INDEPENDENCE OF ARBITRATORS

Cahit AGAOGLU*

The development of arbitration in international commercial relations is relatively recent. However, the notion of arbitration is very ancient. “No, arbitration is not at development for a few years, there is a permanent evolution for four thousand years” as stated by Mr. Clay in his thesis1. Similarly, Mr. Matray states that “Arbitration behoves to the past, present and to the future. What is remarkable for it, its permanence”2.

Not surprisingly and due in large part to this ancient concept’s advantages of confidentiality, speed, cost-effectiveness, party-autonomy access to expert arbitrators, the use of arbitration in international commercial disputes has increased dramatically of late years. All of arbitration’s advantages contribute to its success; it is the author’s belief that the arbitrator’s experience and reputation is a major reason for their appointment although it may imply previous contacts with the parties.

The relationship between the parties and the arbitrator is normally based on a contract entered into after the appointment by which the arbitrator agrees to settle the dispute between the parties for certain remuneration3. Besides its contractual character, the agreement is also jurisdictional in character, meaning that arbitrators have a quasi-judicial power to resolve disputes and issue an award with similar effects to a judgment. The majority of authors note this underlying judicial character4. Indispensable to this jurisdictional mission is that arbitrators must meet some minimum requirements. According to the national arbitration laws and rules of arbitration institutions, the first requirement asked of the arbitrator is that the arbitrator remains independent.

In almost every national law the independence of arbitrators has been mentioned, sometimes alone and sometimes along with the impartiality or neutrality or both. However, most often the independence and impartiality are referred to together in national arbitration laws and institution rules. In spite of this affirmation, it is hard to find a definition of independence or clarify the difference with impartiality or neutrality. It is sometimes said that independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind5, or sometimes it is said that impartiality concerns the relationship between the arbitrator and the subject matter of the dispute, while independence relates to the relationship between the arbitrator and the parties6. However there is no internationally accepted definition of “independence”. Thus, it has been written that “the

---

* Lecturer in International Commercial Arbitration in School of International Arbitration Queen Mary University of London (The author assumes full responsibility for the translation into English or the French texts quoted).
definition of “independence” remains elusive”. For the definition of independence Grigera Naón noted that “arbitral independence is an elusive concept which is beyond rational description in the abstract, may only be identified when one sees it often depends on who is seeing it”.

Therefore this article first provides a brief introduction about “who” is seeing independence by the affirmation of independence, impartiality and neutrality of the arbitrator in the arbitration institutions (I), then in the international echelon with the problem of utilisation of Article 6 of the European Convention on Human Rights (ECHR) to arbitration in French and English jurisprudence (II) the national legislative perspective (III) and concludes by focusing on a comparison of French and English jurisprudence with reference to the 2004 AAA-ABA Code of Ethics and the IBA Guidelines on Conflicts of Interest in International Arbitration.

I) Affirmation of the Independence of Arbitrators by Arbitration Institutions

Multiple types of arbitration institutions are recognised in terms of their different characters. René David distinguished arbitration institutions in regards to their public, semi-public or private character, their national or international character, or their scope of authority. Speaking in these terms Mr. David stated that some arbitration institutions, such as the London Court of International Arbitration (LCIA) may administer occupied all types of arbitration. Other institutions only administer arbitration regarding some kind of special dispute: purely international disputes (ICC), or disputes concerning a determinate product (cacao, cinema, café etc.).

This article demonstrates the importance of the independence of arbitrators by examining its inclusion within the arbitration rules of a majority of arbitral institutions, beginning with the LCIA

A) LCIA

LCIA is one of the oldest arbitration institutions in the world, created in 1892. Its current rules are relevant valuable from 1st January 1998.

LCIA Rules provide for independence of arbitrators and also for their impartiality. Article 5(2) of the London Court of International Arbitration Rules provides

“All arbitrators conducting arbitration under these rules shall be and remain at all times impartial and independent of the parties... ”.

LCIA also requires that an arbitrator submit a written résumé of past and present professional positions and a written declaration to the effect of his independence or impartiality.

B) ICC

For the number of cases and number of appeal to all arbitration institutions see http://schoolofinternationalarbitration.org/under arbitration institutions/statistics
International Commercial Centre (ICC) Rules, differently from LCIA, regulates only the independence of arbitrators. The first rules of ICC were adopted in 1922. From this date the rules were revised in 1955, 1975, 1988 and finally in 1998, the most current version of the rules. The notion of independence came into force with the modifications made in 1975\textsuperscript{12} and was solidified by the revision in 1988. Article 7.1 of ICC Rules provides only for the independence of arbitrators. It provides

“Every arbitrator must be and remain independent of the parties involved in the arbitration”.

The importance of the independence of arbitrators is also evident in Article 7(2) which requires arbitrators to submit a written declaration to the General Secretary of ICC any facts or circumstances which might be of such a nature as to call in the question the arbitrator’s independence in the eyes of the parties. Finally Article 11(2) of the ICC Rules again regulates the independence of arbitrators by providing for the possibility of challenging an arbitrator in the event of failure of independence.

According to Marc Henry the Rules of 1998 remove clearly all the freedom of abrogation in the principle of independence for arbitrators chosen by the parties or for the presidents of the arbitral tribunal. He considers that an arbitral tribunal shall refuse the confirmation of arbitrators which they know in advance are unable to respect the duty of independence regulated in Article 7.1 of the ICC Rules. In the absence of the previous declaration he thinks that if necessary the ICC tribunal shall replace the arbitrator lacking independence under 12(2) of the ICC Rules, even in the absence of the consent of the parties\textsuperscript{13}.

C) UNCITRAL Rules

As reported by the yearbooks of the United Nations, the Rules of Arbitration were approved on 28 April 1976 by UNCITRAL\textsuperscript{14}, adopted by the General Assembly on 15 December 1976. The question of independence of arbitrators is not directly or expressly expressed in the UNCITRAL rules but indirectly, the independence of arbitrator has been regulated in three ways:

Article 6.4 of the UNCITRAL Rules provides that

“The 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”.

We see again independence and impartiality together differently from ICC. We should note that this obligation does not exist in the nomination of the arbitrator by an appointing authority in state of no chose by one of the parties.

