

Fordham International Law Journal

Volume 31, Issue 3

2007

Article 1

Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)

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Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)

Ilhyung Lee

Abstract

This Essay builds on the available literature to date and offers a more probing examination of the international arbitrator and nationality. The opening section reiterates how arbitrator nationality relates to the traditional requirements of arbitrator impartiality, independence, and neutrality (with which the “arbitrator” is most synonymous); how arbitral rules seek diversity of nationality between the tribunal and the parties; the underlying reasons for national neutrality being the accepted practice in international arbitration; and criticisms of the practice. With this background in place, the Essay poses challenging questions relating to the arbitrator’s nationality, with the aid of hypothetical permutations of an international arbitration matter. The hypothetical, which will offer varying descriptions of prospective arbitrators’ nationality and national affiliation, will inspire further discussion on the always difficult issues of party challenge of the arbitrator and the arbitrator’s disclosures. The hypothetical will be put to the test in a survey of international arbitration attorneys from one country asked to give their reactions to prospective arbitrators who have varying degrees of association to another country. Given the sensitivity to national identification in the international commercial arbitration arena, the matter of the nationality of the arbitrator will continue to be of interest.

ESSAY

PRACTICE AND PREDICAMENT: THE NATIONALITY OF THE INTERNATIONAL ARBITRATOR (WITH SURVEY RESULTS)

*Ilhyung Lee**

INTRODUCTION

Perhaps it is a tautology that in the resolution of commercial disputes in the international arena, nationality—of the parties and the deciding forum—matters a great deal. When a dispute arises, requiring resolution by a neutral arbiter, partners in business become adverse parties, and both sides are wary of placing the decision in the hands of the judiciary of their counterpart's country, out of fear that common nationality might result in national judges favoring their compatriots. For this and other reasons, some parties prefer arbitration as the method of resolving international commercial disputes.¹ It is both the peculiarity and the essence of the arbitration method that allow—in the very same setting—national commonality to perpetuate and nationalistic favoritism to be neutralized.

In many arbitration matters involving three-member tribunals, each party is likely to select an arbitrator of the same nationality,² with the understanding that the party-appointed arbitrator will inform the tribunal of the appointing party's legal and

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1. See Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 280 (1996) (referring to "distinct advantage" in arbitration over court adjudication in international setting). A revealing empirical study, however, questions whether companies actually prefer arbitration over litigation, at least enough to include an arbitration clause in their contracts. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007). In their examination of 2,800 contracts of various public firms, Professors Eisenberg and Miller concluded that "[i]nternational contracts include arbitration clauses . . . at a surprisingly low rate." *Id.* at 373.

2. See Pryles, *supra* note 1, at 280.

business culture. Ideally, the party-appointed arbitrator serves as a cultural intermediary and translator.³ Yet parties commonly insist that the chair of the tribunal, or the sole arbitrator in cases involving one arbitrator, be a national of a country other than those of the parties.⁴ All references to “arbitrator” herein are to the chair or sole arbitrator, unless the context refers to arbitrators generally or party-appointed arbitrators. It is said that this practice of national neutrality is widely followed, and even provided for, to varying extents, in the rules of the major arbitration organizations under which parties agree to arbitrate claims.⁵ Consideration of the nationality of the arbitrator is quite important then, to parties, counsel, and administering organizations; and when arbitrator nationality is disregarded, it could be of interest to reviewing courts that are requested to decline the award.⁶

Commentators have discussed the nationality of the tribunal in international arbitration, but usually in brief recitations.⁷ This Essay builds on the available literature to date and offers a more probing examination of the subject. The opening section reiterates how arbitrator nationality relates to the traditional requirements of arbitrator impartiality, independence, and neutrality (with which it is most synonymous); how arbitral rules seek diversity of nationality between the tribunal and the parties; the underlying reasons for national neutrality being the accepted practice in international arbitration; and criticisms of the practice. With this background in place, the Essay poses challenging questions relating to the arbitrator’s nationality, with the aid of hypothetical permutations of an international arbitration matter. The hypothetical, which will offer varying descriptions

3. See Rosabel E. Goodman-Everard, *Cultural Diversity in International Arbitration—A Challenge for Decision-Makers and Decision-Making*, 7 *ARB. INT’L* 155, 158 (1990); Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 *TEX. INT’L L.J.* 59, 65 (1995).

4. See Pryles, *supra* note 1, at 280.

5. See *infra* text accompanying notes 29-33 (discussing requirement of national neutrality in some rules of major arbitration organizations and exceptions to this requirement).

6. See *infra* note 37 and accompanying text (discussing potential results of failure to adhere to party agreements concerning national neutrality of arbitrators).

7. Two works that offer the most detailed examination are: Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in *SWISS ESSAYS ON INTERNATIONAL ARBITRATION* 23 (1984), and ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 202-03 (4th ed. 2004).

of prospective arbitrators' nationality and national affiliation, will inspire further discussion on the always difficult issues of party challenge of the arbitrator and the arbitrator's disclosures. The hypothetical will be put to the test in a survey of international arbitration attorneys from one country asked to give their reactions to prospective arbitrators who have varying degrees of association to another country. Given the sensitivity to national identification in the international commercial arbitration arena, the matter of the nationality of the arbitrator will continue to be of interest.

I. NATIONALITY, INDEPENDENCE, IMPARTIALITY, AND NEUTRALITY

It is a maxim of international commercial arbitration that the arbitrator deciding the dispute must be independent and impartial.⁸ The major administering organizations explicitly demand these basic qualifications in their rules.⁹ Yet none of the various rules further elaborate on what independence or impartiality entails, inviting commentators to offer definitional analy-

8. See REDFERN & HUNTER, *supra* note 7, at 199; see also Int'l Bar Assoc. ("IBA"), Guidelines on Conflicts of Interest in Int'l Arbitration 7 (2004) [hereinafter IBA Guidelines] (Explanation to General Standard 1).

