

PART XV

CONSENSUAL DISPUTE RESOLUTION AND ARBITRATION

CHAPTER 5

INDEPENDENCE, IMPARTIALITY, NEUTRALITY AND SUITABILITY OF THE DECISION-MAKER

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<https://www.cplj.org/publications/15-5-independence-impartiality-neutrality-and-suitability-of-the-decision-maker>

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1 INTRODUCTION

- 1 In the countries of Ibero-America, there is a distinctive common denominator, and that is that they all draw on the sources of continental law, which as is well known, responds to different guidelines that do not have a total similarity with the common law countries.
- 2 Notwithstanding the above, there are some particularities in some procedural systems, that are close to the common law precedent system, such as the Brazilian Code of Procedure, which contains a particular regime concerning precedents, not only through summaries, which are binding but also for cases where there are repetitive judgments, aspects that, although not directly related to arbitration, do have to do with the judicial system and how the dispute resolution system is structured in that country.
- 3 Thus, it can be argued that while the arbitration and procedural legislations of these countries all stem from civil law sources, they still exhibit notable differences.
- 4 In addition, it is necessary to highlight that some countries such as Brazil or Colombia have recently sanctioned procedural codes dating from 2016 or 2017 onwards. On the other hand, countries such as Chile or Argentina, which have procedural codes dating from the last century, in which, in most cases arbitration is regulated as another process. It is noteworthy, however, that several of these countries have specific legislation on arbitration, such as Peru, Argentina and Brazil. Additionally, Argentina in 2019 sanctioned the Law 27.449 on international commercial arbitration, which draws on the sources of the UNCITRAL Model Law.
- 5 Notwithstanding the above, official conflict resolution systems continue to predominate over arbitration systems. However, the sanction of these arbitration laws implies broadening the work base because it is evident that the scope is diverse; a circumstance that allows us to make some distinctions between the judicial system of Ibero-American countries and the arbitration systems that exist in them.
- 6 The question to be considered is to what extent do concerns about the lack of judicial independence create a role for arbitration within the legal system. It is important to note that in general the legal systems in Latin America conceive of arbitration – as mentioned above – either within their procedural codes, within their civil and commercial codes, or autonomous legislation, but the fact is that it is a legal figure that is conceived within the legal systems of Latin America.
- 7 Just as Brazil and Peru have a special arbitration law, Mexico has regulated arbitration in its Commercial Code. The Argentine Republic has regulated this figure in its procedural codes – both national and provincial, by virtue of the autonomy enjoyed by the provinces – and it is also regulated in its Civil and Commercial Code.

- 8 In the same way, these countries have decoded legislation that contemplates arbitration as a means of dispute resolution. So, the first aspect to highlight is that the figure has sufficient legal standing within Latin American countries and, in turn, with differences in their regulations and ups and downs in its use, it is an ever-present figure.
- 9 Nevertheless, the question raised points to a very important aspect to be considered, which both directly and indirectly contributes to the development of arbitration and consists of the reliability that the legal system of these countries offers to its citizens and companies involved in trade to ensure the independence of its bodies. This is due to the possible interference of external factors, whether political, economic, social or otherwise, that may tarnish the work of judges and affect their independence.
- 10 In this regard, it is important to note that Latin American countries, unlike first world countries, for example, linked to the common law system, see their independence affected by being highly subject to the vicissitudes of politics due to the meagre institutional framework that exists in many of them.
- 11 As the opinion within the scope of action of each of the members of the team is required, it is important to point out that in Argentina, the independence of the Judiciary has been particularly challenged. This is due to the pressures to which it is exposed from the political point of view.
- 12 Of course, there may be other types of pressures, such as other factors of power, whether corporate or economic or of a similar nature, because they constitute a propitious environment for exerting this type of pressure on the judicial jurisdiction.
- 13 The question to ask is whether this has an impact on the development of arbitration. The answer is clearly positive. Many companies opt for arbitration not only to avoid being exposed to this type of pressure and media influence but also because of the confidentiality it offers. This confidentiality is a fundamental element that makes companies more inclined to agree on arbitration as a method for resolving disputes.

2 CONFLICT RESOLUTION SYSTEMS: DISTINCTIONS

- 14 Within the various dispute resolution systems, in order to distinguish the figure of arbitration and to note the research work carried out on the independence, impartiality, neutrality and suitability of arbitrators, it is important not to confuse the figure of arbitration with those other systems that are included under the term *alternative*. These systems are as old as mankind itself and of course prior to the judicial process, which is considered the dispute resolution system par excellence.
- 15 For this purpose, it is necessary to distinguish, the birth of the bond between the parties and the way by which they agree to resolve any differences that may arise between them. These may be non-adversarial, where the parties collaborate through an

essentially cooperative procedure, or, on the contrary, they may involve a confrontation between them, since the positions they assume cannot be reconciled. This leads to them needing a third party to collaborate with them by performing another task, which consists of settling the dispute by adjudicating the rights involved in the conflict.

- 16 For this purpose, it is convenient to distinguish some non-adversarial mechanisms. Among these we can identify, in the first place, direct negotiation between the parties, as a traditional way to overcome differences, as well as mediation and conciliation, among others.²
- 17 The figures of the mediator, the conciliator and the arbitrator, due to the functions inherent to each of them, show the differences that exist between these systems, beyond the fact that in all cases their independence and impartiality is a typical feature observed in all these systems.³
- 18 While all are outsiders and impartial third parties to the conflict, the mediator aims to improve communication between the parties. The mediator is a facilitator for this purpose, who in no case proposes conciliatory formulas to overcome the conflict.
- 19 In contrast, the conciliator, although also a facilitator of communication between the parties, carries out a different task than the mediator since his function allows him to find formulas that tend to overcome the conflict.
- 20 As opposed to both figures, and without prejudice to the fact that during the course of the arbitration, an arbitrator may try to reach a compromise between the parties, his essential task is to apply the law, awarding it to the party he proves to be entitled to it, or, if he acts as *amiable compositeur*, he also carries out an adjudication task, but with the difference that he does so by 'softening the letter of the law', according to Barrios de Angelis.⁴
- 21 The existence of one and the other type of system is thus clearly seen, because although the first two have an essentially compositional purpose, the arbitration system that the parties pass through, has another purpose. When for its development a process is developed, which is precisely the adjudication of the rights in dispute through a

² See the work of A do Passo Cabral, in Part XV, which develops extensively his work on consensual methods of conflict resolution and at the same time differentiates them from arbitration.

³ K Fan and L Cadiet, 'Independence, Impartiality of Arbitrators, Mediators and Experts' in E Oteiza and G Priori Posada (ed), *Independencia judicial en el tercer milenio - XVII Congreso Mundial de Derecho Procesal (Judicial independence in the third millennium - XVII World Congress of Procedural Law)* (Lima, Palestra Editores – Pontificia Universidad Católica del Perú 2023) 593 ff.

⁴ D Barrios de Angelis, *El Juicio Arbitral*, (Biblioteca de publicaciones oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de Montevideo 1956) 45; who also points out that equity has been identified under different names since the old Roman Law, passing through French, English and Spanish law, being phrases that in all cases have the same meaning, such as equity, good faith, loyal knowledge and understanding, good judgment, etc.

jurisdictional act of authority, which is the one provided by the contracting parties themselves.

- 22 As can be seen, what used to be a collaborative approach, both by the conciliator and the parties, has been transformed into a process that inevitably confronts the interests of both parties. This approach requires different work by the mediator or the conciliator and evidence to justify the positions held by each of the parties as the basis for their claims.
- 23 All these systems, in turn, can operate in combination with each other, known by their acronyms, eg, med-arb or conc-arb. This means mediation plus arbitration, or conciliation plus arbitration.
- 24 This implies a previous step through a task that tries to compose the interests of the conflicting parties. In case of failure, the next step would be to submit the matter to the judgment of arbitrators, who the parties themselves will decide whether to act as arbitrators of law or equity or what is the same as *amiable compositeurs*.⁵
- 25 The selection of arbitrators is a right that belongs to the parties and therefore, it is they who assume the responsibility, the risks and the consequences of such choice when they have not ceded this prerogative to a third party.⁶
- 26 This is nothing more than two systems – combined together – that are totally different, since one implies – as an alternative to the traditional confrontation observed in a judicial or arbitration process – a system that aims at the collaboration of the parties among themselves, and with the mediator or the conciliator in order to bring their positions closer, as a possible response to meet their interests and overcome the conflict.
- 27 The combination of these systems means that once the conciliatory process has failed, the parties, by their own decision, agree to submit their conflict to the judgment of arbitrators, for which the independence and impartiality will be maintained as a limiting principle, which also happens in the non-adversarial systems.
- 28 There is always a kind of doctrinal pigeonholing around the figure of arbitration, aiming to link it to a contractual figure, due to the essentially commercial nature of the matters it deals with, a thesis that is opposed by those who see in the institute a jurisdictional

⁵ There are several denominations to identify the arbitration of *amiable compositeurs*, some call it equity arbitration, others conscience arbitration, others *ex aquo et bono* arbitration, others known truth and good faith, etc. What is certain is that in all cases reference is made to the arbitrators acting on the basis of equity, not law. That is to say, without having to rigorously apply the law, but rather to temper it or consider another more convenient one, always in order to find a more convenient solution to the conflict in question.

⁶ F Mantilla Serrano, 'La selección del árbitro y su obligación de independencia', in E Gaillard and D P Fernandez Arroyo, *Cuestiones Claves del Arbitraje Internacional* (Universidad del Rosario 2013) 40.

connotation, to finally hold an intermediate position between both – which is the majority – recognizing that although arbitration is born conventionally, its development is assimilated to that of a process, hence its jurisdictional nature.

- 29 Following the teachings of the master Genaro Carrió,⁷ the laborious search by jurists for the legal nature of a particular institute is doomed to failure, said Carrió, and argued that this is because things are the way they are, and precisely with arbitration something like that happens. In most cases, arbitration has contractual characteristics, as it is conventional in its origin, and it has jurisdictional characteristics, as it is procedural – in most cases – in its development.
- 30 It is worth asking not whether the nature of arbitration is one or the other, or whether the intermediate thesis is the one that has the most followers worldwide, but arbitration is a system that, due to its flexibility, admits various forms for its implementation, regardless of whether it is called by a single name.
- 31 It is also commonplace to add the identification of *alternative* since it is assumed that the State – which is the monopolizer of force – provides people with a system called judicial process as a *traditional* mechanism of conflict resolution, hence all those that differ are alternative.
- 32 However, this denomination may be meaningless if we analyse which of them existed first in time. The alternativity of a system indicates the existence of another system that can be substituted, or at least alternated in its use, and it is useful to remember that arbitration has appeared in the world practically as long as mankind itself has existed.
- 33 From Homer's account in 'The Iliad' of the dispute between Menelaus and Antilochus, about a contest of strength and skill, and the complaint of one against the other for a possible fraud in the competition to be settled by an impartial third party, it emerges that who would be that third party rather than an arbitrator.
- 34 Nor was the Roman genius marginalized because the history of Roman law teaches that the common judges were chosen from among the people for each cause. Thus, there was the properly called *iudex* and the arbiter.
- 35 The *iudex* was a private individual appointed by the magistrate to hear the case in *iudicio* and issue the sentence, the appointment of the judge constituted a true participation of the people in the decision of civil cases, and in this aspect, a similarity can be found between this institution and that of the juries.
- 36 Therefore, the *iudex* is a private individual who decides the cause, while the arbiter (not to be confused with the *arbitrator ex compromisso*), is entirely similar to the judge in this

⁷ G R Carrió, *Notas sobre derecho y lenguaje* (1st edn, Abeledo-Perrot 1976) 75.

capacity of a private individual, called upon to decide a cause, only that the difference with the former lies in the different extent of the powers granted to one and the other.