Article 10.1 of the Rules further regulates the challenge of any arbitrator, if circumstances give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

\textsuperscript{12} Article 2(4) ; taken from F. EISENMANN: “Le Nouveau Règlement d’arbitrage de la CCI”, DPCI 1975, p. 358.


Finally, again under the section of “challenge of arbitrators”, Article 9 of the Rules require all arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality and independence.

D) ICSID

ICSID created in the safeguard of the International Bank for Reconstruction and Development (the World Bank) was opened to the signature on 18 March 1965 and entered into force on 14 October 1966. Recent amendments are effective from 10 April 2006.


The notion of independence of arbitrators is regulated in both the Washington Convention and Arbitration Rules. Article 14 (1) of the Washington Convention provides

“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”

Significantly, the Washington Convention does not refer to the impartiality. Moreover, in case of lack of the qualities mentioned in the Article 14 (1), it provides disqualification of its arbitrator with the Article 5715.

In addition, under the article 6 (2) of the arbitration rules of ICSID creates an obligation of preliminary declaration of the arbitrators with which they confirm in absolute terms that there is no susceptible reason to disqualify them as a member of the arbitral tribunal.

E) AMERICAN ARBITRATION ASSOCIATION (AAA)16

The AAA17 was created in 1926. Its rules, called “AAA’s Commercial Arbitration Rules (Including Procedures for large, complex Commercial Disputes) were amended and effective from 1st September 2007. AAA stipulates two different regimes for domestic arbitration and international arbitration. This difference extends to the principle of independence of arbitrators. The principle of independence is not directly referred to in the rules of domestic arbitration. Article 12 of the AAA’s rules provides:

“Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards”.

15 Article 57 of the Washington Convention: A party may propose to a Commission or tribunal the disqualification of any of its member on account of any fact indicating a manifest lack of the qualities required by paragraph 1 of article 14. A party to arbitration may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.
17 Reported statistics from the arbitration institutions show that AAA-ICDR is the most frequently used institution, followed by ICC, HKIAC and CIETAC (see http://schoolofinternationalarbitration/org)
Notably, the AAA’s Commercial Arbitration Rules were the first to include a reference the neutrality of arbitrators in addition to independence and impartiality. Article 12 refers to article 17 which regulates the lack of independence as one of the reason of disqualification of arbitrators (Article 17(a)(i)). Also article 17 provides:

“The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section Rules 12 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence”.

Supplementary procedures of AAA for the International Commercial Arbitration adopted in 1981 and amended and effective from 1 April 1999 regulate independence with only impartiality for all arbitrators.

The same regulation exists in the AAA’s International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) amended and effective from 1st March 2008. Article 7 of this procedure provides “Arbitrators acting these Rules shall be independent and impartial” and also charge again arbitrators, together with the article 37, to disclose to the administrator any circumstances likely give rise to justifiable doubts as to the arbitrator’s impartiality or independence. In the case of these circumstances article 8 gives parties the right to challenge arbitrators.

Also important to note is “The Code of Ethics for Arbitrators in Commercial Disputes” approved by the American Bar Association (ABA) House of Delegates and Executive Committee of the Board of Directors of AAA on 9 February 2004. The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the AAA and a special committee of the ABA. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003 Revision have been approved and recommended by both organizations. The Code establishes ethical guidelines for both national and international commercial arbitration. This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards.

In conclusion, the Code of Ethics for Arbitrators in International Commercial Arbitration established together by AAA and ABA requires independence with impartiality and neutrality.

II) Affirmation of the independence of arbitrators by ECHR and by UNCITRAL Model Law

A) Applicability of the Article 6 (1)\(^{18}\) of the ECHR to Arbitration

\(^{18}\) European Convention on Human Rights Article 6: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law… (http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm)
Numerous records before the European Commission encouraged the doctrine to discuss the relation between the arbitration and Article 6 of the ECHR\textsuperscript{19}. Without enumerating all aspects of the arising discussion, this article focuses on the division of the doctrine between support and opposition to the ECHR’s applicability to arbitration.

The arguments for the exception of the application are that arbitrators are not subject to a state’s jurisdiction, the arbitrators are given jurisdiction via the agreement signed by the parties; the states should respect the convention by the jurisdictions instituted by them. Charles Jarrosson states, “A party to arbitral proceedings cannot, legally speak complain that the arbitral tribunal has not respected human right provisions. Human Rights violations are not as such, a ground for challenging an award or opposing its enforcement. The reason for that is and the focus here will be on the ECHR, but the same arguments would apply to other such conventions that the ECHR as an international instrument, is based on the principle of the state’s responsibility for violations of the rights guaranteed by the convention”\textsuperscript{20}. An arbitral tribunal is not a state court that can engage the state’s responsibility; its actions are not actions of the state that could constitute violations of the Convention\textsuperscript{21}. In fact some cases ECHR has expressly refused the application of the ECHR to the arbitration.

For example in the case of X v. R.F.A\textsuperscript{22}, the European Commission, for the first time, reflected on arbitration and held that Article 6 (1) of the Convention does not prohibit in anyway the resolution of breach of civil rights and obligations by a voluntary arbitral procedure in stead of bringing before state’s tribunals. According to Mr. Henry, arbitration is analysed by the Commission as partial renunciation to the application of the rights defined by the Article 6 (1)\textsuperscript{23} and according to Mr. Jarrosson such renunciation is not prohibited by any article of the ECHR\textsuperscript{24}.

The ECHR unquestionably applies to compulsory arbitration (Arbitrage forcé), as many decisions of the ECHR\textsuperscript{25} clearly hold that such compulsory procedures must comply with the procedural guarantees that the ECHR grants to any litigant\textsuperscript{26}. However in the case of R. v. Switzerland\textsuperscript{27} for the first time there was a consensual (voluntary) arbitration and the Commission considered that the guarantee of celerity of the procedure by the dispositions of the Convention are intended to always be heard by the state’s authorities, with the exclusion of voluntary arbitral procedures\textsuperscript{28}.

