The Impartial and Independent Composition of the International Arbitral Tribunal: A Critical Survey.

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ABSTRACT

Globally the resolution of disputes is known for expensive costs and lengthy periods of time before a court reaches a decision. This position becomes even more complex where a person has to resort to a foreign country with a foreign legal system to resolve a dispute. International commercial arbitration provides a practical alternative to resolve disputes in the world of international trade. International commercial arbitration can shortly be described as a private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law. It is especially aimed at resolving disputes in a manner which is fast, effective and less costly. Due to South Africa's recent re- entry to international trade, the field of international commercial arbitration is relatively new from a South African perspective.

In the light of South Africa's continuous economical expansions and participation in international trade, the role of international commercial arbitration will become increasingly important. Some of the advantages of international commercial arbitration include that the parties to the dispute can choose the rules and procedures to apply in resolving the dispute.

Fundamental to the enforcement of an international commercial arbitration award is the requirement that the arbitrators be independent and impartial. The independency and impartiality of arbitrators within the international context is also linked with the vested international and domestic right to a just and fair trial. Should there not be adhered to the requirements of independency and impartiality, one opens the door to a variety of risks within the international commercial arbitration process. The most important risk is that of the award not being enforced in a court of law due to a lack of either independency or impartiality.

Within the framework of international commercial arbitration, there exist various rules and guidelines with regard to the process and procedures to be followed. The international commercial arbitration instruments include the *UNCITRAL Rules of Arbitration of 1996*, the *UNCITRAL Model Law* of 1985, the *ICC Rules of 1998* and the *LCIA Rules*. All of these rules require the independent and/ or impartial composition of

the arbitration tribunal especially with regard to the enforcement of the award. In the light of the increasing importance of international commercial arbitration, this study is concerned with the thought of the above mentioned international instruments' failure to provide clear and concise guidelines and measurements with regard to the effective establishment of an arbitral tribunal deemed to be independent and impartial.

In this mini- dissertation it is aimed to provide some insight with regard to possible methods on which parties can rely to ensure that arbitrators appointed by them will be deemed to meet the expected requirements of independency and impartiality, despite the vagueness encountered in most of the international arbitration documents.

AFRIKAANS SUMMARY

Dwarsoor die wêreld word die oplossing van regsdispute gekenmerk deur oorvol hofrolle, lang uitgerekte tydperke voordat 'n beslissing verkry word asook duur hofkostes. Die situasie word verder bemoeilik sodra 'n persoon vreemde howe en onbekende regstelsels moet nader om 'n spesifieke internasionale regsdispuut op te los. 'n Praktiese alternatief om regsdispute binne die internasionale handelsverkeer op te los is deur middel van internasionale kommersiële arbitrasie. Internasionale kommersiële arbitrasie kan kortliks beskryf word as 'n private metode vir die effektiewe oplossing van dispute wat deur die partye self gekies word sonder om hulle na howe te wend. Dit is veral daarop gemik om dispute vinnig, effektief en op 'n bekostigbare wyse op te los. Die veld van internasionale kommersiële arbitrasie is relatief nuut vanuit 'n Suid- Afrikaanse oogpunt vanweë die land se relatief onlangse hertoetrede tot internasionale handel.

Gesien in die lig van Suid-Afrika se toenemende ekonomiese uitbreidings en deelname aan die internasionale handelsverkeer mag internasionale kommersiële arbitrasie toenemend 'n belangrike rol speel. Van die voordele van internasionale kommersiële arbitrasie is dat die partye tot die regsdispuut hul eie reëls en prosedures kan saamstel rakende die wyse waarop die dispuut opgelos moet word.

Fundamenteel tot die afdwinging van 'n internasionale arbitrasie toekenning is die vereiste van onafhanklikheid en onpartydigheid van die arbiters as prosesfasiliteerders. Die onafhanklikheid en onpartydigheid van arbiters binne die internasionale konteks, koppel ook ten nouste aan die internasionaal en plaaslik erkende reg op 'n regverdige en billike verhoor. Die nie-voldoening aan die vereistes van onpartigheid en onafhanklikheid mag die deur oopmaak vir verskeie risiko's binne die internasionale kommersiële arbitrasieproses. Die belangrikste risiko is geleë in die feit dat die finale arbitrasietoekenning nie afgedwing sal word nie.
Binne die raamwerk vir internasionale arbitrasie is daar verskeie erkende reëls en riglyne rondom die proses en prosedures wat gevolg kan/moet word. Die internasionale instrumente ter sprake sluit in die *"UNCITRAL Rules of Arbitration of 1996"*, die *"UNCITRAL Model Law* of 1985*"*, die *"ICC Rules of 1998"* en die *"LCIA Rules"*. Hierdie reëls stel elkeen die onafhanklike en/ of onpartydige samestelling van die arbitrasie

tribunaal as 'n voorvereiste vir die afdwinging van 'n uiteindelike arbitrasietoekenning. Hierdie studie ondersoek in die lig van die toenemende belangrikheid van effektiewe kommersiële arbitrasie, die gedagte dat die genoemde internasionale reëls en riglyne daarin faal om konkrete riglyne of maatstawwe uiteen te sit met betrekking tot hóé die vereistes van onpartydigheid en onafhanklikheid verseker kan word.

In hierdie mini-navorsingsverslag word daar gepoog om, met betrekking tot die vereistes van onafhanklikheid en onpartydigheid van arbiters en die internasionale arbitrasietribunaal, lig te werp op die moontlike wyses waarop partye kan verseker dat die arbiters as onafhanklik en onpartydig erken sal word ten spyte van die vaagheid van die meeste internasionale arbitrasiedokumente.

List of Abbreviations

Constitution	Constitution of the Republic of South Africa, 1996
UNCITRAL Rules	United Nations Commission On International Trade Law Arbitration Rules of 1976
UNCITRAL Model Law	United Nations Commission On International Trade Law Model Law On International Commercial Arbitration of 1985
ICC Rules	International Chamber of Commerce Arbitration Rules of 1998
LCIA	London Court of International Arbitration Rules of 1998

1. Introduction

The freedom to choose one's own arbitral tribunal is one of the distinguished features of international arbitration in general and also international commercial arbitration and parties should take careful cognisance of this choice.[1] This freedom of choice however implies that various considerations should be taken into account especially in as far as it is required for an international arbitration tribunal (the tribunal) to be impartial and independent.[2] Should the composition of the tribunal not meet the expectations and requirements of impartiality and independency, it may defeat the purpose of arbitral proceedings and ultimately give rise to the unenforceability of the arbitral award.[3] Independency and impartiality are two fundamental characteristics arbitrators should possess, and form part of the backbone of the creditworthiness of arbitration processes and awards.[4] The establishment of independency and impartiality is furthermore intrinsically linked with the notions of ethics and public policy in the realm of international arbitration.[5] With regard to the importance of public policy, Chukwumerije states:

> "The integrity of international commercial arbitration and its endurance as a viable alternative to litigation would seem to rest on arbitrators' continual respect for public policy of States whose legitimate interests are implicated in arbitration disputes. Arbitrators therefore have to balance their respect for the autonomy of the parties' will with the need to apply mandatory provisions of laws that are relevant to the dispute...(and) while arbitrators should respect the will of the parties, they should also ensure that recourse to arbitration does not become a means of avoiding fundamental principles of public policy."[6]

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1 For the purpose of this study an arbitral tribunal is defined as one or more arbitrators appointed by the parties themselves or by a designated appointing authority, to govern proceedings and make an award.

2 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 236; United Nations Conference on Trade and Development *Dispute Settlement* 16.

3 According to Carlston K *The Process of International Arbitration* 55 writers are unanimously agreed that the corruption or bad faith of the arbitrators will lead to the nullity of an arbitral award ;See also Redfern & Hunter *Law and Practice of International Commercial Arbitration* 488, Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 332 and Chuah *Law of International Trade* 676.

4 Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 327.

5 Public policy raises the expectation of fairness and, independency and impartiality is a fundamental cornerstone to fairness; Capper P *International Arbitration: A Handbook* 13 and Fouchard Gaillard Goldman *On International Commercial Arbitration* 336.

6 Chukwumerije *Choice of Law in International Commercial Arbitration* 180- 183.

Arbitration generally, is often said to carry a moral and ethical burden of fairness.[7] International commercial arbitration pose some challenges[8] with regard to appointed arbitrators since this type of arbitration often involves different systems of law and different rules. Furthermore, the appointed arbitrators represent different nationalities with the arbitration process itself taking place in a country/ jurisdiction that is foreign to the arbitrators.[9] When parties make use of three arbitrators, as is often the case in international commercial arbitration disputes,[10] the situation regarding the composition of the tribunal becomes even more complex since it is likely that each of the arbitrators is of a different nationality with different legal backgrounds, -systems and -training. This may be indicative of the complexity of firstly, the establishment or composition of an independent and impartial tribunal and secondly, adhering and maintaining such said requirements throughout the arbitral proceedings.

