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An Interlegality of International Commercial Arbitration

by M.J. Bond

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An Interlegality of International Commercial Arbitration

by

Michael J. Bond, Esq.*

I. Introduction

A. Arbitration as a place of interlegality.

This paper addresses the evolving standards of independence and impartiality that are central to the selection of arbitrators in international commercial arbitration, and I locate my presentation in the region of what Santos calls "interlegality."[1]

Santos argues that we live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings.[2] Elsewhere I have noted that in the interests of economic competitiveness and growth, developing states are decentralizing, deregulating and liberalizing in order to provide more attractive economic environments for financial capital.[3] As the influence of state led institutions decreases, we can see a shift in the scales of governance. While state institutions are minimized and local actors acquire the opportunity to exercise influence over their destinies, the international, globalized market has been groping for its own choreography of governance.[4] The growth in international arbitration of commercial disputes is but one example of this new choreography of governance.

Santos, in arguing for a symbolic cartography of law, argues that interlegality is the intersection of different legal orders.[5] He contends there has been an increase in the number, locations, and penetrations of law into social, political, cultural, and economic life. The premise of the concept appears accurate; governmental regulation of these four realms of life grows as laws are enacted to, for example, alter or entrench notions of marriage, implement term limits, protect cultural heritage and subsidize business interests. The regulation occurs at local, state, federal and international scales. Other regions also create law: by way of example we can look to Islamic, Hindu, Jewish,

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[1] Boaventura De Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14:3 JOURNAL OF LAW AND SOCIETY, 279-302 (1987).

[2] *Id.* at 298.

[3] Michael J. Bond, The World Bank's Appropriation of Civil Society (2002).

[4] My thanks to Professor Eric Swyngendow, visiting professor from Oxford, for the expression "choreography of governance." He used it to describe the evolution of governance in the European Union, and I believe it is applicable globally.

[5] Santos, *supra* note 1, at 298.

Gypsy, transnational arbitration, the internal governance of multi-national corporations, the Catholic Church, all of which exist at a transnational scale, and indigenous peoples, criminal organizations, and militia movements that exist at a sub-state scale. Santos calls it polycentric, fragmented, uneven and unstable.[6] Legal pluralism sheds light on these different legal orders. Macdonald's simple description of legal pluralism works: "different legal regimes are in constant interaction, mutually influencing the emergence of each other's rules, processes and institutions."[7] He notes "the theory of legal pluralism denies the local hegemony of national legal orders and argues for multiple, overlapping, often non-geographically defined legal systems."[8] Santos argues we can observe these different legal regimes in forms of "local legality in rural areas, in marginalized urban sectors, in churches, in sports, in the professions," and "in the emergence of a new *lex mercatoria*, an international legal space" governed by private actors and associations.[9]

Lex mercatoria refers to the evolving standards of commercial law which may be applied in what is "delocalized" international arbitration, independent of domestic regimes.[10] Smit refers to *lex mercatoria* as "hybrid rules" applied as an accommodation between the various national law rules known to arbitrators.[11] My objective here is not to rehash the arguments over the role or reality of a *lex mercatoria*. I submit that we can see a place of interlegality, that is an intersection of legal orders, in the efforts to achieve harmonization of the ethical rules by which arbitrators are selected.

B. Growth in International Arbitration

As world trade increases, business and governments increasingly resort to arbitration as the preferred "alternative" dispute resolution mechanism. Its alternative (other than negotiation or self help) is usually a domestic court whose processes, where they exist, may be slow, uncertain and subject to political influence.[12] One needs only to read the most recent investment treaty tribunal decision in *EnCana Corp. v Republic of Ecuador*, LCIA Case UN3481, which documents that in three days in April 2005 the National Congress of Ecuador dismissed the entire Supreme Court and President Gutierrez, who himself had also removed the entire Supreme Court by decree two days earlier.