Likewise, in the case of Lightgow v. United Kingdom, there was a compulsory arbitration under English law in 1977 concerning the shipping and aeronautical fields. In this case, there

\textsuperscript{20} Charles Jarrosson, art. cit., p. 579.
\textsuperscript{22} Decision of the Commission rendered on 5 mars 1962 in Annuaires Convention Vol. 5, p. 89 commented as a first decision of the commission for the applicability of the Convention to arbitration by Charles Jarrossson, art. cit., N.21, p. 582 et seq.
\textsuperscript{23} Marc Henry, op. cit., p.86.
\textsuperscript{24} Charles Jarrosson, art.cit., N.21, p.583.
\textsuperscript{25} In this sense see the case of Bramelid and Malmstrom v Suede, on the report of the Commission dated 12 December 1983 published in French in Decisions et Rapports No: 38, p. 18 commented by Jean Francois Flauss in Gazette du Palais 3 July 1986 p. 407 et seq.
\textsuperscript{26} Thomas Schultz, art. cit., p.14, footnotes 55.
\textsuperscript{27} Decision of the Commission rendered on 4 March 1987, Annuaire Convention EDH 1987,83.
\textsuperscript{28} Revue Suisse de droit international et droit européen, 1991, p.372.
was an arbitral tribunal created by the law charged to resolve disputes arising in its fields. The parties could not choose their arbitrators: rather, the president of the arbitral tribunal was selected by the higher judicial authority and two remaining arbitrators were selected by the minister with the consensus of the representative of the parties. The European Court of Human Rights decided that the arbitral tribunal created by the law of 1977 was covered by the Article 6 (1) of the ECHR.

More recently, in the case of Transado-Transportes Fluviais Do Sado S.A v. Portugal\(^{29}\), the parties’ dispute was submitted to an arbitration tribunal composed in accordance with the contract’s provisions. After interpreting the relevant clause of the contract and noting that no agreement had been concluded between the parties, the arbitration tribunal found against the applicant company. For this case European Court of Human Rights held that article 6 (1) of the Convention did not preclude the setting up of arbitration tribunals in order to settle certain disputes. The tribunal, under article 6 (1), was not necessarily to be understood as signifying a court of law in its classic meaning. By choosing to insert in the contract a clause stating that the arbitration tribunal’s decision could not be appealed, the applicant company had lawfully and unequivocally waived certain rights, a waiver not precluded by article 6.

In contrast, those in favour of article 6 (1) of the ECHR’s application to arbitration argue that any jurisdiction process should be subject to the ECHR because the rules expressed in the Convention should largely supercede any agreement made by parties which are also nationals of signatories to the Convention. Swiss jurisprudence provides an example\(^{30}\).

This article agrees with Mr. Clay’s approach: it pertinent that the necessity for a veritable common procedural law for every continent is observed. Common procedural law is essential for an equitable process under article 6 (1) of ECHR\(^{31}\). Although it is expected that article 6 of ECHR is not directly applicable to arbitration, because the tribunal is not established by the law and the obligations announced by the Convention apply to the states and their organs, it should be accepted that the fundamental principles mentioned in the article 6 of the ECHR should inspire both private justice and public justice\(^{32}\). Therefore arbitration is not entirely independent of considerations stipulated under the ECHR.

**A-1) Applicability of the article 6 (1) of the ECHR to Arbitration Regarding to French Jurisprudence**

It can be said without any suspicion that French jurisprudence confirm the application of the ECHR for arbitration as demonstrated by the famous case of Republic of Guinea v. Paris Arbitral Chamber. In this case there were three decisions\(^{33}\) referring to article 6 of the ECHR. It is unnecessary to cite all the cases here however we would like to focus that the dispute was

\(^{29}\) Decision rendered on 16 December 2003, Application No: 35943/02, Third Section, European Court of human Rights Reports of Judgment and decisions, 2003 Vol. 11-12 p. 427 et seq.


\(^{32}\) Ph. Fouchard, E. Gaillard, B. Goldman, book cited, N.1027, p. 582.

\(^{33}\) Paris Tribunal of First Instance 30 May 1986 and 30 October 1986, Tribunal of First Instance (1st Ch., 1st Section) and appeal Paris 1st Arbitral Ch. 18 November 1987 and 4 May 1988 commented by Philippe Fouchard, Rev. Arb., 1988, p. 657 et seq.
specifically about no-execution of obligations of the Arbitral Centre. The tribunal estimated that the procedure followed did not conform to the imperatives of Article 6 of ECHR. The tribunal of first instance (TGI) based “its ruling on Article 6 of the ECHR”\textsuperscript{34}. The Paris Court of Appeals reversed the TGI’s judgment, but not on those grounds. However it still stressed very clearly that arbitrators should abide by the rules laid down in Article 6\textsuperscript{35}. Therefore in this case for the first time we see direct application of the Article 6 of the ECHR to arbitration: the obligation of the Paris Arbitral Chamber to assure the parties an “equitable lawsuit”: grounds directly enumerated in the disposition of Article 6, which the court interpreted as being aimed at the state and arbitral jurisdictions.

This imminence of Article 6 of the ECHR and arbitration has been confirmed again in superior decisions by French High Courts\textsuperscript{36}. However in some more recent cases French jurisprudence changed its opinion and held that ECHR is “sans application” to arbitration\textsuperscript{37}. This solution was established essentially after it was noted that ECHR is applicable only to states and not to arbitrators who do not have state’s jurisdiction as mentioned above. This “sans application” approach has continued and is considered constant in French Jurisprudence\textsuperscript{38}.

This consistent approach of French Jurisprudence, in our knowledge, has changed with the case of STM Brudey Frères Limited Company v. Emeraude Lines (Joint stock Company) before Paris Court of Appeal\textsuperscript{39}. In this case Paris Court of Appeal gave recourse by annulling the award issued by the arbitral tribunal because of the failure of the independence of one of the arbitrators. Paris Court of Appeal referenced the Article 6 of the ECHR and held that:

“Independence of arbitrators is an imperative rule but enacted for the protection of private interests so that it is always possible for the parties to give up the reason of cognition without waiting the violation of the rules governing the equitable character of proceedings protected by the Article 6 of The European Convention on Human Rights” which this Court guarding”\textsuperscript{40}.

