

THE 'REPEAT ARBITRATORS' ISSUE:
A SUBJECTIVE CONCEPT*

*LOS NOMBRAMIENTOS REPETITIVOS DE
ÁRBITROS: UNA CUESTIÓN SUBJETIVA*

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ABSTRACT

The issue of repeated appointments of arbitrators is gaining increasing importance in the practice of international arbitration. The fact that an arbitrator's neutrality may be directly impacted when he is nominated by the same party on several occasions cuts to the core of this issue. In a context where jurisprudential and academic works on the subject of 'repeat arbitrators' are few, the intention of this piece is to offer a brief description and analysis of the current *état de l'art* on the matter. Firstly, I introduce the role of an arbitrator in the context of international arbitration. Secondly, I address the relevance of the standards of impartiality and independence in the light of the issue of 'repeat arbitrators'. Thirdly, I describe some of the factors that come into play when confronted by the possibility of a repeat appointment: namely, the extent to which economic reward, a desire to maintain a pre-existing working relationship between arbitrator and appointing party, and concern for the arbitrator's reputation influence the reappointment. Fourthly, I suggest two distinct analyses of the situations in which an arbitrator has been repeatedly nominated. On the one hand, I propose the 'factual repeat arbitrators' analysis, on the other I propose what I had dubbed 'legal repeat arbitrators'. I end this section by expounding upon the issue of 'repeat arbitrators' by way of the statistics. Finally, I conclude that a determination of an arbitrator's impartiality and independence is a very subjective one. There are many variables that must be taken into consideration; whilst the idea of being repeatedly appointed may seem attractive to an arbitrator, respect for his own reputation will always play a fundamental balancing role in his decision to accept a repeat appointment.

Key words author: Repeat arbitrator, repeat appointment, impartiality, independence, reputation of arbitrator, factual repeat arbitrator, legal repeat arbitrator.

Key words descriptor: International arbitration, appointment.

RESUMEN

El asunto de los nombramientos repetitivos de árbitros gana cada vez más relevancia en la práctica del arbitraje internacional. El hecho de que la neutralidad de un árbitro se vea directamente comprometida cuando este es nombrado por la misma parte en varias ocasiones, hace de esta circunstancia una cuestión sensible. Es muy escaso el análisis jurisprudencial y académico sobre el tema de los “nombramientos repetitivos de árbitros”. Por ello, la intención del presente artículo es ofrecer una breve descripción y examen de la realidad actual de los nombramientos repetitivos de árbitros. En primer lugar, el artículo introduce el papel del árbitro en el contexto del arbitraje internacional; en segundo lugar, describe la pertinencia que tienen las normas de la imparcialidad e independencia en los nombramientos repetitivos de árbitros; en tercer lugar, este trabajo desarrolla algunos de los factores que entran en juego cuando se enfrentan a la posibilidad de nombrar repetidamente un mismo árbitro –la medida en que la compensación económica, el deseo de mantener una relación de trabajo entre el árbitro y la parte que lo nombra, y la preocupación por la reputación de los árbitros influyen en los nombramientos repetitivos de árbitros–; en cuarto lugar, el artículo sugiere dos análisis diferentes de las situaciones en las que un árbitro ha sido nominado varias veces –los “nombramientos repetitivos de árbitros a partir de cuestiones fácticas”– y los “nombramientos repetitivos de árbitros desde una perspectiva legal”. Finalmente, el artículo concluye que la determinación de la imparcialidad de un árbitro y la independencia son cuestiones muy subjetivas pues muchas variables deben tenerse en cuenta. La idea de ser nombrado en repetidas ocasiones puede parecer atractiva para un árbitro; sin embargo, el respeto por su propia reputación siempre jugará un papel fundamental en el equilibrio de su decisión de aceptar o no un nombramiento repetitivo.

Palabras clave autor: *Nombramiento repetitivo de árbitros, imparcialidad, independencia, Directrices de la IBA sobre los Conflictos de Intereses en el Arbitraje Internacional, reputación del árbitro, nombramientos repetitivos de árbitros a partir de cuestiones fácticas, nombramientos repetitivos de árbitros desde una perspectiva legal.*

Palabras clave descriptor: *arbitraje internacional, nombramiento.*

SUMMARY

INTRODUCTION.- I. THE CONTEXT.- II. THE IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS. III. WHAT IS AT STAKE?- A. *To what extent is economic reward an incentive?*- B. *To what extent the reappointment of an arbitrator fosters a relationship?*- C. *Reputation as an incentive to maintain the impartiality and independence of the arbitrator.*- IV. POSSIBLE SCENARIOS.- A. *The ‘factual repeat arbitrators’.*- B. *The ‘legal repeat arbitrators’.*- C. *The repeated appointments in numbers.*- CONCLUSION.- BIBLIOGRAPHY.

INTRODUCTION

One of the main reasons why parties involved in a dispute decide to use arbitration instead of other dispute resolution mechanisms, such as litigation or mediation, is that they are given the opportunity to select their own decision maker. From the simplest viewpoint, an arbitrator is someone who, being neutral to the matter between the parties, can provide an objective, unbiased and, one hopes, wise solution to the dispute. Thus, in principle, an arbitrator does not need to have any specialist training or qualifications to be able to put an end to a dispute.¹

The situation becomes rather different when the dispute is immersed in an array of variables. For example, the increasing number of sophisticated ways of doing business in a global environment, which is tied to the circumstance that in many cases the nationalities of the parties to a transaction may be diverse, mean that the underlying relationship between the parties to a dispute is developed in different jurisdictions, with multiple legal systems in play. When a dispute arises in the context of such a transnational setting, just “any” individual, with no specialist training or expertise, may not be suitable for the role of arbitrator.

International arbitration is considered to be the principal method of resolving disputes that arise in globalized settings.² As such, arbitrators must find the best solution for a conflict with the aim of trying at the very least to maintain the business relationship between the parties.³

The fact that parties get to nominate their own arbitrator is one of the most distinctive characteristics of the arbitral process.⁴

1 Leonard L. Riskin, James E. Westbrook, Chris Guthrie, Richard C. Reuben, Jennifer K. Robbenolt & Nancy A. Welsh, *Dispute Resolution and Lawyers*, 557 (4th ed., West Publishing, Saint Paul, Minnesota, 2009).