Professor Lowenfeld attributes the growth in international arbitrations to three factors.[13] These factors include 1) efforts by the World Bank to provide ground rules for arbitration of disputes that arise in the process of encouraging economic development in the developing world, 2) Iran's seizure of US hostages in 1979, the subsequent US

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[6] *Id.*
[7] Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. LAW 69,79 (1998).
[8] *Id.*
[9] Santos, *supra*, at 287.
[10] Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in LEX MERCATORIA AND ARBITRATION 1, 8, (ed. Thomas E. Carbonneau 1990).
[11] Hans Smit, *Proper Choice of Law and the Lex Mercatoria Arbitralis*, LEX MERCATORIA AND ARBITRATION 59, 62, (ed. Thomas E. Carbonneau 1990).
[12] See, e.g., Michael J. Bond, Current Issues in Law and Development in Latin America (2003).
[13] ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 456 (2002).

seizure of Iranian assets, and the settlement of hundreds of investor disputes by a Claims Tribunal that is still at work, and 3) creation of more than a thousand Bilateral Investment Treaties (BIT) between nations, all of which provide for arbitration of disputes arising from the treaty investments.[14]

Although Professor Lowenfeld's focus is on investor-state disputes, I submit that these factors have lead to the growth of the interest in arbitration as a means of dispute resolution in all commercial contexts. The point at which transnational enterprises realize their profits always creates the potential for conflict arising from unrealized commercial expectations. The ordinary conflicts assume new dimensions when they become subject to alternative cultural and historic realities, some of which are at times reduced to the differences between the civil and common law legal systems. At the center of these differences lie the basic structure of government and the relation of the citizen to the state. In the common law world the courts are often seen as a mediating structure that serves to protect the people from the power of the state and its allies. In the civil law world the courts are more closely aligned with the interests of the state. This dialectic is revealed in bits and pieces in the evolving rules that govern the qualifications of international arbitrators and the assumptions by which they are supposed to operate.

The numbers of cases filed at six leading commercial arbitration institutions have shown a steady growth in filings, increasing from 1,817 filings in 1998 to 2,776 filings in 2002.[15] The London Court of International Arbitration (LCIA) reports a 20% increase in filings between 2002 and 2003.[16] The other institutions reported here are the American Arbitration Association (AAA), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre, the International Chamber of Commerce (ICC), and the International Centre for the Settlement of Investment Disputes (ICSID). These institutions reflect a global growth in arbitration. CIETAC is located in China and the ICC is headquartered in Paris, France; the legal systems of both are within the civil law tradition.[17] The LCIA is headquartered in London, and the AAA and ICSID are based in the United States and these are, of course, common law countries. Hong Kong is a true point of interlegality; its Chinese citizens have lived with a common law legal system, which continues today.

The number of filings is only one sign of the growing role of institutional arbitration. Many institutions have updated their rules and procedures or adopted wholly new guidelines to accommodate evolving issues relevant to international practices. Many of these changes, I submit, reflect a convergence of international practice. For example, the United Nations Commission on International Trade Law (UNCITRAL) Model Law has been used as the basis for revisions to arbitration laws in nations as diverse as Mexico

[14] *Id.*, The number of BIT's now exceeds 2300.
[15] Geoff Nicholas and Joanna Luker, *Global Overview: An Introduction to International Commercial Arbitration-Key Concepts, Trends and Features*, ARBITRATION WORLD: JURISDICTIONAL COMPARISON, 5, 8 (2004).
[16] Adrian Winstanley, *Director-General's Review of 2003*, LCIA NEWS, March 2004 at 3.
[17] I do not overlook the impact of China's socialist circumstances; other cultural and historic circumstances relevant to China are discussed briefly below.

and Japan.[18] And within the last year the International Bar Association (IBA) and the AAA updated their rules governing the arbitrator's ethical responsibilities to the parties and the arbitration system.