Incidental application of the ECHR proceeds from the idea that the judge can not decide a situation in a manner opposite to the Convention which would produce their effects in French legal order and be considered an action of the French State. In fact Paris Court of Appeal adopted a jurisprudence appropriated already by the European Court of Human Rights\textsuperscript{41}.

We see also this same attribution of the decisions of the European Court of Human Rights in

\textsuperscript{34} Footnote 29, p. 659.
\textsuperscript{36} Paris Court of Appeal, 1\textsuperscript{st} Ch. Suppl. B.K.M.I. Industriean Lagen and Siemens v Dutco Construction, 5 May 1989 in Rev. Arb. 1989, p. 723 et seq.
\textsuperscript{38} Note of Louis Perreau Saussine, Revue Arb. 2006, p. 200.
\textsuperscript{39} Paris Court of Appeal (1\textsuperscript{st} Ch. Civ.) dated 18 November 2004 commented by Louis Perreau-Saussine in Rev. Arb. 2006, p. 192 et seq.
\textsuperscript{40} “L’indépendance de l’arbitre est une règle impérative, mais édicté pour la protection d’interets privés (de sorte qu’) il est toujours possible pour les parties d’y renoncer en connaissance de cause, sans que soit en jeu la violation des règles qui gouvernent le caractère équitable du procès protégé par l’article 6 de la Convention européenne des droits de l’homme dont cette court à la garde ».
the case of Israel v. NIOC (National Iranian Oil Company), this time, before the French Court of Cassation. In this case reference is again made to French jurisprudence to Article 6 of the ECHR. An agreement concerning petrol operations between the parties contained an arbitration clause. A dispute arose and Israel refused to nominate an arbitrator. NIOC applied to the tribunal of first instance of Paris and requested to nominate the second arbitrator in accordance with the Article 1493/2 of the French Civil Procedure Code. The tribunal declared incompetence itself and the case appealed before Court of Appeal and Court of Appeal allowed time for Israel to nominate its arbitrator for preventing the denial of justice of the NIOC party to an arbitration agreement to prevent from denial of justice. In the end, the Court of Cassation considerate that impossibility to the access to judgment, including arbitral judgement, which is a right based to the international public policy devoted by the principles of international commercial arbitration and Article 6 (1) of the ECHR constitute a denial of justice which establish the international competence of the tribunal of first instance of Paris in the mission of assistance and cooperation of the state’s judgment for arbitral tribunal. Therefore it rejected the decision of the first instance which declared it incompetence and approved the decision of the Court of Appeal.

In the more recent case between UNESCO and France, the French Court of Cassation clarified the application of Article 6 of the ECHR to arbitration more generally, to be independence of judgment and noted that the guarantees mentioned in the Article 6 includes sufficient delay, choice of the council without hindrance and the justification of the decision.

In conclusion, the French Courts, after long disputes, view Article 6 (1) of the ECHR differently. However, after Republic Guinea v. Paris Arbitral Chamber they reference it indirectly by way of general principles of the ECHR and occasionally reference the general content of all articles of ECHR but not only Article 6.

A-2) Applicability of the Article 6 (1) of the ECHR to Arbitration Regarding to English Jurisprudence

Like French jurisprudence, English jurisdiction consecrates the application of the ECHR for arbitration. However, the application of the ECHR is relatively recent in regards to French jurisprudence. Although in some cases where the court references the Strasbourg jurisprudence such as in R. v Gough (20 May 1993) and in Medicaments and Related Classes of Goods (21 December 2000), there was no direct application of ECHR Article 6 to arbitration.

In Ali Shipping Corporation v. Shipyard Trogir the Court of Appeal held that arbitration proceedings and documents or other information generated during the course of the arbitration should be treated as confidential, (i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, that is, the grounds on which such leave will be granted, which gives

43 Court of Cassation Civile, Ch. Soc., 11 February 2009,07-44/240 in www.legifrance.gouv.fr
45 Court of Appeal (Civil Division), [2001] 1 W.L.R. 700.
rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.

These exceptions are seen in Glidepath v. Thompson⁴⁷ as well. In this case Queen’s Bench Division (Commercial Court), referring to the case of Ali Shipping, was subsequently considered in the context of an application by a non-party for copies of documents held on the court file in proceedings which had been stayed pursuant to section 9 of the Arbitration Act 1996. Colman J. concluded that the Court should not grant permission for a stranger to an arbitration (and the section 9 proceedings) to inspect either an application notice under section 9 or any evidence on the Court file or arbitration claim forms for ancillary relief under section 44, unless: i) all the parties to the arbitration consent, or ii) there is an overriding “interest of justice”⁴⁸.

It has been accepted that English jurisprudence has traditionally approached the issue of bias in arbitration proceedings in the same way as judges have in court proceedings. In practice this has meant that although the Article 6 requirement of independence and impartiality may not apply directly to proceedings before an arbitral tribunal, the legal test for bias under section 24 (1) mirrors the test for bias in English Court proceedings which has been influenced by European case law on Article 6⁴⁹.

After the Human Rights Act 1998⁵⁰ came into the force which intended to give effect to the rights contained in the ECHR, R. v Gough noted the test for bias was whether it presented a “real danger”. However, this formulation was modified in Porter v. Magill⁵¹. The test for bias applied to judges in court proceedings became “whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased⁵².

In the ASM Shipping case⁵³, the Commercial Court held that this modified test for bias should also apply to questions of bias arising in the context of arbitration tribunals. In that case, the chairman of the tribunal had previously been instructed as counsel by the defendant’s solicitors in another case, in which serious allegations of impropriety had been made against the claimant’s main witness. The Court held that the chairman should have declined to sit on the panel because an objective and independent observer considering the facts would have shared the feeling of discomfort expressed by the claimant’s main witness about the chairman’s impartiality, and would have concluded that there was a real possibility of bias⁵⁴.