This study is concerned with the current international ambiguity that surrounds the meaning and establishment of the requirements of impartiality and independency in international commercial arbitration. The question arises whether or not international instruments provide sufficient direction in estimating whether or not these requirements are met and what the consequences may be (also for South Africa) should this study show that indeed some *lacunae* exist. This research is done by means of a literature review of related international and domestic instruments (and legal frameworks) and related international and domestic jurisprudence. This study is furthermore conducted by means of a comparative legal analysis that involves the best practices of the United Kingdom. This study concludes with some suggestions on how, if possible, the vagueness surrounding the requirements of impartiality and independency may be effectively addressed

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7 The concept of fairness directly correlates with the enforcement of an arbitral award as no award will be enforceable if the commonly accepted requirement of fairness was lacking throughout any stage of the proceedings.

8 According to Chukwumerije *Choice of Law in International Commercial Arbitration* 183 international commercial arbitrators are *"...the guardians of the international commercial order: they must protect the rights of participants in international trade, give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international commercial community and the policies expressed and adopted by appropriate international organisations; and enforce the fundamental moral and ethical values which underlie every level of commercial activity".*

9 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 8 –9.

10 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 219.

especially in instances where South Africa is a party to international commercial arbitration proceedings.

2. Defining impartiality and independency

2.1 Introduction

In estimating whether or not the requirements of impartiality and independency as requisites of impartiality for the validity of international arbitral awards exist and to remark on possible consequences of international vagueness in his regard, it is important to understand what the meaning of these two notions are in the international arbitration context. Lately, there has been a distinct trend towards viewing these two elements as the opposite side of the same coin.[11] The two elements are rarely used individually but are mostly joined together, as a "package".[12] Therefore it is important to draw some linkages between impartiality and independency, not only to reflect on their interrelatedness but also to distinguish them from each other. By understanding the meaning of these two elements it will provide insight as to the expectations of a truly independent and impartial arbitral tribunal.

2.2 Impartiality

To date, the term "impartiality" in the context of arbitration and the arbitration tribunal has not been clearly defined, since both local and international sources of law provide no concise explanation of this term. Generally, "impartial" is described as *"...not supporting one person or group more than another".*[13] The meaning of "impartial" can best be described by looking at the opposite of the word, namely "partial". For the purpose of this study, impartiality is viewed to include bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute.[14] Both the *United Nations Commission for International*

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11 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 238.
12 *Ibid.*
13 Hornby A *Oxford Advanced Learner's Dictionary* 598.
14 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 212; Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 117.

Trade Law Arbitration Rules[15] and the *United Nations Commission for International Trade Law Model Law on International Commercial Arbitration*[16] provide that an arbitrator should be impartial and may be removed where "justifiable doubts" as to their impartiality arises. It is however not clear from these instruments what exact meaning should be afforded to the notion of 'impartiality'. Impartiality should also be considered where any relation between an arbitrator and a party to the proceeding exists, which may import concepts of bias[17] (either actual or imputed bias) and could accordingly impair the fairness of the process of arbitration. The fact that a relationship or tie may exist between an arbitrator and a party to the proceeding could become a challenge on the ground of "justifiable doubt".[18] According to *Kock* impartiality deals with the arbitrator's mental predisposition toward the parties or the subject matter or controversy at hand.[19] It is thus the interior frame of mind that the arbitrator brings to the reference and is therefore referred to as a "subjective standard".[20]

2.3 Independency

Apart from being impartial, it is also required from the arbitrator(s) to be independent, which can be described as *"...the freedom to organise your own life, make your own decisions, etc. without needing help from other people".*[21] Independence is measured in terms of the degree of the relationship between an arbitrator and one of the parties, whether financial or otherwise.[22] According to article 2(7) of ICC Rules of Arbitration, independence requires each arbitrator to declare whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind and whether the nature of such relationship is such that disclosure is called for considering the arbitrator's independence in the eyes of the

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15 United Nations Commissi on On International Trade Law Arbitration Rules of 1976 (hereafter the UNCITRAL Rules).
16 United Nations Commission On International Trade Law Model Law On International Commercial Arbitration of 1985 (hereafter the UNCITRAL Model Law).
17 Rubino- Sammartano *International Arbitration Law and Practice* 339.
18 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 246.
19 Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 328.
20 *Ibid.*
21 Hornby A *Oxford Advanced Learner's Dictionary* 608.
22 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 238; Carlston K *The Process of International Arbitration* 55; Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 117.

parties. It must be stated that independence and the determination thereof is more easily determined due to it's objective nature, whereas, impartiality is a more abstract and subjective concept.[23] This is evident in the late trend of rules, such as the ICC Rules[24], by only including independence and not impartiality. The reason therefore being is that it is imputed that impartiality is an integral part of independency and need not to be mentioned since it can be assumed that a person would be impartial if such a person is deemed to be independent. It can be concluded that independency means that an arbitrator must be free from any involvement or relationship with any of the parties to the dispute as well as any interest in the outcome of the dispute itself.[25]

2.4 *Foundations of the clauses pertaining to independency and impartiality*

Impartiality and independency has mainly two foundations. Firstly, one has to deal with the subjective disposition of the arbitrator, which mainly relates to impartiality. This might seem impossible to determine as the true impartial "mindset" of the arbitrator will only be known to the arbitrator himself. The basis of the impartial point of view of the arbitrator is not only much dependent on, but also guided by ethical considerations.[26] Within the sphere of international commercial arbitration it is widely accepted for arbitrators to sign a code of ethics. It is however doubtful that the mere signing of a code of ethics will establish the required fundamental standards of impartiality. Therefore, it is contended that one should include ethical requirements in the 'impartial clause' by which the arbitrator's conduct is guided, and which will also serve purposefully as a criterion against which the arbitrator concerned may be evaluated.

The second foundation, relates to the independent nature of the arbitrator. These include two considerations, namely the independent disposition of the arbitrator with regard to the parties to the arbitration, and the independent disposition of the arbitrator with regard to the proceedings itself. In the above it was illustrated that

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23 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 238 – 239; Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 117.

24 International Chamber of Commerce Arbitration Rules 1998.

25 Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 327.

26 See chapter 5.2 in which it is contended that one should rather appoint arbitrators of different nationalities. However, the arbitrators of different nationalities still need to adhere to ethical considerations in conducting their duties.

independency is evaluated by the more convenient objective approach. Subsequently it is thus contended to draft an 'independency clause' which will include all factors pertaining to the independent disposition of the arbitrator with regard to both the parties to the proceedings as well as the proceedings itself.

Before one can draft the clauses relating to impartiality and independency, the considerations pertaining to the foundations should be highlighted.

2.4.1 Ethical considerations relating to the subjective disposition of the arbitrator

The *Code of Ethics for Arbitration in Commercial Disputes* as contained in the *American Arbitration Association* contains some useful guidelines in this regard.[27] An arbitrator should uphold the integrity and fairness of the arbitration process.[28] This responsibility relates not only to the parties but also to the process itself, and the arbitrator must observe high standards of conduct so that the integrity and fairness of the process will be preserved.[29] Accordingly, an arbitrator should recognise a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceedings.

After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality.[30] This obligation also extends to a reasonable time after the award has been made.

Arbitrators should furthermore conduct themselves in such a manner which is fair to all parties and should not be swayed by outside pressure, public clamour, and fear of criticism or self- interest.[31] Conduct and statements that give the appearance of partiality toward or against any party should be avoided by arbitrators. In avoiding partiality, the arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other

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27 See Van den Berg *Yearbook Commercial Arbitration Volume XXIX- 2004* in this regard.

28 Van den Berg *Yearbook Commercial Arbitration* 300; Garnett & Gabriel *A Practical Guide to International Commercial Arbitration* 83..

29 *Ibid.*

30 Van den Berg *Yearbook Commercial Arbitration* 301; Garnett & Gabriel *A Practical Guide to International Commercial Arbitration* 84.

31 *Ibid.*

abuse disruption of the arbitration process.[32] It is important to remember that a prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or customs and practices of the business involved.[33]

They may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration.[34] Important is the consideration that an arbitrator should disclose any previous or current interest or relationship which will not only affect his or her impartiality, but which might create an appearance of partiality.[35]

When communicating with the parties the arbitrator should avoid impropriety or the appearance thereof.[36] This consideration is especially important as it is advisable that the arbitrator only communicates with the parties when all of the parties to the arbitration are present.[37] The arbitrator is also required to conduct the proceedings in an even- handed manner which includes being patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by the parties.[38]

The last consideration relates to the relationship of trust and confidentiality. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.[39] According to *Kock* should the trust be compromised it will provide means to remove arbitrators from a tribunal if such lack of trust amounts to an arbitrator not being impartial or independent.[40]

2.4.2 Considerations with regard to the independent nature of the arbitrator

As said in the above, this include two considerations namely independency from the parties to the proceedings, and independency from the proceedings itself.

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32 Van den Berg *Yearbook Commercial Arbitration* 302.
33 *Ibid.*
34 *Ibid.*
35 Van den Berg *Yearbook Commercial Arbitration* 303.
36 Van den Berg *Yearbook Commercial Arbitration* 304.
37 See also Garnett & Gabriel *A Practical Guide to International Commercial Arbitration* 87 with regard to communications with either party.
38 Van den Berg *Yearbook Commercial Arbitration* 306.
39 Van den Berg *Yearbook Commercial Arbitration* 307.
40 Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 325.