II. Ethics: Can Pigs Fly?

A. The Problem

On February 13, 2004 I had an interesting conversation with two colleagues, a Brazilian lawyer who is a partner with the firm of Pinheiro Neto Advogados and a senior British lawyer who practices in Cairo, Egypt. We met for breakfast on the veranda at the Pinheiro Neto offices following the 2004 IBA International Arbitration Day Conference in São Paulo. The Brazilian lawyer explained to us that when a lawyer in Brazil files a brief with the court, he personally hand delivers the brief to the judge and they sit down and have coffee and cookies and privately talk about the case. It was commonly understood that the lawyers for both sides of the case would have similar opportunities to discuss the case outside the presence of the other side. The British lawyer noted the difference in practice and said that if a lawyer in England did such a thing, in addition to losing his right of audience and the license to practice law forever, he would be prosecuted because *ex parte* contacts like those said to be common practice in Brazil were a criminal offense. My response went something like "well, John, maybe the Brazilians are used to a higher level of professionalism than we are accustomed to?" And in response to my naïve suggestion he pointed to the deep blue Brazilian sky and said: "Yes, and pigs can fly."

Well, pigs cannot fly, and in recognition of that fact the American Bar Association (ABA) and IBA recently published standards and guidelines intended to address the ethical conduct of arbitrators and the importance of maintaining some distance from those who have requested the arbitrator's services. On February 9, 2004 the American Bar Association approved The Code of Ethics for Arbitrators in Commercial Disputes (ABA Code), and on May 22 2004 the IBA approved and adopted Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).

Most of the codes and laws governing arbitration acknowledge the importance of the principle that arbitrators must be independent and impartial. Article 9 of the UNCITRAL Model Law states the rule in terms of the basis for a potential challenge to an arbitrator: "a prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[19] Canon I B (1) and (2) of the ABA Code states that an arbitrator "should accept appointment as an arbitrator only if fully satisfied that he or she can serve impartially and that he or she can serve independently from the parties, potential witnesses, and the other arbitrators." Part I (1)

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[18] Claus von Wobeser, *Mexico*, ARBITRATION WORLD: JURISDICTIONAL COMPARISON, 231 (2004); Toshio Nishimura and Hiroyuki Tezuka, *Japan*, ARBITRATION WORLD: JURISDICTIONAL COMPARISON, 210 (2004).

[19] The United Nations adopted the Model Law in 1976, which was before many people recognized the importance of using gender neutral language in such documents. My spelling follows the document's convention.

of the IBA Guidelines states: "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."

The ICC rules and Chinese law may be notable exceptions. Article 7.1 of the ICC Rules of Arbitration states only that "every arbitrator must be and remain independent of the parties involved in the arbitration." As to the potential for a challenge to a proposed arbitrator, Article 11.1 of the ICC Rules provides for a challenge for "an alleged lack of independence or otherwise," but this rule do not expressly require impartiality. A notion of impartiality appears only at the point of the proceeding: "in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[20]

Article 13 of the Arbitration Law of the People's Republic of China (PRC Law) states only that arbitration officers must be "fair-minded and respectable persons." Article 34, which is discussed below, sets forth the basis for challenge to an arbitrator, but the terms independent and impartial are absent. This lacunae is filled by Articles 25 and 26 of the China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC rules), which expressly require all arbitrators to treat the parties equally, fairly and independently and declare any matters which may raise reasonable doubts about their impartiality and independence. The CIETAC rules were most recently revised and adopted by the China Chamber of Commerce and became effective on May 1, 2005 and they show a convergence of local and international standards of conduct.

Dezalay and Garth report that the community of arbitrators and the lawyers who appear in arbitrations is a small club, one that might be described as a "narrow circle of the grand old men."[21] The arbitrators and counsel seem to appoint each other and "the principle players therefore acquire a great familiarity with each other."[22] They describe what they suspect is "a certain connivance with respect to the role held by the adversary of the moment."[23] One practitioner describes this community nefariously "because people appoint one another. You always appoint your friends – people you know."[24]

But I submit that in order to foster a dispute resolution mechanism that will grow in legitimacy, comply with commonly held notions of due process, and advance the rule of law, international commercial arbitration must become more transparent, and those who practice in this field must recognize obligations beyond their own self interest. To that end the ABA and IBA recently attempted to provide greater guidance to practitioners and those who are called upon to decide challenges to independence and impartiality. I will discuss the ABA Code first.