---

⁴⁹ Paula Hodges, art. Cit., p. 165.
⁵² Paula Hodges, art. Cited, p. 165.
⁵⁴ Paula Hodges, art. Cited, p. 165.
In the Stretford case\textsuperscript{55} the Court of Appeal held that “it was common ground that the 1996 Act will apply to the arbitration”\textsuperscript{56} and added that

"The provisions of the 1996 Act are important in the context of Article 6 of the Convention because they provide for a fair hearing by an impartial tribunal. Moreover, the mandatory provisions ensure that the High Court has power to put right any want of impartiality or procedural fairness, so that the only provisions of Article 6 which could arguably be said not formally to be met by the act are the requirements that the hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and the judgment be pronounced publicly"\textsuperscript{57}.

The Court also noted “the Commission thus stressed the pivotal role of the national courts in considering whether there has been a breach of Article 6 in a particular case relating to arbitration. Moreover, it is clear from its reasoning and that of both the Commission and the Court in the other cases to which we have referred that the more important the Article 6 rights the greater the scrutiny to be expected. Thus it is easier to waive the requirement that the arbitration proceedings be in public than the requirement that the arbitrators be impartial\textsuperscript{58} (not mentioned independent!).

More recently in the El Nasharty\textsuperscript{59} case, the Commercial Court, referencing the Stretford case held that

"the arbitration of the claimant's claims either will be or could at the claimant's election be subject to the procedural and other safeguards contained in section 33 of the Arbitration Act 1996, although I should stress that it is not shown or sought to be shown that arbitration in Paris would lack any features which compliance with Article 6 would require. The discussion of the Strasbourg jurisprudence in the Stretford case would seem to indicate that any such argument would be doomed to failure"\textsuperscript{60}.

The Court stipulated the application of Article 6 to the valid arbitration agreement. Mr. Justice Tomlinson noted that “The Stretford case to which I have already referred makes clear that by agreeing to arbitration parties may waive the requirement implicit in Article 6 that they have access to a court”. However, as Sir Anthony Clarke MR pointed out at paragraph 52 of the judgment of the Court of Appeal (Stretford case), “if there is duress or undue influence or mistake which invalidates the arbitration agreement there will be no waiver of relevant rights under Article 6”\textsuperscript{61}.

Finally, in the Entico Corporation Ltd.\textsuperscript{62} case, the claimant Entico was an English publishing company. The defendant UNESCO was a specialised agency of the United Nations, which under the convention on the Privileges and Immunities of the Specialised Agencies 1947, was entitled to “immunity to every form of legal process except insofar as … they have waived their immunity” (Article III section 4). Entico further alleged that UNESCO failed to perform the contract and by letter dated 21 April 2006 Entico’s solicitors invoked the arbitration clause and invited UNESCO’s agreement to proceed to arbitration under UNCITRAL rules. UNESCO replied on 22 May 2006, denying that “any contract had been concluded and that

\textsuperscript{55} Court of Appeal Civil Division 21 March 2007, [2007] Bus. L.R. 1052.
\textsuperscript{56} Footnote 50 (Section 35).
\textsuperscript{57} Footnote 50 (Section 38), see also Paula Hodges, art. cit., p. 166.
\textsuperscript{58} Footnote 50 (Section 64)
\textsuperscript{60} Footnote 55, Section 35.
\textsuperscript{61} Footnote 50, Section 25.
\textsuperscript{62} Entico Corporation Ltd. v. United Nations Educational Scientific And Cultural Association; Secretary of State for Foreign and Commonwealth Affairs, Queen’s Bench division, 18 March 2008, [2008] EWHC 531 (Comm).
the invocation of the arbitration clause “must fail because that clause is part of a draft contract that did not enter into force”\textsuperscript{63}. After this repudiation Entico alleged that UNESCO violated Entico’s rights under Article 6 (1) of the ECHR namely, access to fair and public judicial processes because arbitration would be meaningless if UNESCO refused to participate. After reviewing the detailed research of the correspondences between parties the Commercial Court posed this general principle and held that

“The Convention including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity”\textsuperscript{64}.

In conclusion, the English jurisprudence approach to the application of Article 6 of the ECHR is different from the approach taken in French jurisprudence. However, regarding the cases examined, the debate continues. Especially in the Sumukan case\textsuperscript{65} it is apparent that some lords view the application of Article 6 to arbitration negatively.

On the other hand, in spite of this debate it is apparent that English courts, would like to keep the utilisation of Article 6 of the ECHR to arbitration. The rights enumerated in Article 6 of the ECHR are also protected by the Arbitration Act of 1996. English jurisprudence concentrates on impartiality rather than independence, in opposition to French jurisprudence.

B) UNCITRAL Model Law

On 21\textsuperscript{st} June 1985 the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law concerning international commercial arbitration with the participation of 58 states and 18 international organisations. UNCITRAL plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions.

It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. The model law articles were amended after a general assembly on 7 July 2006. Changes were made in the articles 1 (2), 7, and 35 (2), a new chapter IV A has replaced Article 17 and a new Article 2 A was adopted by UNCITRAL on 7 July 2006.

However no amendment was made to the article regarding independence and impartiality of arbitrators. UNCITRAL Model law Article 11 (5) reminds the court or other authority to secure the appointment of independent and impartial arbitrator. It provides:

“The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to

\textsuperscript{63} Footnote 58, Section 9.
\textsuperscript{64} Footnote 51. Section 26.
In contrast to the ICC Rules, UNCITRAL Model Law similarly to the LCIA, requires predict both independence and impartiality of arbitrators.

Article 12 of the Model Law requires the arbitrators to disclose all circumstances likely to give rise to justifiable doubts as to his impartiality and independence. The same article expresses as reasons for challenge all of the circumstances that give rise to justifiable doubts as to his impartiality and independence.

Finally, the Model law stipulates independence of arbitrators with impartiality in three different approaches: in the revelation approach, in the challenge approach and in the approach of third authority.

III) Affirmation of the independence of arbitrators in national legislative schemes

As demonstrated, the importance of the independence of arbitrators has been acknowledged by all institutions and in the international legal echelon. Moreover, UNCITRAL Model Law has been followed by many countries in the world. However, most arbitrations having their seat in a particular country will be governed by the law of that country whatever the choice of the proper law to determine the merits of the dispute. As known, lex arbitri coincides with the law of the forum unless the parties choose to the contrary. In practice France (especially Paris) and/or England (especially London) are common choices for the seat of arbitration. Therefore, the following section focuses on French and English national law.