Should circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's independence, the arbitrator should disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority and the co- arbitrator's at all relevant times.[41]

The most common circumstances which may arise include a relationship between the arbitrator and one of the parties to the proceedings, or the instance where the arbitrator has a direct or indirect interest in the outcome of the award.[42] According to the *Guidelines on Conflicts of Interest in International Arbitration* by the *International Bar Association* there exist justifiable doubts as to an arbitrator's independence should a reasonable third person come to the same conclusion[43] after attaining knowledge of the relevant facts.[44]

Furthermore, justifiable doubts *necessarily* exist as to the arbitrator's impartiality or independency if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.[45]

With regard to independency (and impartiality), the *International Bar Association* has therefore a double approach. Firstly, they make use of the "justifiable doubts"- test when a lack of independence or impartiality is alleged.[46] Secondly, three instances are mentioned when it is deemed that justifiable doubts *necessarily* exist as to an arbitrator's potential lack of independence. It must be stated that by making use of "necessarily" it creates more uncertainty since it could thus also be argued that circumstances may exist (with regard to the three instances) where justifiable doubts as to the independence of the arbitrator would not exist.

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41 Van den Berg *Yearbook Commercial Arbitration* 319; Calvo MA "The Challenge of the ICC Arbitrators" 1998 *Journal of International Arbitration* 67- 68. These circumstances may be exhaustive and subsequently it is not possible to mention each and every possibility which may arise. Each and every circumstance should be evaluated through the 'eyes of the parties'.

42 Kock C "Standards and Procedures for Disqualifying Arbitrators" 2003 *Journal of International Arbitration* 327.

43 In other words that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case.

44 Van den Berg *Yearbook Commercial Arbitration* 317.

45 Van den Berg *Yearbook Commercial Arbitration* 318.

46 This approach is made use of after the arbitrator has been appointed and the lack of independence is alleged by either of the parties to the proceedings.

In proving such, one would ultimately make use of either an objective or subjective approach (or both) depending on the facts of the case.[47] For these reasons it is contended to draft an independence clause which will prevent the possible future application of a "justifiable doubts" approach.

Lastly, it must also be mentioned that an arbitrator should remain independent from outside influences such as the press or other opinions.

2.5 *Conclusive remarks*

It is contended that it is necessary to draw a distinction between impartiality and independency, and the sole requirement of either independency or impartiality is not sufficient since both terms are interrelated and equally important.[48] Due to their interrelatedness, the terms are much dependent on each other for their existence. However, this does not mean that the terms are the same or that there is no difference between them. As said above, independency is determined with regard to the degree of relationship between an arbitrator and a party to the proceedings. Impartiality on the other hand is connected by actual or apparent bias of an arbitrator, thus a focus on the state of mind of the arbitrator.[49] It is especially from these viewpoints from which the existence of a lack of independency and impartiality should be determined. Not only is it evident that the two terms differ to a great extent from each other, but is it also just to infer that the one term cannot serve as an implication of the other.

The requirements of impartiality and independency form by no doubt a fundamental cornerstone of international commercial arbitration. It is also an important consideration in the commencement of arbitral proceedings. As mentioned above, should there be any indication to a partial or dependent nature of the tribunal throughout any stage of the proceedings, it would suffice to valid grounds for either the termination of proceedings or the unenforcement of the award in local courts.[50] Due to the frailty which the requirement may impose, it is evident that impartiality and independency remains requirements of note since both elements are equally important for the existence of fair arbitration

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47 This would ultimately lead to further time and costs constraints, which will defeat the initial purpose of the arbitration proceedings.

48 Rubino- Sammartano *International Arbitration Law and Practice* 331.

49 *Ibid.*

50 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 236.

proceedings. It is contended that the importance thereof is in some instances underestimated. Should the practical significance of these requirements be increasingly emphasised it would not only establish a greater sense of security, but also attribute to the furtherance of good and efficient international commercial arbitration practices.

In determining the application of independency and impartiality, one has to consider the different sources of law which may apply as well as the different international practices that have developed over the years. Firstly, in international commercial arbitration different rules and conventions between signatory states play an important role. The different rules and conventions applicable to impartiality and independency will be discussed in detail in the next chapter. Secondly, with regard to systems of law, a comparative exposition between the British law and the South African law will be provided. From a South African perspective, the British legal system has not only been substantially influential over the past decades, but also provided necessary paradigms in which South African arbitration practises has evolved. The London Court of Arbitration is one of the oldest institutions and is highly rated due to its successes and effective practises that have been established. This is evident in the following phrase:

> "This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simply where the law is technical, a peace- maker instead of a stirrer- up of strife".[51]

3. The legal framework governing international commercial arbitration

3.1 Introduction

International arbitration is firmly embedded in a framework of laws at the international, regional and domestic level.[52] At the core of this framework is arguably the *New York Convention on the Recognition and Enforcement of*

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51 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 5.

52 See Aaron S "International Arbitration I: Drafting an Arbitration Clause for International Commercial Contracts" 1990 *SALJ* 633- 635 and Salomon C "The Conduct of International Arbitration: Do the Rules Make a Difference ?" 2004 *Journal of International Arbitration* in this regard.

Foreign Arbitral Awards of 1958[53] and secondly, the *UNCITRAL Model Law and the UNCITRAL Arbitration Rules*. Within this legal structure leading international arbitration institutions come into play. These institutions include *inter alia*: the *International Chamber of Commerce*[54] and the *London Court of International Arbitration*[55].

With regard to South Africa and its relation to international commercial arbitration, the *Arbitration Act*[56] and the recent *South African Law Commission Report Project 94*[57] are of importance, since it provides for South African participation in global arbitration practices. All of the above legal instruments and institutions make reference of the impartiality and/ or independency of the arbitrator(s) as prerequisites for proceedings, but neither of them explain the manner in which the presence of these requirements can be established or ways in which to measure whether these requirements have sufficiently been met. It is accordingly important to survey the different ways in which these requirements are outlined in international and domestic instruments and to draw some conclusions from similarities and differences between the instruments discussed.

3.2 The international framework

3.2.1 Introductory remarks

In the following discussion an exposition of different international rules, legal systems and conventions will be provided in order to distil its provisions on independency and impartiality. The rules include UNCITRAL, the ICC and the LCIA. A comparison between the English Arbitration Act and the South African Arbitration Act will be provided, as well as a focus on the New York Convention. Only the articles applicable to independency and impartiality will be discussed.

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53 The New York Convention.
54 The ICC.
55 The LCIA.
56 *Arbitration Act 42 of 1965.*
57 South African Law Commission Project 94, *Report on Arbitration: An International Arbitration Act for South Africa* (1998).

3.2.2 UNCITRAL Rules

These Rules were adopted by UNCITRAL in 1976 for ad hoc arbitrations *i.e. that* parties to a dispute can agree that it should be resolved by arbitration conducted, not under the auspices of any international institution, but according to provisions contained in the contract itself.[58] The Rules are employed by parties either in support of or in preference to their own rules in arbitration proceedings.[59] It must be emphasised that the Rules do not constitute an arbitration institution but must rather be seen as a subsidiary of measures aimed at unification of legal measures relating to international trade disputes.[60] The UNCITRAL Rules mention in article 6(4) that an 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*"[61] (emphasis author's own). The use of the word "likely" arguably creates uncertainty in this regard in that it seems to indicate the possibility of the contrary. In other words, the requirements are so formulated that it recognises that the appointing authority might appoint an arbitrator who is not independent and impartial although it initially seemed likely that this would not have been the case. This is indicative of the casual stance in general with regards to the important requirement of independency and impartiality. The Rules also state in article 9 that a prospective arbitrator shall *"...disclose...any circumstances likely to give rise to justifiable doubts as to his impartiality or independence".*[62] In article 10 it is stated that *"...any arbitrator may be challenged*[63] *if circumstances exists that give rise to justifiable doubts as to the arbitrator's impartiality or independence".*[64] Even though the Rules are silent on measurements to establish whether or not an arbitrator is/ will indeed be impartial in an international arbitration process, two additionally required features come to

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58 Aaron S "International Arbitration I: Drafting an Arbitration Clause for International Commercial Contracts" 1990 *SALJ* 635.

59 Schulze & Van Niekerk *The South African Law Of International Trade: Selected Topics* 297.

60 *Ibid.*

61 Article 6(4) of the UNCITRAL Rules.

62 Article 9 of the UNCITRAL Rules.

63 The challenging of an arbitrator can have dire consequences, depending at what stage the arbitrator is challenged. Should the arbitrator be challenged during the proceedings it is most likely that the arbitrator will have to recuse himself or herself. However, if the arbitrator is challenged after the award was made (thus during the enforcement thereof) it may suffice to the unenforcement of the said award.