9. See Am. Arbitration Assoc. ("AAA"), International Arbitration Rules, art. 7(1) (2000) [hereinafter AAA International Rules] ("Arbitrators acting under these rules shall be impartial and independent"); London Court of Int'l Arbitration ("LCIA"), Arbitration Rules, art. 5.2 (1998) [hereinafter LCIA Rules] ("All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties . . ."). The International Chamber of Commerce ("ICC") Arbitration Rules omit a separate requirement of impartiality: "Every arbitrator must be and remain independent of the parties involved in arbitration." Int'l Chamber of Commerce, Arbitration Rules, art. 7(1) (1998) [hereinafter ICC Rules]. The United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, the leading rules for ad hoc arbitrations, provide, "In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator . . ." G.A. Res. 31/98, art. 6(4), U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) [hereinafter UNCITRAL Rules]. The phrasing tracks the language of the UNCITRAL model law, which includes a provision for the appointment of the arbitrator by a proper authority. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, art. 11(4), U.N. Doc. A/40/17/Annex I & A/61/17/Annex I (June 21, 1985) [hereinafter UNCITRAL Model Law]. Japan is one of the few countries with an arbitration statute that includes references to qualifications of impartiality and independence. Chusai-Ho [Arbitration Law], Law No. 138 of 2003, art. 17(6)(ii), translated in HANS SMIT, THOMAS E. CARBONNEAU & LOUKAS MISTELIS, NATIONAL ARBITRATION LAWS JAP B-7 (2006).

sis. Two deans of the field, Alan Redfern and Martin Hunter, having reflected on their previous distinction between independence and impartiality, have since noted the recent trend towards viewing the two as “opposite side[s] of the same coin.”¹⁰ That is, independence on one side refers to the arbitrator’s relationship with one of the parties; on the other side, impartiality “is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties or in relation to the issues in dispute.”¹¹ These terms are considered as a package, “usually joined together as a term of art.”¹² The basic qualifications of arbitrator independence and impartiality should, it would seem, be sufficient to ensure fair deliberation of the claims, equal treatment of the parties, and party confidence in the process.

Yet in the discussion of the essential requirements for arbitrators, commentators have also separately identified neutrality¹³ as a fundamental requirement.¹⁴ Professor Giorgio Bernini weighs in on the inter-relationship between the three basic traits, explaining that independence is “the result” of neutrality and impartiality, the two being “prerequisites” to independence.¹⁵ He distinguishes between neutrality and impartiality, positing that neutrality refers to the “likelihood for the arbitrator to be, and remain, wholly equidistant in thought and action throughout the arbitral proceedings,” whereas impartiality involves the arbitrator’s “status to be actually tested in the context of the con-

10. REDFERN & HUNTER, *supra* note 7, at 201. Employing this metaphor, one wonders whether the two sides of independence and impartiality are both necessary to form the coin, or whether having one side means that the other side is indubitably present. If the latter is true, then perhaps not much should be read into the ICC Rules requiring only independence and omitting impartiality.

11. *Id.*

12. *Id.*

13. The term “neutral” or “neutrality” might have a different meaning in domestic arbitration seen in the United States than in international arbitration elsewhere. In the former, “neutral” often refers to the chair or the presiding arbitrator of the tribunal, and not party-appointed arbitrators, who, far from being neutral, “may be predisposed toward the party appointing them.” AAA, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canons IX.B, X.A(1) (2004) [hereinafter AAA, CODE OF ETHICS]. See REDFERN & HUNTER, *supra* note 7, at 202 (referring to “non-neutral” and “neutral” arbitrators).

14. See Lalive, *supra*, note 7, at 23; Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT’L ARB. 45, 73 (1998).

15. Giorgio Bernini, *Report on Neutrality, Impartiality, and Independence*, in THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS 31, ¶¶ 2.1, 2.2 (1991).

crete relations existing between the arbitrator(s) and each individual party.”¹⁶ Whereas Professor Bernini proposes that neutrality is subsumed into the independence concept, Professor Pierre Lalive’s statement that neutrality “goes further than . . . independence and impartiality”¹⁷ suggests that neutrality has a more prominent role among the three qualifications, and is more than a mere subset of another.¹⁸ Despite the characterization of neutrality as “equidistance in *thought* and *action*,”¹⁹ the common view is that the neutrality of the arbitrator in international arbitration is generally seen as a matter of *geographic* or national equidistance.²⁰ Indeed, commentators have noted that neutrality is largely synonymous with nationality, such that references to neutrality generally mean national neutrality (or neu-

16. *Id.* at 31, ¶ 2.3; see also TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 265 (3d ed. 2006) (“Neutrality is not synonymous with impartiality. Rather, it is an exterior sign or an indication of likely impartiality; neutrality is easier to recognize, and easier to translate into standards”). Professor William W. Park notes simply that “[t]he type of neutrality sought by internationalists focuses on what might be described as ‘reversibility.’ An adjudication process is neutral if the parties’ nationalities could be reversed (French plaintiff becomes American, and American defendant becomes French) without changing the result in the case.” William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12 J. INT’L ARB. 99, 103 (1995).