A) Affirmation of independence of arbitrators in French Law

Arbitration in French law is regulated in the book IV of the French Code of Civil Procedure, in articles 1442 and 1507. In France domestic and international arbitration are regulated by the same code. However, there is no article which directly regulates the independence of arbitrators. Fouchard noted that “in national legislation, the requirement of independence and impartiality does not necessarily apply specifically to international arbitration. It is generally a rule found in domestic law, which is extended to international arbitration”. Therefore French jurisprudence supplied the meaning of independence of arbitrators.

In Ury v. S.A. des Galeries Lafayette, the Paris Court of Cassation noted for the first time independence of arbitrators in terms of challenge of arbitrators using the same reasons used for challenge of judges. The Court held that “independence of mind is indispensable in the exercise of judicial power, whatever the source of that power it is one of the essential qualities.

66 For the list of countries http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. We would like to remind that France is not in this list which uses own Civil Procedure Code.
of an arbitrator.” The approach of “independent mind” has been reiterated in several subsequent decisions.

However, in some cases French courts do not use the “independent mind” test and instead reference the notion of independence with impartiality or neutrality. In the Forges and Ateliers of Commentry Oissel (FACO) case and Hydrocarbon Engineering. In this case FACO did not present his arbitrator as a consular magistrate of one bank which was the creditor of FACO at the moment of the signature of the compromise. Therefore Hydrocarbon asked the annulations of exequatur and claimed that the ignorance of this relationship made the independence and impartiality of the arbitrator suspect. French Court of Cassation rejected the claim and pointed that this claim is not enough for the suspect of independence and impartiality of arbitrator and also noted that according to the correspondences presented before it was easy for Hydrocarbon to understand the relation between the bank and the arbitrator.

Or in the Transportacion Maritima Mexicana S.A. case, the tribunal of first instance of Paris do reference to independence of arbitrator with neutrality and held that “in the choice of third arbitrator in the litigation between a French and Mexican companies, there is no reason for eliminate third arbitrator in French nationality without any reason on his independence and neutrality”. French jurisprudence, in this case, not only focused on the relation between the arbitrator and parties but also to the nationality of arbitrators and pointed that the third arbitrator who has the same nationality with one of the parties does not mean that the third arbitrator is not independent and non-neutral.

However, in the affirmation of impartiality Paris Court of Appeal referred to the relationships between the arbitrator and parties and also asked the proof of these relationships. It did not accept the partiality of arbitrator only from his nationality or from the languages that the arbitrator speaks. For example in the case AGRR Prévoyance (AGRR) v. European Speciality Ruckversicherung AG (ESG), one of the parties informed the other party of the designation of his arbitrator and said this arbitrator is independent and does not know German law and did not practise German from the college. The other party did not accept this arbitrator and alleged that the designation of this arbitrator prejudice that there will be a problem in the applicable law and in the language of arbitration. However, the Paris Court of Appeal after noted that the party who asked the challenge did not demonstrate and prove the partiality of the arbitrator posed the general principle that the linguistic and juridical omission is never a reason for the challenge of an arbitrator.

Despite these changes in the approach of “independent mind” of the French jurisprudence during the years we remark that independence or impartiality of arbitrators continued to be mentioned from the view of challenge.

---

69 See Footnote 64, paragraph 8.
71 Forges and Ateliers de Commentry Oissel and Others v. Hydrocarbon Engineering and others, Court of Cassation 20 February 1974, Rev. Arb. 1975, p. 239 et seq.
rentes et de financement Crédirente (FRF) v. Compagnie Générale de Garantie SA (CGG), where the arbitrator was the director of judicial affaires of the company of CGU Courtage, a company of the group GAN to which behove also the company CGG. Therefore FRF sent a letter to other arbitrators on 18 October 2004 and said that this arbitrator (director of judicial affaires) can be considered as a party to this case and it claimed the challenge before the judge in the end of December 2005 when the final decision has already rendered. On the other hand the arbitral tribunal condemned the FRF to pay some amounts to the CGG. FRF claimed the annulment of the award for the reason that the arbitrators were partial to its detriment. Paris Court of Appeal rejected this claim and held that “if impartiality is a subjective notion to which attacks can be seen in the sentence, these attacks can be confused with the reasons which give all to one of the parties.” Therefore, regarding to the French Court of Appeal if it is possible to disclose a fault of impartiality in view of the enunciation of the sentence the circumstance which the reason refers to pretence of one of the parties is not enough to create the partiality of an arbitrator.

This article makes two points regarding French jurisprudence: First, the French courts discuss the independence or impartiality of arbitrators in the perspective of the challenge of arbitrators. However, for the notion of independence they pay attention to the position of the arbitrator rather than his relations with the parties. On the other hand when the impartiality of the arbitrator is a subject of dispute they are considering subjectively, regarding the relations between the arbitrator and parties. In this situation we conclude that French jurisprudence anticipate independence as objective and impartiality as subjective.

B) Affirmation of independence of arbitrators in English Law

According to René David two differences should be noted at the beginning between the common law and the Roman-Germanic legal systems. The first concerns judicial organization. A basic distinction is made in the common law countries between superior courts, which are the holders of judicial power, and inferior courts, which do not claim to have the same function and dignity, but are the main organs for the settlement of disputes. The second difference lies in the different ways in which the law is understood. In England, law has for centuries been considered in the light of procedure.

As known the arbitration procedures have been applied in UK with the rules of Arbitration Act. Similar to the French approach independence of arbitrators is regulated in section 24 of the Arbitration Act 1996 under the title “Power of Court to remove arbitrator”. In this article lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. Section 24 brings together the various grounds for removal and subjects them to the same procedural rules. Impartiality is, indeed, one of the general principles relating to arbitration set out in section 1(1)(a) of the Act. According to Mr. Merkin the Departmental Advisory Committee feared that there might be complex and unnecessary arguments regarding exactly how independent the arbitrator has to be, and the parties might be precluded from appointing an arbitrator with expertise in the field in question. Lord Donaldson also pointed out that any requirement of independence would run

---

counter to the long-established procedure in England whereby each party appoints his own arbitrator: in such a case, the only issue is whether the arbitrators have acted impartially irrespective of whether or not they are “independent” in the full sense of the word\textsuperscript{79}.