64 Article 10 of the UNCITRAL Rules.

the fore, namely nationality and disclosure (or the duty to disclose). In brief, the Rules advise that an arbitrator should be of a different nationality than the parties involved in the dispute[65] and, it is expected that an arbitrator will disclose all relevant information that may give rise to justifiable doubts in connection with his or her independency and impartiality.[66] The Rules accordingly lay emphasis on impartiality and independency as a requirement but do not provide any clear guidelines or measurements to use in the aim to ensure that these requirements are indeed met. Evidently the Rules rely on the integrity of an appointed arbitrator to reveal any circumstances/ conditions which do not obviously make him or her unsuitable to serve as an arbitrator.

3.2.3 UNCITRAL Model Law

The United Nations Commission on International Trade Law Model Law on International Commercial Arbitrations was adopted in 1985.[67] Three aspects should be borne in mind when considering the Model Law, beginning with the fact that it is not a convention.[68] There accordingly exist no treaty obligation on states to enact legislation in accordance with member states' terms and each country has to decide whether Model Law should be implemented as part of its own legislation.[69] Secondly, it is important to remember that the Model Law is not a complete code of arbitration since there are instances in international commercial arbitration which are not regulated by the Model Law.[70] Thirdly and from a South African perspective, the Model Law is expressed in a language that may differ from the typical South African statute.[71]

With regard to independency and impartiality, some institutions contend that arbitrators coming from different nationalities as the parties to the arbitration proceedings are fundamental. In an ideal world the nationality of the arbitrator(s) should be irrelevant.[72] After all, the qualifications, experience and integrity of the

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65 Article 6(4) of the UNCITRAL Rules.
66 Article 9 of the UNCITRAL Rules.
67 Hereafter the Model Law.
68 Schulze & Van Niekerk *The South African Law Of International Trade: Selected Topics* 300.
69 *Ibid.*
70 *Ibid.* Model Law only applies to international commercial arbitrations and not to domestic arbitrations.
71 *Ibid.*
72 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 240.

arbitrator should be the decisive criteria and not the nationalities of the arbitrators.[73] As UNCITRAL Model Law states in article 11(1) *"(n)o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties".* However, the Model Law somewhat contradicts itself by stating in article 11(5) that the *"...court or other authority, in appointing an arbitrator, shall...take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties".*[74] It is thus not clear from the Model Law exactly what criteria should be met when appointing an impartial and independent arbitrator. The Model Law merely state that an appointed arbitrator, may *"...be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independency".*[75] Again as was the case with the UNCITRAL Rules, the Model Law does not provide much certainty as to when an arbitrator will be impartial and independent and what criteria should be met to ensure that these requirements are fulfilled. Two possibilities may be applicable. In the first instance the requirement that the arbitrator(s) should be of different nationalities is relevant. The Model Law draws a distinction between party- nominated arbitrators and arbitrators appointed by an appointing authority.[76] With regard to party- appointed arbitrators the Model Law emphasise the parties' freedom[77], the only requirement being that arbitrators appointed should be impartial and independent. The Model Law only advise the element of different nationalities when appointment is conducted via an appointing authority.[78] This approach gives rise to a double standard, creating more uncertainty than stability.

3.2.4 International Chamber of Commerce Arbitration Rules of 1998[79]

The present ICC Rules came into force in 1998, and are designed for institutional arbitration which is open to arbitration for both members and non- members of the ICC.[80] These Rules have a different point of view considering the independent

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73 *Ibid.*
74 Article 11(5) of the Model Law.
75 Article 12(2) of the Model Law.
76 See article 11 of the Model Law in general.
77 Article 11(2) of the Model Law.
78 Article 11(5) of the Model Law.
79 Hereafter the ICC Rules.
80 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 295.

and impartial composition of the tribunal. The ICC Rules merely focuses on independency. The Rules state in article 7(1) that *"...every arbitrator must be and remain independent of the parties involved in the arbitration"*. Redfern & Hunter interpret the exclusion of the requirement of impartiality as follows:

> "While the main purpose of Art7(1) is to secure the appointment of impartial arbitrators, the drafters of the ICC Rules have preferred to express the relevant requirements in terms of independence because independence is a more objective notion. Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind, which it may be impossible for anyone but the arbitrator to check or know when the arbitrator is being appointed. It is therefore easier for the court to determine when confirming or appointing an arbitrator, whether that person is independent rather than to asses the extent of his or her impartiality".[81]

Consequently, the ICC Rules merely requires independency as yardstick in the composition of the arbitral tribunal. The reasons for having excluded impartiality seem to be twofold. Firstly, when determining independence a more objective approach is applied, contrary to the subjective approach when determining impartiality.[82] Such objective approach is less complicated and more ascertainable as in the case when applying a subjective approach. Secondly, it is implied that an arbitrator is deemed to be impartial when he or she is presumed to be independent.[83] It is contended that this point of view is insufficient since independency and impartiality are two different terms with different meanings as was outlined in chapter 2 of this study. Even though these two notions are interrelated it cannot be assumed that by fulfilling the requirement of independency that it would also automatically suffice to satisfy the requirement of impartiality.

3.2.5 London Court of International Arbitration Rules of 1998[84]

The LCIA originated from the London Chamber of Arbitration and aims to provide a comprehensive service for disputes arising out of commercial transactions.[85] The LCIA Rules have a different approach to independency and impartiality as to

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81 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 238.
82 *Ibid.*
83 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 239.
84 Hereafter the LCIA Rules.
85 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 63.

the rules mentioned above. According to the LCIA Rules all arbitrators *"...shall be and remain at all times impartial and independent* ***of the parties;***[86] *and none shall act as...as advocates for any party".*[87] It is interesting that the Rules, apart from referring to the requirements of impartiality and independency, make use of the wording *"of the parties".* This formulation implies that an arbitrator will only be expected to be impartial and independent ***from*** the parties who arbitrate. It is argued that apart from refraining from explaining what is meant with impartiality and independency, this formulation is inadequate. Independency and impartiality arguably are not confined only to the degree of relationship between the parties and the arbitrators, but should also extend to, for example, impartiality from the issue at stake or the outcomes of the arbitration proceedings. The LCIA Rules mention a number of other requirements in article 5(3) which an arbitrator should meet. Firstly, an arbitrator shall before appointment *"...furnish to the Registrar a written sum of his past and present professional positions...and sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence...".*[88] Secondly,there is a duty on any arbitrator to disclose any doubtful circumstance which may arise after signing the declaration but before conclusion of the arbitration.[89]

With regard to the question to what exactly is independent and impartial, the LCIA Rules have, as in the instance with the rules discussed above, encompassed the *convenient* standard of *justifiable* doubt which applies both before and after appointment of the arbitrator. The LCIA Rules therefore also fail to provide a detailed description of what is regarded as impartial and independent and what measurements could be used to establish whether or not an appointed arbitrator is indeed impartial and independent as far as the parties and the issue at hand are concerned.

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86 Own emphasis.
87 Article 5(2) of the LCIA Rules.
88 The LCIA Rules provides in article 10 that should such justifiable doubts arise, an arbitrator would be regarded as unfit and consequently be a valid ground to be challenged on by any of the parties involved.
89 *Article 5(3) of the LCIA Rules.*

3.2.6 The New York Convention

This Convention is aimed at facilitating the international recognition of arbitration agreements and foreign arbitral awards and furthermore, the enforcement of such awards.[90] It only applies to contracting states and imposes an obligation on such party states to recognise and enforce valid foreign arbitral awards. However, a contracting state can still part from its obligation under the Convention in certain instances provided for in article 5 of the Convention. For purposes of this dissertation the most important provision is article 5(1) (d) which clearly states that recognition and enforcement of the award may be refused if proven that the *"...composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, with the law of the country took place".* Even though the Convention does not directly refer to impartiality or independency as requirements that appointed arbitrators should meet, it is implied since most legal systems expect in arbitration proceedings for this basic requirements to be met.[91] To the extent that impartiality and independency are directly provided for in the Convention, it may be concluded that it assists even to a lesser extent in the concretisation of the meaning of impartiality and independency.

3.2.7 The English Arbitration Act 1996

In contrast with the ICC Rules the English Arbitration Act primarily focuses on impartiality as requirement. Firstly, in article 24(1)(a) of the English Arbitration Act it is stated that any of the parties to the arbitral proceedings may apply to the court to remove an arbitrator should *"...circumstances exist that give rise to justifiable doubts as to his impartiality".* Secondly, in section 33(1)(a), the duty of the tribunal to act fairly and impartially as between the parties is imposed. Subsequently the question arises why the English Arbitration Act makes no referral to independency? The reason therefore is that a lack of independence is only

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90 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 289.

91 This is illustrated by section 34 of the Constitution which envisages that everyone has the right to have a dispute resolved in a **fair** public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It must be noticed that independency and impartiality is emphasised with regard to fairness.

considered *important* where it gives rise to justified doubts regarding impartiality.[92] The concept of "neutrality" which is mainly used in the United States is important in this regard. This only applies in instances where party- nominated arbitrators are being used. It is suggested that a party- nominated arbitrator is generally predisposed to the party by whom he or she was nominated, thus "non- neutral".[93] This point of view is incorrect since "non- neutral" arbitrators do not allow the fact of their appointment by a party to dictate the outcome of proceedings and furthermore, override their conscience and professional judgement.[94] However, the English Arbitration Act refrains from referring to "independence", since a party-nominated arbitrator will not be deemed to be independent (from the party by whom he or she was nominated) and the right to appoint or choose arbitrators is a vested right in English Law.[95] This illustrates the need to determine what "independence" is. In conclusion, the English Arbitration Act solely relies on impartiality and, as most of the Rules above, do not provide a concise exposition as to when an arbitrator is impartial. Once again, an arbitrator is deemed to be impartial unless there subsists a "justifiable doubt" to the contrary.

