

Introduction to International Commercial Arbitration

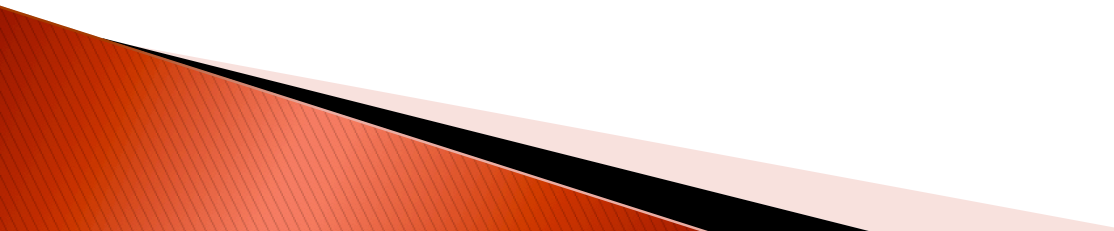
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Independence and Impartiality

Lesson n.8

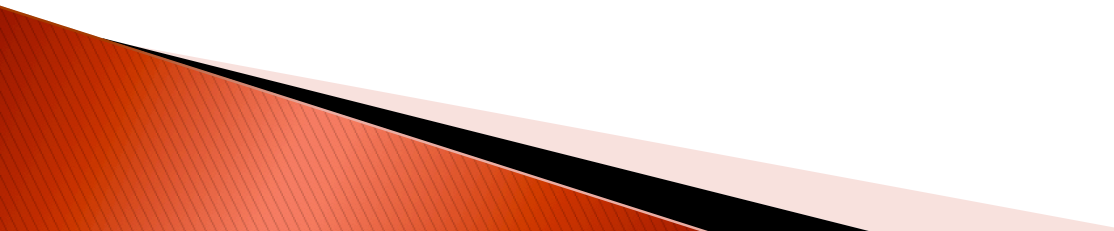
Independence and Impartiality

- ▶ One of the fundamental principles in international arbitration is that every arbitrator must be and remain independent and impartial of the parties and the dispute
 - ▶ Independence and Impartiality are two different yet interrelated notions
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Every Arbitrator

- ▶ The general standard is that, even in the case of party-appointed arbitrators, they must be independent and impartial
- ▶ It is not always like this: *e.g.* in the USA domestic arbitration until 2004, this was not mandatory

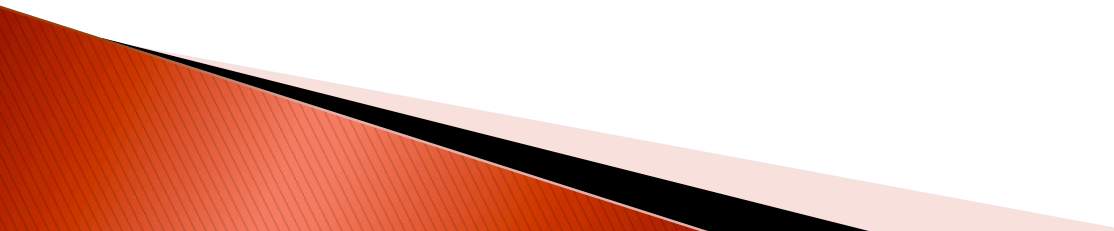
Independence

- ▶ A generally accepted definition of «independence» is that the arbitrators must not have any relationship with the parties (whether financial, personal, professional, etc.) that may influence their decision
 - ▶ It is considered to be an «objective» condition
 - ▶ It means that does not matter if the relationship has a real effect on the arbitrators' mind
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Impartiality

- ▶ A generally accepted definition of «impartiality» is that the arbitrators must not have a personal interest (related to the parties or to the dispute) in the outcome of the dispute, whether personal, economical or otherwise (political? Scientific?)
- ▶ It is a mixed subjective–objective criterion

Duty to disclose

- ▶ Upon acceptance of the appointment, an arbitrator must disclose whether there are circumstances that could raise doubts about his independence and/or impartiality
 - ▶ The institution/parties concerned examine the circumstances disclosed, and decide whether to confirm the appointment or choose another arbitrator
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How to evaluate the circumstances