17. Lalive, *supra* note 7, at 24.

18. *Id.* Yet another commentator would give impartiality primary billing: “It is clearly beyond any doubt that impartiality is to be considered as the principal requirement for an arbitrator;” but she then acknowledges that “some problems may arise with regard to the ‘independence requirement’ and to the ‘neutrality requirement’ as well.” Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. REV. 93, 104 (1998). There is likely no final word or universal agreement on the definitions of the three terms and their inter-relationship. Professor Bernini notes:

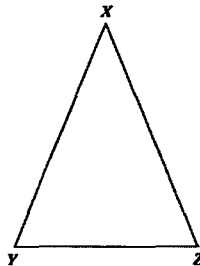
Students of arbitration tend to deal indiscriminately with neutrality, impartiality, and independence of arbitrators. The borderline between these definitions cannot be clearly traced, as all are characterized by a common goal, namely the safeguard of equal treatment as regards the arbitrators’ intentional conduct vis-à-vis the parties.

Giorgio Bernini, *Cultural Neutrality: A Prerequisite To Arbitral Justice*, 10 MICH. INT’L L.J. 39, 40 (1989).

19. Bernini, *supra* note 15, at 31 ¶ 2.3 (emphasis added); see also Lalive, *supra* note 7, at 26; VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 265.

20. See Goodman-Everard, *supra* note 3, at 156. The “equidistance” phrasing emphasizes that the arbitrator is literally equally distant from the parties, and not closer (more partial or biased) to one party than the other. The term, used for a geometric figure, places the arbitrator (x) at the apex and the two parties (y, z) at the other two vertices of an isosceles triangle:

tral nationality).²¹ Nationality,²² in turn, appears to be widely understood to mean citizenship.²³ The London Court of Inter-



In an insightful piece, Professor Lalive would require in arbitrator neutrality more than mere nationality or geographic location, someone who is:

[M]ore than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adapt to a comparative and truly “international outlook.” In this way, he will really be neutral in relation to the legal systems and methods, whether procedural or substantive, of both parties—systems and methods which, whatever may be the law chosen to govern the subject-matter in dispute, are bound to influence to some extent the parties’ attitudes and presentations, consciously or not, as arbitration practice frequently reveals.

Lalive, *supra* note 7, at 27-28.

21. See Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *ARB. INT’L* 395, 400-01 (1998); see also Goodman-Everard, *supra* note 3, at 156; Lalive, *supra* note 7, at 26. Another observer, however, warns that “neutral nationality should not be allowed to become an end in itself—it is only relevant insofar as it provides some guide to, indication of or justifiable doubts as to impartiality.” Landau, *supra* note 14, at 74.

There appears to be a suggestion that neutrality can be satisfied merely when national borders are crossed, that is, when the arbitrator is from a(ny) third country. But some decisions by arbitral organizations indicate that relative proximity of the arbitrator’s country to each of the countries of the parties will also be considered. Consider the report of an ICC arbitration involving a British claimant and Yugoslavian respondent, with Zurich as the seat of the arbitration, where a Hungarian national was named as chair. “Upon objection from the British party that in naming Zurich as the seat it had been intended to have a neutral, non-eastern bloc chairman, the [ICC Court of Arbitration] agreed not to confirm the appointment of the Hungarian national and decided to apply to the Finnish national committee to suggest a chairman.” W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 224 (3d ed. 2000) (citing Michael A. Calvo, *The Challenge of ICC Arbitrators—Theory and Practice*, 15 *J. INT’L ARB.* No. 4, Dec. 1998, at 63, 69-70).

22. In the commentary, it is the rare author who openly asks, “What does ‘nationality’ mean?” GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 623 (2d ed. 2001).

23. See Donald Francis Donovan & David W. Rivkin, *International Arbitration and Dispute Resolution*, 143, 155 (1999); see also REDFERN & HUNTER, *supra* note 7, at 202 (stating, in discussion of nationality, “[t]he country in which the arbitrator was born, or the passport carried, should be irrelevant.”). One arbitrator expressed to this author the following views on the meaning of nationality:

national Arbitration (“LCIA”) is one of the few major arbitral organizations that offers in its rules any elaboration of what nationality means, and addresses foreseeable questions relating to citizenship: one who has citizenship in more than one country is treated as a national of each country;²⁴ persons who are citizens of the European Union are regarded as nationals of the different member countries, and not as having the same nationality;²⁵ and “[t]he nationality of parties shall be understood to include that of controlling shareholders or interests.”²⁶ The other major arbitral organizations have no such clarifying language, presumably allowing administrator discretion to address questions of nationality and citizenship on a case by case basis.

The mechanistic definition of nationality as determined by citizenship is certainly easy to apply, but, as commentators have advanced,²⁷ one wonders if citizenship should be the sole or even primary index of determining nationality. If nationality in its definition should be more faithful to *geographic* equidistance, should it not take into consideration other indicators of national identification or affiliation? In all events, whereas impartiality is generally seen as a subjective trait, neutrality—if used interchangeably with nationality—can be achieved in virtually all situations with objective certainty.

That neutrality is generally synonymous with nationality appears to have support in the text of the major arbitral rules.²⁸

I can only confirm that the word, nationality, is used in different ways all over the world. Practically everywhere except in the United States of America *it means the same thing as citizenship of a particular sovereign state*. It has nothing to do with the national or ethnic origin that people may have or claim, or with the citizenship of their parents at the time of birth, or their former citizenship if they have changed.

Letter from Dr. Pierre A. Karrer, Hon. President of ASA Swiss Arbitration Assoc., to Ilhyung Lee (Jan. 16, 2002) (on file with *Fordham International Law Journal*) (emphasis added).

24. See LCIA Rules, *supra* note 9, art. 6.3. An ICC arbitration adopted the same policy, disqualifying an arbitrator with dual U.S. and Italian citizenship from serving as chair, where one of the parties was a U.S. national. See CRAIG, PARK & PAULSSON, *supra* note 21, at 224-25 n.50.

