

TABLE OF CONTENTS

List of Abbreviations	xiii
Acknowledgements	xix
Introduction	1
1 Introduction to International Commercial Arbitration	9
1.1 The Arbitration Agreement and the <i>lex loci arbitri</i>	9
1.2 Differences between Institutional and Ad Hoc Arbitration	10
1.3 The Dualistic Nature of Arbitration	11
1.3.1 The Judicial Nature of Arbitration	11
1.3.2 The Contractual Nature of Arbitration	13
1.4 Concluding Remarks	15
2 Applicable Laws, Rules, and Guidelines	17
2.1 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines 2014)	17
2.2 IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules 2020)	19
2.3 IBA Guidelines on Party Representation in International Arbitration (IBA Guidelines 2013)	19
2.4 IBA Rules of Ethics for International Arbitrators (IBA Rules 1987)	20
2.5 Institutional Guidelines and Codes	21
2.6 European Law	24
2.7 New York Convention	26
2.8 UNCITRAL Model Law	27
3 Overview of the Compared Legal Systems	31
3.1 France	31
3.2 Germany	32
3.3 Switzerland	34
3.4 United Kingdom	35
3.5 United States	36

TABLE OF CONTENTS

4	Conflicts of Interest	39
4.1	Relationships	40
4.1.1	Arbitrator's Relationship	42
4.1.1.1	Arbitrator's Relationship with a Party or Counsel	43
4.1.1.2	Arbitrator's Relationship with a Witness	80
4.1.1.3	Arbitrator's Relationship with an Expert	82
4.1.1.4	Arbitrator's Relationship with Another Arbitrator	83
4.1.1.5	Arbitrator's Relationship with an Appointing Authority or Institution	87
4.1.2	Law Firm Conflicts	88
4.1.2.1	Relationship between the Arbitrator's Law Firm and a Party	89
4.1.2.2	Relationship between the Arbitrator's Law Firm and Counsel's Law Firm	92
4.1.2.3	Relationship between the Arbitrator's Law Firm and a Witness	93
4.1.2.4	Relationship between the Arbitrator's Law Firm and Another Arbitrator's Law Firm	93
4.1.3	Tribunal Secretary's Relationships	94
4.1.3.1	Status of Tribunal Secretaries	94
4.1.3.2	Potential Conflicts of Interest in Form of Relationships	102
4.1.4	Counsel's Relationships	105
4.1.4.1	Potential Conflicts of Interest	105
4.1.4.2	Involvement of a Third-Party Funder	107
4.1.5	Expert's Relationship	109
4.1.5.1	Tribunal-Appointed Experts	110
4.1.5.2	Party-Appointed Experts	112
4.2	Conduct	113
4.2.1	Arbitrator's Conduct	114
4.2.1.1	Ex Parte Communication with the Parties	116
4.2.1.2	Comments and Actions during the Proceedings	124
4.2.1.3	Deliberating and Decision-Making	131
4.2.1.4	Tribunal Orders and the Arbitral Award	133
4.2.1.5	Familiarity with the Subject Matter	134
4.2.1.6	Non-Disclosure as a Ground for Finding Dependence and Partiality	139