2 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 1 (5th ed., Oxford University Press, Oxford, 2009).

3 Piero Bernardini, *The Role of the International Arbitrator*, 20 *Arbitration International*, *The Journal of the London Court of International Arbitration* 2, 113-122, 116 (2004). Available at: http://www.arbitration-icca.org/media/0/12224319103780/lcia_2004.pdf.

4 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and*

Hence, a party has the fundamental right to select the individual that party believes is in the position to provide a solution for that party in a particular dispute.⁵ Accordingly, the power of the arbitrator to conduct an arbitration proceeding derives directly from the right of the party to select that arbitrator, making the selection of the arbitrators by the parties a crucial and determinative step.⁶ Though, the power of the arbitrator as expressed in the arbitration agreement, must be within the limits established by the applicable legal system.⁷

As the decision maker of the dispute, the arbitrator is deemed to perform a judicial role. Arbitrators therefore need to exercise judicial or quasi-judicial prerogatives, an aspect of their function which makes them comparable to judges.⁸ Different from a mediator and a conciliator, an arbitrator needs to render an award that is binding on the parties and that puts an end to the particular dispute.⁹

The party appointed arbitrator has a dual function: to give confidence to the party who appointed him and to promise a fair hearing and decision by interpreting the dispute in the light of the law at his disposal, in the wisest manner possible.¹⁰ In consequence, an arbitrator's most important qualifications should be his experience in the law and in the practice of arbitration.¹¹

Hunter on International Arbitration, 251 (5th ed., Oxford University Press, Oxford, 2009).

5 For a different opinion in this topic, Jan Paulsson, *Moral Hazard In International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law*, 8 (29 April 2010). Available at: http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

6 Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *Arbitration International, The Journal of the London Court of International Arbitration*, 4, 395-429, 395 (1998). Available at: <http://ksintranet.kslaw.com/library/pdf/bishop4.pdf>.

7 Piero Bernardini, *The Role of the International Arbitrator*, 20 *agregar: Arbitration International, The Journal of the London Court of International Arbitration* 2, 113-122, 114 (2004). Available at: http://www.arbitration-icca.org/media/0/12224319103780/lcia_2004.pdf.

8 Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2007*, 226 (Fordham Law School, New York, 2007).

9 Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 12 (Kluwer Law International, The Hague, 1999).

10 Andreas F. Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 *Texas International Law Journal*, 1, 59-69, 66 (1995).

11 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 263 (5th ed., Oxford University Press, Oxford, 2009).

Entrusted by the parties with the power to provide a solution to a particular dispute and being the individual selected to interpret the law and to apply it, the standard for being an arbitrator is high. Thus, the premise that an arbitrator does not need to have any specialist training or qualifications to be able to put an end to a dispute is not always applicable, particularly in international arbitration. When an arbitrator is appointed to conduct the resolution of a dispute the arbitrator is no longer an observer, if he ever was, but an adjudicator of the solution for the parties. As it has been identified by some authors,¹² to perform the task of an arbitrator, one must be as qualified as a surgeon or pilot. The point being made here, I would venture, is that the role can only be performed by someone who has the necessary practical experience.

Since the parties to a dispute are entitled to choose their own decision maker, they tend to nominate the person who would best support their position in the dispute. That implies that in international arbitration, when choosing an arbitrator, the parties consider the knowledge, expertise, organisation and ability of the individual to resolve the dispute. All of these skills can only be exercised by a rather small group of individuals and not by anybody.

I. THE CONTEXT

In the midst of the increasing concentration on the ethical standards that lie behind the practice of international arbitration, the phenomenon of ‘repeat arbitrators’ has gained significant importance, especially since it is viewed by some with suspicion. Although arguably controversial, there is still scarce case law from which to build up a universal concept of what repeat arbitrators are. There are, however, a few academic pieces¹³ that address the concept in great detail.

12 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 263 (5th ed., Oxford University Press, Oxford, 2009).

13 Fatima-Zahra Slaoui, *The Rising Issue of ‘Repeat Arbitrators’: A Call for Clarification*, 25

A broad concept of 'repeat arbitrators' is the situation where an arbitrator has been previously appointed on several occasions by the same party, company or counsel.¹⁴ An illustrative definition of the concept of 'repeat arbitrators' was provided in a recent article on the topic which established: "The term refers to situations in which the same party (A) or companies belonging to the same group of companies as the party appoint the same arbitrator (X) in several arbitrations. A similar situation is found when the same counsel regularly appoints the same arbitrator for different, but often similar cases."¹⁵

From this definition two possible scenarios arise. Firstly, a repeated appointment of an arbitrator exists when the same individual has been appointed as arbitrator on more than one occasion by the same party –or group of companies acting in the name of such a party– in arbitration proceedings. Secondly, the issue of repeated appointment is present when an individual has been frequently appointed as arbitrator by the same counsel for distinct but similar cases.¹⁶ Other authors have determined that the 'repeat arbitrators' term could be extended to situations where individuals in arbitral proceedings sometimes act

Arbitration International, The Journal of the London Court of International Arbitration, 1, 103-119 (2009).

Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010). Available at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kapeliuk-final.pdf>.

14 For a general definition of the concept, William W. Park, *Arbitrator Integrity*, in *The Backlash against Investment Arbitration*, 189-252, 209 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010).

Fatima-Zahra Slaoui, *The Rising Issue of 'Repeat Arbitrators': A Call for Clarification*, 25 *Arbitration International, The Journal of the London Court of International Arbitration*, 1, 103-119, 109 (2009).

15 Fatima-Zahra Slaoui, *The Rising Issue of 'Repeat Arbitrators': A Call for Clarification*, 25 *Arbitration International, The Journal of the London Court of International Arbitration*, 1, 103-119, 109 (2009).