25. See LCIA Rules, *supra* note 9, art. 6.3. This provision contemplates the questions raised by Born, “[a]re Germans and French nationals of the European Union?” and “[a]re there different nationalities in North America?” BORN, *supra* note 22, at 623.

26. LCIA Rules, *supra* note 9, art. 6.2.

27. See *infra* text accompanying notes 57-59.

28. The rules discussed herein are those of: the most recognized ad hoc arbitration (UNCITRAL Rules), the major arbitral organizations (ICC, LCIA, AAA Interna-

None of these rules explicitly refer to or require “neutral” tribunals, but most call for some consideration of nationality. Of course, parties may agree on the nationality of the arbitrator, which reminds us that party autonomy is the beginning (and often controlling) point of the arbitration method. Where there is no agreement, however, the various rules provide for consideration of arbitrator neutrality. The requirement of diversity of nationality between the tribunal and the parties, save the exception of affirmative party waiver, is clearly set forth in the rules of the LCIA: “Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.”²⁹ But the requirement set forth in the LCIA Rules is not typical of the arbitral rules. Some organizations’ rules require the nationality of the arbitrator and of the parties to be different, but provide significant exceptions, e.g., in “suitable circumstances” (International Chamber of Commerce (“ICC”))³⁰ or “special circumstances such as the need to appoint a person having particular qualifications”³¹ (World Intellectual Property Organization (“WIPO”)). The rules of yet other organizations provide that nationality of the arbitrator is a matter of discretionary consideration for the appointing authority. For example, the American Arbitration Association International Rules provide that “the administrator *may* appoint nationals of a country other than that of any of the parties.”³² A similar result is foreseeable under the United Nations Commission on International Trade Law (“UNCITRAL”) Rules, which state that the appointing authority “shall take into account . . . the *advisability* of appointing an arbitrator of a nationality other than the national-

tional), and organizations devoted to specialized classes of disputes (International Centre for Settlement of Investment Disputes (“ICSID”), World Intellectual Property Organization (“WIPO”)).

29. LCIA Rules, *supra* note 9, art. 6.1.

30. ICC Rules, *supra* note 9, arts. 9(1), 9(5). Importantly, in addition to “suitable circumstances” being present, there must not be a timely objection from either party. *Id.* art. 9(3).

31. WIPO Arbitration and Mediation Center, *WIPO Arbitration and Mediation Rules*, art. 20(b), WIPO Publication No. 446(E) (effective from Oct. 1, 2002)[hereinafter *WIPO Rules*].

32. AAA International Rules, *supra* note 9, art. 6(4) (emphasis added).

ities of the parties.”³³ Some arbitral rules—namely, the China International Economic and Trade Arbitration Commission (“CIETAC”) Rules³⁴ and the Swiss Rules of International Arbitration³⁵—have no mention whatsoever of the nationality of the arbitrator.³⁶

Party agreements concerning the national neutrality of the arbitrators, or arbitral rules relating to arbitrator nationality under which the parties have agreed to arbitrate, must be adhered to. Failure to do so can be fatal; the subsequent award may be set aside by a court of law with jurisdiction over the arbitration seat, or be refused recognition or enforcement by courts of other jurisdictions that are signatories to the New York Con-

33. UNCITRAL Rules, *supra* note 9, art. 6(4) (emphasis added). Notably, in the UNCITRAL Rules, consideration of the nationality of the arbitrators is in the very same provision as that referring to the independent and impartial arbitrator. The UNCITRAL text lends support to the view that independence, impartiality, and neutrality are fundamental qualifications to be considered as a single package.

34. China International Economic and Trade Arbitration Commission (“CIETAC”), Arbitration Rules (2005) [hereinafter CIETAC Rules]. The possibility under the CIETAC Rules of the presiding arbitrator being a Chinese national in an arbitration involving Chinese and non-Chinese parties has been controversial. *See Benjamin O. Kostrzewa, China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, 15 PAC. RIM L. & POL’Y J. 519, 529 (2006).

35. Swiss Rules of International Arbitration (2006), available at http://www.swissarbitration.ch/pdf/SRIA_english.pdf [hereinafter Swiss Rules]. One commentator offers a defense of the absence of the nationality requirement in the Swiss Rules, stating that it was a “conscious choice of the drafters . . . who preferred to leave the [administering authority] with the widest discretion in this respect.” Micha Bühler, *Composition of the Arbitral Tribunal*, in SWISS RULES OF INTERNATIONAL ARBITRATION COMMENTARY 45, 69 (Tobias Zuberbühler, Christoph Müller & Philipp Habegger eds., 2005).

36. Arbitrations relating to investment disputes between governments and foreign investors, administered by ICSID, are governed by perhaps the most labyrinthian presentation of rules with respect to the nationality of arbitrators. Initially, the parties may agree to one or any uneven number of arbitrators; where there is no agreement, the tribunal is to be composed of three arbitrators, one selected by each party and the president of the tribunal by agreement of the parties. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 37, Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. Either party must direct a communication to the other party naming two arbitrators, one party-appointed arbitrator—who must *not* be a national of the country of *either* party—and another whom that party proposes to be the president of the tribunal. Upon receipt of this communication, the other party is to name its party-appointed arbitrator—again, who must not be a national of the country of either party—and concur in the first party’s proposal of the tribunal president or propose another. Then, in the case where the second party proposes a tribunal president different from that of the initiating party, the initiating party is to notify the other party whether it concurs in that party’s proposed president. ICSID, Rules of Procedures for Arbitration Proceedings, R. 3, ICSID Basic Doc. ICSID/15 (1985).

vention.³⁷ For “the composition of the arbitral tribunal . . . [that] was not in accordance with the agreement of the parties” remains a ground to set aside the award³⁸ and to refuse its recognition and enforcement.³⁹