In AT & T Corporation v. Saudi Cable Co\textsuperscript{80} the arbitrator in an ICC administered arbitration was a non-executive director of a competitor of AT&T Corporation and was also a shareholder of this company. In this case the judge considered the claim that there was an appearance of bias or at least a risk that the arbitrator was unconsciously biased against them. The judge attributed the doctrine of bias in R. v. Gough where Justice Longmore described the position as a “real danger of bias”. In the case of R. v. Gough\textsuperscript{81}, House of Lords held that

\begin{quote}
“the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors, and, in cases involving jurors, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely, whether, in all the circumstances of the case, there appeared to be a “real danger of bias”, concerning the member of the tribunal in question so that justice required that the decision should not stand; that, accordingly, the Court of Appeal, in dismissing the appeal, applied the correct test...”.
\end{quote}

These words of House of Lords are reminiscent of the French jurisprudence approach till 1980, which applied the same reasons of challenge of judges to arbitrators as Article 378 of the old French Civil Procedure Code. From 1806 till 1980 French law had only Article 1014 of this Civil Procedure Code for challenge of arbitrators but it did not contain the reasons of challenge. Such as in the view of “real danger of bias” English jurisprudence does not separate arbitrators from judges, French jurisprudence does not separate arbitrators from judges in the view of challenge.

However, the commercial relationship between arbitrator and one of the parties continued to be a “real danger of bias”. For example in the Save and Prosper Pensions Ltd case\textsuperscript{82} Chancery Division held that

\begin{quote}
“If a relationship between an arbitrator and a party to the dispute would be such as to give rise to a real possibility of bias, a relationship of the same nature with an associated company is likely to give rise to the same risk. In this case the association between two companies was seen sufficiently close to give rise to a real possibility of bias on the part of the arbitrator”.
\end{quote}

However, the approach “real danger of bias” changed with a case where one member of a barristers’ chambers appeared as counsel before an arbitrator who came from the same Chambers. Is it a real danger for the lack of independence? English Courts replied negatively to this question and noted that there must also be “justifiable doubts” about his impartiality with the direct application of the section 24(1)(a), even if there is a justifiable doubt, no need to look for a “bias”. As a further example in Laker Airways Inc v. FLS Aerospace Ltd\textsuperscript{83}, the Commercial Court held that:

\begin{quote}
“The circumstances in which an arbitrator can be removed are therefore defined in section 24 of the Act. The test is an objective one: whether circumstances exist that give rise to justifiable doubts as to an
\end{quote}

\textsuperscript{79}Robert Merkin, Louis Flannery, book cited, p.66.
\textsuperscript{81} For the details of this case see footnote 39.
\textsuperscript{83} Laker Airways Inc. v. FLS Aerospace Ltd. and Burnton, Queen's Bench Division (Commercial Court), 20 April 1999, [1999] 2 Lloyd's Rep. 45.
arbitrator’s impartiality. The test is thus objective in at least two respects: the court must find that circumstances exist, and are not merely believed to exist (although I (Rix J.) suppose that a belief may itself be a circumstance); and secondly, those circumstances must justify doubts as to impartiality. An unjustifiable or perhaps unreasonable doubt is not sufficient: it is not enough honestly to say that one has lost confidence in the arbitrator’s impartiality. On the other hand, doubts, if justifiable, are sufficient: it is not necessary to prove actual bias”.

This case further importance because in this case the Commercial Court also referenced the decision of Paris Court of Appeal in the case Kuwait Foreign Trading Contract & Investment Co. v. Icori Estero S.p.A. (unreported), 29 June 1991. This case arose out of an arbitration award made in Paris by a three-arbitrator tribunal presided over by an English barrister. The losing party appealed inter alia on the ground that the president of the tribunal was not independent of the parties because he came from the same set of chambers as one of the counsel in the arbitration. This ground of appeal was rejected and the Paris Court of Appeal reasoned:

“... Considering that, in this instance, it is apparent from elements of the dispute (especially from the translation of an extract from the work 'International Commercial Litigation'); from the memorandum drafted by the London firm of solicitors, Masons, for the appellant, and from the statements of Mr. X, barrister and Mr. Y, solicitor) that the function of a barrister is essentially carried out independently and that belonging to a set of chambers of barristers—an age-old institution unique to the British system—is characterised, in essence, by the sharing of premises and support staff, without necessarily creating any professional ties, which would imply—such as in the French Law Society for example—common interests or a certain economic or intellectual dependence between various members of a set of chambers who are, between themselves, frequently called, usually because of the specialism of the chambers, to plead against each other or to participate in arbitral tribunals before which other members of the same set of chambers may appear in the capacity as counsel; if no other objective element existed in the current case which would have affected the independence of the president of the arbitral tribunal; from the single fact that a member of the same set of chambers acted as counsel to one of the parties, this situation creates no tie of dependence between the arbitrator and that particular party to the arbitration proceedings; if it is established that the appellant and its counsel were not aware of the fact that the president of the arbitral tribunal belonged to the same set of chambers as counsel to the respondent, the appellant cannot have grounds against the arbitrator for not having revealed a situation which was not, in itself, of such a nature as would affect his judgment and could exist without affecting the exercise of his jurisdictional function; in these circumstances, it is not established in this instance that the arbitrator referred to in the appeal had not disposed of the independent spirit necessary for the exercise of his jurisdictional power; these being the conditions necessary to invalidate the constitution of the arbitral tribunal ...”.

As seen, differently from the English Commercial Court, the Paris Court of Appeal was required under the relevant law to consider not only the question of impartiality but also independence. They focused specifically on the “intellectual independence” with “independent spirit”.