- 37 The judge had more restricted powers, including those delegated to him by the magistrate, he had to simply recognize the existence of the right in the form that had been designated to him, the existence or not of the facts whose knowledge had been entrusted to him; and in case the existence of the facts and right concurred, he had to condemn for which he had been precisely designated.
- 38 On the other hand, the arbiter is much freer, he knows with greater spontaneity and breadth. That is to say, the *iudicium* was strict, while the *arbitrium* is moderate and mild in Cicero's words.⁸
- 39 The similarity between the classic arbitration institutes, such as arbitration at law and *amiable compositeurs*, may be a mere coincidence. However, it is appropriate to recall the origin of these formulas, as they are still used in arbitration.
- 40 The truth is that, as it happened in the old Roman Law, the intervention of the State led to the monopolization of jurisdiction in the person of magistrates and judges, and to the dilution of the distinction that Cicero rightly pointed out regarding the function of arbitrators.
- 41 This background is important for placing arbitration within the adversarial dispute resolution systems since it involves opposing positions that require a final decision for the adjudication of the rights in dispute.
- 42 Hence the importance of noting that this implies the birth of a process, beyond its private nature, which requires the observance of fundamental guidelines that allow the safeguarding of the right to jurisdiction of the parties, a right that implies not only access to an arbitration process – because the parties so decided – but also that this process is developed before a court that meets the conditions that are contemplated in the summary of this work.

⁸ See V Scialoja, *Procedimiento Civil Romano* (translated by S Melendo and M Redin, E.J.E.A. 1954) 118 ff, where he also analyses the reason why over time this distinction faded away, and also the existence of another figure which was that of the 'recuperatores' which were international courts to intervene in international conflicts or also to decide issues between citizens belonging to different states.

- 43 Although there is agreement that arbitration is a dispute resolution system, and that it is the most widely used and universally recognized at the international level,⁹ it is no less true that each arbitration system has its particularities that distinguish it from others.
- 44 An eloquent example of this is the arbitrations that take place under the ICC guidelines. These have the particularity of reaching an agreement in its development through a mission statement. Additionally, the parties choose the integration of the tribunal and according to its own rules, is exempt from providing the grounds for some decisions taken during the arbitration.
- 45 These particularities – which are distinctive features – can be seen reflected in the different institutional tribunals that exist in Ibero-America, since each of them adopts its own rules of procedure which – *mutatis mutandis* – beyond their similarities, are not identical.
- 46 Notwithstanding the foregoing, the mechanisms foreseen for the action of the judicial jurisdiction may be similar, which may be generated at the beginning of the arbitration, if there are problems with the formation of the tribunal, or at the end, either because the annulment of the award or its enforcement is sought.
- 47 Based on these particularities, it is appropriate to take into account the draft Model Law elaborated by the Ibero-American Institute of Procedural Law, which took the UNCITRAL Model Law as its main reference and concentrates in some way the Latin American experiences in this area, with the particularity of taking into account not only the cultural patterns of countries that respond to the civil law system, but also their domestic laws and, in particular, the specific arbitration laws that exist in various Latin American countries, such as Peruvian, Brazilian, Colombian and Argentine laws on international commercial arbitration, among others.
- 48 These distinctions become even more evident when reference is made to the neutrality of the arbitrators due to the intervention of persons from different countries, who in turn report to dissimilar legal systems.
- 49 However, as regards the aspects to be addressed in the task entrusted to us, it will be limited to the development of the subject matter of the summary of this work, since arbitration is, in most cases, a system whereby the parties decide to submit to a private jurisdiction based on the principle of free will, the main basis that the parties place on

⁹ R L Lorenzetti, *Teoría de la Decisión Judicial* (1st edn, Rubinzal-Culzoni 2006) 37. In the same sense A L Calvo Caravaca and L Fernández De La Gandara, *El arbitraje comercial internacional* (Tecnos 1989) 38; who point out that this is an increase parallel to the increase experienced worldwide by commercial transactions between companies from different countries.

the arbitrators to carry out the management entrusted to them is the trust they deserve due to their suitability, independence and impartiality.

- 50 This freedom is the inalienable right enjoyed by the parties to choose the arbitrator in whom they will deposit their right to jurisdiction. The importance of this fundamental right cannot be overstated. Any omissive conduct by the arbitrator that conceals circumstances hindering their action would be detrimental to the parties and the process itself. Such conduct would impact the arbitrator's independence or impartiality, damaging the parties' freedom of choice and the legality of the process. This would result in an *undue* legal process or, as stated above, a non-process.
- 51 This impairment to the freedom of contracting, either at the beginning of the arbitration or during its development, would disregard any arbitration process, since it would be developed before an arbitrator who would be affected because he would lack one of the essential principles to allow the development of a process, either because he is not independent, because he is not impartial, because he is not competent due to his lack of suitability, or because he is not neutral, for all cases the consequences, as will be seen below, are identical, since they would result in the absolute nullity of the arbitration.
- 52 This being the main reason why an arbitral tribunal is formed, the worldwide recognized phrase arises that *arbitration is worth what its arbitrators are worth*.

3 INDEPENDENCE, IMPARTIALITY AND NEUTRALITY

- 53 It is necessary to take into account that, in accordance with the above characterization of arbitration, which in most cases is voluntary, it is the parties who invoke the jurisdiction of the arbitrators they choose.
- 54 For this reason, it is an essential link to the notion of due process that these arbitrators, when performing an essentially jurisdictional function, like the judges of any justice system, must be independent and impartial in the performance of their duties.
- 55 In some systems, such as the Spanish system, the Arbitration Law establishes, as a guarantee of the transparency and independence of the arbitrators, that the arbitration institutions shall ensure compliance with the conditions of the capacity of the arbitrators and transparency in their appointment, as well as their independence.
- 56 This imposes on the arbitration institutions a duty to monitor the transparency of the appointment of arbitrators as well as their independence.¹⁰
- 57 The doctrine points out that most modern national arbitration laws and arbitration rules usually refer to the independence and impartiality of arbitrators together (eg, Art 1456

¹⁰ P Martínez González, *El Nuevo Régimen del Arbitraje* (Bosch 2011) 70.

of the French Code of Civil Procedure (FCCP); Art 17 of the Spanish Arbitration Law Nr 60/2003; Art 75 of the Colombian Law 1563 of 12/7/2012; Art 10.1 of the UNCITRAL Arbitration Rules, revised in 2010, Art 7 of the Arbitration Rules of the American Arbitration Association (hereinafter AAA); Art 5.2 of the Arbitration Rules of the London Court of International Arbitration (hereinafter LCIA); Art 11.1 of the ICC Arbitration Rules, among others). However, despite the close links between the two notions, they have also been understood to be two distinct concepts.¹¹

- 58 For this reason, it's important to distinguish between two aspects that are often used together but can have different impacts in arbitration: independence and impartiality. Making this distinction beforehand can help avoid misleading interpretations.
- 59 On the one hand, independence and on the other hand, impartiality. These aspects, both, and not only one, make the development of due process, certainly not only arbitral but also judicial.
- 60 Despite their importance and widespread acceptance in the field of arbitration law, the doctrine argues that the principles of impartiality and independence have not been defined conceptually, much less uniformly, although this lack of uniformity seems to respond more to semantic than substantive issues. Still, this has been enshrined in various arbitration laws as well as in the rules of arbitral institutions, as well as the recommendations that exist in the Soft Law, although it is considered that this omission is due to giving freedom to the decision-making body to analyse the situation in each specific case.¹²
- 61 It can be argued that it is a fundamental principle in international arbitration that every arbitrator must be and must remain independent and impartial of the parties and the dispute, although the actual content of the notions of independence and impartiality is not univocal.¹³

¹¹ Mantilla Serrano (n 6) 39 ff. There the author cites the precedent *Suez, Sociedad General de Aguas de Barcelona S.A. and Inter Aguas Servicios Integrales del Agua S.A. v Argentine Republic*, Case No Arb/03/17 (ICSID), Decision on the Proposal for the Recusal of a Member of the Arbitral Tribunal of 22 October 2007, para 29. The Tribunal noted that the concepts of independence and impartiality, although mutually related, are often seen as distinctly different, although it is not always easy to perceive precisely the nature of the distinction.

¹² LJ Caputo, 'La independencia e imparcialidad de los árbitros, de la teoría a la práctica' (2021) 8 Revista Argentina de Arbitraje.

¹³ The concepts of independence and impartiality, although related, are often seen as distinct, although the precise nature of the distinction is not always easy to understand. Generally speaking, independence refers to the absence of any relationship with a party that might influence the arbitrator's decision. Impartiality, on the other hand, refers to the absence of partiality or predisposition towards one of the parties. Being so, it is theoretically possible that in certain situations a judge or arbitrator may be independent of the parties but not impartial (*AWG Group Ltd. v The Argentine Republic* (ICSID), Decision on a second proposal to disqualify a member of the tribunal of 12 May 2008).

- 62 It would be wrong to assume the development of due process with judges or arbitrators who are not independent, or who are not impartial. Therefore, the first distinction to be made is to clarify the concepts of independence and impartiality, allowing for their distinction.
- 63 Independence is generally understood as an objective concept, based on the arbitrator's relations with the parties. Impartiality, on the other hand, is more subjective, relating to the arbitrator's attitude towards the dispute. The latter must be understood fundamentally as an essential ethical duty of the arbitrator. Independence depends on past or present relationships with the parties that can be catalogued and verified, whereas impartiality is a state of mind and therefore more difficult to assess.¹⁴
- 64 The word independence comes from the Latin *independere*, which means 'not to be under the will of others', which refers to a subjective aspect because it points to the lack of connection that must exist between the decision maker and the parties. Nevertheless, in reality, the analysis of the *independence* of the judge or arbitrator must be verified objectively.
- 65 Independence thus refers to the decision-maker's relationships with the parties or counsel, which affects his or her views or attitudes on the merits of the dispute under consideration.¹⁵
- 66 For example, financial, professional or personal relationships would be sufficient to raise doubts about the arbitrator's independence.¹⁶
- 67 Therefore, the test of independence is objective, since prior business, family, or financial relationships are easy to determine from the position of a third party. The facts are irrefutable proof of the existence of such a relationship. Impartiality, on the other hand, is more subjective, since it requires adopting the arbitrator's position and knowing his or her particular state of mind.¹⁷
- 68 Independence, on the one hand, refers to the relationship of the arbitrator to one of the parties; impartiality, on the other hand, is considered to relate to an arbitrator's actual

¹⁴ Case No 834/2008 (Provincial Court of Madrid, Twelfth Section, Spain), Judgment of 25 November 2008.

¹⁵ M Hwang and K Lim, 'Issue Conflict in ICSID Arbitrations' (2011) 5 TDM, para 9.

¹⁶ P A Alonso, 'Impartiality and Independence of Arbitrators in International Arbitration: Issue Conflicts as Grounds for Disqualification with Special Regard to ICSID Arbitrations' (2016) 20, Max Planck Yearbook of United Nations Law, 537-604.