B. The ABA Code

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[20] ICC Rules of Arbitration, Article 15.2.

[21] YVES DEZALAY AND BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 47 (1996). I am happy to report the growing presence of women in this club.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 50.

The ABA Code acknowledges that in the past and in some types of arbitration, a party appointed arbitrator is not expected to be neutral and is instead expected to be an advocate for one party.[25] The new ABA code resolves that difference of practice on the side of neutrality; all arbitrators, including party appointed arbitrators, are expected to be neutral, which means independent and impartial.[26] Canon I (A) declares this to be an obligation to the parties, all other participants and the process. Under the ABA Code, the potential arbitrator must initially determine his or her own ability to serve impartially and independently. And in order to make this judgment call it seems obvious that the potential arbitrator must learn something about the case, the parties, and potential witnesses. Neutrality as to the parties is easily understood. The reference to "all other participants" must refer to witnesses, clerical staff and the institutions that are designated to conduct the arbitration. The duty to "the process" reflects the crucially important role that arbitrators play in fostering the integrity and legitimacy of commercial arbitration in a system of essentially private justice. Of course, it is in the arbitrators' commercial interests to behave in ways that enhance institutional credibility and legitimacy. But to state a less cynical observation, I suggest it also advances the rule of law.

Canon I (B) (2) states that "one should accept appointment as an arbitrator only if fully satisfied that he or she can serve independently from the parties, potential witnesses and the other arbitrators." Canon II (A) sets forth the duties of disclosure when a person is requested to serve as arbitrator. The circumstances requiring disclosure include:

1) any known direct or indirect financial or personal interest in the outcome,
2) any known existing or past financial, business, professional or personal relationship which might reasonably affect impartiality or lack of independence in the eyes of any of the parties,
3) the nature and extent of any prior knowledge of the dispute, and
4) any other matters, relationships, or interests they are obligated to disclose by agreement of the parties, rules of an institution, or applicable law.

Canon II (D) states that "any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure." As is common in U.S. practice, if an arbitrator is contacted by one of the parties about a potential arbitration, in accordance with Canon III (B), they may discuss the identities of the parties, counsel or witnesses, availability and "the general nature of the case" but should not discuss the merits of the case. I would note here that at the LCIA Latin American User's Council Symposium in Rio de Janeiro on February 14, 2004, Bernard Hanotiau, a Belgian lawyer who is one of the very respected active international arbitrators and a well published scholar of international arbitration, seemed to be completely disgusted by the American practice of interviewing arbitrators prior to appointment.

C. IBA Guidelines

[25] ABA Code of Ethics for Arbitrators in Commercial Disputes, Note on Neutrality.
[26] Canon I (B).

The IBA Guidelines more specifically describe the situations that practitioners might face, and set forth recommendations of the types of information that should be disclosed in order to preserve the integrity of the arbitral process and harmonize practices. The IBA is an organization of over 16,000 international lawyers; its Committee D, which deals with arbitration and other forms of alternative dispute resolution, has over 1,940 members in 115 countries.[28] A Working Group of 19 experts in international arbitration developed these Guidelines.

One might reasonably question whose interests the Working Group served. It consisted of 19 members; of the 13 members for whom information is available from Martindale Hubbell, 8 work at firms of over 275 lawyers. Five of those members work at firms of over 500 lawyers, including the world's largest law firm, Clifford Chance, which in 2003 boasted of 2,700 lawyers and annual revenues in excess of US $1.5 Billion.[30] The shear size and global reach of these law firms makes it nearly inevitable that claims of conflict of interest and their attendant challenges to independence and impartiality will arise. And while one could argue that these firms have an undeniable economic interest in preserving their place in the system, it is also fair to observe that clarifying the situations that might raise questions of impartiality and independence serves the interest of fostering transparency, legitimacy and the rule of law.