3.3 The South African framework

3.3.1 Introduction

South African law of arbitration is in a process of transition.[96] Due to international trade isolation as result of the Apartheid regime, South Africa experienced very little development (if any) with regards to international commercial arbitration. Up to date, all arbitration proceedings conducted within our borders are to be governed by the *Arbitration Act 42 of 1965,* unless express provision is made for another system of rules such as UNCITRAL. Due to the lack of transition to an accepted system of workable international commercial arbitration rules, it can be stated that South Africa has been caught napping. The lack of transition is a barrier to international trade practises as South Africa is not regarded a sought-

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92 South African Law Commission's Report on Arbitration: An International Arbitration Act for South Africa 90.

93 Redfern & Hunter *Law and Practice of International Commercial Arbitration* 239.

94 *Ibid.*

95 Section 14(4) of the English Arbitration Act states: *"Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings..."*

96 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 287.

after venue for international commercial arbitrations.[97] The reason therefore is quite simple. The *Arbitration Act 42 of 1965* was drawn up primarily for domestic arbitrations and has a very limited application in the field of international commercial arbitration.[98] However, it can be safely said that the *Arbitration Act's* days are numbered. The South African Law Commission recommended in July 1998 that a proposed *International Commercial Arbitration Act of 2000* should be adopted as law.[99] But until then, the *Arbitration Act 42 of 1965* is applicable.

3.3.2 The Arbitration Act 42 of 1965[100]

Since 1965 the South African Arbitration Act has practically regulated both domestic and international arbitrations, even though it had a very limited application in the field of international arbitration.[101] This insufficiency is the result of a number of reasons, especially with regards to independency and impartiality. The fact that the South African Arbitration Act makes no mention of either independency or impartiality is evident of the impracticality and dire need of South African arbitration law. Worldwide there exists a notion of allowing the arbitral process to become more autonomous and free from judicial intervention.[102] The same cannot be said from a South African point of view. South African arbitration law is prone for its courts' statutory powers such as interlocutory powers as well as their powers of assistance and supervision during the arbitral process.[103] These powers are excessive, infringe unnecessary on the authority of the arbitrator and consequently also on party autonomy. Since the South African Arbitration Act makes no direct mention of independency or impartiality, we must assume that it could be implied. The South African Arbitration Act mentions that parties[104] as well as the court[105] have the power to appoint an arbitrator where *"...an appointed arbitrator refuses to act or is or becomes* ***incapable*** *of*

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97 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 287.
98 *Ibid.*
99 *Ibid.*
100 Hereafter the "South African Arbitration Act".
101 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 287.
102 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 288; Christie RH "Arbitration: Party Autonomy or Curial Intervention: The Historical Background" 1994 *SALJ* 144.
103 *Ibid.*
104 Section 10(1) of the Arbitration Act 42 of 1965.
105 Section 12(1)(e) of the Arbitration Act 42 of 1965.

acting...".[106] What circumstances would amount to being "incapable" is uncertain, and one can only assume that it includes the notions of independency and impartiality. In section 33 of the South African Arbitration Act three circumstances are provided for the setting aside of the award. These include where an arbitrator has *"...misconducted himself in relation to his duties..."*[107] or where the *"...tribunal has committed any gross irregularity in the conduct of the arbitration proceedings...".*[108] Once again, we can only assume that these circumstances include the notions of impartiality and independency.

3.3.3 The South African Law Commission's Report on Arbitration: An International Arbitration Act for South Africa

The South African Law Commission recommended that the UNCITRAL Model Law be enacted as part of South African municipal law.[109] With regards to impartiality and independency it implies that section 12 of the Model Law would hence forth be applicable. This section implies a duty on a prospective arbitrator to disclose circumstances which are likely to affect his or her independence and impartiality.[110] The section also sets out the grounds for challenge namely justifiable doubts as to the arbitrator's impartiality and independency.[111] From a South African point of view this is undoubtedly a step in the right direction. With regards to the scope of this discussion, the Law Commission (as the other rules and institutions discussed above) provides no indication as to how independency and impartiality should be determined. They also stipulate the (rather uncertain) standard of justifiable doubt.

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106 Own emphasis.
107 Section 33(1)(a) of the Arbitration Act 42 of 1965.
108 Section 33(1)(b) of the Arbitration Act 42 of 1965.
109 Schulze & Van Niekerk *The South African Law of International Trade: Selected Topics* 308.
110 Section 12(1) UNCITRAL Model Law.
111 Section 12(2) UNCITRAL Model Law.

4. International trends and practices

4.1 Introduction

Before international trends and practices with regard to the application of independence and impartiality are assessed, the difference between impartiality and independency should be underlined. In chapter 2 above, it was indicated that the term impartiality is best described by the opposite term "partiality". Partiality usually serves as an indication of an arbitrator being biased, either in favour of one of the parties or in relation to the issues in dispute. Bias is assessed on whether the arbitrator had a pecuniary interest or close connection to a party in the arbitration.[112] Impartiality is the subjective state of mind of the arbitrator which not only suffices to the fairness requirement but which is also in accordance with public policy. Independence, though interrelated with impartiality, is a total different concept. Independence is measured objectively (also subjectively) in the degree of relationship between the arbitrator and the parties to the dispute. Preferably, an arbitrator should have no interest in a matter whether this interest is financially or otherwise. It is thus evident that circumstantial evidence plays an important role in determining impartiality and independency. In what will follow it is aimed to determine the approach which international and local courts have adopted in their aim to establish independence and impartiality.

4.2 Case law regarding independency and impartiality

In *Total Support Management and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*[113] the Supreme Court of Appeal of South Africa was confronted with the aspects of independency and impartiality. The parties to the dispute could not agree upon an arbitrator and the second respondent was nominated to act as such. The appointed arbitrator had more than 40 years experience as an attorney. Both the appellants were unsuccessful in their respective claims. Later the appellants launched an application in the Transvaal Provincial Division of the High Court in terms of s 33(1) of the South African

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112 Chuah *Law of International Trade* 669.

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

Arbitration Act[114] to set aside the award made by the arbitrator (thus the second respondent). The application was dismissed with costs, but leave to appeal was granted and the appellants applied for a review and the setting aside of the arbitrator's award in the Supreme Court of Appeal. The appellants complained that the arbitrator "*...made a mistake so gross and so manifest and was so grossly careless in ignoring facts that were common cause between the parties and evidence that was not disputed in cross-examination that an inference of misconduct as envisaged by s 33(1)(a) of the Arbitration Act, 1965 on the part of second respondent can be made...*".[115] Section 33(1) of the South African Arbitration Act states:

> "(1) Where -
> *(a)* any member of an arbitration tribunal has **misconducted** himself in relation to his duties as arbitrator or umpire; or
> *(b)* an arbitration tribunal has committed any **gross irregularity** in the conduct of the arbitration proceedings or has exceeded its powers; or
> *(c)* an award has been improperly obtained, the Court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'[116]

In the light of section 33, proof that the arbitrator has misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award.[117] Consequently, the onus rests upon the appellants to prove such misconduct. For purposes of impartiality and independency, the court stated that arbitration "*...is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties...*"[118] According to the court, the question with regards to whether the fairness requirement of section 34 of the Constitution also applies to private arbitrations must be answered.[119] Section 34 of the Constitution states:

> '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.'

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114 The *Arbitration Act 42 of 1965.*

115 See *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at paragraph 12.

116 Section 33(1) of the South African Arbitration Act.

117 The Court referred to *Dickenson & Brown v Fisher's Executors* 1915 AD 166 and stated that the basis on which an award will be set aside on the grounds of misconduct is a very narrow one, and that a gross or manifest mistake is not per se misconduct.

118 See *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at paragraph 24.

119 See *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at paragraph 27.

The court stated that arbitration proceedings, even though they may seem private, do not fall outside the scope of section 34 and should adhere to the requirement of fairness.[120] In conclusion the court could not find that the arbitrator has misconducted himself or committed any gross irregularity whatsoever.