In sum, parties are free to agree that the arbitrator may be a national of the same country as one of the parties. Absent agreement, a review of the text of the major arbitral rules reveals that not all guarantee national neutrality of the arbitrator. Instead, most rules call for some consideration of the arbitrator’s nationality, or provide exceptions where nationality diversity can be refused. Nevertheless, it is reported that the practice under most arbitral rules is that the nationality of the arbitrator must differ from those of the parties.⁴⁰ Indeed, commentators indicate that national neutrality of the arbitrator is the prevailing practice in today’s international commercial arbitration;⁴¹ one describes the appointment of the arbitrator of a nationality different than the parties to be “fundamental.”⁴² Practitioners and parties consider nationality of the arbitrator vitally important,⁴³ and are appar-

37. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

38. UNCITRAL Model Law, *supra* note 9, art. 34(2)(a)(iv); see Bundesgesetz über das Internationale Privatrecht [IPRG], Loi fédérale sur le droit international privé [LDIP] [Switzerland Federal Code on Private International Law Act] December 18, 1987, SR 291, art. 190(2)(a) (Switz.) (providing that award can be challenged only “[if] a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly”).

39. New York Convention, *supra* note 37, art. V(1)(d); see UNCITRAL Model Law, *supra* note 9, art. 36(1)(a)(iv).

40. See REDFERN & HUNTER, *supra* note 7, at 202; see also BORN, *supra* note 22, at 623; CRAIG, PARK & PAULSSON, *supra* note 21, at 224; Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSN’L L. 9, 18 (1986-87).

41. See Bishop & Reed, *supra* note 21, at 404; Landau, *supra* note 14, at 73; see also REDFERN & HUNTER, *supra* note 7, at 202 (“[T]he usual practice in international commercial arbitration is to appoint a sole arbitrator (or a presiding arbitrator) of a different nationality from that of the parties to the dispute.”).

42. Landau, *supra* note 14, at 73.

43. See BORN, *supra* note 22, at 623. The practice commentary advises counsel to specify the nationality of the arbitrator in advance. See 2 DOMKE ON COM. ARB. § 49:3 (3d ed. 2007); Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration*, 7 TUL. J. INT’L. & COMP. L. 43, 59 (1999); see also DOUGLAS H. YARN & GREGORY TODD JONES, *ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA* § 14:15 (3d ed. 2007). In practice, however, the nationality of the arbitrator is not explicitly identified in available arbitration clauses reviewed by commentators. See Christopher R. Drahozal & Richard W. Naimark, *Arbitration Clauses: Commentary*, in TOWARDS A SCIENCE

ently successful in obtaining tribunal neutral nationality.

Professor Lalive offers a basic, and very human explanation for the relevance of the arbitrator's nationality in the arbitration setting: "[I]t is because of its supposed implications: by an instinctive reaction, parties will generally assume without much further thought that a prospective arbitrator is likely, or even bound, to share his country's ideology and common values, if any."⁴⁴ If this candid assessment is the motivating force for what is now the general rule and widespread practice of appointing an arbitrator of a neutral nationality, it is a rule and practice that has resulted from human reaction prevailing over reason or principle. Despite the requirement of arbitrators to be independent and impartial, a prospective arbitrator's nationality may be disqualifying if it coincides with that of the parties, absent party agreement to the contrary. Redfern and Hunter note that "[i]n an ideal world, the nationality of a sole arbitrator, or of the presiding arbitrator, should be irrelevant."⁴⁵ Nevertheless, in the international setting, sensitivity to national identification is, rightly or wrongly, a significant reality. Business entities may be eager to participate in transactions in a borderless economy, but when a dispute arises, they revert to their national boundaries, and national identification. This is the culture of international arbitration. Students, teachers, practitioners, and administering organizations routinely identify parties by their nationality, even in situations when the nationalities are not relevant to the particular discussion.⁴⁶ This is not to be faulting. The subject after all, is *international* commercial arbitration.

Given the prevalence and reality of national identification and suspicion of national favoritism, Professor Lalive notes that neutral nationality of the arbitrator is necessary, for without it, "an unhealthy atmosphere of doubt and fear is likely to appear."⁴⁷ The doubt and fear is of arbitrator bias toward the party

OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 57, 60 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); see also Stephen R. Bond, *How To Draft an Arbitration Clause (Revisited)*, ICC Int'l Cl. of Arb. Bull., Dec. 1990, at 14, reprinted in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, *supra*, at 65, 76.

44. Lalive, *supra* note 7, at 26.

45. REDFERN & HUNTER, *supra* note 7, at 202.

46. Of course, party nationality could be quite relevant in a host of situations relating to, among other issues, choice of law questions.

47. Lalive, *supra* note 7, at 25.

with the same nationality, notwithstanding his obligation to be independent and impartial. Perhaps the “requirement” of a neutral national is best understood not by the presence of actual partiality or bias, but rather the “appearance” of it.⁴⁸ In brief, there is a “greater degree of confidence . . . on all sides if there is no chance that one party will get a better hearing because of some cultural or national identification between the party and the arbitrator.”⁴⁹ To give one of several possible examples, in an arbitration involving Israeli and Egyptian parties, “a Swiss arbitrator can usually be characterized as more neutral than an Israeli or Egyptian.”⁵⁰

An analogy from the sporting arena will support the need for national neutrality of the tribunal in international commercial arbitration. Football (soccer, in some jurisdictions) is a sport that has worldwide appeal and interest. The level of fan passion for the game is rarely seen in other sports. On the international stage, the crowning event is the World Cup, organized and sanctioned by the Fédération Internationale de Football Association (“FIFA”), the international governing body of football. The finals competition of the World Cup brings together the national teams of thirty-two countries for a month-long tournament that crowns a world champion national team. The tournament itself is preceded by grueling regional qualification matches held over two years. Regarding the selection of referees for the 2006 World Cup, FIFA’s regulations specified that the referees, assistant referees, and fourth officials of every match in the preliminary and the final competitions were to be from, not only countries *other* than those in the matches,⁵¹ but also from countries “not included in the same group as the matches in question.”⁵²

48. REDFERN & HUNTER, *supra* note 7, at 204; see also Avraham Azrielle, *Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN L. REV. 187, 224-25 (1993); Lalive, *supra* note 7, at 25.