The Working Group observed a tension between the need for disclosure and the right of a party to select arbitrators of their own choosing.[31] Interference with the right to chose one's decision maker in arbitration arises when one party challenges the other party's choice. Challenges to the independence and impartiality of arbitrators appear to be an increasingly common tactic.

The IBA Guidelines are an attempt to assist arbitrators and the parties in identifying the types of personal experiences that raise a need for disclosure of facts that should be taken into account in determining whether an arbitrator is truly impartial and independent. Set forth like a highway traffic light, the Working Group identified three categories of events in terms of red, orange and green lists. The Guidelines are not rules of law, but instead reflect what the Working Group understood to be best current international practices, subject always to applicable local law or arbitral rules chosen by the parties.[32]

The Red List consists of two parts: a non-waivable Red List and a waivable Red List. The non-waivable Red List includes those situations where the arbitrator is also counsel for, an officer or director of, owns a significant financial interest in one of the parties or the outcome of the case, or regularly advises the appointing party from who his or her firm derives a significant financial income. The non-waivable conflicts acknowledge the basic proposition that a person cannot sit impartially and independently as one's own judge when his or her direct financial interest is at stake.

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[28] International Bar Association homepage, www.ibanet.org, last accessed May 8, 2004.
[30] *Clifford Chance Partners with Korn/Ferry to Select COO*, (May 15, 2003) http://www.kornferry.com/Library/Process.asp?P=PR_Detail&CID=448&LID=1.
[31] IBA Guidelines, Introduction 2.
[32] IBA Guidelines, Introduction 4.

The waivable Red List arises from less direct but none the less potentially problematic situations involving relationships the arbitrator has to the dispute, parties or counsel. These relationships include situations where:

1. the arbitrator has given legal advice or an expert opinion on the dispute to a party or one of its affiliates,
2. the arbitrator has previous involvement in the case,
3. the arbitrator owns shares in one of the parties or one of its affiliates that is privately held,
4. a close family member of the arbitrator[33] has a significant financial interest in the outcome,
5. the arbitrator or a close family member has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute,
6. the arbitrator currently represents one of the parties or its affiliates or the lawyer or law firm that is counsel for one of the parties, or is a member of the same law firm as one counsel,
7. the arbitrator is a manager, director or member of the supervisory board of an affiliate of one of the parties if the affiliate is directly involved in the matter in dispute,
8. the arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved,
9. the arbitrator's law firm has a significant commercial relationship with one of the parties or an affiliate,
10. the arbitrator regularly advises the appointing party or an affiliate, but neither the arbitrator nor his or her firm derives a significant income therefrom, or
11. the arbitrator has a close family relationship with one of the parties or an affiliate or with a manager ,director or member of the supervisory board or with one party's counsel, and
12. a close family member has a significant financial interest in one of the parties or an affiliate.[34]

The presumption is that the situations described by the waivable Red List will disqualify a person from serving as arbitrator. The IBA General Standard (4)(c) states in relevant part: "a person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the waivable Red List, exist."[35] However, in order to balance the need of impartiality and independence with the parties' right to choose their arbitrator, the IBA Guidelines provide that, following full disclosure to the parties and arbitral institution, the parties may waive these conflicts. This ability to waive conflicts advances one of the alleged benefits and attractions of arbitration, which is party autonomy. One of the essential characteristics of arbitration is that the parties are free to determine the

[33] Throughout the lists close family member refers to a spouse, sibling, child, parent or life partner. IBA Guidelines, fn. 3.
[34] IBA Guidelines, Red List.
[35] *Id.*, Part I, General Standards (4)(c).

mechanism, rules and procedures that will govern their dispute, including the selection of arbitrators.[36]

