicts", Spain Arbitration Review n° 7/2010, pages 5 to 9.

<sup>24</sup> Hernando Díaz-Candia, "El rol jurisdiccional de los árbitros y su constructiva evolución: deberes y responsabilidad", Spain Arbitration Review, n° 16/2013, pages 79 a 105.

*academic work is specifically related to the facts or to the parties in dispute and not only in respect of legal issues in general, but also if a position has been defended too vigorously in order to obtain academic recognition".*

In our opinion, the views of the cited authors are broadly in line with the current IBA Guidelines on conflicts of interest, whose treatment of "issue conflicts" restrict significantly their scope.

Rule 3.5.2 makes indeed reference to a case which could raise doubts on the impartiality of the arbitrator and should be revealed to the parties: *The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise".* However, immediately afterwards, paragraph 4.1.1 states that an arbitrator will not be conflicted, nor will he have to reveal details of a general opinion expressed in an article or public speech which, although touches upon an issue arising in the arbitration, "is not focused on the case that is being arbitrated". Therefore, according to the IBA Guidelines an issue conflict cannot exist if the opinion expressed by the arbitrator does not expressly refer to the specific arbitration in question.

In our opinion, the current IBA Guidelines would be appropriate for arbitrators from Mars, whose good judgement would never be corrupted by these cognitive and psychological limitations which can exert an influence on earthly arbitrators. However, this excessive faith on the perfect rationality of arbitrators made of flesh and bone fails to consider another powerful influencing factor which reinforces the "confirmatory bias": our desire for consistency and our moral commitment to the ideas that we have already expressed, especially if we have expressed them publically or in writing.

In his aforementioned work, Cialdini dedicates a long chapter to the multiple examples which confirm our inclination to uphold opinions which we have already expressed, even when we did it without complete freedom of expression!<sup>25</sup>

For instance, in horse betting, it has been proved that a person who has already placed a bet on a horse will consider that horse to be much more likely to win compared to what he would have predicted immediately before placing the bet. Cialdini also describes the techniques used by the Chinese military to convince American soldiers, captured during the Korean War, of the worthiness of the Communist cause. They would begin by asking them, in a friendly way, to write down apparently innocuous phrases (for example, "the United States is not perfect"). Later on, they would ask them to illustrate this statement with concrete examples. Finally, they would broadcast these affirmations on the radio, which made the captives look like "collaborators". Paradoxically, these soldiers, conscious that they had not been coerced into making those assertions, ended up admitting to their role as "collaborators" with China and gave further support to the Chinese authorities.

The "committing power of written statements" has been verified in other experiments.

In one famous experiment, social psychologists Morton Deutsch and Harold Gerard showed a straight line to a range of students and asked them to calculate its length. They then divided the students into three groups: they asked the first group to write their estimate of the length of the line on a piece of paper which they submitted to the investigators; they asked the second group

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<sup>25</sup> Rober B. Cialdini, op.cit. chapter 3.

to write their estimate on a small children's blackboard and after having done so, they would rub out the number before anyone could see it; and they asked the third group to keep their estimate of the line's length in their heads.

Immediately after this, they provided all the students with additional information so that they could refine their initial estimations and, if they wanted to, correct any possible errors. The results were telling: those from the third group, readily used the new information to update their estimations; the second group were more reluctant but also made some modifications; the students from the first group however, who had already publically written down their initial estimates, hardly altered their opinions despite the new information. *"Their commitment in public had made them more obstinate"*.

According to Cialdini, the American direct sales company *"The Amway Corporation"* demonstrates this "magic power of writing things down". They ask their sellers to write down their individual sales goals to enhance their motivational effect; they use a similar tactic with consumers to prevent that they change their minds during mandatory *cooling off* periods: they make sure that clients themselves write out the purchase order, so that their desire for consistency makes it more difficult for them to later reverse their decision.<sup>26</sup>

Therefore, in practice, issue conflicts and "doctrinal predispositions" can have much more relevance than that attributed to them by the IBA Guidelines and the authors cited above. In our opinion, paragraph 4.1.1 should be deleted and paragraph 3.5.2 reformulated, so that it makes reference to "prior expression of firm views on an issue which could have a significant influence on the outcome of the case", without being limited to opinions which expressly refer to the specific dispute under arbitration.