There are three important conclusions to be withdrawn from this case. The first being the fact the court merely focused on impartiality as requirement. Secondly, that proof of irregularity or misconduct must be proven by the party by whom it is alleged. Thirdly, it is of quite some importance to note that the requirement of fairness applies to *private* arbitrations as well. In *private* arbitrations, the parties have the luxury of choosing the legal systems and procedural rules of their choice to apply to their arbitration. However, the question which must be answered is whether a party can submit himself to a certain procedure or set of rules in which impartiality and independency is not a prerequisite?[121] This question must be answered in the light of the section 34 requirement of fairness enshrined in the Constitution. The judgement in the *Total Support*-case illustrated that private arbitrations should be conducted in a manner which is fair and only then will an arbitration award be enforced in our courts. Consequently, it should be determined what would be regarded as fair? According to the Court fairness is determined in terms of impartiality. However, the Court contradicts itself by referring to section 34 of the Constitution which clearly states that *"everyone has the right to have any dispute...resolved...in a fair public hearing before... (an)* ***independent and impartial*** *tribunal or forum".* It is contended that the court deliberately refused to take the requirement of independency into consideration since the arbitrator appointed was one of the parties to the dispute itself. The only logical conclusion which can be made is that the court was of the opinion that the requirement of impartiality overrides the requirement of independency. In conclusion it must be noted that, since fairness is regarded as the yardstick in establishing impartiality as emphasised by the Court, the Court also failed in providing a test for the establishment of such fairness.

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120 See *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at paragraph 28.

121 Furthermore, may a party apart from the requirement of fairness by agreeing thereto?

In the case of *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company*[122] the English Court of Appeal was also confronted with the aspects of independence and impartiality. AT&T, an international telecommunications company, had successfully bid for a project in Saudi Arabia upon condition that the cable required for the project will be bought from Saudi Cable. A dispute arose between AT&T and Saudi Cable and the matter was referred to arbitration proceedings held in London under ICC Rules as agreed upon by the parties. After awards were made in favour of Saudi Cable, AT&T discovered that the tribunal chairman did not disclose reference to his non- executive directorship of Nortel which was a rival to AT&T in the bidding for the project. The failure to disclose this reference in the *curriculum vitae* of the chairman was the result of a clerical error. AT&T applied to the court that firstly, the chairman be removed in that he lacked the required independence and impartiality as required by the ICC Rules. Secondly, it was applied for that the awards be set aside. AT&T also contended that it is a fundamental right in arbitration proceedings to object to the appointment of an arbitrator upon reasonable grounds and that they have been deprived of such opportunity to object which they would have done in the light of the circumstances. The Court of Appeal came to the conclusion that the award could only be set aside and the chairman be removed from the tribunal had there been a *real danger* of bias. Consequently, the Court found that such danger did not exist in the present case and that there was nothing in the ICC Rules to support the allegation that the chairman was guilty of misconduct as a result of the omission. For purposes of this dissertation it is important to note the test which the Court applied in determining bias. The Court stated that since the chairman was not disqualified under the English common law test of bias which was applicable to judges, it was therefore also unreasonable to assume that he lacked the necessary independence as required by the ICC Rules.

In comparing the two cases with each other, it is evident that the South African point of view is based on fairness whilst the English approach is based on the premise of being biased.

In the case of *Norbrook Laboratories Ltd v Challenger and Another*[123] the claimant applied to court for the removal of the arbitrator under section 24 of the English

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122 *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company* 2000 (2) All ER 625 (Comm).

123 *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm).

Arbitration Act.[124] The grounds were that circumstances existed that gave rise to justifiable doubts as to the impartiality of the arbitrator, and that the arbitrator had failed to properly conduct the proceedings giving rise to a substantial injustice to the claimant.[125] In resolving the dispute, the arbitrator had on occasion made direct contact by telephone without the other party's knowledge or access of such telephone call.[126] The arbitrator described this direct contact as a "simple administrative expedient" to ensure that correspondence was transmitted in a timely fashion in accordance with his orders.[127] What needed to be determined was whether the impact of the telephone calls on the mind of the arbitrator would have given rise to fear of a real possibility of bias in the mind of a fair- minded, independent observer.[128] The Court contended that the making of such direct unilateral telephone contact by the arbitrator with the parties was generally to be disapproved for two reasons. Firstly, it inevitably gave rise to the risk that evidence or submissions would be put before the arbitrator of the circumstances of which no record was kept of what had been said.[129] Secondly, such evidence and submissions was obtained without the opposing party's awareness and therefore without an opportunity of challenging it. Subsequently the court came to the conclusion that the fair- minded observer, having considered all the facts relating to the circumstances of the telephone calls, would have concluded that there was a real possibility that the tribunal had been biased.[130] Therefore, the award was set aside under section 68 of the English Arbitration Act of 1996 on the grounds that the arbitrator had committed a serious irregularity and that the arbitrator was removed under section 24. The Court also stated that it is inherently difficult to prove unconscious bias and even more so for the court to know whether the bias actually made any difference or not.[131]

In this case it is important to note the comparison between methods which was drawn in determining bias. It was referred to *Porter v Magill* (2002) 2 AC 357 in which it was concluded that the test to be applied in determining apparent bias

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124 English Arbitration Act of 1996.

125 See *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm) at paragraph 74.

126 See *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm) at paragraph 76.

127 *Ibid.*

128 See *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm) at paragraph 141.

129 *Ibid.*

130 See *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm) at paragraph 156.

131 This remark emphasises the difficulties surrounding the nature of a subjective test.

was whether the relevant circumstances would lead a fair- minded and informed observer that there was a real possibility that the tribunal was biased.[132] Contrary to the above, the court in *R v Gough*[133] stated that there should be a *real danger of bias.*[134]

The comparison referred to above was also dealt with in *ASM Shipping Ltd of India v TTMI Ltd of England*[135] in which the *Magill*- decision regarding the 'fair-minded and informed observer test' was confirmed. In the *Gough*- decision the court thought it unnecessary to require the court to look at the matter through the eyes of a reasonable man for two reasons. Firstly, it was contended that the court personifies the reasonable man. Secondly, 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 a court at the relevant time. Even though there is not much of a difference between the *real possibility* and a *real danger* of bias, the imposition of the fair- minded observer provides for a different standard. As it was stated in the *ASM Shipping*- case, the fair- minded (objective) observer is there to ensure an even handed approach to apparent bias, whatever the nationality of the parties.[136]

Apart from the above the court referred to the notion that an arbitral award made by a tribunal which was not impartial is to be enforced unless it can be shown that the bias has caused prejudice.[137] In the *ASM Shipping*- case it was ruled that this notion is contrary to fundamental principles since the problem with unconscious bias is that it is inherently difficult to prove and the statements made about it by the judges themselves cannot be tested.[138] Furthermore, it would not be able for the court to determine whether the bias made any difference or not in the making of the award.[139]

In *Laker Airways Inc v FLS Aerospace Ltd and Burton*[140] a dispute arose between the first respondent (FLS) and the applicant (Laker) out of the alleged defective performance by FLS of maintenance services on a Laker aircraft. Part of the

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132 See *Norbrook Laboratories Ltd v Challenger and Another* 2006 (D) All ER 186 (Comm) paragraph at 85.
133 *R v Gough* 1993 AC 646.
134 *Ibid.*
135 *ASM Shipping Ltd of India v TTMI Ltd of England* 2006 (2) All ER 122 (Comm).
136 See *ASM Shipping Ltd of India v TTMI Ltd of England* 2006 (2) All ER 122 (Comm) at paragraph 39.
137 *Ibid*
138 *Ibid.*
139 *Ibid.*
140 *Laker Airways Inc v FLS Aerospace Ltd and Burton* 1999 (2) Lloyd's Rep 45.

claim was referred to arbitration because of an IATA arbitration clause incorporated into one schedule of the contract between FLS and Laker. FLS appointed Burton as their arbitrator, however Laker has prior to Burton's appointment, appointed Sullivan who in fact also practised at the same chambers as that of Burton since Sullivan recently joined the chambers. Sullivan had not met or knew Burton at that point in time. Subsequently Laker requested FLS to make a new appointment in the place of Burton, but FLS declined the request stating that Burton's independence could not be questioned and that the request was a mere campaign to delay the arbitration. Laker applied to court for the removal of Burton as an arbitrator. Laker argued *inter alia* that they strongly doubted Burton's impartiality as it was unthinkable for two lawyers from the same firm to assume roles in the same matter where an actual or potential conflict of interest arose and therefore Burton's position on the arbitral tribunal could not be regarded as just. As in the *Norbrook-* case above the court also referred to section 24 of the English Arbitration Act[141], *i.e.* the objective test whether circumstances exist that give justifiable doubts as to an arbitrator's impartiality.[142] The court stated that the test is objective in at least two respects. Firstly, the court must find that circumstances *actually* exist and are not merely *believed* to exist. Secondly, those circumstances must justify doubts as to impartiality.[143] As Laker argued that a conflict of interest between Burton and Sullivan existed, the court stated that the common law rule of *nemo iudex in sua causa*[144] ultimately applied.[145] The court interpreted this rule as to cover all instances where a judge is a party to a case, or has a pecuniary of proprietary interest in it, or where it is so closely connected with the party to the proceedings that he may be said to be acting in his own cause.[146] In such instances disqualification is automatic and there is no question of investigating whether there is likelihood or even a suspicion of bias.[147] For this reason it can thus be assumed that the court applied the *nemo iudex-* test only with regard to independence and not to impartiality. But still, if an