4.2.1.7	Conduct Provoking (Tactical) Challenges	142
4.2.1.8	Involvement of Social Networks	145
4.2.1.9	Involvement of Third-Party Funding	146
4.2.2	Counsel’s Conduct	148
4.2.2.1	General Remarks	148
4.2.2.2	Interviewing and Briefing an Expert or Witness	149
4.2.3	Conduct of the Tribunal Secretary	150
4.2.4	Conduct of the Arbitral Institution	153
4.2.5	Arbitrator’s Nationality, Language, or Cultural Affiliations	155
4.3	Concluding Remarks	156
5	Other Potential Grounds for Challenge or Annulment Based on Dependence and Partiality	159
5.1	Previous Challenge of the Arbitrator in Unrelated Proceedings	159
5.2	Arbitrator Being Convicted	160
5.3	Institutional Dependence and Partiality	161
5.4	Cumulation of Grounds	165
5.5	Concluding Remarks	167
6	The Applicable Standard of Independence and Impartiality	169
6.1	Definite Dependence and Partiality versus Potential Dependence and Partiality	170
6.1.1	Perspective	171
6.1.2	Different Standards	174
6.1.2.1	Definite Dependence and Partiality or Actual Bias	174
6.1.2.2	Real Possibility of Dependence and Partiality	177
6.1.2.3	Definite Risk of Dependence and Partiality	179
6.1.2.4	Justifiable Doubts on Independence and Impartiality	180
6.1.2.5	Impression of Dependence and Partiality	184
6.1.2.6	Potential Dependence and Partiality	186
6.1.3	Evaluation and Comparison	187
6.1.3.1	Evaluation of Different Standards	188
6.1.3.2	Comparison with Judges	190
6.2	Same Standards for All Grounds at All Stages in the Proceedings	193
6.2.1	Different Grounds in General	193
6.2.2	Non-Disclosure as a Special Ground	195
6.2.3	Different Stages in the Proceedings	196

TABLE OF CONTENTS

6.3	Same Standard for All Arbitrators	197
6.3.1	Partisan Party-Appointed Arbitrators	199
6.3.2	Sympathetic Party-Appointed Arbitrators	202
6.3.3	Three Independent and Impartial Arbitrators	203
6.4	Same Standard for Unconscious Bias	205
6.5	Parties' Possibility to Modify the Standard	206
6.5.1	Agreeing on a Lower Standard of Independence and Impartiality	207
6.5.1.1	Agreement	208
6.5.1.2	Modification Due to Limited Pool of Arbitrators	210
6.5.2	Agreeing on a Higher Standard of Independence and Impartiality	211
6.6	Standard for Experts	212
6.7	Standard for Tribunal Secretaries	214
6.8	Concluding Remarks	215
7	Consequences	217
7.1	Disclosure	218
7.1.1	Scope of Disclosure – What Needs to Be Disclosed	219
7.1.1.1	Broad Scope of Disclosure	219
7.1.1.2	Limited Scope of Disclosure	225
7.1.1.3	Intermediate Scope of Disclosure	229
7.1.1.4	Necessary Specificity of Disclosure	236
7.1.1.5	Individual Scenarios	236
7.1.2	Personal Scope of the Obligation to Disclose	245
7.1.2.1	Arbitrators and Co-Arbitrators	245
7.1.2.2	Experts	246
7.1.2.3	Parties, Counsels, and Third-Party Funders	247
7.1.3	Point in Time of Disclosure	249
7.1.4	Consequences of Non-Disclosure	250
7.1.4.1	Differentiation between Disclosure and the Applicable Standard of Independence and Impartiality	251
7.1.4.2	Non-Disclosure May Hinder Independence and Impartiality	252
7.1.4.3	Arbitrator's Liability	254
7.1.5	The Obligation to Investigate	257
7.1.5.1	Parties' Obligation to Investigate	258
7.1.5.2	Arbitrators' Obligation to Investigate	259
7.2	Right to Object and Waiver	261

7.2.1	Knowledge of the Waived Fact	262
7.2.2	Lack of Timely Objection	265
7.2.3	Waiver in Regard to Cumulated Grounds	266
7.2.4	Advance Waiver	267
7.3	Circumventing the Arbitrator’s Challenge	270
7.3.1	Exclusion of Party-Appointed Experts	270
7.3.2	Exclusion of Witnesses	273
7.3.3	Exclusion of Counsel	273
	7.3.3.1 Tribunal’s Authority to Exclude Counsel	273
	7.3.3.2 Grounds for Exclusion of Counsel	277
7.4	Concluding Remarks	280
8	Conclusion and Outlook	283
8.1	The Standard of Independence and Impartiality	283
8.2	The Obligation to Disclose	284
8.3	The Use of Case Law	285
8.4	Tendencies of Harmonisation	286
8.5	Practical Guidance	287
	Bibliography	291
	Table of Cases	315
	Index	329