How should this new criteria, more rigorous than that currently established by the IBA Guidelines, be applied in practice without falling into excess?

This question is related to another endless controversy between those who – like Jan Paulsson, Albert Jan van den Berg and Juan Fernández-Armesto- think that it should be the Courts who appoint all the members of an arbitral Tribunal and the many others who defend the advantages of a system which normally allows each party to nominate one of the Tribunal's arbitrators.

This is not the place to summarize- let alone resolve- that debate, the last instalment of which was the critique by Charles N. Brower and Charles B. Rosenberg of the theory that "party appointed arbitrators" are not reliable.<sup>27</sup> But in their critique, Brower and Rosenberg make a statement which we find very relevant for issue conflicts:

*"There is a critical difference between, on the one hand, Paulsson's feared 'advocate-arbitrator' who 'will help me win the case', and, on the other hand, an arbitrator who*

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<sup>26</sup> One of the authors, Manuel Conthe, had a similar experience in the World Bank, soon after his arrival as Financial Vice President, when the Human Resources Vicepresidency, following the instructions of the President, James Wolfensohn, asked him to sign a document or "contract" committing him personally to comply with the Bank's binding diversity objectives when recruiting new staff. As a lawyer and a law-abiding citizen, it surprised him that they would ask him for a written commitment to follow of a criteria which was binding on all the managers of the Bank. However, he signed the document willingly and surmised that the Bank had been inspired either by Cialdini or by the Chinese military.

<sup>27</sup> Charles N. Brower & Charles B. Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded", in *Arbitration International, LCIA*, Volume 29 Number 1, 2013, pages 7 to 44.

*is appointed by a party because that party perceives, based on the arbitrator's judicial and/or professional track record, that the arbitrator might be more likely than not to share the party's view of the case. While the former is clearly improper, the latter is benign and in fact commonly practiced. Parties and their counsel typically spend considerable time and resources vetting potential arbitrators in an attempt to predict how they might decide specific issues and the dispute as a whole. This due diligence includes: (i) reviewing arbitral awards (and separate opinions) that the potential arbitrator had authored or signed; (ii) reviewing prior professional and scholarly articles by the potential arbitrator; and (iii) perhaps more controversial, interviewing the potential arbitrator. "*

This statement reflects the daily reality in the selection process of arbitrators and, translated into the terminology of this article, considers accepted practice for parties to put forward arbitrators who have "doctrinal predispositions" favourable to their interests. Thus, claiming that the doctrinal predispositions of party-appointed arbitrators are sufficient grounds for a challenge would go against well-established practices and would gravely disrupt the process of forming arbitral Tribunals. Besides, to the extent that both parties have the opportunity to elect arbitrators with opinions favourable to their case, this practice will not alter the equilibrium within the Tribunal, nor will it pre-determine the outcome of award.

The question differs, however, with regards to a sole arbitrator or to the chairman of an arbitral Tribunal, since their doctrinal predispositions may have a decisive influence on the award.<sup>28</sup> Hence, in our opinion, concerning issue conflicts it makes sense to apply a much higher standard of impartiality to sole arbitrators or to Tribunal's chairs than to party-appointed arbitrators: if there are theoretical or doctrinal issues which can have a significant bearing on the outcome of an arbitration, both parties have the right for the "match" to start with the score-line at 0-0 or more likely, 1-1; and they should be able to challenge the presiding arbitrator if they can demonstrate with objective arguments that his or her confirmation would put the initial scoreboard at 2-1 against them.

Therefore, concerning issue conflicts a reasonable and realistic aspiration should be to ensure the absolute impartiality and absence of doctrinal predispositions of the Tribunal as a whole, even though this might not be the case for all of its members.

The solution that we advocate here would not completely inhibit the capacity of aspiring arbitrators to express academic views on controversial issues, since it would not prevent them from being appointed by parties. But those who aspire to preside over Tribunals should abstain from taking positions on controversial issues, in order not to be challenged when they are relevant for a case. In practice, this is something which already occurs: anyone attending conferences or seminars on arbitration may readily observe the obvious reticence of many arbitrators to express opinions, and even take the microphone, during debates on hot topics.