¹⁷ Guzmán-Barrón Sobrevilla states in the same sense in *Arbitraje Comercial Nacional e Internacional*, (Colección Lo Esencial del Derecho, Pontificia Universidad Católica del Perú 2023) 76, for which he argues that independence is an objective criterion that refers to the bond that may exist between the arbitrator and the parties, or between the arbitrator and the dispute. While impartiality is a subjective criterion, that is difficult to verify, which refers to the arbitrator's state of mind. It describes the absence of preference or direct interest towards one of the parties or the dispute.

or apparent partiality, either in favour of one of the parties or in relation to the issues in dispute.¹⁸

- 69 The doctrine interprets that an arbitrator must be both independent and impartial. Impartiality refers to the arbitrator's conduct in proceedings, while independence relates to personal, social, or financial relationships between the arbitrator and a party or counsel. As Donahey notes, 'the closer the relationship in any of these spheres, the less "independent" the arbitrator will be of the party'.¹⁹
- 70 This lack of relationship must be appreciated in a broad sense. That is to say that it matters both the link from a social point of view, as family, as business, as in any other order, that matters the existing relationship between the decisionmaker and one of the parties (or both) involved, both in a judicial process and in arbitration, hence it is aimed at the linking of the subjects, although it can be assessed objectively, their relationship is subjective according to the nature of the relationship they maintain, either because they are associated with a law firm, or because there is a relationship of kinship, or close friendship, or a business or corporate relationship, among other aspects to be taken into account.
- 71 Impartiality, on the other hand, points to a subjective aspect, which has to do with the relationship that may exist between the decisionmaker and the subject matter or object of the arbitration process. Therefore, impartiality is usually identified with the neutrality of the judge or arbitrator with the case, although the latter – in turn – has a different scope in international arbitration.
- 72 Notwithstanding the foregoing, it should be noted that the judge or arbitrator, when issuing his decision on the merits, will make assessments of a personal nature which, of course, make his decision subjective. Here, objectively, there may appear links, relationships, or interests that involve the arbitrator with the subject matter of the arbitration process, which is why, as in the case of independence, if the arbitrator is affected in this respect, he/she will not be suitable to intervene in the arbitration.
- 73 Both aspects, which are often used indiscriminately for the correct analysis and interpretation of a given situation, must be separated in their interpretation to facilitate the development of a due arbitration process for the parties.
- 74 It should also be noted that the interpretations regarding the distinctions between independence and impartiality that were analysed from a subjective point of view for

¹⁸ U Sharma, 'Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments' (2020) 9 (1) Indian Journal of Arbitration Law, 121-141. In the same sense: A Redfern and M Hunter, *Teoría y Práctica del Arbitraje Comercial Internacional* (4th edn, La Ley 2007) 201.

¹⁹ T Tampieri, 'International Arbitration and Impartiality of Arbitrators - The Italian Perspective' (2001) 18 (5) Journal of International Arbitration, 549-571. Similarly: M S Donahey, *The Independence and Neutrality of Arbitrators* (4J INT'L ARiu 1992) 31.

the first concept and objective for the second, as has also been pointed out, are interpreted inversely by other lines of doctrine.²⁰

75 For example, some authors argue that independence has often been understood as an objective concept, which can be assessed based on the arbitrator's relations with the parties, while impartiality refers more to a necessarily subjective attitude or state of mind of the arbitrator in relation to the dispute at hand.²¹

76 Notwithstanding this, another line of doctrine has interpreted the situation in the opposite direction, holding for example that:

[...] the Tribunal's statement that the test for assessing the impartiality of an arbitrator is objective applies throughout English law, irrespective of the forum. The Court considered that the English assessment under section 24(1) of the 1996 Act of whether circumstances exist that could or would give rise to justifiable doubts as to an arbitrator's impartiality, and therefore what an arbitrator should or should not disclose, is an objective inquiry.²²

77 Despite that, both independence and impartiality can be objectively analysed to verify them, it is also necessary to note that subjectively any type of doubt that may be generated in any of the parties by the arbitrator's performance will give rise, following the IBA guidelines – which will be analysed below – to allow his or her denunciation and withdrawal from the arbitration.²³

78 The London Court of International Arbitration has ruled in this regard that the challenger need not prove the bias of an arbitrator, however, there must be objective circumstances proven from which a lack of impartiality can be inferred. Doubts as to

²⁰ The ICSID Tribunal has interpreted, in line with the above, that impartiality refers to the absence of partiality or predisposition towards one of the parties. Independence is characterized by the absence of external control. Both independence and impartiality protect the parties from arbitrators being influenced by factors other than those related to the merits of the case (*KS Invest GmbH and TLS Invest GmbH v Kingdom of Spain*, Case No ARB/15/25 (ICSID), Decision on a proposal to disqualify arbitrator Kaj Hober of 15 May 2020).

²¹ J M Alonso, 'La independencia e imparcialidad de los árbitros' (2006) 2, *Revista Peruana de Arbitraje*, 98.

²² S Leung and A Chan, 'The Duties of Impartiality, Disclosure, and Confidentiality: Lessons from a London-Seated Arbitration' (2021) 37 (3) *Arbitration International*, 667-684.

²³ Independence and impartiality respond, from a contemporary vision, not simply to the search for the unique and excluding answer that the legislated law grants to each factual assumption, but it is evident that the judicial work is essentially interpretative. This means that independence and impartiality is evaluated in terms of the rationality and transparency of the judge's hermeneutic exercise (C-538/16 (Constitutional Court, Colombia), Judgment of 5 October 2016).

impartiality arising only from a subjective point of view of the challenger are sufficient if they are 'justifiable' from an objective point of view.²⁴

- 79 Just as competence is an essential prerequisite for the development of due legal process, since a judge who is not competent to intervene in a case could hardly be in charge, as by-products of this system, which delimits the orbit of business in which a judicial authority may intervene, the same happens with the arbitrator, although this would be linked to his availability if we analyse it from the point of view of international arbitration.
- 80 It is important to note that in Latin American countries a distinction is made between competence and jurisdiction. In the common law system, the term jurisdiction subsumes both concepts.
- 81 This is because, in addition to being competent to hear the case in which he was appointed, he must maintain independence in relation to the parties, since he cannot be dependent on any of them, either directly or indirectly, and must also be impartial, ie, maintain the proper balance to hear the merits of the dispute, without interests of any kind that compromise his knowledge of the case.
- 82 The role of arbitrators is similar to that of judges and the distinction has been made by the Constitutional Court of Colombia when it states that:

While judges exercise a public institutional function that is inherent to the very existence of the State, private parties exercise this function by virtue of the authorization granted to them in the exercise of the autonomy of their contractual will by the parties involved in a given conflict. It has also pointed out that the constitutional justification of this conflict resolution mechanism lies not only in its contribution to the decongestion, efficiency, speed and effectiveness of the state apparatus for the administration of justice but also in the fact that it provides citizens with a voluntary option to take an active part in the resolution of their conflicts, thus materializing the democratic and participatory regime designed by the Constituent [...].²⁵

- 83 The conceptual overlap may occur when reference is made to judicial independence, in that the mechanisms generally used in republican systems, such as the case of Argentina and most Latin American countries, which support their organizational structure on the principle of division of powers, is that the mechanism observed for the appointment of

²⁴ *Conduto Companhia Nacional de Dutos S.A. v Sinopec International Petroleum Service Corporation and Transportadora Asociada de Gas S.A.*, Case no UN152998 (LCIA), Decision on challenge of a co-arbitrator of 22 June 2015. Also in: P M Patocchi and T Niedermaier, 'UNCITRAL Arbitration Rules' in R A Schütze, *Institutional Arbitration* (C. H. Beck, Hart, Nomos 2013) 12, para 263.

²⁵ Sentence SU.174/07 (Constitutional Court, Colombia), Unification Decision of 14 March 2007.

judges involves the participation of the three levels of state power, ie, the legislative, executive and finally the judiciary.

- 84 This is the central aspect that has been taken into account when working on judicial independence, as Part XV proposes to approach it from different perspectives, one of which aims to take into account constitutional guarantees, and how the different systems for electing judges can affect their independence.
- 85 Within the systems for the appointment of judges, in most cases, their appointments are based on mechanisms in which the three branches of government participate and are conceived both constitutionally and legally.
- 86 With this type of appointment system, it could be inferred that judges are dependent on the person who ultimately appoints them, but this dependence is in no way functional in nature since their integration within the judicial organization in question means that they remain independent of the functional actions of the other branches of government that participated in their selection and appointment.
- 87 This is where the judge's independence from the functional point of view comes into play. It makes him neutral to the conflict, since he cannot assume any of the two opposing positions but must maintain equidistance with both in order to know – after the corresponding demonstration – which of those two positions was the correct and true one, through a value judgment free of error or vice, which ultimately constitutes the meaning of the term 'sound criticism'.²⁶
- 88 All this is analysed from a strictly theoretical point of view. But of course, we cannot overlook the weakness of the judicial systems in Latin American countries, which are often subject to the designs of the political powers of the day, as well as to other factors of power, such as corporations, trade unions or the press, among others.
- 89 All these aspects, as well as the one related to intra-judicial independence, are linked to the power of higher courts in relation to lower courts, both at the institutional and individual levels. These are aspects proposed to be addressed in Part XV, which is why the overlapping that occurs is evident so that these analyses will be taken into account for comparative purposes because they will be extremely useful for properly delimiting the concepts of independence and impartiality on which the team works.
- 90 Another important aspect to take into account is transparency, which team 3 proposes to address in general terms when analysing judicial independence, in this case, linked to the obligation to make the justice system more open, to how it is linked to society in general and to the parties in particular, and to the impact that technological systems

²⁶ E M Falcon, *Tratado de la Prueba* (vol 1, Rubinzal-Culzoni 2009) 660.

currently have for these purposes, all of which results in a more agile and transparent justice system.

- 91 This gives rise to the field of arbitration, since many companies exercise the arbitration option for the resolution of their disputes, precisely because of the interference caused in the judicial sphere, especially through power factors that blur judicial independence and neutrality.
- 92 From this point of view, arbitration becomes a favourable environment for resolving disputes, especially those that have a very special bias in relation to the influences to which the case may be subjected, and the interference that may be caused by factors of power over the judges, an aspect that can also be difficult to detect.
- 93 However, it is unfortunate that in practice it happens (although not in all cases), that the arbitrator appointed by one of the parties to the dispute (commonly, although improperly, called *party arbitrator*) confuses the task entrusted to him and considers that he has the duty (or worse, the obligation) to look after the interests of the party that appointed him and, therefore, tends to rule in its favour; or that, erroneously, the party (and/or its lawyers) who appointed such arbitrator, consider that he is under their orders and, therefore, must defend their interests within the arbitral tribunal.
- 94 However, we must be very clear that the so-called party arbitrator, like any other arbitrator of the arbitral tribunal, must not only be an independent and impartial person but must also prove it, as he cannot confuse roles. One thing is the duty of partiality that a party's counsel has, and another is the duty of impartiality that an arbitrator has. Arbitrators are not obliged to account for their actions to the parties that appoint them. These lawyers are not arbitrators *of the parties who appoint them* but *appointed by one of the parties*, due to the functional characteristics of the system to which they conform.
- 95 From the very moment they are appointed, if they do not have any impediment to accepting the position, they do not have any subordinate relationship with the party that appointed them, therefore they are not obliged to it but they have to act independently and of course aiming at the resolution of the conflict with impartiality, which means absence of any kind of *prejudice* of race, religion, nationality, sex or religion, turning a deaf ear to any kind of suggestion or persuasion of any interested party that may influence their mind or with any particular ideology and with complete disregard for the possibility of any gift or bribe and the influence of friendship, hatred, charitable sentiment, desire for personal showcasing or journalistic figure.²⁷
- 96 As already anticipated, to help resolve the conflicts of interest that usually arise in this area, the International Bar Association (IBA), published the 'Guidelines on Conflicts of Interest in International Arbitration' to assist parties, counsel, arbitrators, arbitral

²⁷ A Alvarado Velloso, *Proceso y Debido Proceso* (La Ley 2010-C-1001 2010).

institutions and state courts to address issues relating to the impartiality and independence of arbitrators, the arbitrator's obligation to disclose facts and circumstances likely to create doubts about his or her impartiality and independence and to resolve objections and challenges of arbitrators on such grounds, all of which is an aspect of the so-called soft law.