16 In the commentary of Emmanuel Gaillard on the decision rendered by the French Cour de Cassation on 6 December 2001 on the case *Société Frémarc v. Société ITM Entreprises*, the author addressed the phenomenon of repeat arbitrators as: "le même arbitre est nommé de manière répétée par la même partie dans des contentieux qui l'opposent sur des sujets semblables à des partenaires différends." Emmanuel Gaillard, *Note, Cour de cassation (2^e Chambre civile), 6 décembre 2001; Cour d'appel de Paris (1^{re} Chambre Générale), 2 avril 2003; Cour d'appel de Paris (1^{re} Chambre Civile), 16 mai 2002, 4 Revue de l'arbitrage*, 1240-1247, 1244 (2003).

as arbitrators and sometimes as counsel, or even as experts or witnesses.¹⁷ For the purposes of this article the first two situations will be analyzed.

As discussed further in the next section, the repeated nomination of arbitrators is a controversial phenomenon to the extent that it falls directly within the scope of two of the most important duties of an arbitrator, namely his independence and impartiality. When addressing the issue of ‘repeat arbitrators’, it is necessary to take into consideration the specific rules promulgated by the prominent arbitral institutions regarding transparency of arbitration proceedings and its interplay with the independence and impartiality of arbitrators. In particular, one must turn to the *Guidelines on Conflicts of Interest in International Arbitration* provided by the International Bar Association (the *IBA Guidelines*). The *IBA Guidelines* were created with the purpose of providing a list of specific situations that could call into question an arbitrator’s independence or impartiality, and therefore require disclosure within an arbitration proceeding.¹⁸

The *IBA Guidelines* classify the different type of situations that could give rise to possible conflicts of interest under three different lists: the Red, the Orange and the Green Lists.¹⁹ These lists determine the degree of threat to the standards of independence and impartiality that a particular situation may create.

17 William W. Park, *Arbitrator Integrity*, in *The Backlash against Investment Arbitration*, 189-252, 209 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010). The author is of the view that the notion of ‘repeat players’ should incorporate *individuals who change functions in the arbitral process, serving one day as advocate and another as arbitrator, thus arguably sitting in judgment of each other’s clients.*”

Pascal Hollander, *Arbitrators’ Bias Because of Previous Appointments: A Civil Law Perspective*, 5 *Transnational Dispute Management*, 4, 2 (2008).

18 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, section (3) Disclosure by the Arbitrator*. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

19 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards*. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

The issue of repeat arbitrators as identified above is addressed in the Orange List which refers to circumstances that could raise justifiable doubts as to the arbitrator's impartiality or independence.²⁰ Pursuant to the Orange List, an arbitrator has the duty to disclose the fact that within the past three years he or she has been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties;²¹ that the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties;²² and that he or she has within the past three years received more than three appointments by the same counsel or the same law firm.²³

According to the aforementioned provisions of the *IBA Guidelines*, a situation where a party appoints the same arbitrator for similar cases, and the situation where counsel or law firms regularly appoint the same arbitrator, may give rise to justifiable doubts as to the arbitrator's independence and impartiality. In that context, the *IBA Guidelines* establish a time frame (i.e., within the past three years) in order to determine when a situation of repeat appointment could give rise to justifiable doubts. The *IBA Guidelines* also establish a limit to the number of occasions when an arbitrator has been appointed repeatedly (i.e., two

20 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards*, paragraph 3. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

21 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards, Orange List*, paragraph 3.1.3. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

22 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards, Orange List*, paragraph 3.1.5. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

23 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards, Orange List*, paragraph 3.3.7. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

or more occasions when the arbitrator has been appointed by a party, and more than three appointments when the appointment is received by the same counsel or law firm). The Orange List is useful as it helps to determine if certain situations should be disclosed by the arbitrator; each situation should be reviewed on a case by case basis considering that a particular situation may or may not give rise to *justifiable doubts* as to the arbitrator's independence or impartiality.

The applicability of the *IBA Guidelines* to the 'repeat arbitrators' issue is still under analysis, and is a topic which has been recently addressed by the IBA Conflicts of Interest Subcommittee in the report *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009* (the *Report of the Subcommittee*). According to the *Report of the Subcommittee*, one of the most common grounds on which contending parties challenge the appointment of arbitrators before the Court of Arbitration of the International Chamber of Commerce (ICC) is where an arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.²⁴

The *IBA Guidelines* have been relied upon by parties, arbitration institutions and in some cases by courts,²⁵ in the course of arbitration proceedings. However, it is important to take into account that they are still merely guidelines.²⁶

24 International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 29 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

For the Report of the Subcommittee, the Court of Arbitration of the International Chamber of Commerce, ICC, provided statistics of examined cases between 1 July 2004 and 1 August 2009 in which the ICC Court was called upon to decide on a challenge or contested confirmation of arbitrators. According to the report provided for by the ICC, Paragraph 3.1.5 from the Orange List was one of the most referenced articles.

25 *Korsnäs Aktiebolag v. AB Fortum Värme samägt med Stockholms stad* [Svea Court of Appeal], 10 December 2008, unpublished. Reported in Karl-Erik Danielsson & Björn Tude, *Sweden: Two different arbitration cases – The role of the IBA Guidelines on conflicts of interest in international arbitration in Sweden*, 28 *International Financial Law Review*, 33 (2009). Available at: <http://www.iflr.com/Article/2176818/Channel/193438/Sweden-Two-different-arbitration-cases.html>.