The Orange List is a non-exhaustive enumeration of situations that in the eyes of the parties may give rise to justifiable doubts about the arbitrator's impartiality of independence. If no objection is made within 30 days of a disclosure of the facts fitting the description of situations stated on the Orange List, then the parties are deemed to have waived any potential conflict of interest by the arbitrator and may not raise any objection at a later stage.[37] The Orange List is the longest of the lists and it reflects a sensitivity about the relationships the arbitrator may have to the dispute, parties, counsel for one of the parties, or the other arbitrators. These are situations in which:

1. the arbitrator within the last three years has served as counsel for or been consulted by one of the parties or an affiliate in an unrelated matter and has no ongoing relationship,
2. the arbitrator within the last three years has served as counsel against one of the parties or an affiliate in an unrelated matter,
3. the arbitrator within the last three years has been appointed as arbitrator two or more times by one of the parties or an affiliate,
4. the arbitrator's law firm within the last three years acted for one of the parties or an affiliate in an unrelated matter without the involvement of the arbitrator,
5. the arbitrator currently serves or has served in the last three years as an arbitrator in another arbitration on a related issue involving one of the parties or an affiliate,
6. the arbitrator's law firm is currently rendering services to one of the parties or an affiliate without creating a significant commercial relationship and without the involvement of the arbitrator,
7. a law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate,
8. the arbitrator or his or her firm represents a party or affiliate on a regular basis but is not involved in the current dispute,
9. the arbitrator and another arbitrator are lawyers in the same law firm,
10. the arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers,
11. the arbitrator was with the last three years a partner of or otherwise affiliated with another arbitrator or any of the counsel in the arbitration,
12. a lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or an affiliate of one of the parties,
13. a close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute,
14. there is a close personal friendship between the arbitrator and the counsel of one party, as demonstrated by the fact that they spend considerable time together outside of professional commitments, associations or social organizations,

[36] Nicholas and Luker, *supra* note 15, at 5-6.
[37] IBA Guidelines, Part I, General Standards (4)(a).

15. the arbitrator has received more that three appointments by the same counsel or law firm within the last three years,
16. the arbitrator's law firm is acting adverse to one of the parties or an affiliate in another dispute,
17. the arbitrator has been an employee or partner of one of the parties or an affiliate in the past three years,
18. there is a close personal friendship between the arbitrator and a manager, director, or member of the supervisory board of one of the parties or an affiliate, as demonstrated by the fact that they or a witness or expert spend considerable time together outside of professional work, associations or social organizations,
19. if the arbitrator is a former judge, he or she has within the last three years heard a significant case involving one of the parties,
20. the arbitrator owns shares in a party or an affiliate that is publicly listed and the value of the holding is material,
21. the arbitrator has publicly advocated a specific position regarding the case, whether in a published paper or speech or otherwise,
22. the arbitrator holds a position in an arbitration institution with appointing authority or the dispute, and
23. the arbitrator is a manager, director or member of the supervisory board in an affiliate of one of the parties, where the affiliate is not directly involved in the matter in dispute.

I submit that disclosure of these relationships may help to dispel the appearance of "connivance" that Dezalay and Garth suspect existed in international commercial arbitration where friends appoint each other to decide their disputes. But in all cases of challenge, the institution decides the merits of the challenge. Under Article 7.4 of the ICC Rules, "the decisions of the (ICC) Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated." The LCIA Rules are similarly preemptory. In accordance with Articles 5.5 and 10.4 of the LCIA Rules, "the LCIA Court alone is empowered to appoint arbitrators," and it "shall decide on the challenge." Article 36 of the PRC Law states that "the arbitration commission director shall decide whether an arbitrator should withdraw."[38]

The Green List reflects the reality that the community of international commercial arbitrators is a collegial endeavor. With study and experience they come to know something about the multi-faceted issues presented by global trade, their brethren, and the lawyers who come before them. By acknowledging these realities the Working Group rightly concluded that the Green List describes situations where there is no apparent or actual conflict of interest and, therefore, no duty of disclosure. These situations include those where:

[38] Whether an aggrieved party may contest the award for lack of impartiality or independence at the time the party seeks enforcement is beyond the scope of this paper.