- 97 The Working Group that drafted the *Guidelines* considered that for practical influence, the Guidelines should contain situations that are likely to arise in arbitral practice. In this context, they designed three *Lists* (red, orange and green) of situations that arise or may arise, in international arbitration regarding conflicts of interest.
- 98 It should be noted that the IBA Working Group considered that the lines separating the situations included in the guidelines are very thin, which is why it is possible that it is not always certain whether a given situation fits into one list or another; therefore, the analysis to be carried out must be casuistic. The authors have rightly stated that the Guidelines are not legal rules and do not prevail over the applicable national law, nor over the arbitration rules chosen by the parties.
- 99 Concerning the Red List, we may comment that it contains a non-exhaustive list of specific situations likely to create doubts as to the arbitrator's impartiality and independence; therefore, if any of the facts or circumstances outlined in this list were to arise, a prudent person with knowledge of the main facts would consider that a conflict of interest exists.
- 100 The Red List is subdivided into two groups, the Unwaivable Red List and the Waivable Red List:
- The Unwaivable Red List lists situations in which the principle that no one can be both judge and party at the same time cannot be circumvented. Therefore, even if the facts or circumstances of the case were disclosed, the conflict of interest would not be avoided.
 - The Waivable Red List includes serious situations, but not as serious as those mentioned in the non-waivable Red List. However, given their seriousness, they shall be considered waivable only if the parties, being aware of the conflict of interest, explicitly state their willingness to have the person they have chosen to perform the functions of an arbitrator.
- 101 In the case of the non-waivable Red List, this includes cases of identity between one of the parties and the arbitrator, or the arbitrator is a legal representative or employee of a legal entity party to the arbitration; or the case in which the arbitrator has a significant economic or personal interest with one of the parties, or in the outcome of the case; and the waivable list includes the case in which a close relative of the arbitrator has a

significant economic interest in the outcome of the dispute, or an affiliated entity of one of the parties.

- 102 The Orange List contains a reference list that includes some specific situations, which depending on the analysis of the case, in the eyes of the parties involved in the arbitration could create doubts about the arbitrator's impartiality or independence.
- 103 It should be noted that the situations described in the Orange List do not automatically disqualify the arbitrator. Consequently, the arbitrator must disclose these facts, and it is understood that the parties accept the arbitrator if they do not proceed to object to his or her appointment within the time limit established for such purpose.
- 104 The Green List contains a list of some of the situations which, from an objective point of view, are not likely to create or create a conflict of interest. Therefore, the arbitrator has no duty to disclose them.
- 105 In the latter case, for example, the arbitrator may be related to another arbitrator or the counsel of one of the parties by belonging to the same professional association, or social or charitable organization, or through social networks, and the case where the arbitrator owns an insignificant amount of shares of one of the parties or an affiliate of the parties if they are publicly traded companies.
- 106 The IBA Guidelines on Conflicts of Interest in International Arbitration are not binding, but they have contributed to the resolution of conflicts of interest that arise in arbitration.
- 107 Other notable Soft Law instruments in this area are the recommendations of the AAA/ABA Code of Ethics, which also address the scope of this duty, providing guidelines such as the following: an arbitrator should disclose any interest or relationship that could affect his or her impartiality or that could create an appearance of impartiality (Canon II). This same canon mentions examples such as any personal or financial interest, direct or indirect, in the outcome of the arbitration and any other subject matter, relationship, or interest that they were required to disclose under the parties' agreement, the rules or practices of an institution or the applicable law governing the arbitrator's duty of disclosure.
- 108 It is also important to highlight the ICC note of 2021, which in Art 27 exemplifies, although not exhaustively, facts that the arbitrator must consider at the time of disclosure.
- 109 A special consideration should be made here in relation to a phenomenon that has arisen in recent years called *third-party funding*, which is of course closely linked to the duty of disclosure that weighs on arbitrators, especially in international arbitration.

110 This is the case of financing provided by a third party to one of the parties to the arbitration, usually the claimant, who does not have sufficient resources to pursue its case, and of course by financing its litigation, obtains in return a share in the successful outcome of the arbitration. Of course, their interest in the outcome of the arbitration is obvious.

111 For this reason, the new arbitration rules include in their regulations this aspect that is directly related to the duty of disclosure of the arbitrators to know their possible connection if there is the financing of the arbitration by third parties and therefore their relationship with the arbitrators, as this may affect their independence.

112 As an example, ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration requires arbitrators to take this circumstance into account, providing in its paragraph 27 that:

In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration, such as third-party funders as well as relationships with other members of the arbitral tribunal, as well as experts or witnesses in the case.²⁸

113 In turn, the concepts of independence and impartiality must be distinguished from the *neutrality* that both, the judge and the arbitrator, must observe in relation to the dispute. This aspect plays a fundamental role in the arbitration field since it is common that in international disputes, where arbitrators from different countries are appointed, the arbitration rules contemplate the need for the third arbitrator to be appointed from a country other than the one in which the parties are involved.

114 For example, the ICC Rules provide in its article 13.1 that:

In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).²⁹

115 And then it details in the same Article in its numeral 5 where the Court is to appoint the sole arbitrator or the chairman of the arbitral tribunal, such sole arbitrator or chairman shall be of a nationality other than those of the parties. However, in appropriate circumstances and provided that neither party objects within the time limit fixed by the

²⁸ Section III paragraph 27, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration 2021 (ICC).

²⁹ Art 13.1, Arbitration Rules 2021 (ICC).

Secretariat, the sole arbitrator or the chairman of the arbitral tribunal may be from the country of which one of the parties is a national.

- 116 And adds in paragraph 6 that whenever the arbitration agreement on which the arbitration is based derives from a treaty, and unless otherwise agreed by the parties, no arbitrator shall have the same nationality as any of the parties to the arbitration.
- 117 In other words, there is also cultural neutrality on the part of this international arbitrator, who must be at least briefly acquainted with the fundamental differences that oppose each other in the major systems of law, both in terms of substance and in terms of the conduct of the proceedings.
- 118 The cultural neutrality of the international arbitrator also requires that he/she knows that the meaning of a legal concept may vary from one system to another, eg, the concept of 'testigo' (in Spanish) and 'witness' are not equivalent, because although at first glance they may seem so, the regime of one and the other in the Civil Law system and the Common Law system are different.
- 119 For in the latter, all persons may testify, while in the former, there are restrictions to receive statements from all persons. In the Civil Law system, the independence of the witness must be respected, and it is not dared to prepare him to be interrogated, while on the contrary, in the Common Law system, it is considered professional misconduct not to do so.
- 120 In line with the above, the doctrine has interpreted neutrality, stating that:

Although impartiality, independence, and neutrality are often understood as the same thing under a narrow concept by some commentators, the neutrality of an arbitrator goes much further than the other two concepts. Impartiality and independence are often used synonymously to reflect the impartial quality that arbitrators are expected to possess. Although they are often used interchangeably, they are conceptually different even though they are related. Impartiality is evaluated subjectively, while independence adopts an objective test.

Similar to independence, neutrality reflects an objective state and requires the arbitrator to be intermediate and equidistant in thought and action throughout the arbitral process. In contrast, impartiality is subjective and abstract and requires an inquiry to determine evidence of bias, which can be very difficult to establish in practice, hence the need to look for external behavior that establishes the arbitrator's state of mind. Lack of neutrality does not automatically translate into bias, but no arbitrator can be considered neutral if his or her behavior is biased.

Neutrality refers primarily to the bias of the arbitrator toward a party personally or toward the party's position, and as noted, it has generally been accepted that this bias results from the nationality and culture shared by the arbitrator and a party.

Neutrality is clearly linked to nationality, and some argue that independence, impartiality and neutrality are synonymous concepts. However, there are clear differences, since neutrality refers more to the perception of bias than to actual bias and, consequently, is different from impartiality, which refers to actual bias and adopts a subjective criterion.

Impartiality requires that an arbitrator be free from bias due to preconceived notions about the dispute, or any other reason that might favour one party to the detriment of the other. Although a subjective concept, impartiality must be demonstrated through some external behaviour that establishes the arbitrator's state or situation of mind, such as a professional or personal relationship with a party that might reasonably lead to the conclusion that the arbitrator was biased.

Independence reflects the absence of a pre-existing relationship between the arbitrator and the parties, whether financial, personal or otherwise. Independence decreases as a function of the proximity of the relationship. An objective test is employed to make this determination, as it has nothing to do with the arbitrator's state of mind.³⁰

- 121 Here again, we can appreciate the distinctions that are made from the theoretical point of view in the doctrinal field on concepts that, although they overlap, require different views for their interpretation.
- 122 Therefore, the concept of neutrality of the third arbitrator points to the need to maintain respect for the recognition of possible different legal systems observed by the parties, whether one observes the civil law system or the other the common law system, just as aspects linked to the Muslim system, the Russian system or other different systems may arise.
- 123 Therefore, the arbitrator's neutrality aims to respect the systems from which each of the parties originates, maintaining equidistance from both, to keep his neutrality with the object of the conflict and how it will be interpreted -according to the *lex arbitri* chosen by the parties to settle the dispute.

³⁰ R Feehily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice' (2019) 7 (1) Penn State Journal of Law & International Affairs, 88-114.

4 ON SUITABILITY

- 124 In turn, regarding the suitability of arbitrators, it is appropriate to quote the 1st article of the Model Law approved by the Ibero-American Institute of Procedural Law, which states that ‘the arbitrators chosen by the parties to submit to arbitration must be sufficiently qualified, considering the subject matter in question’.³¹
- 125 However, not all institutional arbitration tribunals have this particularity in terms of the alleged specialty of the arbitrators, although there are some that are specialized concerning specific matters, such as construction, or technological disputes, among others.
- 126 Here there is a fundamental difference to be taken into account concerning the judicial jurisdiction, since there is no such degree of specialization in most cases there are civil and commercial courts, either with joint jurisdiction to hear disputes related to both matters or separate, also labour, contentious-administrative, criminal, among others, in general with a broad range of matters that does not allow inferring a special dedication to any type of subject matter, even within its specific sphere of action.
- 127 The degree of specialization provided by some arbitration systems, which allow the selection of such arbitrators, has a special impact on the development of the arbitration system in question.

5 APPLICABLE INTERNATIONAL REGULATIONS

- 128 There are several sources from which principles can be extracted, such as rules that reflect the aspects we have mentioned, in the same way, that there are rules that weigh on the arbitrators to maintain throughout the process their neutrality with the case through their independence and impartiality.
- 129 UNCITRAL prohibits preventing someone from being appointed as an arbitrator based on his or her national origin. Some arbitration rules, including those of the London Court of International Arbitration (LCIA), provide that, as a general rule, a sole arbitrator or the chairman of an Arbitral Tribunal may not have the same nationality as any of the parties, if they come from different countries, to safeguard the impartiality of the decision and the neutrality of the arbitrator, who must also respect the different legal systems from which each of the parties come.
- 130 The International Bar Association (IBA), as already mentioned, through its Committee on Arbitration and Alternative Dispute Resolution, formed a working group of nineteen experts from fourteen countries to draft the IBA Guidelines on Conflicts of Interest in International Arbitration, a document that seeks to assist in the decision-making process

³¹ Art 1(g) Model Law for Commercial Arbitration 2023 (IIDP).

regarding the impartiality and independence of the members of an arbitral tribunal in international commercial arbitration (although the drafters themselves acknowledge that its application could be extended to other types of arbitration).

- 131 The text has two parts, namely: 1) the General Standards on impartiality, independence, and duty of information of arbitrators and 2) the practical application of these standards. It should be noted that the provisions of the IBA are not normative but are intended to obtain customary acceptance by the arbitration community, forming what has been called soft law.
- 132 Well, the first IBA General Standard seems to confirm the idea that the arbitrator must be impartial and independent, by stating as a general rule that: 'Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated'.³²
- 133 To preserve these objectives of arbitration justice, the IBA has made explicit the assumptions in which arbitrators may incur in conflicts of interest. Therefore, it establishes duties of disclosure to the contracting parties throughout the arbitration process. Accordingly, an arbitrator must decline to be appointed or cease to act as such if there are serious doubts as to his or her impartiality or independence.
- 134 The IBA extends this rule to cases in which, due to facts or circumstances after the appointment, the doubts arise and are evident from the perspective of a reasonable third person informed of the relevant facts, unless the parties have recognized the arbitrator. This is the reasonable third-person test, which IBA took from Article 12 of the 1985 Model Law. The problem with this rule is to determine what a serious or justified doubt is. Well, according to the IBA:

Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator's decision.³³

- 135 To this end, as mentioned above, various circumstances that may affect the independence or impartiality of an arbitrator were identified, by way of example, classifying the situations into the lists described above, which enable the possible impairment of an arbitrator to be objectified with greater precision.
- 136 As can be seen – according to the distinction made in the previous point – this assessment has a high dose of subjectivity and discretion to try to objectively seek the possible lack of independence or impartiality in the appointed arbitrator, with which the

³² Part 1(1) Guidelines on Conflicts of Interest in International Arbitration 2014 (IBA).