26 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and*

II. THE IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

As mentioned above, the *IBA Guidelines* were created with the purpose of providing a set of specialized standards to the challenge of an arbitrator, and more specificity to the general principles established by the leading arbitration institutions in this regard. Although these leading institutions do not contemplate a universal standard to be applied reiteratively when a challenge to an arbitrator takes place, the rules of the leading arbitration institutions consider impartiality and independence as the principal standards upon which a challenge to an arbitrator may be found.²⁷

Undoubtedly, when discussing the issue of repeat arbitrators the standards of impartiality and independence come into play. The Arbitration Rules of the United Nations Commission on Trade Law, UNCITRAL,²⁸ the Arbitration Rules of the London Court of International Arbitration, LCIA,²⁹ and the International Arbitration Rules of the International Centre for Dispute Resolution, ICDR³⁰ set forth the challenge on the basis of circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. For example, the Rules of Arbitration of the ICC prescribe an "alleged lack of independence",³¹ and the Convention on the Settlement of Invest-

Hunter on International Arbitration, 272 (5th ed., Oxford University Press, Oxford, 2009). Emmanuel Gaillard, *Note, Cour de cassation (2^e Chambre civile), 6 décembre 2001; Cour d'appel de Paris (1^{re} Chambre Générale), 2 avril 2003; Cour d'appel de Paris (1^{re} Chambre Civile), 16 mai 2002*, 4 *Revue de l'arbitrage*, 1240-1247, 1244 (2003).

With respect to the applicability of the *IBA Guidelines*, Professor Gaillard established that the situations contemplated by the *IBA Guidelines* regarding the issue of 'repeat arbitrators' should not be considered as grounds for a challenge of an arbitrator but just as a way of identifying the duty to disclose the circumstance.

- 27 Gary B. Born, *International Commercial Arbitration*, 1556 (Kluwer Law International, The Hague, 2009).
- 28 United Nations Commission on Trade Law, UNCITRAL, *Arbitration Rules*, Article 12(1), as revised in 2010. Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.
- 29 London Court of International Arbitration, LCIA, *Arbitration Rules*, Article 10.3, effective 1 January 1998. Available at: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.
- 30 International Centre for Dispute Resolution, ICDR, *International Arbitration Rules*, Article 8(1). Available at: <http://www.adr.org/sp.asp?id=33994>.
- 31 International Court of Arbitration of the International Chamber of Commerce, ICC,

ment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes, ICSID, establishes the standards of “high moral character” and “independent judgment”.³² Moreover, the *IBA Guidelines* were founded on the basis of the principles of independence and impartiality.³³

Thus, the issue of ‘repeat arbitrators’ is to be analyzed in the light of such principles.³⁴ To this end, some authors have recognized that the impartiality of arbitrators may be at risk when the same individual has been appointed repeatedly by the same party.³⁵

Although the concepts of independence and impartiality are similar, they should be interpreted separately. On the one hand, it has been established that an arbitrator will be deemed ‘dependent’ on the basis of an existing relationship between the arbitrator and one of the parties. Thus, in order to determine whether an arbitrator is independent, an objective test must be performed. On the other hand, impartiality is related to the arbitrator’s state of mind, which may exhibit an apparent bias

Rules of Arbitration, Article 11(1), in force as from 1 January 1998. http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

International Court of Arbitration of the International Chamber of Commerce, ICC, *Rules of Arbitration*, Article 14(1), in force as from 1 January 2012. http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf.

32 International Centre for Settlement of Investment Disputes, ICSID, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Article 14(1) (Washington, April 2006). Available at: http://icsid.worldbank.org/ICSID/Static-Files/basicdoc/CRR_English-final.pdf.

33 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Explanation to General Standard 2*. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

34 This issue may attract less attention in diplomatic arbitration where fewer constraints are placed upon impartiality and independence. For a discussion on the differences between judicial and diplomatic arbitration, Stephen Myron Schwebel, *The prospects for International Arbitration: Inter-State Disputes, Comments on a paper by Ambassador M.C.W. Pinto*, in *International Arbitration: Past and Prospects: a symposium to commemorate the centenary of the birth of professor J.H.W. Verzijl (1888-1987)*, 101-108 (Jan Hendrik Willem Verzijl & Alfred H. A. Soons, eds., Martinus Nijhoff Publishers, Dordrecht, 1990).

35 Pascal Hollander, *Arbitrators’ Bias Because of Previous Appointments: A Civil Law Perspective*, 5 *Transnational Dispute Management*, 4, 2 (2008).

in relation to the issues of a particular dispute. Therefore, in this context, a subjective analysis must be carried out.³⁶

To determine whether an arbitrator has compromised his duties of independence and impartiality when he has been appointed on repeated occasions by the same party or group of companies with respect to similar issues, or when he has been appointed frequently by the same counsel for distinct but similar cases is a question that must be resolved on a case by case basis. This reasoning calls for the assessment of the specific circumstances under the view of objective and subjective perspectives. The answers such an assessment yield will always vary.

Nonetheless, any possible concern regarding the standards of independence and impartiality could be resolved beforehand by disclosing the relevant circumstances that give rise to these doubts, and such disclosure will stop any future challenge.

III. WHAT IS AT STAKE?

Regarding the questions that may arise with a repeated nomination of an arbitrator in terms of independence and impartiality, there are factors that are worth bearing in mind and that are the basis of discussions about the issue. Besides the fact that arbitrators may want to be reappointed,³⁷ there are other factors that must be taken into consideration such as, *inter alia*, (i) whether an economic reward represents an incentive for the arbitrator to be reappointed; (ii) whether the reappointment of the arbitrator fosters a relationship with respect to the party who appointed him; and (ii) the potential impact of such factors when the reputation of the arbitrator is at stake.

36 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, 267-268 (5th ed., Oxford University Press, Oxford, 2009).

37 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 14 (1997). When describing the motivations behind seeking the job of an international arbitrator, Paulsson noted: "Whatever their motivation, arbitrators tend to want to be reappointed."

A. To what extent is economic reward an incentive?

It has been suggested that the arbitrator's financial reward can constitute an incentive for the arbitrator's desire to be reappointed. It would be *naïve* to consider that the economical reward of a repeated appointment is not attractive. After all, the arbitrator's fees in international proceedings are often generous; therefore, the more arbitrations, the better the income.

This line of reasoning, however, could prove to be misleading: firstly, the income of an occasional arbitrator is unsteady;³⁸ secondly, "arbitrators who are much in demand are likely to have the ability and the opportunity to earn at least equal rewards in other endeavors";³⁹ and thirdly, because impartiality and independence do not depend on money, it is arguable that an arbitrator may be honest and unbiased, regardless of the money he earns.