This is the price that the arbitration community must pay in order to ensure full impartiality of arbitration Tribunals.

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<sup>28</sup> The question is not purely theoretical. One of the authors, Manuel Conthe, has personal evidence of two different commercial arbitration cases, held in Spain before two different arbitration Tribunals, which involved the same legal issue (namely, whether the conformity with European competition law of a fuel distribution agreement had to be settled in Court before a civil arbitration claim for breach of contract could proceed). The results of the two awards were diametrically opposed, due mainly to the different views of the Tribunal's chairs on that issue.

## Conclusions

1. In all likelihood, the on-going review of the IBA Guidelines on Conflicts of Interest will not result in drastic changes, since The 2004 Guidelines were well conceived and, in general, maintain the right balance between the general, abstract character of principles and the prescriptive nature of specific rules.

One Guideline which might, nonetheless, need to be made slightly more rigorous is, as we have indicated, the rule on issues conflicts arising from the previous expression by arbitrators of doctrinal views on issues which could have a significant influence on the outcome of a case.

2. Even more important than refining the IBA Guidelines is that they are applied rigorously, combining the revitalising spirit of the principles which inspire them with the specific circumstances of the case to which they are applied.
3. Some of the potential biases which have been described here – above all those related to reciprocity and economic incentives – are much less likely to be encountered by prestigious arbitrators, who receive frequent nominations from a multitude of parties and law firms.

As in many other professions – including *inter alia* auditing-, the prestige and popularity of an arbitrator will reinforce his independence and impartiality.

4. As arbitrators, we have a limited capacity for self-policing, to identify the conflicts of interest which affect us or our colleagues, and to rigorously apply the Guidelines and rules specifically aimed at avoiding them.

Consequently, as Fernando Mantilla-Serrano and Phillippe Pinsole state, given the preventative character of disclosing requirements, "*arbitrators should, when in doubt, be exhaustive in their declaration of independence.*"<sup>29</sup>

5. When members of an arbitral Tribunal have to rule on the conflicts of interest of their colleagues – as happens in CIADI – they too often rely on the argument that the challenge is "speculative" and unsubstantiated.

In our opinion, when something as crucial as the impartiality of the arbitrator is in play and there are objective indications of a potential conflict of interest, the applicable standard should not be the permissive standard of "the presumption of innocence" (that is to say, of impartiality) as inspired by Criminal Law, but the much more rigorous "precautionary principle" espoused by environmentalists: a reasonable suspicion, based on objective indicators, should be sufficient to justify inhibition or challenge.

Such decisions about conflicts of interest and challenges should be adopted by arbitral Courts, not by the arbitrators or their colleagues in the arbitral Tribunal.

6. Arbitrators and Arbitration Courts must wholeheartedly support that ordinary Tribunals – or in the case of the CIADI, at least "*ad hoc*" committees – critically scrutinize potential conflicts of interest which the arbitrators or Arbitration Courts might arguably have overlooked.

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<sup>29</sup> Fernando Mantilla-Serrano and Philippe Pinsolle, "La independencia del árbitro y su obligación de revelación", op.cit. page 890.

This risk of an award being set aside for lack of impartiality of the arbitration Tribunal will have a healthy disciplinary effect which will encourage that arbitrators and Courts rigorously apply the rules on conflicts of interest and disclosure requirements.

Arbitrators do not come from Mars: we are human beings living on planet Earth. Our human and social nature will help us reconcile judicial rigour with common sense. However, it also deprives us of the unshakeable rationality of a Martian arbitrator who only *"comes down to Earth to arbitrate and then immediately returns to his Martian retreat"*. For good or for bad, we are not from Mars.

As a result, if we play poker or go hunting with someone related to a dispute, we should at least allow others to decide whether our potential conflict of interest is real or imaginary, because our "bounded ethicality" could render us incapable of perceiving this.

Thus, when it comes to conflicts of interests and disclosure duties, let us we arbitrators follow Don Quixote's rule of honour, as recalled by Sancho: *"In matters of courtesy, it is better to lose by a card too many than by a card too few."*<sup>30</sup>

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<sup>30</sup> "Don Quijote de la Mancha", Second Part, Chapter XXXIII.