³³ Part I (2) Conflicts of Interest, Guidelines (n 29).

distinction that will be made is nested in the provisions arising from the soft law that has been generated from these IBA rules, that are aimed at clarifying possible incompatibilities that may arise.

- 137 In line with this, the 1965 Washington Convention (ICSID Convention) regulated the full confidence that arbitrators must have in their impartiality of judgment.³⁴
- 138 Similarly, in the MERCOSUR Permanent Review Tribunal³⁵, the Olivos Protocol stipulates that the arbitrators of the *ad hoc* arbitration tribunals and those of the Permanent Tribunal must observe impartiality and functional independence from the Central or direct Public Administration of the States Parties and must not have interests of any nature in the dispute and shall be appointed based on their objectivity, reliability, and good judgment.³⁶
- 139 Other legislations positivize these requirements, for example, the Swedish Arbitration Act provides that:

An arbitrator shall be impartial and independent. If a party so requests, an arbitrator shall be released from appointment if there exists any circumstance that may diminish confidence in the arbitrator's impartiality or independence. Such a circumstance shall always be deemed to exist: 1. if the arbitrator or a person closely associated with the arbitrator is a party, or otherwise may expect noteworthy benefit or detriment as a result of the outcome of the dispute; 2. if the arbitrator or a person closely associated with the arbitrator is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect noteworthy benefit or detriment as a result of the outcome of the dispute; 3. if the arbitrator, in the capacity of expert or otherwise, has taken a position in the dispute, or has assisted a party in the preparation or conduct of its case in the dispute; or 4. if the arbitrator has received or demanded compensation in violation of Section 39, second paragraph.³⁷

- 140 As can be seen, this rule only refers to the duty of impartiality that weighs on arbitrators, so beyond the rules of the International Bar Association, they are regulated only in some countries, such as the arbitration legislation of Germany, Belgium, Holland, Brazil, Finland, etc.
- 141 Although its specific regulation is more notorious in the rules of the arbitration institutions. For example, the rules of the International Chamber of Commerce state that

³⁴ Art 14.1, Convention on the settlement of investment disputes between states and nationals of other states 1965 (ICSID).

³⁵ The Southern Common Market (MERCOSUR) basically comprises Argentina, Brazil, Paraguay and Uruguay.

³⁶ Art 35.2, Protocolo de Olivos para la Solución de Controversias (Olivos Protocol for Dispute Settlement) 2002 (MERCOSUR).

³⁷ Section 8 Swedish Arbitration Act 1999 (Sweden).

any arbitrator appointed or confirmed by the Court shall be and remain independent of the parties to the arbitration.³⁸

- 142 All arbitrators (whether or not appointed by the parties) conducting an arbitration under these rules shall always be and remain completely independent and impartial and shall not act as representatives of any party.

6 DUTY OF DISCLOSURE

- 143 Just as important as the duty of independence and impartiality, that arbitrators must observe in the performance of their duties in an arbitration proceeding, is the duty of disclosure.
- 144 This duty, as important, or perhaps even more important than the previous ones, consists of the obligation of the arbitrator to disclose any type of circumstances that directly or indirectly involve him/her with any of the parties to the conflict, or with that which is the subject of the arbitration, due to the possible implications that they may have for him/her.
- 145 He shall even have the duty to disclose those aspects that in his opinion are doubtful, to allow the parties to make their assessment of the arbitrator's independence and impartiality.
- 146 As can be seen, the arbitrator's duty of disclosure and the independence and impartiality he/she must observe in the performance of his/her duties as arbitrator are intertwined.
- 147 Thus, the task imposed on the arbitrator to disclose facts or circumstances that may invalidate him for the performance of his duties, are those that allow him to guarantee to the parties his independence and impartiality since the evaluation of the eventual impeditive circumstances to his function is not only left to the subjectivity of the arbitrator.
- 148 In that sense, such assessment shall be left to the interested parties themselves, who, learning from the circumstances invoked by the arbitrator as doubtful or hindering, shall be the ones to confirm him in office by dismissing all doubts in this respect.
- 149 While the relationship between independence and impartiality and the duty of disclosure, on which the IBA has placed so much emphasis, it was contemplated that arbitrators shall remain independent and impartial throughout the arbitration. Arbitrators as well, must permanently respect the duty of disclosure, under penalty of

³⁸ Art 11.1 Arbitration Rules 2021 (ICC).

disqualification or recusal and at the risk of affecting the integrity of the award or any other arbitral decision.

- 150 An example of the importance given in some countries to this issue is that in the Madrid Court of Arbitration, in October 2020 a Commission for the Recusal of Arbitrators was created, formed by independent members (not linked to the Court or the Chamber), who hold office for a maximum of three years and are not remunerated, in order to advance institutional strength, ensure the effectiveness and independence of its decisions, and renew its commitment to transparency.

7 GROUNDS FOR RECUSAL

- 151 The power to disqualify an arbitrator is a fundamental safeguard that the parties must observe when contracting and committing their case to arbitrators if a conflict arises since it is the key that allows access to the defence of integrating a tribunal with arbitrators who are independent, impartial and, when circumstances require, neutral. Likewise, when referring to the suitability of the arbitrator to participate in the type of process in question.
- 152 This faculty is the fundamental reassurance that the parties must take into account when contracting and choosing the arbitral tribunal they will select to resolve possible conflicts, since it may be an institutional tribunal or an ad hoc one, in such cases necessary precautions must be taken to ensure the existence of recusal mechanisms that provide sufficient guarantees for the integration of the tribunal.
- 153 Just as an example, to objectively know some cases of removal of an arbitrator, Article 12 of the UNCITRAL Model Law establishes the grounds for the challenge of an arbitrator:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.³⁹

- 154 In relation to the lecture above, the London Court of International Arbitration has interpreted the relevant standard of the LCIA Rules as one of impartiality or independence in the eyes of a third party. That third party must have justifiable doubts

³⁹ Art 12 Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (UNCITRAL).

about the impartiality or independence of the impugned arbitrator. These are different qualifications involving different issues. Impartiality refers to the arbitrator's attitude towards the subject matter of the case. It is a notion that does not necessarily coincide with his or her independence, that which refers to the relationship between arbitrators and parties.⁴⁰

8 THE IMPACT ON DUE PROCESS

- 155 It is evident that the impact that the non-observance of the aspects analysed may cause contributes to the conformation of due process, hence the palliatives that are created for its protection such as the duty of disclosure of the arbitrators as well as the challenge mechanisms available to the parties to exercise their right of recusal.
- 156 As a consequence of being in an increasingly globalized world, where the dynamics of relations are characterized by the speed imposed by the technological systems of information and communication, conflicts of interest arise, which are inherent to any organized society, and even more so when considering the patterns in which international trade develops.
- 157 Therefore, to safeguard compliance with the conditions that make the development, within the framework of due process, it is appropriate to identify this fundamental notion to mark the limits that may give rise to the possible annulment of the arbitrator's decision, precisely because of the violation of the principles that make the independence, impartiality, and neutrality of the arbitrators.
- 158 The notions of due process are closely related, without making any distinction between judicial and arbitral due process because, from a scientific point of view, they have the same effect.
- 159 In the same way that it was pointed out above, just as it is difficult to define independence, impartiality, or neutrality, something similar happens with a definition of due process, precisely because of its dynamics, made evident through time since its very origins, in the famous *Carta Magna* from de year 1215 of King John (the Landless).
- 160 Since then, the right of every person not to be deprived of his or her life, liberty, and property except through a process carried out by his or her peers was enshrined. Although the notion of due process of law became more clearly defined in later statutes, the important thing to note is that from its origins it materializes – in some way – in the figure of *habeas corpus*.

⁴⁰ U Draetta, 'Leveragging the Arbitral Process to Encourage Settlement: Some Practical and Legal Issues' (2009) (4) *Revue du Droit des Affaires International/International Business Law Journal*, 493. Cited in *Company X v Company Y*, Case no 142862 (LCIA), Judgment of 2 June 2015.

- 161 Later, the progress brought about by the independence of the United States, the enactment of its Constitution, the French Revolution, and the influence of *jus naturalism* gave this figure a new dimension and increased its scope.
- 162 Precisely the Virginia Declaration of 1776 recognizes this influence as it pointed out that all people have inherent natural rights, and on that basis, independence from the British Crown was called for.
- 163 The consolidation of the liberal ideology enshrined in the French Revolution in 1789, allowed the delineation of the modern state based on basic principles, among which the division of powers, which allowed the birth of an independent judiciary, stands out.
- 164 The notion of independence, in the liberal ideology, is deeply rooted in the freedom of the person, and therefore with the non-restriction of that freedom, with which projecting this notion to the jurisdictional power, this notion is strongly rooted in safeguarding this fundamental right, so that the freedom – understood with the laxity that the term requires – of a person is not affected or undermined by the lack of independence of the jurisdiction.
- 165 Most of the constitutions of the countries of America were built on this basis, with the particularity of not finding a specific definition of due process of law, since it is an open concept that gained ground with time and the recognition and expansion of rights, especially since the middle of the last century with the end of the Second World War.
- 166 The Constitution of the United States itself did not enshrine this notion of due process in its text, but later – in 1791 – in the 5th Amendment and its subsequent extension in the 14th Amendment.
- 167 This fifth amendment provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without *due process of law*; nor shall private property be taken for public use, without just compensation.⁴¹
[emphasis added]

- 168 In line with this, we can quote the Brazilian Constitution which states that: 'All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners

⁴¹ Amendment V (1791), Constitution of The United States 1787 (USA).

residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property [...].⁴²

- 169 There begins a very extensive and detailed description of these guidelines, stating only in paragraphs LIII and LIV that no one shall be prosecuted or convicted except by competent authority and then that no one shall be deprived of liberty or property without *due process of law*.
- 170 It is therefore taken for granted that the Gordian knot of any type of restriction be it on life, property or the restriction of any type of rights of a person requires the development of a due process that eventually imposes them.
- 171 Something similar happens in the Constitution of the Argentine Republic, but there is no reference – even with its reform carried out in 1994 – to what should be understood as due process of law.
- 172 To the point that the doctrine has identified the institute as an *unnamed* guarantee of the Argentine Fundamental Law, which only establishes in multiple rules and guidelines that allow the establishment of principles from which there is no possibility of departing when the legislator designs a procedural system.
- 173 As can be inferred from the foregoing, there is no definition to identify the concept of due process, which produces a situation similar to the concepts of independence, impartiality, or neutrality, so it is convenient to characterize it to be able to identify the eventual affectation of due process due to the lack of concurrence of any of these essential requirements for its existence.
- 174 In the same way that independence means the lack of dependence of any of the parties with the arbitrator; impartiality aims precisely to ensure that the arbitrator is not biased, so that the negative way of each of these concepts allows the approach to its existence.
- 175 In the same sense, due process, since it does not have the possibility of a conceptualization, precisely because of the dynamics that over time continues to expand the significance of the right, the negative way is the one that will allow determining when there is a violation.
- 176 The development of an arbitration process before a dependent or partial arbitrator, allows to notice of a violation that allows to demonstrate the non-existence of process, that is to say, it would be in front of a non-process by way of the violation of the system in question to liminal principles that cannot be left aside for the observance of due process.