Thus, parallel to the income incentive there are other more important incentives that may motivate an arbitrator to be repeatedly appointed, such as the fact that an arbitrator is gratified by peer recognition and accomplishment, as Jan Paulsson wisely asserts.⁴⁰

B. To what extent the reappointment of an arbitrator fosters a relationship?

One of the questions that could be asked in the scenario of a frequent nomination of an arbitrator by the same party is whether the arbitrator may be motivated to seek reappointment so as to maintain a longstanding relationship with the appointing party itself, or its affiliate or counsel.⁴¹ Such a circumstance

38 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 13 (1997).

39 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 13 (1997).

40 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 15 (1997).

41 On this matter, Park has suggested that: "*Nuances appear at some point between extremes. The somewhat ambiguous notion of friendship might encompass business associates who*

would put the independence and impartiality of an arbitrator at risk. Nonetheless, as has been analyzed above, there are other factors that are at stake when frequently appointing an arbitrator. It is clear that confidence and knowledge of the arbitrator's work would explain, to a considerable extent, the party's interest in reappointing him. Whether or not the party, its affiliate or counsel relied on the experience of an arbitrator and whether this influences the arbitrator's independence and impartiality will depend on the circumstances in question.

Demonstrating the existence of a longstanding relationship may be difficult to prove and is a question to be resolved on a case by case basis. However, one element that could help to answer this kind of subjective question, could be the number of times an arbitrator has been reappointed (as the *IBA Guidelines* propose). In this regard, it is worth mentioning the manner in which Swedish courts approached this issue. In the case of *Korsnäs Aktiebolag v. AB Fortum Värme*,⁴² the claimant sought to set aside the award, arguing that the arbitrator appointed by the respondent did not meet the impartiality standards required by Swedish law on the basis that the respondent's arbitrator had been repeatedly appointed three times by the respondent's law firm in three years.⁴³ Furthermore, it was alleged that not only had the arbitrator been previously appointed by the respondent's counsel, but that the same arbitrator had been appointed twice as chairman of arbitral panels where one of the co-arbitrators had been appointed by a party represented by counsel from the

occasionally share a meal, as well as confidants who exchange regular calls and visits. In some cases, the shared cup of coffee can become a deeper relationship." William W. Park, *Arbitrator Integrity*, in *The Backlash against Investment Arbitration*, 189-252, 199 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010).

42 Karl-Erik Danielsson & Björn Tude, *Sweden: Two different arbitration cases – The role of the IBA Guidelines on conflicts of interest in international arbitration in Sweden*, 28 *International Financial Law Review*, 33 (2009). Available at: <http://www.iflr.com/Article/2176818/Channel/193438/Sweden-Two-different-arbitration-cases.html>.

43 International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 18 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

respondent's law firm.⁴⁴ For the Svea Court of Appeal, this did not seem to be a strong enough argument to set aside the award.⁴⁵

The Court concluded that the arbitrator had not been appointed a sufficient number of times to compromise his independence and impartiality in the light of the *IBA Guidelines*, which establish that the arbitrator, within the past three years, must have received more than three appointments by the same counsel or the same law firm, to be compromised.⁴⁶

The case was appealed to the Supreme Court,⁴⁷ which also determined that the arbitrator had not been appointed enough times to consider the situation a sufficient ground to challenge the award. In addition, the Court pointed out that failure to disclose this type of relationship by no means implied an automatic disqualification of the arbitrator.⁴⁸ Contrary to the Svea Court of Appeal, the decision of the Swedish Supreme Court made no explicit reference to the *IBA Guidelines*. That said, it is worthy of note that the Supreme Court continued to place so much weight on the number of appointments the arbitrator had received to determine it was an insignificant number compared to all the other cases to which the arbitrator was appointed dur-

44 Karl-Erik Danielsson & Björn Tude, *Sweden: Two different arbitration cases – The role of the IBA Guidelines on conflicts of interest in international arbitration in Sweden*, 28 *International Financial Law Review*, 33 (2009). Available at: <http://www.iflr.com/Article/2176818/Channel/193438/Sweden-Two-different-arbitration-cases.html>. The authors establish that: “the party appointed arbitrator had on two occasions been appointed as chairman of arbitral tribunals in which one of the arbitrators had been appointed by a party represented by counsel from the law firm.”

45 International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 18 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

46 International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, Part II: Practical Application of the General Standards, Orange List*, paragraph 3.3.7. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

47 Björn Tude, *A firm favourite: Supreme Court Rules on Arbitrator Bias*, *International Law Office* [on line] (2010), commenting the decision of the Supreme Court Case T 156-09. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=919eb483-78dc-4c2b-924a-2b628b0e1456>.

48 Björn Tude, *A firm favourite: Supreme Court Rules on Arbitrator Bias*, *International Law Office* [on line] (2010), commenting the decision of the Supreme Court Case T 156-09. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=919eb483-78dc-4c2b-924a-2b628b0e1456>.

ing the time in question.⁴⁹ By relying so heavily on a numbers based approach, some may say that the Svea Court of Appeal and the Supreme Court exhibited an overly orthodox attitude.

C. Reputation as an incentive to maintain the impartiality and independence of the arbitrator

Parallel to the aspects that have been outlined above, there is also a matter that is assessed by arbitrators when they face a repeated appointment and which could prove to have significant, if not crucial, value to them. This is the issue of the arbitrators' reputation –in this case not in terms of their experience and knowledge– but in terms of what their peers and the arbitration community in general think of them.

In this regard, on the one hand it is argued that when arbitrators are repeatedly appointed by the same party they can feel that they must do their best to support the argument of the appointing party. On the other hand, it has also been suggested that, often, the arbitrators who dissent are those who have been appointed by the unsuccessful party.⁵⁰ Such situations may affect the arbitrator's impartiality and independence. With respect to

49 Björn Tude, *A firm favourite: Supreme Court Rules on Arbitrator Bias*, *International Law Office* [on line] (2010), commenting the decision of the Supreme Court Case T 156-09. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=919eb483-78dc-4c2b-924a-2b628b0e1456>.