- ▶ Those general principles are accepted in most national laws and in the Model Law. But how to precisely evaluate a specific case?
- ▶ The International Bar Association (IBA) has elaborated some Guidelines on Conflict of Interest

The IBA Guidelines

- ▶ **Non-Waivable Red List**
 - Situations where an arbitrator should not be appointed, even if the parties consent
- ▶ **Waivable Red List**
 - Situations where an arbitrator should not be appointed, but the parties may consent to the appointment
- ▶ **Orange List**
 - Situations the arbitrator need to disclose, but if the parties do not object is OK
- ▶ **Green list**

ICC Statement of Acceptance

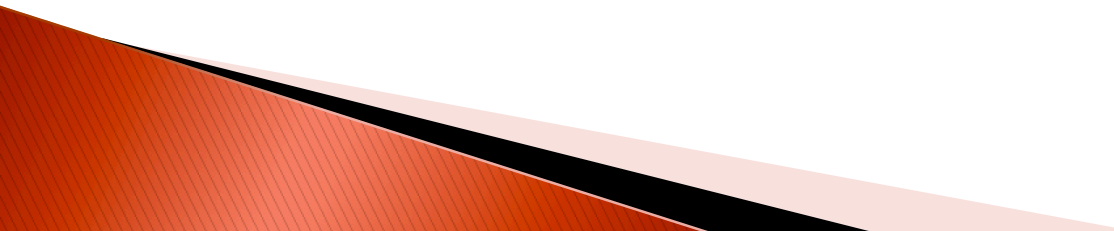
INDEPENDENCE (*Tick one box and provide detailed information, if necessary.*)

In deciding which box to tick, you should take into account, having regard to Article 7(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

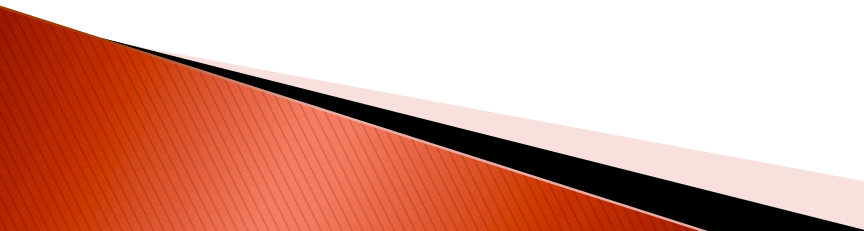
- Nothing to disclose:** I am independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties.
- Acceptance with disclosure:** I am independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties, I draw attention to the matters on the attached sheet.

Let us play!

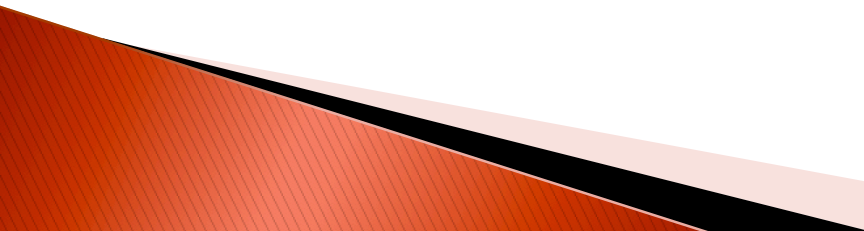
I am independent, however...

- ▶ I have published a book concerning a legal issue that also arises in the arbitration
 - ▶ I was appointed as arbitrator in other three cases in the last two years by the same law firm that is assisting the party which appointed me in this case
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I am independent, however...

- ▶ My cousin is a member of the Board of Directors of the party which appointed me
 - ▶ My law firm is currently advising one of the parties on an unrelated matter. However, I am not directly involved in that activity, and the fees earned are not significant compared to the overall income of the firm
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I am independent, however...

- ▶ One of my associates is Chairman of the Arbitral Tribunal in another disputes involving one of the parties
 - ▶ A law firm in alliance with my law firm renders services to one of the parties in unrelated matters. We do not share fees or revenues
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I am independent, however...

- ▶ One of the counsels of a party is a Member of the Fencing Club I am member to
- ▶ My law firm advises one of the parties on unrelated matters. This consultancy service amounts to 52% of my firm's annual income

I am independent, however...

- ▶ One of the lawyers involved is my friend on Facebook