⁴² Art 5 Constitution of The Federative Republic of Brazil 1988 (Brazil).

177 An example of this is represented by the European Convention on Human Rights and the American Convention on Human Rights. Article 6 of the former specifically states that: '[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'⁴³; and the second of these Conventions, also known as the Pact of San José of Costa Rica, replicates in practically similar terms in Article 8 what is stated in the European Convention.

178 As a consequence, the importance of the delimitation of the term due legal process, for the analysis of the terms under investigation in both the judicial and arbitral systems, is translated into its characterization, in order to know any type of violation that may have occurred in its development, because as well as independence, impartiality and neutrality, its negative expression will be the one that will allow determining its possible violation, since a positive conceptualization would be a restriction.

179 Of course, the violation of the liminal principles on which due process in arbitration is based will entail its eventual annulment since it would entail the violation of an essential human right.

180 This has been interpreted by the Superior Court of Lima, holding that:

Impartiality is a procedural guarantee and is the guarantee of a fair process. Impartiality is consubstantial to the very function of judging; a partial judge is not a true judge.

The issue of the independence, impartiality, and appearance of arbitrators is of great importance in arbitration, for the simple reason that arbitration is based on trust, but the arbitrator must not only be independent and impartial but must also appear to be so. In other words, he must be virtuous in both substance and form.

While the guarantee of independence, in general terms, protects the judge against external influences, the principle of impartiality, closely linked to the principle of functional independence, is linked to certain requirements within the process, defined as the independence of the judge from the parties and the object of the process itself, which can be understood in two ways:

- a) Subjective Impartiality: this refers to any commitment that the Judge may have to the case.

⁴³ Art 6.1, European Convention on Human Rights 1950 (EU).

b) Objective impartiality: this refers to the negative influence that the structure of the system may have on the judge, thus reducing his impartiality, ie, if the system does not offer sufficient guarantees to remove any reasonable doubt'.⁴⁴

181 These principles, which are fundamental to be observed, are outlined by the constituent and are embodied in the Fundamental Laws – which in the case of arbitration – will be the country that will eventually be the seat of such arbitration.

182 So, it will be convenient to take into account not only the *lex fori* but also the *lex arbitri* that the parties may have eventually chosen, and thus analyse the system to which the parties will adjust and its observance.

183 All the Fundamental Laws enshrine basic principles, such as the equality of the parties before the law, or the principle of legality, the principle of defence in the trial of the person and his rights, or the principle of authority, which in the case of the arbitration process, would be reflected in the fact that the parties may not be removed from the court they have chosen to settle their dispute.

184 Each of these principles, and specifically in the case of the principle of authority, as it arises from Fundamental Laws and International Human Rights Treaties, requires that the jurisdiction – whether judicial or arbitral – must be impartial and independent. This was pointed out in the comparison of the European Convention on Human Rights and the American Convention on Human Rights.

185 All these principles mentioned by way of example are presented with only one facet. There is no principle of inequality, just as there is no principle of dependence, or one of partiality, nor one of non-neutrality.

186 Therefore, these principles will be fundamental for the respect of an essential human right such as the right to jurisdiction. At the same time, the fundamental for any type of order, whether it is a procedural order or an arbitration regulation, which in short, its essentially procedural nature is what characterizes it, beyond the flexibility it imposes for the observance of the forms that may have been established.

187 At the same time, these fundamental principles must be made concrete, that is to say, they must be translated into the reality of a given arbitration – or even legal – system, to allow them to come to life.

188 Couture saw this relationship as the passage from the constitution to the law and it is none other than the mandate of the constituent to the legislator and said:

⁴⁴ *Gobierno Regional De Arequipa v Oncoserv Arequipa Sac*, Case No 00042-2015 (Superior Court of Justice of Lima, First Civil Chamber Commercial Subspecialty, Peru), Resolution No 18, annulment of arbitration award of 20 October 2015.

From the Constitution to the law, there must only be a process of systematic development. Not only must the procedural law be a faithful interpreter of the principles of the Constitution, but its procedural regime, and especially that of the action, the defence, and the sentence, can only be instituted by law.⁴⁵

- 189 On the other hand, the contemporary constitutionalism that has developed in Europe since the Second World War seeks to incorporate dense substantive material content. According to Prieto Sanchis, this is the true purpose of any true constitutionalism: to impose normatively the limitation of power based on a vigorous catalogue of judicially guaranteed fundamental rights, and he recognizes that the UN Charter and the 1966 Declarations of Rights undoubtedly represent the beginning of a new era after the catastrophes of the war, which he finally came to call a 'global constitutionalism'.⁴⁶
- 190 And if we advance in this evolutionary line, this new reality imposes a new look. It is not possible to see with the eyes of the past, it is necessary to warn that the advent of a new Constitutional Rule of Law, develops a constructivism – in the words of Prieto Sanchis himself – that not only offers a foundation for discursive ethics and finally to the moral value of democracy, but also intends to print rationality to the processes of interpretation and application of constitutionalized law.⁴⁷
- 191 He considers this to be the core of the theory of principles and legal argumentation, which, especially in Alexy's approaches, constitutes a new point of connection between law and morality. Every minimally evolved legal system incorporates in its constitution a certain number of moral concepts that we call principles and that demand from the judge or arbitrator a particular argumentative exercise of weighting.
- 192 Where there is deliberation, there are principles, and where there are principles, there is a presence of morality in law.⁴⁸ In the words of Atienza, who is not a supporter of the so-called neo-constitutionalism, principles would constitute a bridge between law and morality, aspects that play a fundamental role when the arbitral tribunal must decide as *amiable compositeur*.
- 193 Here appears a disquisition that originates in the field of the philosophy of law, which is usually made between principles and rules. In general, it is usually pointed out that while principles require weighting, rules are applied on an all-or-nothing basis.

⁴⁵ E J Couture, *Estudios de Derecho Procesal Civil* (vol 1, Depalma, Buenos Aires 2003) 21.

⁴⁶ L Prieto Sanchis, *El Constitucionalismo de los Derechos* (Trotta, Madrid 2017) 228 ff.

⁴⁷ Along the same lines, Delucchi points out that after the Second World War the issue of principles appeared, shifting the force of the law to the force of the Constitution. Law would not only be made up of rules, but also of principles (M L Delucchi, 'Algunas consideraciones en torno a los principios' (2010) 7(40) *Revista Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad Nacional de La Plata*).

⁴⁸ Prieto Sanchis (n 46) 116.

- 194 There are an infinite number of interpretations on what constitutes a principle, and even more so when this principle is referred to the procedural orbit, which gives a guideline, that according to the classification we observe, we can find a diversity of principles.
- 195 And such is the situation that arises, that we can find principles that we would arbitrarily call cultural, such as those principles of life that make a *good family man*, or a *good businessman*.
- 196 These principles are presented with a double face since they constitute themselves interpretative standards – as Dworkin said⁴⁹ – to resolve situations that generate doubts within a judicial process, and in turn, the conduct of the parties is procedurally evaluated in the light of those principles.
- 197 But there are also principles in the exact sciences and logic, and these principles are different from those mentioned above. It would be enough to stand out – for example – the principle of identity, which indicates that every object is identical to itself; which is opposed to the principle of contradiction, more properly called non-contradiction, which indicates that an object cannot be and not be at the same time.
- 198 That is also applicable to the principle of the excluded third party, which indicates that every statement is true or false, bearing no other possibility; and finally the one that is recognized as the fourth principle, which is that of sufficient reason, indicating that everything has a reason to be or to know, that is to say, that all knowledge has to be founded.
- 199 All these principles are principles that make up classical logic and are used as contours that allow avoiding uncertainty in the development of thought, to avoid inconsistencies or falsehoods in reasoning. These could be identified as principles of scientific character that also have universal recognition.
- 200 For this reason, it is very difficult to conceptualize a clear identification of what the principles mean, not only because of the restriction that a definition in itself implies but also because the behaviour of this phenomenon generates a very peculiar dynamic that causes permanent changes.
- 201 This, of course, has to do with the advancement of new rights or the recognition of new rights, since it can be old situations that now have another rank, only because by the force of reality they are recognized as having another value or importance, a very peculiar circumstance that occurs constantly in the arbitration field due to the need to adapt to the speed with which changes in commercial transactions occur.

⁴⁹ R Dworkin, *Los derechos en serio* (Ariel Derecho, Barcelona 2010) 72.

- 202 Therefore, if a principle is interpreted – following the Aristotelian conception – as that which allows us to start something, or north, or a starting point, which allows us to develop an activity, eg, a principle of life could be honesty, from the observance of that principle an evident consequence will be produced, which will be reflected – in this case – in a behaviour.
- 203 As can be seen, in this approach there are two divisible fronts. On the one hand, a front is placed at the beginning of something, but also as a north that, like a guide, indicates a path to follow. This means that the beginning not only indicates the way but also the end to be pursued.
- 204 Therefore, it is easy to gather that the lack of an independent, impartial, or neutral arbitrator will entail a clear violation of the notion of due process that will lead to the nullity of the award since it would constitute an invalid – albeit jurisdictional – pronouncement.
- 205 These principles will come to life in reality through the systems designed by the legislator or by the private authority that institutionally provides arbitration services, such as any of the institutions already mentioned as examples (ICC, AAA, LCIA, among others).
- 206 A system should be interpreted as a set of interrelated parts that pursue a common objective.
- 207 It is enough to point out as an example an *ad hoc* arbitration, as well as an arbitration to be carried out in an institution that provides such services.
- 208 In both cases, either the parties themselves shall provide the forms they deem appropriate for the conduct of their arbitration, or they shall submit to the rules of the arbitration institution they have chosen.
- 209 Therefore, the system – that is to say, the forms that are methodically exposed – will allow the parties to respect the fundamental principles that make the existence of due process, as in this investigation the existence of a court that observes the principles of impartiality, independence, and neutrality, will give rise, in the event of its non-existence, or its omission, or its violation, to the conclusion that there is a violation of due process, for example, in a court that is not independent or is not impartial, circumstances that will allow the violation of the fundamental principles that make the existence of due process to be noted.
- 210 In the design of this system, because the parties have decided to submit to *ad hoc* arbitration, or institutional arbitration, they will be themselves or will rely on the trust placed in them by a certain institution, to conduct their arbitration by the guidelines they have chosen, either because they have done so directly, or because they have submitted to the rules of an institution.

- 211 The particularity of this system is that they may choose variants that will be chosen for them, for example, they may opt for a sole arbitrator or a collegiate tribunal; they may choose to develop a written or oral procedure; they may opt for the immediacy of the arbitrator with the parties, or may adhere to a videoconferencing system, among other aspects.
- 212 All these alternatives show that the systems are now presented as options in favour of the parties, which means the parties themselves are who will choose to carry out their arbitration in one way or another, but in no case may the system clash or violate the fundamental principles that make the existence of due process possible.
- 213 The foregoing allows us to conceptualize principles and systems by closely following the criterion outlined by Clemente Díaz⁵⁰, when interpreting principles, if they are positivized, as the political-legal presuppositions that determine the functional existence of a given system, in this case procedural.
- 214 It is from the Constitution – precisely as Couture taught – where the guidelines that allow us to infer the existence of those principles arise, as well as those new rights that mark a path that the legislator must observe. So then, its eventual non-observance would have an important effect due to the projections upon those rights.
- 215 In line with the foregoing, Guastini maintains, when referring to the principles, with the support of the doctrine of the Italian Constitutional Court, that these are the ethical-political values that, on the one hand, inform the entire legal system and, on the other hand, give it foundation or justification.
- 216 He points to the principles of equality, popular sovereignty, non-retroactivity of laws, legality, and *naeminen ladere*, among others.⁵¹
- 217 Therefore, the key to interpreting these principles in all cases is that whether they are of a cultural, scientific, or procedural nature since they are operative for the process, they are always presented through a single facet in reality.
- 218 These principles – even though they belong to the process – cannot observe a duality, since their non-observance is the one that allows noticing the anomaly that reveals the violation to the development of the due legal process.
- 219 But in turn, other principles can be identified or denominated as general, which have been universally accepted, such as the *pro actione* principle, or the principle of non-retroactivity of the law, or the *naeminen ladere* principle, the good businessman, or the

⁵⁰ C Díaz, *Instituciones de Derecho Procesal Civil* (vol 1, Abeledo-Perrot 1968) 198.