49. Landau, *supra* note 14, at 73.

50. Park, *supra* note 16, at 103.

51. Fédération Internationale de Football Assoc. (FIFA) Exec. Comm., Regulations 2006 FIFA World Cup Germany, art. 29(2) (2005), available at <http://www.fifa.com/mm/document/tournament/competition/fwc06%5fregulations%5fen%5f1558.pdf>. The Regulations also provided that the appointment of the referees, assistant referees, and fourth officials, was left to the FIFA Referees’ Committee, whose decisions were “final and not subject to appeal.” *Id.* art. 29(3),(4).

52. *Id.* art. 29(2). For the first round of the preliminary and the finals competitions, teams are placed in a group under a round robin pool play format, at the end of

The analogy to football offers useful parallels to the arbitration setting. The counterpart of the game of football is commerce. Matches are played and business transacted, often at the most sophisticated levels, in the international setting. Individual matches are arbitration cases, with governing rules agreed in advance. The teams on the pitch are the parties in arbitration, with participants identified by their respective nationalities. Referees are the sole or presiding arbitrator, and participants in the exercise must have some confidence that a match will be called and a case decided fairly, without partiality or bias to one side. Thus, by rule and custom, or both, neither the referee nor the arbitrator may be of the same nationality as either of the teams or parties, respectively.⁵³ Were this rule not followed, the potential for appearance of partiality and bias is large, the decisions adverse to the team of the other nationality would be subject to suspicion, and participants' confidence in the system shaken.⁵⁴ Thus, all referees and officials are disqualified from taking part in given matches, due simply to their nationality. Although qualified referees are essential to the advancement of football, as are equally qualified arbitrators in an arbitration matter, football is foremost for the teams, as arbitration is for the parties (and not for the referees or arbitrators, respectively).

Despite the common rule and practice of appointing an arbitrator of a neutral nationality, and the motivating forces behind it, the requirement is not without criticism. Commentators quite aptly observe that even if an arbitrator from a third country is appointed, it does not necessarily guarantee independence or impartiality,⁵⁵ or that such an arbitrator would be "more impartial than a national of the same country as one of the parties

which a predetermined number of the top teams in the group advance to the next round.

53. The metaphor to sport is imperfect, of course. In arbitration, the parties may agree to appoint an arbitrator of the same nationality as one of the parties; each party also may choose a party-appointed arbitrator in arbitrations with three-member tribunals. No similar opportunities are allowed in FIFA matches. Teams may not agree on referees, and all referees and officials must be of different nationalities than both teams.

54. Or in the converse, the referee may feel pressured to make borderline calls adverse to his compatriots to appear more impartial. A parallel exists in the arbitration setting, where arbitrators may agree in advance that a particular member of the tribunal will pose certain questions to one of the parties as to avoid appearance of favoritism, or to appear more unbiased.

55. See REDFERN & HUNTER, *supra* note 7, 204.

would be.”⁵⁶ Another criticism is that individual traits other than national citizenship could give rise to fear of bias and appearance of partiality, but are not included as potentially disqualifying factors. The arbitrator’s domicile⁵⁷ and residence⁵⁸ are chief among these. Moreover, the commentary suggests that if indeed neutrality and the appearance of unbiased impartiality are the desired ends, perhaps common characteristics between the arbitrator and parties, such as religion, regional origin, ethnicity, or culture should also be considered.⁵⁹ By far, the most frequently seen criticism of the national neutrality rule is that it could work to disqualify the most qualified arbitrators for the particular case—for example, those with expertise in the governing law or the specialized field of business, or fluency in the languages of the parties or the proceeding⁶⁰—merely because of the technicality of the passport. As stated above, the practice is designed to allay fears of bias and partiality, and the appearance of the same, even if it might be based on general assumptions and without much thought. Barring party agreement to make an exception, this is the consequence and cost of the neutral referee.

With this background, the next section addresses practical situations in which the nationality of the arbitrator could arise as a critical issue even before the arbitral tribunal begins its deliberations.

II. NATIONALITY AND NATIONAL IDENTIFICATION: HYPOTHETICAL

There are a number of foreseeable circumstances in the contemporary international setting where a prospective arbitra-

56. Lalive, *supra* note 7, at 25.

57. See Landau, *supra* note 14, at 73; Smit, *supra* note 40, at 10 n.3 (citing Michael Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. L. 164).

58. See Azriele, *supra* note 48, at 225 (“[T]oday the significance of nationality or citizenship is diminishing, while a person’s residency has a growing importance.”).

59. See VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 265; Lalive, *supra* note 7, at 26, 27. Given the current world climate, in some settings, a common religion between the arbitrator and one of the parties might give rise to concern of arbitrator neutrality, even more so than common nationality. Within this general discussion, one is reminded of the call for “cultural neutrality” in the tribunal. See Bernini, *supra* note 18, at 40; Goodman-Everard, *supra* note 3, at 156.