1. the arbitrator has expressed a non case specific opinion in an unrelated forum such as an article or lecture concerning an issue which also arises in the arbitration,
2. the arbitrator's law firm acted against one of the parties or an affiliate in an unrelated matter,
3. a firm in association with the arbitrator's law firm (but does not share fees) renders services to one of the parties in an unrelated matter,
4. the arbitrator has a relationship with another arbitrator or counsel for one party through membership of the same professional or social organization,
5. the arbitrator and another arbitrator or counsel for one party previously served as arbitrators or co-counsel,
6. the arbitrator had an initial contact with the appointing party or an affiliate if the contact was limited to the arbitrator's availability and qualifications to serve or the names of possible candidates for a chairperson and if they do not discuss the merits or procedural aspects of the dispute,
7. the arbitrator holds a significant amount of shares in a party or an affiliate that is publicly listed, and
8. the arbitrator and a manager, director or member of the supervisory board of one party or an affiliate worked together as joint experts or in another professional capacity, including as arbitrators in the same case.

D. Special Chinese Issue

As China continues to build its market economy, commercial arbitration is playing a growing role in dispute resolution, and the government has enacted legislation to facilitate this growth in the need for dispute resolution.[39] But these issues of independence, impartiality and disclosure do not resemble the Western approaches in many respects because, I suggest, the context for these rules of arbitration is very different. A full discussion of that context is beyond the scope of this paper and I intend only to refer very briefly to the central role of personal relationships in Chinese society, which are sometimes referred to as guanxi. According to one writer,

> Guanxi is the network of personal connections which governs virtually every facet of Chinese society, both public and private... Guanxi is the "oil of life" in China; guanxi is the means by which all transactions are accomplished and the measure of an individual's power and wealth... The Chinese spend a great deal of time and money nurturing personal connections (building guanxi) in order to increase personal prestige and to further professional or business opportunities... However, guanxi is not synonymous with bribery; it is rooted in deep cultural conventions having

[39] Wang Sheng Chang, *Roundtable on Arbitration and Conciliation Concerning China: CIETAC's Perspective, in* PROCEEDINGS 17TH ICCA CONFERENCE 16-18 MAY 2004.

> more to do with interpersonal respect and friendship than with money per se.[40]

Another scholar puts it this way:

> guanxi is a traditional concept meaning relationships or connections. To get anything done in China, you must have guanxi. In a society of scarcity and strict institutional control, getting what you want – a good doctor, a scarce consumer item, the right job, acceptable housing, a chance to travel abroad – depends on having good guanxi. Thus, Chinese cultivate guanxi. The use of guanxi (who owes you a favor, or who thinks you might be of use in the future) is just as important as the formal lines of authority.[41]

Although this may be an exceptionally oversimplified characterization of many thousands of years of history and culture, some cite the impact of Chinese history and culture on dispute resolution. Professor Jones writes:

> Confucian ethics and cosmology inform the traditional view of dispute resolution. Confucius held a low view of law and this is reflected in the Chinese approach to the resolution of disputes. Traditionally, litigation is seen as a last resort and signifies a breakdown of harmony. Thus, the goal in Chinese dispute resolution is to settle the dispute, not to have it adjudicated. [42]

This devaluation of the resort to law in favor of preserving harmony is shown by the long use and acceptance of conciliation in China to resolve disputes. Professor Jones reports that "historically conciliation was used at the local village, neighborhood and work unit level."[43] Today there are approximately 40,000 conciliation centers in China, most of which deal with domestic disputes, but it is also an integral part of the arbitration practice.[44] And I submit that these cultural factors need to be taken into account when we examine the role of independence and impartiality in arbitration in China.