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141 English Arbitration Act 1996.
142 See *Laker Airways Inc v FLS Aerospace Ltd and Burton* 1999 (2) Lloyd's Rep 45 at paragraph 2.
143 An unjustifiable or unreasonable doubt is not sufficient and it is not enough to honestly say that one has lost confidence in the arbitrator's impartiality. However, on the other hand if doubts (should they be justifiable) are sufficient and it is not necessary to prove actual bias.
144 "No one must be a judge in his own cause".
145 See *Laker Airways Inc v FLS Aerospace Ltd and Burton* 1999 (2) Lloyd's Rep 45 at paragraph 2.
146 *Ibid.*
147 *Ibid..*

arbitrator is in contravention with the *nemo iudex*- rule (*i.e.* not independent from the matter at hand) disqualification is automatic as the court stated.[148] The obvious conclusion is that it is strange for the English Arbitration Act not to include independency together with impartiality. It is clearly contradictory, since they acknowledge the working of the *nemo iudex*- rule as relevant but only refers to the section 24 'justifiable doubt- test'.[149] This is evident by the ruling of the court by also applying the *Gough*- decision. The court came to the conclusion that no allegation of actual bias was made against Burton and that there was no question at all of actual bias on the part of Burton (Laker's claim was based on independence and not on impartiality as required by the English Arbitration Act).
A further important aspect which the court addressed in the *Laker*- case was that of independence. According to the court a lack of independence, unless it gives rise to the impartiality of the arbitrator, is of no significance.[150] The court gave various reasons for the exclusion of independence. Firstly, if independence was to be included it could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point in including lack of independence as separate ground.[151] Thus, "non- partiality" lack of independence does not necessarily amount to justifiable doubts or the appearance of partiality. Secondly, the inclusion of independence would ultimately give rise to endless arguments where almost any connection, however remote, may be put forward to challenge an arbitrator.[152] Thirdly, there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent.[153] Therefore, independence is only applicable in as far it may contribute to justifiable doubts with regard to impartiality.

4.3 Conclusive remarks

The point of view (exclusion of independence) of the English courts is understandable and may well suffice a valid argument. However, it is contended that the exclusion of independence is more likely to open the proverbial "flood

148 *Ibid.*
149 Not only does this approach create much uncertainty and controversy, but serves as evidence for a double standard.
150 *Ibid.*
151 *Ibid.*
152 *Ibid.*
153 *Ibid.*

gates" of future difficulties, such as interlocutory applications in attaining clarity, which in turn would amount to not only the furtherance of costs but also the delay of an award. This illustrates exactly the lack in arbitration proceedings with regard to the impartial and independent composition of the tribunal. The courts only provide a yardstick as to when the tribunal (or an arbitrator) is deemed *not* to be either impartial or independent but fails to provide a process which must be followed in ensuring the said requirement of impartiality and independence. Arbitration proceedings are especially dependent on trust between the parties. For this reason it is important to lay down a good foundation in the beginning of the process in favour of all the parties concerned.

It is contended that should there be clear and concise procedure which must be followed to ensure the vital standards of impartiality and independency, it will not only limit future disputes and grounds for review but also enhance the enforcement of awards globally and consequently be less costly. Furthermore, the courts will more easily adjudicate a matter relating to independence and impartiality if the parties agreed to a certain procedure to be followed in establishing such, as in the case of determining fairness or bias. A concise procedure would be without difficulty since the adjudication of a clear and concise procedure which must be followed is done objectively, whilst the determination of fairness or bias oftenly involves not only an objective approach but also a subjective approach.[154] An objective evaluation is straight forward and trouble free, whilst a subjective evaluation inclines to intricacies of emotions, opinions and assumptions being not only costly but exhaustive and time consuming.

In conclusion, it is argued that it is ideal to provide a standard procedure for parties to follow in establishing the important foundation of independency and impartiality. Before a standard procedure can be provided, there are some important aspects which must be addressed.

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154 As it was illustrated above, a subjective approach involves the state of mind of the arbitrator relating to concepts of integrity and honesty.

5. Influential aspects pertaining to independence and impartiality

5.1 Party-appointed arbitrators versus arbitrators appointed by an appointing authority

One of the cornerstones of arbitration is that parties are free to choose a process to be followed which may also include the right to appoint an arbitrator of their choice.[155] Since independence is a fundamental constituent of arbitration, this freedom to appoint an arbitrator may create various difficulties especially in that it may be difficult to prove the independent nature of such party- appointed arbitrator. In most instances a party- appointed arbitrator is not only known to the party by whom he or she was appointed, but has also been briefed on previous occasions by such a party with regard to similar issues of arbitration.[156]

As it was stated in the above, arbitration proceedings are dependent on trust between the parties whereas such party- appointed arbitrator is more likely to create doubt between the parties. This doubt stems from the fact that the "relationship" between the arbitrator and the party by whom he or she was appointed is evident of a *prima facie* representative capacity by the arbitrator on behalf of the party.[157] This will ultimately bring the role of the arbitrator as an independent and impartial adjudicator of the dispute into scrutiny[158] and in evaluating the independency and impartiality of the arbitrator one would once again have to make use of a subjective approach.

An arbitrator appointed by an appointing authority or in accordance with a standard procedure (which lives up to the expectations of independence and impartiality) has quite the opposite attributes. Not only would such arbitrator be regarded as being *prima facie* independent and impartial, but it would also give rise to the all important foundation of trust between the parties since both parties are subjected to the same procedure and thus being treated equally. Apart from trust considerations there are also important time and costs constraints which apply.

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155 See Thirgood R "International Arbitration: The Justice Business" 2004 *Journal of International Arbitration* 341.

156 Alam N *Independence and Impartiality in International Arbitration- an assessment* http://www.transnational-dispute-management.com.html 13 September 2006.

157 *Ibid.*

158 *Ibid.*

Party- appointed arbitrators might seem less costly and without any delay. However this is not the fact in that there would ultimately rest a heavier onus on the party who appoints such arbitrator. The party appointing the arbitrator carries the onus in proving that the expectations of independence and impartiality are being adhered to (which might be difficult to prove), which will undoubtedly be more costly and time- consuming. Importantly, there also exists the possibility at a later stage during the proceedings that it may arise that such party- appointed arbitrator is in fact not independent as assumed. This would obviously give rise to further time and costs constraints.

On the other hand, in adjudicating the independent and impartial nature of an arbitrator appointed by an appointing authority, an objective approach will be followed. Not only is the matter regarding impartiality and independency finalised in the beginning of proceedings but is it also much speedier and more cost-effective since the arbitrator will be deemed to be independent on face value.

In the light of the above, it is contended that it is advisable for parties to arbitration proceedings to make use of an appointing authority or a standard procedure when appointing arbitrators.

5.2 A "code of ethics" versus simple rule of "different nationality"

In international commercial arbitration it is expected of an arbitrator to maintain the highest standards of integrity which includes independence and impartiality. It is important to remember that independence and impartiality means not only independence and impartiality from the parties itself but also from the facts of the dispute. It is widely accepted for arbitrators to sign a code of ethics in ensuring impartiality and independence.

Such codes of ethics include topics such as the disclosure of interests, informing of direct or indirect relationships which may exist, and influential factors which may be at hand. However, this method relies once again on the subjective state of mind of the arbitrator as illustrated in the above. Whenever parties have to rely on the subjective state of mind of an arbitrator, it would be likely that doubt instead of trustworthiness would be the norm. Luckily there exists a more logical approach to the dilemma which is in fact more straightforward.

Since international commercial arbitrations are usually conducted between parties of different nationalities, it would only make sense that arbitrators with nationalities other than that of the parties should be appointed. The reason therefore is that

such arbitrators would from the beginning be deemed to be independent from the parties because of the mere fact that they live in different countries. Not only will it constitute *prima facie* independence but is the less complex objective approach applicable. On the other hand, should parties from different countries each appoint an arbitrator of their own nationality, the logical inference would be that of the possibility of being biased towards his or her own nationality. Subsequently, it is hard to believe that the mere signing of a code of ethics by an arbitrator will invigorate trustworthiness with regard to independency and impartiality.

However, there are also certain cost and time consuming constraints which should be taken into account. As in the above it might seem more time consuming and more costly to appoint an arbitrator of a different nationality. Again, this assumption is not necessarily correct. From a costs- perspective both initial and future complications should be kept in mind.

In the initial stages of the proceedings a party- appointed arbitrator would most likely be expected to prove his independence, whereas an arbitrator appointed by an appointing authority would be regarded as independent until the contrary is proven. Therefore it will in fact be more costly and time- consuming in the case of a party- appointed arbitrator, due to the fact of an initial enquiry with regard to his or her independence. Furthermore, as in the above, there may also emerge future difficulties with regard to party- appointed arbitrators which will contribute to further costs. Again, from this point of view it is hard to believe that the signing of a code of ethics would limit the difficulties at hand. On the other hand, an arbitrator from a different nationality would not necessarily be subjected to an initial enquiry as to his or her independence for the mere fact that it is presumed.