English and French jurisprudence also seem to take a similar approach to the situation where the arbitrator and one of the parties involved in the past in one or many disputes. For example in ASM Shipping Ltd v. Harris and Others, a dispute arose under a charterparty between owners ASM Shipping Ltd and charterers TTMI Ltd. The disputes were referred to arbitration. H and S were appointed as arbitrators. Subsequently H and S appointed M as third arbitrator. The owners claimed the challenge of the award under section 68 of the Arbitration Act 1996, alleging serious irregularity and submitting that M should have challenged himself because M had previously appeared as an advocate in disclosure proceedings which involved the owners’ principal witness in the present dispute. The Commercial Court held that the

judge on the section 68 application had not determined that the two arbitrators were tainted by M’s apparent bias. There was no invariable rule, nor was it necessarily the case, that where one member of a tribunal was tainted by apparent bias the whole tribunal was affected second-hand by apparent bias and it was clear that the two arbitrators had shared M’s view that he could properly and should continue as an arbitrator and that they agreed with the representation made by M on the section 68 application in respect of his impartiality and independence. Any objection to the two arbitrators continuing with the reference because M would be a witness would not be on the basis of any involvement that they themselves had had with M. It could only be made on the basis that there was a risk that they would be other than impartial because they had been influenced by discussions that they had with M. That suggestion would be fanciful. The question was one of apparent bias, not actual bias, but it was to be considered against the background that M had stated during the hearing that he recalled nothing relating to the previous case that gave rise to any doubt in his mind as to the propriety of M’s conduct, and there was no suggestion that that was not the case. That being so, a fair minded and informed observer would not conclude that there was any real possibility that there had been discussions between M and the two arbitrators that might improperly influence their assessment of M’s evidence or detract from their impartiality. There was nothing in the arbitrators’ conduct since objection had been taken that gave rise to justifiable concerns about their impartiality and the court therefore had no grounds for removing them under section 24.

In this case English jurisprudence has approved again the necessity of “justifiable doubt” and insufficiency of the “real danger of bias” test. Further, the Commercial Court attributed their decision to the notion of “independence” with impartiality of arbitrators and stipulate the condition of justifiable doubt for independence as well.

However, what about the independence or impartiality of one arbitrator, not the chairman but an arbitrator who had involved in the past in one or many disputes by one of the parties? The French Court of Cassation answered this question in Frémarc v. ITM Enterprises. In this case ITM Enterprises, franchisor, choose the same arbitrator in different arbitration conflicts with his franchisees which is based on the same type of contract. This situation, which was not disclosed during the constitution of the arbitral tribunal was discovered by one of the franchisees and they challenged the award on that basis. The French Court of Cassation noted the arbitrator’s failure to disclose but held that:

“This breach of disclosure of informing parties by the arbitrator that he has been chosen in other arbitration procedures before, does not demonstrate the failing of independence and impartiality of the arbitrator”.

Similarly to English jurisprudence, French judges also considered the “justifiable doubts” test in determining the independence of arbitrators. Therefore, the number of arbitrators appears to have no importance to determine the independence of arbitrators.

International Bar Association (IBA) Guidelines to concretize the independence of arbitrators

---

The last two decisions are reminiscent of the IBA Guidelines adopted in 1987 and approved in 2004. As known these guidelines help to concretize general standards regarding independence and impartiality of arbitrators. Within these guidelines three lists (red, orange and green) have been created and the red list, composed of serious instances of challenge, divided into two parts of situations which can be waived or not by the parties.

The rules of these guidelines invite arbitrators to inform the parties the circumstances which can create doubts regarding independence or impartiality (Standard 3 a). According to Mr. Gaillard’s “the explanations” to the general standards underline clearly that there are two criteria: one is subjective for the disclosure and the second are the objective grounds on independence and impartiality for the disqualification of arbitrator in case of contestation.

The facts of Frémarc v. ITM Enterprises are reflected in the orange list of the IBA Guidelines, circumstances which have to be disclosed by the arbitrator. The orange list 3.1.3 states that if “The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties” it must be disclosed.

On the other hand the facts of ASM Shipping are more complicated. There was not a relationship between the arbitrator and one of the parties but between a principal witness and the arbitrator. However, according to the IBA Guidelines this situation can also be considered as part of the orange list because there is still previous relationship between the arbitrator and one of the person which can effect arbitrator’s award.

Finally, it is clear that French and English jurisprudence both refer to the “justifiable doubts” test and do not consider every relationship between arbitrators and parties as affecting independence. English jurisprudence generally pays more attention to the “bias” than the independence of arbitrators. On the other hand French jurisprudence does not separate and use both independence and impartiality of arbitrators.

CONCLUSION

Independence of arbitrators is considered in almost in international and national legislations, in UNCITRAL Model Law including arbitration institutions. Although there is utilisation of different terms, each of the institutions and each of the countries requires similar general standards of independence of arbitrators.

However, all the regulations mentioned above do not give an absolute definition of independence or impartiality or neutrality. However, according to the rules and jurisprudence that we examined, it seems that independence is more general concept which covers impartiality and neutrality. For example in ICC Rules although the word “impartiality” was not used with “independence”, Yves Derains pointed that the prevention of partiality was clearly its primary object. It seems that “independence of mind” of French approach and “justifiable doubts” of English approach creates two main parts and pose the general principles of independence which help to encompass impartiality and neutrality. In impartiality we see more the position of arbitrator according to the parties which signifies the prejudice of arbitrator vis a vis of parties. Because the choice of arbitrators depends on the confidence between the arbitrator and parties, in impartiality; the background of the arbitrator,  

87 Yves Derains, Eric A. Schwartz, book cited, p.117.
the relationship, the friendship and also conversations between an arbitrator and parties is more important. Maybe because of this English jurisprudence attributes more to impartiality. In regard to neutrality according to international practice it seems that there is an idea between arbitrator and his juridical, economic, politic or social environment which creates his culture. In this point Pierre Lalive estimated that “the neutrality of arbitrator should be considered more than politic neutrality including also cultural neutrality i.e setting up of mind, absence of juridical nationalism…”88. Therefore for neutrality it is used frequently the nationality of sole arbitrator or third arbitrator. However as mentioned above French jurisprudence did not accepted only this criteria and putted neutrality into the independence and noted that we need again justifiable doubts which has been looking for independence already. Finally, as for independence of arbitrators this article concludes that by the notion independence it should be pointed “independence of mind” which cover not only the relationship between the arbitrator and parties, but also between the arbitrator and subject of the litigation.