Stated one way, guanxi sounds like the reciprocal doing of favors that Dezalay and Garth bemoan, and it is not clear that the Chinese Arbitration Law will relieve their anxiety. Article 34 of the Arbitration Law of the People's Republic of China states:

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[40] Ted Hagelin, *Reflections on the Economic Future of Hong Kong*, 30 VAND. J. TRANSNAT'L L. 726, 734 N. 113 (1997) (citing BOYE LAFAYETTE DEMENTE, CHINESE ETIQUETTE AND ETHICS IN BUSINESS (2d ed. 1994)).

[41] THURSTON, ANNE F., ET AL., CHINA BOUND: A GUIDE TO ACADEMIC LIFE AND WORK IN THE PRC 58-59 (REV. 1994)

[42] Doug Jones, *Various Non-Binding (ADR) Processes*, *in* PROCEEDINGS 17TH ICCA CONFERENCE 16-18 MAY 2004.

[43] *Id.*

[44] Ariel Ye, *General Introduction to and Comments on the Integrated Dispute Resolution Systems in the PRC*, *in* PROCEEDINGS 17TH ICCA CONFERENCE 16-18 MAY 2004.

> **Article 34.** An arbitrator shall withdraw from serving in the tribunal when his case is one of the following, and the litigants also have the right to present a withdrawal request:
>
> (1) where he is one of the litigants in the arbitration, or he is a close relative of any one litigant, or a relative of the attorney;
> (2) where he has a vital interest in the arbitration;
> (3) where he is related to the litigants, or their attorneys in other respects in the case and the relationship may affect an impartial arbitration; or
> (4) where he has had private meetings with the litigants or with their attorneys, or when he has accepted the invitation of the litigants or their attorneys, to dine, or accepted their gifts.[45]

The PRC Arbitration law does not provide for waiver of the conflicts of interest described in Article 34 and it appears that some of the IBA's waivable Red List situations would require the arbitrator to withdraw, for example where the arbitrator is a close relative of one of the parties. But whether the scope of "vital interest" or a "relationship" with one of the litigants or attorneys "that may affect an impartial arbitration" would ever be construed to encompass the type of personal relationships and networking inherent in guanxi remains to be seen.

At the LCIA Symposium in Beijing on May 15, 2004, I asked if the prohibition on "private meetings" with the lawyers for one side barred the type of pre-appointment interview common in the U.S. Jengzhou Tao, a Chinese lawyer and author of a new treatise ARBITRATION IN CHINA replied that Article 34 was not applicable until after the arbitrator was appointed. But the PRC Arbitration Law is new and practice and procedure in China is evolving.

The PRC Arbitration Law does not express the means by which impartiality and independence are supposed to be disclosed and evaluated. Under the former CIETAC rules, Article 28 stated only that "any appointed arbitrator having a personal interest in the case shall himself disclose such circumstances to the Arbitration Commission and request a withdrawal from his office." No other disclosure was required absent a challenge from one of the parties; any advance disclosure is limited to the facts showing a "personal interest," and while the Arbitration Commission can deny the arbitrator's request for withdrawal, it appears the Commission could disagree and permit the arbitrator to stay on the case. Now, under Article 25 of the revised Rules an arbitrator shall sign a Declaration and disclose to the CIETAC in writing any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.

III. Conclusion

The world is becoming more closely knit and the means by which commercial disputes are resolved is adjusting to new realties. Parties from differing legal systems, cultural histories and concomitant expectations are compelled to constant "transitions and trespassings" in the sense Santos describes. One scale of administration has expressly

[45] The PRC Arbitration Law was Adopted at the Ninth Standing Committee Session of the Eighth National People's Congress on August 31, 1994.

adopted rules of impartiality and independence in arbitrators who serve in international arbitration. At another scale of administration the PRC Law requires only that arbitrators be "fair minded and respectable." And yet with the result that practice and expectations converge, the scale is "jumped" in China for parties who use the CIETAC rules, which also now require impartiality and independence. The evolution of these various codes, guidelines and rules governing the expectations of the arbitrator's independence and impartiality demonstrate Santos's conception of interlegality.

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