60. See REDFERN & HUNTER, *supra* note 7, 202-03; Landau, *supra* note 14, at 73; Smit, *supra* note 40, at 18.

tor's national identification or affiliation, short of national citizenship, would raise questions of the propriety of appointment. Consider the prospective arbitrator whose:

- A. domicile or residence is a country other than that of his national citizenship, but is the same as one of the parties;
- B. national origin, *prior* domicile, and *prior* citizenship, all of the same country, are the same as one of the parties;
- C. national origin is the same as one of the parties; and
- D. spouse is a national (citizen) of a country of one of the parties.

Would any of these characteristics be disqualifying? Should a prospective arbitrator disclose them prior to confirmation? As Professors Varady, Barcelo and von Mehren have noted, the matter of arbitrator partiality based on group affiliation is a sensitive subject, and "a principled approach to group-biases is next to impossible. The exclusion of individuals, because of their group affiliation, opens a Pandora's box."⁶¹ Or, as another commentator has suggested, comprehensive rules of neutrality cannot be adopted, "or one would never be able to find any suitable arbitrator at all."⁶² With respect to the suitability of arbitrators, the rules of most administering organizations allow challenges of arbitrators only when there are circumstances as to raise "justifiable doubts as to the arbitrator's impartiality or independence."⁶³ The ICC rules do not include this language, instead referring to the challenge of arbitrators "whether for an alleged lack of independence or *otherwise*."⁶⁴ The rules do not further elaborate on what might meet the "justifiable doubts" or "otherwise" standard.⁶⁵ The administering organization makes the ultimate deci-

61. VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 266.

62. Goodman-Everard, *supra* note 3, at 156.

63. AAA International Rules, *supra* note 9, art. 8(1); *see also* Swiss Rules, *supra* note 35, art. 10(1); CIETAC Rules, *supra* note 34, art. 26(2); WIPO Rules, *supra* note 31, art. 24(a); LCIA Rules, *supra* note 9, art. 10.3; UNCITRAL Rules, *supra* note 9, art. 10(1). This standard is consistent with that in the UNCITRAL Model Law art. 12(2): "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. . . ." UNCITRAL Model Law, *supra* note 9, art. 12(2).

64. ICC Rules, *supra* note 9, art. 11(1) (emphasis added).

65. Here, the IBA Guidelines offer some guidance. *See* IBA Guidelines, *supra* note 8, at 7-8. The Guidelines posit that an arbitrator should be self-disqualified if "facts or circumstances exist . . . that from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's im-

sion on arbitrator challenges, often without announcing reasons for the decision. In practice, challenges based on group affiliation are often rejected.⁶⁶

One is reminded of the words of Professor Philippe Fouchard, on the rules of the French code, which “remain most discreet on the person, the mission, rights and obligations of the arbitrator.”⁶⁷ Reading this passage with some license and latitude then, the responsibility falls on the arbitrator in the first instance to act with prudence and good judgment, bearing in mind the nature of the arbitration method and the importance of party confidence in it. This approach inevitably raises the question of what if anything the arbitrator should disclose before appointment, relating to any number of issues, including the arbitrator’s national affiliation.

Toward discretion and decision on the question of disclosure relating to the arbitrator’s national identity or affiliation, the arbitrator has available multiple sources for guidance. First, the majority of the rules of administering organizations provide that the standard for arbitrator disclosure is the same as that for challenge, that is, the presence of circumstances that raise justifiable doubts as to the arbitrator’s independence or impartiality.⁶⁸ This is an objective standard, but again; one without much guidance.⁶⁹ Importantly, the ICC approach differs in that its rules

partiality or independence.” In addition, “[d]oubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.” *Id.* at 8. This is an objective, “reasonable third person test.” *Id.*

66. At an international commercial arbitration workshop attended by arbitrators and practitioners, one speaker stated that “the vast majority” of challenges against arbitrators (not specifically limited to challenges based on the arbitrator’s national affiliation) are rejected, and that many are “patently ridiculous on their face.” Jennifer Kirby, Deputy Sec’y Gen., ICC Court of Arbitration, Remarks at the ICC Arbitration Workshop (June 11, 2007); see Drahozal & Naimark, *supra* note 43, at 147, 158 n.41 (summarizing challenges of arbitrators in ICC arbitrations).

67. VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 266 (quoting Philippe Fouchard, *Le statut juridique de l’arbitre dans la jurisprudence française*, 1996 *REVUE DE L’ARBITRAGE* 325, 326).

68. See AAA International Rules, *supra* note 9, art. 7(1); CIETAC Rules, *supra* note 34, art. 25(1); LCIA Rules, *supra* note 9, art. 5.3; Swiss Rules, *supra* note 35, art. 9(2); WIPO Rules, *supra* note 31, art. 22(b); see also UNCITRAL Rules, *supra* note 9, art. 9. The standard is the same in the UNCITRAL Model Law, *supra* note 9, art. 12(1).

69. Redfern and Hunter observe that some of the major arbitral institutions “give no specific guidelines as to matters that ought to be disclosed. It is not an easy topic, because people from different cultures approach the problem from different view-

offer a more subjective, party-centered approach, calling for disclosure of “any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence *in the eyes of the parties*.”⁷⁰ Here, one may refer to Professor Bernini’s relation of neutrality as a subset of independence, such that if neutrality is questioned, it impacts linearly to independence. Second, international arbitrators also have available recommended codes of ethics, principally, those issued by the International Bar Association (“IBA”)—the Rules of Ethics for International Arbitrators,⁷¹ and the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).⁷² Both are the product of full deliberations by well-informed and experienced professionals in the international arbitration field, with the worthy purpose of enhancing ethical arbitrator practices. But as recommended guidelines, neither text is binding on any arbitration or arbitrator unless the parties agree to make them so. The IBA Guidelines are in line with the ICC’s subjective standard on arbitrator disclosure, and emphasize that “parties have an interest in being fully informed about any circumstances that may be relevant *in their view*.”⁷³ Third, there is the oft-stated ad-

points.” REDFERN & HUNTER, *supra* note 7, at 205. If the objective “justifiable doubts” standard is employed for arbitrator disclosures, the IBA Guidelines propose the view of “a reasonable third person[] . . . having knowledge of the relevant facts.” IBA Guidelines, *supra* note 8, at 7.