⁵¹ R Guastini, *Distinguishing - Studies in theory and metatheory of law* (Gedisa 2016) 152.

good father of a family, or the principle *lex posterior derogat legi priori*, or *lex specialis derogat legi generali* to point out some common examples.

- 220 Therefore, these principles, which have a supporting purpose, which have a hermeneutical basis that justifies their existence, as they assist the interpreter's work, can be identified as *general principles* of law, since they do not belong exclusively to procedural law, although they also make use of them.⁵²
- 221 These general principles that serve as hermeneutic support are those that offer the possibility, through their weighting, of evaluating a given situation to resolve it, allowing the interpreter sufficient ductility to frame the situation in question within their parameters if it were necessary to resort to them, unlike the rule, which the legal philosophers agree is applied on an all or nothing basis.
- 222 The International Institute for the Unification of Private Law (UNIDROIT) principles on contractual matters, or the ethical principles of the International Bar Association, which have been considered to interpret the independence and impartiality of arbitrators, serve as a strong example in this regard.
- 223 In turn, the difference in the mode of application between rules and principles would be the following: while rules establish definitive mandates and are applied through subsumption since the applicator must compare the concept of the fact with the concept contained in the normative assumption and, if they fit, apply the consequence, principles establish provisional duties and will be applied through their weighting, to the extent that the applicator must attribute a dimension of weight to the principles in each specific case.
- 224 What's important to highlight in this case is an additional category: the systems. This is because the rules aim at an all-or-nothing application since they always take into account the substantive law, ie, the *lex arbitri*. However, procedural law has a particular dynamic because it is precisely the operation of the substantive law, so the description of the procedural rule is not always all or nothing, but the procedural rule has its dynamics providing options. The defendant may or may not comply with the law, answer the claim, offer evidence, or appeal. These are all procedural options. In other words, rights are not always adjudicated by themselves, but rather positions in expectation are adjudicated within the process that implies gaining or losing ground in the attainment of the final objective.

⁵² Guastini, taking as an example Art 12.2 of the Italian Civil Code, which in a way replicates the old Art 16 of the Civil Code of Velez, states that 'if a controversy cannot be decided by means of a precise provision, the provisions that regulate similar cases or analogous matters will be taken into account; if the case is still in doubt, it is decided according to the general principles of the legal system of the State' (n 51) 165.

- 225 Therefore, what the procedural rule allows is the description of a path to follow because it describes a procedure. The procedure to constitute a court, for the election of arbitrators, to file a claim, or the steps to be followed for its notification, or the different mechanisms or ways that can be used for this purpose, among other aspects.
- 226 And if the subject matter of this task is specifically analysed, the independence and impartiality of the judge or arbitrator is as important as the determination of their possible non-observance is complex, whether at the beginning of the proceedings or during their development, especially with much greater emphasis in arbitration whereas we have seen – the duty of disclosure imposes on the arbitrator a much more precise and detailed obligation during the entire development of the arbitration process.
- 227 This task presents difficulties when trying to identify the lack of independence or impartiality of an arbitrator. As an example, the difficulty that existed in one of the most established courts worldwide, such as the International Chamber of Commerce (ICC), which in its arbitration rules only in 1975 introduced the requirement of *independence* of the arbitrator. Much later, in its 2012 rules, it added the requirement of impartiality and of course both without defining them concretely.
- 228 At present, Article 11.1 of the ICC Rules – in the latest reform of 2021 – maintains these concepts, specifically stating that ‘every arbitrator must be and remain impartial and independent of the parties involved in the arbitration’.⁵³
- 229 In turn, the duty of disclosure that weighs on the arbitrators can be seen in the same Rules in paragraph 2 of the same Article, placing on the arbitrator the duty to denounce any fact or circumstance likely, from the point of view of the parties, to cast doubt on his independence, as well as any circumstance that could give rise to reasonable doubts as to his impartiality.
- 230 On the other hand, neutrality is not expressly mentioned in these arbitration rules. However, it can be inferred from the 5th paragraph of Article 13 of the ICC Rules, which states:

Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.⁵⁴

⁵³ Art 11.1 Arbitration Rules 2021 (ICC).

⁵⁴ Art 13 Arbitration Rules 2021 (ICC).

- 231 It then adds the following paragraph: Whenever the arbitration agreement on which the arbitration is based derives from a treaty, and unless otherwise agreed by the parties, no arbitrator shall have the same nationality as any of the parties to the arbitration.
- 232 As can be seen, the aspects that concern us arise from these references, and in general terms, they are contemplated in the regulations of the institutional tribunals, so that their conceptualization will allow us to approach each of these concepts.
- 233 Currently, with the reform to the rules in 2021, the provisions on independence and impartiality of arbitrators are expanded with the inclusion of a provision empowering the arbitral tribunal to take the necessary measures to avoid a conflict of interest of an arbitrator as a result of a change in the representation of the parties (Art 17 ICC Rules), and the obligation for the parties to disclose financing agreements with third parties (Art 11 ICC Rules).
- 234 In addition, Article 13 in its sixth paragraph, of the ICC Rules, which applies to investment arbitration under a treaty, promotes the neutrality of the arbitral tribunal by providing that no arbitrator shall have the same nationality as any of the parties to the arbitration.
- 235 Likewise, the UNCITRAL Model Law, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the Arbitration Rules of the LCIA (Art 5.2), the AAA (Art 7.1), the Arbitration Institute of the Stockholm Chamber of Commerce (Art 5.4), as well as the Swiss Rules of International Arbitration (Art 7.1), the Swiss Rules of International Arbitration (Art 5.3) and the UNCITRAL Model Law (Art 5.4). 5.2), the AAA (Art 7.1), the Arbitration Institute of the Stockholm Chamber of Commerce (Art 5.4) as well as the Swiss Rules of International Arbitration (Art 9.1).
- 236 It should be noted, just as a minimum approach to the subject to be addressed, and to identify the central aspects of this task, that both the judge and the arbitrator appointed by the parties – whether a one-person or collegiate tribunal – must be independent because he is not subordinated to the parties, but carries out his work at their request, but without being subject to their will regarding the decision to be adopted, not only for the development of the due process but also for the decision on merit. He is also impartial because his work must be carried out respecting both parties but maintaining equidistance of the two positions that both sustain in order not to be involved with them.
- 237 In addition, beyond the fact that in judicial systems neutrality may conceptually overlap with the concept of impartiality, it should be differentiated in the case of arbitration, because neutrality must be observed by the arbitrator in cases where he/she is confronted with different cultural patterns and legal systems that bind the parties in conflict.
- 238 In other words, precisely because the arbitration practice may involve companies or individuals, or even states, that report to different legal systems, those aspects make the

arbitrator's task more refined to remain neutral and to be able to adjust to the law chosen by the parties and respecting, in turn, guidelines that identify the parties.

- 239 Along the same lines, it may be pointed out that the term *suitability* refers to the capacity or specialty in a branch of knowledge for which a person is chosen, either because of his or her background, experience in that field, or aptitude for the achievement of the desired goal.
- 240 Failure on the part of the arbitrator to comply with any of the aforementioned aspects will simply nullify the process by affecting the system and thus violating the elementary principle of the right of defence in court by subjecting the parties to the trial of their case by an arbitrator (or a court) that is affected by a negative aspect, which would be his lack of impartiality or lack of independence.
- 241 These aspects, along with the chosen seat and its legislation for potential award nullity, or the law to which parties decide to submit, are central issues requiring focus. They are especially important when designing the arbitration clause or agreement. These elements are often neglected, not given the importance they deserve due to their significant implications.

9 REFLECTION OF THE REALITY IN THE NOTION OF DUE PROCESS

- 242 It is important to note the impact that the observance of the guidelines described above has on the reality of the various arbitral tribunals, citing as an example some of the cases decided in ICSID against Argentina.
- 243 There it has been stated that the concept of independence refers to the absence of relations with a party that could influence the arbitrator's decision, and impartiality refers to the absence of a bias or predisposition in favour of any of the parties.⁵⁵
- 244 It has been debated whether a lack of independence or impartiality must be demonstrated for the removal of an arbitrator to be appropriate, or whether it is sufficient to demonstrate only an appearance of a lack of impartiality or independence.
- 245 And in that regard in the ICSID context it has been held that the appearance of such bias from the point of view of a reasonable and informed third party is sufficient to justify doubts about an arbitrator's independence or impartiality.⁵⁶

⁵⁵ *Suez, Sociedad General de Aguas de Barcelona S.A.; and Vivendi Universal S.A. v Argentine Republic*, Case No ARB/03/19 (ICSID), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of 22 October 2007.

⁵⁶ *Urbaser S.A. and consorsico de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, Case No. ARB/07/26 (ICSID), Judgment 12 August 2010.

- 246 Along the same lines, it was held in the *Blue Bank v Venezuela* case that Articles 57 and 14 of the ICSID Convention do not require proof of actual dependence or partiality; rather, it is sufficient to establish the appearance of dependence or partiality.⁵⁷
- 247 Similar to these descriptions, in *Beg v Italy*⁵⁸ the European Court of Human Rights (ECtHR) found a violation of Article 6 (1) of the European Convention on Human Rights (ECHR) on the right to a fair trial based on the alleged lack of independence of one of the arbitrators. The case concerned arbitration on a dispute concerning an agreement for the production of hydroelectric power in Albania, between the Claimant Company and *Enelpower*, a company spun off from *ENEL* which, at the time, was Italy's state-owned electricity company.
- 248 The claimant complained about the lack of impartiality of the arbitral tribunal since one of its members – then and now one of the most famous Italian legal academics – had previously been a director of *ENEL* and acted as counsel for *ENEL* itself in another proceeding at the time of his appointment to the arbitral panel.
- 249 In the *Beg v Enelpower*⁵⁹ case, which gave rise to the intervention of the ECtHR, the Italian Court of Cassation reiterated, based on the Italian Code of Civil Procedure and the principles of the *lex arbitri*, that the failure to challenge this arbitrator, since the plaintiff was acting in the same field of business as the defendant, and was aware of the arbitrator's situation, constituted an implicit acceptance of his appointment.
- 250 It is clear that the Italian legal system does not consider impartiality and independence as absolute requirements for arbitrators, but merely as requirements for the protection of the parties. The parties have the right to accept an arbitrator who is not completely independent or impartial if they so wish; however, if they do not, they have the obligation to challenge them immediately.
- 251 In its judgment, the ECtHR noted that due to the arbitrator's close links with *ENEL* and, therefore, his direct links with *Enelpower*, the impartiality of the arbitral tribunal was compromised; Since *Beg* had challenged the arbitrator, the Italian courts' refusal to annul the award violated Article 6 of the ECHR.
- 252 Therefore, due to his direct links with *Enelpower*, the impartiality of the arbitral tribunal was compromised, and since *Beg* had challenged the arbitrator, the Italian courts' refusal to annul the award violated Article 6 of the ECHR.

⁵⁷ *Blue Bank International & Trust (Barbados) Ltd. v Venezuela*, Case No. ARB/12/20 (ICSID), Judgment 12 November 2013.

⁵⁸ *Beg S.P.A. v Italy* (ECtHR), Judgment 20 August 2021 [ECLI:CE:ECHR:2021:0520JUD000531211].