According to the analysis of the author: "*The Supreme Court declared that when a law firm frequently appoints a particular person as arbitrator, it can create the impression that the arbitrator has ties to the firm which can diminish confidence in the arbitrator's impartiality. According to the Supreme Court, establishing whether this is the situation must be determined on a case-by-case basis by taking into account the number of previous engagements and the scope thereof. (...) The court further stated that the determination should differentiate between a party appointment and the chairmanship of the tribunal. However, the court did not believe that an appointment as chairman created such ties to a particular law firm as to diminish confidence in the arbitrator.*"

50 This was discussed by Jan Paulsson on his, *Moral Hazard In International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law*, 9 (29 April 2010). Available at: http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

See also, the commentary posted on the Kluwer Arbitration Blog with respect to Jan Paulsson's inaugural lecture by Alexis Mourre, *Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, posted on 5 October 2010, available at: <http://kluwearbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>.

this matter, it is however important to take into account that safeguarding one's professional status is almost sacred to an arbitrator.

The practice of international arbitration is limited to a group of people who deeply care about the respect of their peers and colleagues in both personal and professional terms, irrespective of whether the arbitration practitioner works as counsel, as an academic or as an arbitrator.⁵¹

Thus, it is not only the desire to do a good job and to apply the law wisely to a dispute that is relevant when an arbitrator is discharging his duties. Arbitrators may also feel compelled to be far from any circumstance that could potentially impact their reputation. Therefore, from a practical point of view, the strongest incentive for an arbitrator to refrain from compromising his independence and impartiality when the arbitrator is frequently nominated by a party could be the fear of putting his reputation at risk.⁵²

Hence, an arbitrator's reputation *vis-à-vis* his peers and the party who appointed him can prove to be a significant motivation for maintaining his duty of independence and impartiality.

IV. POSSIBLE SCENARIOS

When thinking about the reasons that may motivate a party to appoint the same arbitrator on more than one occasion two different scenarios could be distinguished. On the one hand,

51 William W. Park, *Arbitrator Integrity*, in *The Backlash against Investment Arbitration*, 189-252, 209 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010) when addressing specifically the issue of 'repeat players'.

52 On the issue of reputation from the perspective of international arbitrators, Jan Paulsson stated: "*Their stock in trade is not a reputation for helping their friends, but one of being straight and competent. To the extent they are concerned with the impression they make, they care about the views of all participants in the process, not just those who are directly responsible for their presence in a particular case.*" Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 20 (1997).
Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90, 49 (2010). Available at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kapeliuk-final.pdf>.

scenarios I propose to call 'factual repeat arbitrators', on the other hand scenarios I propose to call 'legal repeat arbitrators'.⁵³

A. *The 'factual repeat arbitrators'*

If an arbitrator who is being appointed on several occasions has previously worked on the same set of facts or on the same transaction, common sense would dictate to seek his participation again. In this regard, Yves Derains has stated "in such cases a party may nominate the same arbitrator in the hope that identical Arbitral Tribunals will be constituted in the related arbitrations so as to reduce the possibility of inconsistent results [...] A party may feel that designating a common arbitrator will nevertheless serve the useful purpose of ensuring that one of the arbitrators, at least, is already familiar with the contract or project that is the subject of the arbitration."⁵⁴

The downside to this approach is that the other party may feel that the arbitrator may have an advantage or knowledge of the facts superior to that of the other co-arbitrators. In this respect, Professor Emmanuel Gaillard noted that the arbitrator who has been repeatedly appointed by the same party risks losing his or her independence with respect to that party. According to Professor Gaillard, the risk of compromising independence or impartiality derives from the fact that there are issues capable of raising the same questions of fact or law which may give the other arbitrator who has previously worked with such facts/law an advantage as compared to his colleagues, and such an advantage would justify an arbitrator's challenge.⁵⁵

53 Pascal Hollander has presented an interesting approach with respect to the issue of bias through previous appointments. He suggests that previous appointments can give rise to a bias that relates to the subject matter of the dispute, or to a bias that indicates a certain link to one of the parties. Pascal Hollander, *Arbitrators' Bias Because of Previous Appointments: A Civil Law Perspective*, 5 *Transnational Dispute Management*, 4, 1 (2008).

54 Yves Derains & Eric A. Schwartz, *A Guide to the ICC [Court of Arbitration of the International Chamber of Commerce] Rules of Arbitration*, 129 (2nd ed., Kluwer Law International, The Hague, 2005).

55 "L'arbitre nommé de manière répétée par la même partie risque de perdre de ce seul fait son indépendance à l'égard de cette partie. [...] Le fait qu'il s'agisse d'affaires susceptibles de soulever les mêmes questions de fait ou de droit donne en outre à l'arbitre qui en a connu à

This is more common in international commercial arbitrations, where a single contract performed over long periods of time can give rise to multiple disputes and multiple arbitrations. This would also be the case in arbitrations concerning specific sectors or industries, where specialized knowledge of the subject-matter is required, and the pool of arbitrators is even more reduced (*e.g.* maritime or commodities arbitrations⁵⁶).

Therefore, it is not very likely that an arbitrator would be successfully challenged in this context, provided that the previous involvement of the arbitrator is duly disclosed to the parties before the proceedings take place.

Two French cases and one Austrian case offer an illustration on this point. In the first case, *Qatar v. Creighton*,⁵⁷ the respondent Creighton had appointed the same arbitrator in three different arbitral proceedings arising out of the same contract the respondent had entered into with the State of Qatar. The French *Cour de Cassation* upheld a decision of the Paris *Cour d'appel* that had established that there was no basis to call into question the impartiality of an arbitrator that had acted as an arbitrator in previous proceedings unless such an arbitrator had been asked to decide on the liability of a third party.