For this reason the logical conclusion is that an arbitrator of a different nationality will be less costly as well as less time- consuming. It must also be stated that by making use of the "different nationality" point of view, it is not meant that ethics don't play a role. Ethics are undoubtedly a fundamental to the existence of independency and impartiality, and provide important guidelines for the establishment of the required independency and impartiality.[159]

5.3 Can parties depart from "independence"?

At first glance this statement may seem strange, but in fact parties are entitled to appoint an arbitrator which is not independent. The role of a party- appointed

159 See Chapter 5.2.1 in this regard.

arbitrator is seen as a balance of power of the parties in the tribunal, but it is more likely that their engagement with "their party" would suggest that they are working *for* the party.[160] However, if the appointed arbitrator remains impartial and uninfluenced by their party, it is unlikely that difficulties will emerge. But the fact of the matter is that it is not that simple. When parties depart from the independent-requirement, they effectively open the door to various risks. The most obvious of which is the recognition and enforcement of the award.[161] In South Africa this aspect is dealt with by the *Recognition and Enforcement of Foreign Awards Act* 40 of 1977, of which the main purpose is to implement the New York Convention.[162] As it was stated in the above, the most important provision of the New York Convention is article 5(1) (d) which clearly states that recognition and enforcement of the award may be refused if proven that the *"...composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, with the law of the country took place".*[163] Therefore, as it was illustrated above, the yardstick for the recognition and enforcement of the award in South Africa would be the fairness requirement of section 34 of the Constitution, whereas English Law will apply the "bias- test"[164] applicable to judges.

In conclusion, it is advisable for parties not to depart from the independence requirement since it may create difficulty in enforcing such award.

6. A model 'independency clause' and 'impartiality clause'

6.1 Introduction

In the preceding chapters it was continuously emphasised for the need of a uniform procedure or a standard set of rules in order to establish an independent and impartial arbitral tribunal, with certainty. The composition of the tribunal is the starting block for any arbitration and the adherence to impartial and independent

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160 Alam N *Independence and Impartiality in International Arbitration- an assessment* http://www.transnational-dispute-management.com.html 13 September 2006.

161 Should one depart from independence the possibility exists that one may litigate in a foreign country in order to enforce the arbitration award. Again, this would then ultimately defeat the purpose of the arbitration agreement; Aaron S "International Arbitration I: Drafting an Arbitration Clause for International Commercial Contracts" (1990) *SALJ* 635.

162 Becker PW *The Recognition and Enforcement of International Commercial Arbitration Awards in a South African Context* 14.

163 Article 5 (1) (d) of the New York Convention.

164 See exposition of English cases referred to in heading 4.2 above.

standards are fundamental to the prior. As it was stated, the laying down of a good foundation in the beginning of the process is in favour of all the parties. An independent and impartial foundation will not only instil trust between the parties and confidence in the arbitration proceedings, but also limit future disputes and possible grounds for review. In turn, this would enhance the enforcement of awards globally and would ultimately be less costly and time consuming. The next logical question is how the required independency and impartiality can be achieved? The answer to this question is quite simple. Arbitration is known for party autonomy and freedom to choose not only the arbitrator(s) but also the procedure to apply in resolving the dispute. Therefore it is contended that parties to the arbitration should subject themselves to or incorporate into the arbitration agreement a clause or a set of rules which specifically applies to the independent and impartial composition of the tribunal.

In adhering to a clear and concise 'impartial and independent clause' it ensures the advantages as set out in the above. However, it must be questioned whether it would be appropriate to include both impartiality and independency in one clause. As it was stated in the above, impartiality and independency are two different concepts, though interrelated. It is contended that one should rather draft two clauses, one which specifically pertains to impartiality and the other specifically to independency.

6.2 The recommended clauses

6.2.1 The "impartiality clause"

"1(1) An arbitrator shall be impartial prior, during, and after[165] the arbitration proceedings which include the following:[166]

a) upholding the integrity and fairness of the arbitration proceedings;[167]
b) disclosing any interest or relationship likely to affect his or her impartiality or which might create an appearance of partiality;

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165 With regard to remaining impartial after the arbitration award has been made, it is usually expected that a reasonable time should elapse before an arbitrator's impartial duty terminates.

166 This clause is aimed at providing ethical considerations as to the impartial nature of the arbitrator.

167 See chapter 2.4.1 above.

c) avoiding any impropriety or the appearance of impropriety in communicating with the parties to the proceedings;[168]
d) conducting the proceedings fairly and diligently;[169]
e) being faithful to the relationship of trust and confidentiality between himself or herself and the arbitration proceedings;[170] and
f) declining to accept appointment as arbitrator if he or she has any doubts as to his or her inability to be impartial.

1(2) An arbitrator will not be deemed to meet the required and expected standard of impartiality should he or she:[171]

a) enter into any business, professional ,or personal relationship with any of the parties prior or during the proceedings or within a reasonable time after the award has been made;
b) conduct themselves or make statements that give the appearance of partiality toward or against any party;
c) have any interest or relationship which is likely to be affected by the arbitration proceedings;
d) communicate with any of the parties without the presence or knowledge of either of the other parties;
e) refuse to allow any of the parties a fair opportunity to present its evidence and arguments; or
f) use confidential information acquired during the proceedings to gain personal advantage or advantage for others, or to affect adversely the interest of another".

6.2.3 The "independency clause"

"1(1) An arbitrator shall be independent prior, during and after the arbitration proceedings, which include:[172]

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168 *Ibid.*
169 *Ibid.*
170 *Ibid.*
171 The aim of this clause is to establish "absolute" impartiality and provides strict requirements to which the arbitrator must adhere prior, during and after the proceedings. It specifically relates to the expected impartial **conduct** of the arbitrator. Should the arbitrator act in contravention of these expectations it would serve as a valid ground for the removal of such arbitrator.
172 See chapter 2.4.2 above.

(a) being of a nationality other than any of the parties to the proceedings;[173]

(b) disclosing any direct or indirect facts, circumstances, interests or relationships present or likely to occur between the arbitrator and any of the parties to the proceedings which may be affected by the arbitration proceedings or create doubt as to his or her independence;

(c) disclosing any direct or indirect facts, circumstances, interests or relationships present or likely to occur between the arbitrator and any third party which is not a party to the proceedings which may be affected by the arbitration proceedings or create doubt as to his or her independence; and

(d) declining to accept appointment as arbitrator if he or she has any doubts as to his or her inability to be independent.

1(2) An arbitrator will not be deemed to meet the required and expected standard of independency if:[174]

(a) the arbitrator is of the same nationality as any of the parties to the proceedings;

(b) there is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration;

(c) the arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties;

(d) any direct or indirect facts, circumstances, interests or relationship is present or likely to occur between the arbitrator and any of the parties to the proceedings which may be affected by the arbitration proceedings or create doubt as to his or her independence;

(e) any direct or indirect facts, circumstances, interests or relationships is present or likely to occur between the arbitrator and any third party which is not a party to the proceedings which may be affected by the arbitration proceedings or create doubt as to his or her independence; and

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173 See chapter 5.2 above.

174 As in the case of the "impartiality clause" above, this clause is aimed in establishing "absolute independency", that is independency from both the parties to the proceedings as well as the proceedings itself.

(f) the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his firm derives a significant financial income there from".

7. Conclusion and recommendations

It is evident from this dissertation that the aim is to determine a clear and concise procedure for the establishment of independency and impartiality in international commercial arbitration proceedings. Furthermore, it is contended that it would be beneficial to all parties to the proceedings to subject themselves to arbitrators which will be deemed to be absolute independent and impartial. It is important to remember that this dissertation applies to international commercial arbitrations, being arbitrations between parties of different nationalities.

In some instances it might be argued that requiring *absolute* independency and impartiality is excessive, unnecessary and gives rise to further costs and time constraints. However, as it was pointed out, arbitrations in general are fundamentally dependent on trust, not only between the parties, but also with regard to the proceedings. It is contended that there exists no reason why an arbitral tribunal cannot be approached with the same amount of trust and confidence as the case would be when resorting to a court of law. By laying down a solid foundation in the beginning of the proceedings it ultimately limits future and interim disputes, especially with regard to the enforcement of the award in a foreign country.[175]

Independency and impartiality is the root of such a solid foundation and a lack thereof would only amount to further time and costs constraints which could not only have been avoided but is also likely to defeat the initial purposes of the arbitration proceedings. For these reasons it is contended that parties to international commercial arbitrations should strive to appoint arbitrator's who are deemed to be absolute independent and impartial.

The clauses pertaining to independency and impartiality provide a dual purpose in this regard. Firstly, they provide the appointment of absolute independent and impartial arbitrator's. Secondly they also serve as an instrument by which the

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175 As it was indicated, the enforcement of the award is dependent on the notion of fairness emanating from public policy. Independency and impartiality is at the heart of such expected fairness.

arbitrators' conduct prior, during and after the proceedings can be evaluated on a continuous basis.

Generally, international commercial arbitration is undoubtedly on the verge of expansion, especially from a South African point of view. It has at its disposal the unique opportunity to serve as a mechanism for countering the difficulties associated with court procedures such as lengthy trials, excessive costs and the possibility of litigating in a foreign country with a foreign legal system.

Should international commercial arbitration strive to establish a reputation as a fair and competent means for the effective resolution of international commercial disputes, it can no longer ignore the importance of an effective procedure for the composition of an arbitral tribunal which is truly independent and impartial.

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