⁵⁹ *Beg v Enelpower* (Court of Cassation, Italy), Judgement 20 October 2010.

- 253 What has been exposed so far allows the approach of the *Halliburton v Chubb*⁶⁰ case, decided by the Supreme Court of the United Kingdom in 2020. The case arose as a consequence of the famous oil spills in the Gulf of Mexico in 2016.
- 254 The conflictive situation arose with the appointment of one of the arbitrators, due to several arbitrations that had arisen from this conflict, who was finally appointed by the United Kingdom's Court, Mr Rokinson.
- 255 Once this arbitrator was appointed, he reported that he had been appointed by *Chubb* in other cases involving that company, but the English Court considered that his duty of impartiality was not at stake in those appointments.
- 256 Sometime later *Chubb* appointed Mr Rokinson in arbitration, so the arbitrator again reported that he had been involved in previous cases at *Chubb's* suggestion. However, *Halliburton*, which was its counterparty in one of these new arbitrations, learned of these appointments and claimed that Mr Rokinson had failed to comply with his duty of disclosure in this regard.
- 257 As a consequence of this situation, Mr Rokinson proposed to both parties (*Halliburton* and *Chubb*) to collaborate with them for the appointment of a third arbitrator to intervene in the arbitration process between them.
- 258 The case eventually reached the English Supreme Court, which rejected *Halliburton's* approach and made a distinction between the duty of discovery or disclosure and the duty of fairness.
- 259 To this end, the Court held that an arbitrator may breach his or her duty of disclosure or discovery, but that does not necessarily imply that he or she has breached his or her duty of impartiality.
- 260 This situation would not be the reverse, for while the Court recognized that Mr Rokinson omitted his duty of disclosure to *Halliburton*, it noted that if there is a breach of the duty of fairness, then there was a breach of the duty of discovery.
- 261 We believe that the *Halliburton* case opens a debate that brings into play aspects that were once traditional in arbitration, and which arise from the first examples mentioned above. The interpretation made by one of the arbitral tribunals – as is the case of ICSID – where the mere appearance leads to disqualify the arbitrator.
- 262 In this other case, the omission of the duty of disclosure to one of the parties would not affect the arbitrator's impartiality because, apart from the fact that the error made by

⁶⁰ *Halliburton Company v Chubb Bermuda Insurance Ltd.*, Case UKSC 2018/0100 (Supreme Court, UK), Judgment 27 November 2020.

the arbitrator in omitting this duty was recognized, this in no way implied his alleged lack of impartiality, as *Halliburton* had invoked.

- 263 The debate remains open, as the English Court sets a precedent that has a transcendent impact on the international arbitration community, so it is appropriate to cite as an example, the interpretation made by the Constitutional Court of Colombia in the sense that:

subjective impartiality guarantees that the judge has not had relations with the parties to the process that affect the formation of his opinion, and objective impartiality refers to the object of the process and ensures that the person in charge of applying the law has had no prior contact with the issue to be decided and therefore approaches the object of the process without any preconceived ideas.⁶¹

- 264 As can be seen from the decisions of the English and Colombian Courts, the debate on the interpretation of the arbitrator's impartiality is clear, an aspect that, of course, as the latter of these courts points out, has a clear discretionary conditioning, due to the different points of view that it proposes for its analysis, although it tries to objectify, its interpretation will finally be left to the particular contingencies of each case, which makes this assessment casuistic.

10 BY WAY OF CONCLUSIONS

- 265 It would not be difficult to conclude what has been developed in this area since it is clear that independence, impartiality, and neutrality are essential links in the conformation of due legal process.
- 266 It is also clear that their omission generates a non-proceeding, precisely because of the fundamental nature of those liminal principles that must be observed by the authority, to which the parties have decided to grant the necessary jurisdiction to settle their conflict.
- 267 Likewise, the mechanisms that have been created as a result of the development of these arbitration systems are fundamental, which, as we have seen, is not a single one, but will vary according to the regulations that the parties decide to grant each other or those resulting from the authority they have nominated to intervene.
- 268 It is also important to determine the seat of arbitration in order to know the *lex fori* and through them the Basic Laws of the place that will be the seat or main seat of the tribunal, for which purpose it is advisable to take into account any judicial interference that may occur and therefore the routes that would eventually need to be transited.

⁶¹ *Ernesto Matallana Camacho v Personeria de Bogota D.C.*, T-1034 (Constitutional Court, Colombia), Judgment 5 December 2006.

- 269 All this revolves around several concepts, that have been tried to identify not only from a theoretical point of view but also for the impact caused by its non-observance to weaken and certainly nullify the development of a due process, by the possible violation or non-observance of these fundamental principles, which have also been seen in the corresponding arbitration practice, with pronouncements of various courts.
- 270 But all this allows us to draw preliminary conclusions since, as mentioned above, the dynamics of commerce and the speed of contemporary times, not only imposed by the recent pandemic that devastated the dsfsdworld but also by the impact of the development of technological means of information and communication, make that the conclusions cannot be definitive.
- 271 These conclusions cannot be definitive but show the possibility of a casuist that leads to the need to analyse in each specific case the particularities that arise to fairly resolve the possible removal of an arbitrator for the affectation in which he/she may be involved.
- 272 Moreover, the pronouncement of the English Court in the *Halliburton* case mentioned above opens a debate that hopefully will provide light and clarity for the decisions to be adopted in these aspects, more than the doubts that may arise. This will be overcome precisely by the work of the arbitral tribunals themselves, which will thus contribute to the enrichment of the *Lex Mercatoria*, based on these decisions.
- 273 It is important to note the impact generated by the case on this source of arbitration, which is nothing more than soft law, and which has allowed historically the structuring of a right with strong technical content that originates in the business world, leading to a spontaneous right that has been identified under the name of *Lex Mercatoria* as an expression of the business community or *societas mercantile*.⁶²
- 274 Therefore, it is entirely acceptable, and even more so when it is the decision of the parties to agree so, that the *Lex Mercatoria* be interpreted as those transnational practices or uses in commercial matters, which may arise from various sources, such as those from facts, which refer to such practices, or from law, such as jurisprudential precedents of both arbitration and state courts, or even doctrine, thereby the projections that may have the precedent emanating from the English Court.

⁶² F De Trazegnies Granda, 'Lex Mercatoria Rediviva: De la Edad Media a la Posmodernidad' (2006) (3) *Revista Peruana de Arbitraje* (Jurídica Grijley) 19-34; F Galgano, *La Globalización en el Espejo del Derecho* (1st edn, Rubinzal-Culzoni 2005) 71; It is worth noting in Galgano's work, the citation he makes to two coinciding jurisprudential precedents. One of them, from the French Cassation of 22 October 1991, and the other one from an Italian court (*Tribunale Busto Arsizio*) of 17 October 2003. They state that the *Lex Mercatoria* is constituted by true and proper 'rules of law', which the parties can validly choose in place of any state law and can be chosen in international arbitration by the arbitrators themselves, if the parties have conceded to them the choice of the applicable law. The Italian court added that the *Lex Mercatoria* is an 'autonomous customary law with respect to state laws' and that international arbitration is the appropriate place to judge the facts that contrast with the new *Lex Mercatoria*.

ABBREVIATIONS AND ACRONYMS

AAA	American Arbitration Association
ABA	American Bar Association
Art/arts	Article/articles
CEPEJ	European Commission for the Efficiency of Justice
cf	<i>Confer</i> (compare)
ch	Chapter
conc-arb	conc-arb
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
Ed	editor/editors
eg	<i>exempli gratia</i> (for example)
etc	et cetera
EU	European Union
ff	following
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	ICSID
ie	<i>id est</i> (that is)
IIDP	Ibero-American Institute on Procedural Law
LCIA	London Court of International Arbitration
med-arb	med-arb
MERCOSUR	Southern Common Market
n	footnote (internal, ie, within the same chapter)
para	paragraph/paragraphs
UK	United Kingdom
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

Arbitration Rules 2020 (LCIA).

Arbitration Rules 2021 (ICC).

Arbitration Rules 2021 (UNCITRAL).

Arbitration Rules 2023 (Arbitration Institute of the Stockholm Chamber of Commerce).

Commercial Arbitration Rules and Mediation Procedures 2013 (AAA).

Convención Americana de Derechos Humanos (American Convention on Human Rights) 1969.

Convention on the settlement of investment disputes between states and nationals of other states 1965 (ICSID).

European Convention on Human Rights 1950 (EU).

Guidelines on Conflicts of Interest in International Arbitration 2014 (IBA).

International Covenant on Civil and Political Rights 1966.

International covenant on Economic, Social and Cultural Rights 1966.

Ley Modelo de Arbitraje Comercial (Model Law for Commercial Arbitration) 2023 (IIDP).

Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (UNCITRAL).

Protocolo de Olivos para la Solución de Controversias (Olivos Protocol for Dispute Settlement) 2002 (MERCOSUR).

United Nations Charter 1945 (UN).

National

Ley de Arbitraje No 60/2003 (Arbitration Law) (Spain).

Carta Magna from the year 1215 of King John I (UK).

Constitución de la Nación Argentina (Constitution of the Argentine Nation) 1994 (Argentina).

Constituição da Republica Federativa do Brasil (Constitution of the Federative Republic of Brazil) 1988 (Brazil).

Constitution of the United States of America 1787 (USA).

French Code of Civil Procedure 1975 (France).

Italian Code of Civil Procedure 1940 (Italy).

Law 1563 of 12 July 2012 (Colombia).

Rules of International Arbitration 2021 (Switzerland).

Swedish Arbitration Act 1999 (Sweden).

Virginia Declaration of Rights 1776 (USA).

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International/Supranational

Suez, Sociedad General de Aguas de Barcelona S.A. and Inter Aguas Servicios Integrales del Agua S.A. v Argentine Republic, Case No ARB/03/17 (ICSID), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of 22 October 2007.

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Awg Group Ltd. v The Argentina Republic (ICSID), Decision on a second proposal to disqualify a member of the tribunal of 12 May 2008.

Urbaser S.A. and consorrio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic, Case No ARB/07/26 (ICSID), Judgment of 12 August 2010.

Blue Bank International & Trust (Barbados) Ltd. v Venezuela, Case No ARB/12/20 (ICSID), Judgment of 12 November 2013.

Company X v Company Y, Case no 142862 (LCIA), Judgment of 2 June 2015.

Conduto Companhia Nacional de Dutos S.A. v Sinopec International Petroleum Service Corporation and Transportadora Asociada de Gas S.A., Case no 152998 (LCIA), Decision on challenge of a co-arbitrator of 22 June 2015.

KS Invest GmbH. and TLS Invest GmbH v Kingdom of Spain, Case No ARB/15/25 (ICSID), Decision on a proposal to disqualify arbitrator Kaj Hober of 15 May 2020.

Beg S.P.A. v Italy (ECHR), Judgment of 20 August 2021 [ECLI:CE:ECHR:2021:0520JUD000531211].

National

Ernesto Matallana Camacho v Personeria de Bogota D.C., T-1034 (Constitutional Court, Colombia), Judgment of 5 December 2006.

Sentence SU.174/07 (Constitutional Court, Colombia), Unification Decision of 14 March 2007.

Judgment No 834/2008 (Provincial Court of Madrid, Twelfth Section, Spain), Judgment of 25 November 2008.

Beg v Enelpower (Supreme Court of Cassation, Italy), Judgement of 20 October 2010.

Gobierno Regional de Arequipa v Oncoserv Arequipa SAC, Case No 00042-2015 (Superior Court of Justice of Lima, First Civil Chamber Commercial Subspecialty, Peru), Resolution No 18 of 20 October 2015.

C-538/16 (Constitutional Court, Colombia), Judgment of 5 October 2016.

Halliburton Company v Chubb Bermuda Insurance Ltd.K, Case UKSC 2018/0100, (Supreme Court, UK), Judgment of 27 November 2020.

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