In the second case, *Frémarc v. ITM Entreprises*,⁵⁸ the respondent ITM Entreprises, a franchiser, had appointed the same

plusieurs reprises dans le passe un avantage sur ses collègues qui, à lui seul, devrait être de nature à justifier sa récusation". Emmanuel Gaillard, *Note, Cour de cassation (2^e Chambre civile)*, 6 décembre 2001; *Cour d'appel de Paris (1^{re} Chambre Générale)*, 2 avril 2003; *Cour d'appel de Paris (1^{re} Chambre Civile)*, 16 mai 2002, 4 *Revue de l'arbitrage*, 1240-1247, 1245 (2003).

56 Pursuant to the *IBA Guidelines*: "It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitration from a small, specialized pool." International Bar Association, IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, section (3) Disclosure by the Arbitrator*. Available at: www.ibanet.org, http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

57 *State of Qatar v. Creighton Ltd.* *Cour de Cassation*, 16 mars 1999, 2 *Revue de l'arbitrage*, 309 (1999).

Pascal Hollander, *Arbitrators' Bias Because of Previous Appointments: A Civil Law Perspective*, 5 *Transnational Dispute Management*, 4, 3-4 (2008).

58 *Frémarc v. ITM Entreprises.* *Cour de Cassation (2^e Chambre Civile)*, 6 décembre 2001, 4 *Revue de l'arbitrage*, 1231-1233 (2003).

arbitrator for different arbitration proceedings the respondent had conducted against some of the respondent's franchisers.⁵⁹ This circumstance, which was not disclosed at the moment of the constitution of the tribunal in the arbitration with Frémarc, was the basis for the *Cour de Cassation* to annul the decision of the Paris Cour d'appel which had stated that the tribunal was validly constituted. The *Cour de Cassation* based its reasoning, not on the fact that the arbitrator had been nominated on several occasions by the respondent, but on the fact that the arbitrator had failed to disclose that he had been previously appointed as an arbitrator. From the aforementioned decision, it is clear that the issue of repeated appointments of an arbitrator where similar matters are at stake is not challengeable per se. However, the failure to disclose may give rise to more serious consequences.

The third case that has addressed this issue corresponds to a decision of the Commercial Court of Vienna rendered in 2007.⁶⁰ The Report of the Subcommittee makes specific reference to this case. According to this report, the claimant challenged a decision rendered under the Rules of the International Arbitral Centre of the Austrian Federal Economic Chamber,⁶¹ arguing that the respondent had appointed the same arbitrator in four occasions prior to the case.

A key point in this case was that, according to the claimant, all the previous cases dealt with the same matters, thus questioning the arbitrator's impartiality as he had already developed an opinion with regards to the case at hand. On two of the four

59 Emmanuel Gaillard, *Note, Cour de cassation (2^e Chambre civile), 6 décembre 2001; Cour d'appel de Paris (1^{re} Chambre Générale), 2 avril 2003; Cour d'appel de Paris (1^{re} Chambre Civile), 16 mai 2002*, 4 *Revue de l'arbitrage*, 1240-1247, 1244 (2003).

60 *Case 16 No. 2/07w*. Vienna Commercial Court, 24 July 2007, decision unpublished. The reference to this case is based on the abstract which the Report of the Subcommittee. International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 7 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

61 Vienna International Arbitral Centre, International Arbitral Centre of the Austrian Federal Economic Chamber, VIAC, Rules of Arbitration and Conciliation, adopted by the Enlarged Presiding Committee of the Austrian Federal Economic Chamber on 3 May 2006, with effect from 1 July 2006. Available at: http://www.internationales-schiedsgericht.at/images/stories/documents/en/VIAC_Arbitration_Rules_2006_1.pdf.

cases, the claimant was also a party, but in the course of the other two cases the arbitrator had allegedly acquired information that he was not able to share with the rest of the tribunal. This, according to the claimant, created an imbalance of knowledge among the arbitrators. The claimant considered that the Vienna Commercial Court should take the *IBA Guidelines* into consideration to decide the challenge.

The Vienna Commercial Court decided to dismiss the challenge. According to the Report of the Subcommittee, the Vienna Commercial Court “noted that the challenged arbitrator’s prior experience would allow him to suggest further evidentiary measures in order to fully elucidate the factual and legal issues in dispute.”⁶² In fact, the Court did not consider the repeat appointment to be a negative issue. As outlined in the report, the court “clearly rejected the view taken by the claimant that an arbitrator who has already been involved in prior related proceedings is necessarily partial because he has already formed an opinion on the matter.”⁶³

It is clear from the above that the Vienna Commercial Court’s reasoning seems to have a very favorable appreciation of the issue of repeat arbitration when it is presented on circumstances where similar factual matters arise.

Thus, in the light of the decisions analyzed above,⁶⁴ it could be argued that when it comes to ‘factual repeat arbitrators’, national courts –at least the few that have dealt with the issue– tend to favor the repeat appointment notwithstanding the fact that the duty to disclose such circumstances should be at the forefront

62 International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 9 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

63 International Bar Association, IBA, IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 *Dispute Resolution International*, 1, 5-53, 9 (2010). Available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e545a3e1-13af-4d75-ad50-36d29c2777b4#1>.

64 For another interesting example of ‘factual repeat arbitrators’, Devashish Krishan, *London Court of International Arbitration: Introductory note to Encana Corporation v. Republic of Ecuador*, 45 *International Legal Materials*, 895-900, 895 (2006).

of the mind of the arbitrators when dealing with these kind of situations.

B. The 'legal repeat arbitrators'

A party may prefer to nominate the same arbitrator on frequent occasions because of the views he has previously taken with respect to certain legal issues. It would be illogical and even foolish to appoint an arbitrator who has publicly given an opinion (in an award, an article or otherwise) contrary to the interests of that party on the same legal issue.⁶⁵

This raises the question of predisposition. To what extent is the arbitrator predisposed to solving the legal issue in the same way in the eventuality of second arbitration proceedings? The arbitrator himself may be concerned with showing consistency in his opinions.

Jan Paulsson is of the view that such doctrinal positions are not per se enough to disqualify arbitrators, and nor are they for judges. One would not say that a judge is predisposed towards or against a case, because he has already decided similar cases before. For Paulsson, only when an arbitrator has given his opinion on the relevant case (namely, when he has given a legal opinion on the very facts and issues), would he be put in a situation of bias.⁶⁶ Moreover, other authors have considered that the desire to maintain uniformity of jurisprudence may bring an undue legitimacy and precedential weight to particular legal conclusions.⁶⁷ Needless to say, a desire to fashion law should never be considered in isolation of independence and impartiality.

65 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 15 (1997).

66 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 15 (1997). The author noted that: "predisposition is disqualifying only if it relates directly to the relevant case [...] [for example] someone who has given an opinion to the effect that the particular facts of a dispute do or do not give rise to a valid cause of action."

67 William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, in *The Backlash against Investment Arbitration*, 407-432, 426-427 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, eds., Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2010).

Furthermore, the question of repeat legal arbitrators may occur more often in investment arbitrations where the applicable law is a bilateral investment treaty, as those treaties are generally based upon the same legal standards (*e.g.* fair and equitable treatment, expropriation, national treatment, etc.) and, therefore, there are more opportunities to decide on the same set of legal rules, than there are in commercial arbitrations.

According to the above, the determination of whether an arbitrator who has been repeatedly appointed is predisposed one way or another when he is to decide on an issue upon which he has already manifested his view will ultimately depend on the similarity of the factual circumstances.

C. The repeated appointments in numbers

The number of investment disputes has increased exponentially in the last decade. It is still argued that there is a “*relatively small number of arbitrators who are involved*”⁶⁸ therein. Thus, for the purposes of this piece it is important to mention how the issue of repeat arbitrators has been addressed in investment arbitration proceedings. The recent article of Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, offers a thorough study on the issue of ‘repeat arbitrators’ in investment arbitration. For that purpose, Kapeliuk conducted research on the number of international arbitrators that had been appointed in the arbitration cases registered at ICSID between January 1994 and September 2009. For her study, the author classified as “elite arbitrators” the arbitrators “who were appointed at least 4 times to cases registered and concluded during the period under analysis.” On the contrary, the author called “ordinary arbitrators” those

68 See, the Opening Remarks by Roberto Dañino, former Secretary of ICSID. Roberto Dañino, *Opening Remarks at the Symposium Making the Most of International Investment Agreements* (Paris, 12 December 2005). Available at: <http://www.oecd.org/dataoecd/5/8/36053800.pdf>.

arbitrators who were “selected less than 4 times to serve on ICSID tribunals.”⁶⁹

The study of Kapeliuk reflected that there were 131 concluded cases in which 175 arbitrators were appointed. Of that pool of 175 appointed arbitrators, 26 were selected at least four times (“elite arbitrators”), 18 arbitrators were chosen 3 times, 24 arbitrators were appointed twice and 107 once.⁷⁰

According to these statistics the percentage of arbitrators who might be identified as “elite arbitrators” is 14.9% of all the arbitrators. If one were to rely on these figures, it would be fair to conclude that there are 68 arbitrators, or 39% of the total, who have been nominated more than once to an arbitration panel and that repeat appointments are the exception. However, these figures could only be taken into account to determine the circumstances where arbitrators have been frequently selected, irrespective of whether they were appointed by the same party, affiliate of that party or counsel.

From the study by Kapeliuk it is worth taking into consideration what the research reveals in terms of the qualifications of the arbitrators who constituted the group of ‘elite arbitrators’. According to Kapeliuk, the elite arbitrators were a combination of those in private practice and those holding academic positions, some of them highly regarded in their posts.⁷¹ This fact supports the contention established at the beginning of this article that arbitrators are chosen mostly because of their professional qualifications, experience in the law and in the practice of arbitration. Interestingly, it has also been suggested that a different standard may apply to developing countries where a

69 Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010). Available at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kapeliuk-final.pdf>.

70 Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010). Available at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kapeliuk-final.pdf>.

71 Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010). Available at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Kapeliuk-final.pdf>.

lack of suitable candidates means repeat appointments necessarily have to occur.⁷²

For the purposes of further analysis on the issue of ‘repeat arbitrators’ it would be interesting to consider studies on the number of times an arbitrator has been appointed by a same specific party, affiliate of the party or counsel. Furthermore, other analysis could concentrate on how factors such as the nationality, gender or age of the arbitrators may influence the decision of a party when appointing an arbitrator.

72 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 *Journal International Arbitration*, 4, 13-21, 15 (1997), citing W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (2nd ed., 1990), at 22. Please note that this passage was erased from subsequent editions of the latter text.

CONCLUSION

To determine if the frequent nomination of an arbitrator puts an arbitrator's duty of impartiality and independence at risk is a question that needs to be addressed on a case by case basis. This analysis is the same subjective assessment that an arbitrator faces when he has to decide whether or not to disclose the circumstance that may or may not raise *justifiable doubts* as to his independence and impartiality. Therefore, the issue of 'repeat arbitrators' is a truly subjective one.

Behind the frequent nomination of an arbitrator there are many variables that must be taken into consideration. Firstly, the expertise, practice and knowledge of the arbitrator give confidence to a party who seeks an amenable solution to the dispute in which it is involved. Secondly, as previously addressed, the issue of 'repeat arbitrators' may seem attractive to an arbitrator. Nevertheless, in spite of the attractions repeat appointments may represent to an arbitrator, respect for his own reputation will always play a fundamental role. It is for reputation's sake that arbitrators tend to be cautious.

There is still substantial work to be done regarding the issue of 'repeat arbitrators'. Although parameters have been established by, inter alia, the *IBA Guidelines*, select decisions of national courts, the opinions of certain practitioners, and studies based on empirical research, the subject of repeat appointments of arbitrators warrants greater development.

It is worthwhile remembering though, that the practice of international arbitration demands the participation of highly specialized practitioners, given the sophistication of the underlying affairs i.e., elaborate transactions, diverse nationalities of the parties, a globalized setting and, most importantly, multiple legal systems. The arbitrators nominated to put an end to a dispute must necessarily be as sophisticated as the dispute itself.

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