70. ICC Rules, *supra* note 9, art. 7(2) (emphasis added).

71. IBA, Rules of Ethics for International Arbitrators (1998), available at http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf.

72. IBA Guidelines, *supra* note 8. This Essay gives proper recognition of the IBA Guidelines, which offer reasoned guidelines relating to arbitrator impartiality and independence and arbitrator disclosure about which parties, arbitrators, courts, and policy makers had little guidance. In addition to specific standards and explanations, the IBA Guidelines offer non-exhaustive lists of items that the arbitrator: must disclose (“Red List,” further divided into “Non-Waivable” and “Waivable” sub-categories); should disclose (“Orange List”); and need not disclose (“Green List”). IBA Guidelines, *supra* note 8, at 15-25. It should be noted that nationality of the arbitrator is not mentioned in any of the lists. See Omar E. Garcia-Bolivar, *Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes*, DISP. RESOL. J., Nov. 1, 2005, at 76, 78. The IBA Guidelines are indeed “a beginning, rather than an end, of the process.” IBA Guidelines, *supra* note 8, at 5.

73. IBA Guidelines, *supra* note 8, at 10 (Explanation to General Standard 3(a)) (emphasis added). There are slight variations in phrasing between the ICC and IBA approaches. The IBA Guidelines state, “If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such acts or circumstances” *Id.* at 9 (General Standard 3(a)). The ICC Rules state, “[A] prospective arbitrator shall . . . disclose in writing any facts or circumstances which might be of such nature as to call into question

vice heard at professional conferences, arbitrator training sessions, and law school classrooms, that whenever there is doubt as to disclosure, one should disclose in the exercise of caution and professionalism.⁷⁴ Finally, the individual arbitrator's own code of conduct regarding propriety of disclosure (indeed, regarding every aspect of arbitration practice where mandatory rules are not explicitly provided) will work to tip the balance toward a final decision.⁷⁵

A hypothetical international arbitration matter will provide the setting for a practical application of much of the above discussion relating to neutrality, nationality, equidistance, disclosure, challenge, and appointment. Assume a business transaction involving Goh-ryuh Co., a Korean manufacturer, and Meiji, Inc., a Japanese distributor. They enter into a contract in which Meiji will be the exclusive distributor of Goh-ryuh's products in Japan for a term of years. Spirited negotiations that led to the agreement also resulted in a standard arbitration clause, stipulating that the proceedings are to be administered under the rules of a named international arbitral organization, provided that the seat of the arbitration is Tokyo, and that the law of Korea will govern substantive rights under the contract. A dispute arises, with mutual allegations of a material breach of contract: Meiji

the arbitrator's independence in the eyes of the parties." ICC Rules, *supra* note 9, art. 7(2).

74. See IBA Guidelines, *supra* note 8, at 9 ("Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."); see also AAA, CODE OF ETHICS, *supra* note 13, Canon II.D ("Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."). Erring on the side of disclosure is good advice, of course, although some arbitrators may report an experience of a disclosure of a minor matter that leads to objection from a party, removal by the administering organization, or both. In such a case, the arbitrator's conviction that disclosure is advised when in doubt could be matched equally by his conviction that (i) the specific circumstances disclosed will not affect his independence, impartiality, or neutrality; and (ii) in the event that the arbitrator chose not to disclose, a party's attempt in a court of law to set aside the resulting award or a challenge to refuse recognition and enforcement upon subsequent discovery of the circumstances would fail. The IBA Guidelines recognize this possibility. IBA Guidelines, *supra* note 8, at 3 ("Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.").

75. This final factor is offered, in light of the author's experiences with students, who, when posed with questions of disclosure in hypothetical situations that do not appear to be governed by any rule or guideline, reach their decisions based on their own sense of what is "right."

alleges delivery of defective products; Goh-ryuh alleges failure of timely periodic payments. A sole arbitrator is to decide the case.

In this scenario, absent party agreement to the contrary, the administering organization would not likely appoint a Korean or Japanese national as the arbitrator; either nationality would be disqualifying for prospective arbitrators. It is entirely understandable that Meiji would oppose a Korean arbitrator, and that Goh-ryuh would oppose a Japanese arbitrator, due to (stated blatantly) the presupposition and general assumption that an arbitrator of Korean or Japanese nationality, respectively, would be partial to the cause of his countrymen. Stated another way, party skepticism and fear, and the appearance of bias and partiality, would counsel an arbitrator with a neutral nationality. Appearances, doubts, and fears may be more pronounced when the two countries of the parties, like Korea and Japan here, have had uneasy political and social relations over the years.⁷⁶

If the parties insist on national neutrality, a prospective arbitrator of Korean or Japanese nationality would be disqualifying, even if he were lauded by professional peers as an arbitrator of unimpeachable independence and impartiality, and even if he were, like Caesar's wife, beyond suspicion.⁷⁷ That the arbitrator possessed qualifications uniquely suited for the case, for example, fluency in both languages and expertise in Korean contract law and Japanese arbitration procedure, would be beside the point. Again, party agreement to such an arbitrator notwithstanding, this practice is an example of the consequence of a stubborn insistence on the rule of national neutrality and also highlights its chief criticism. Instead, neutrality could be obtained here simply by resorting to an arbitrator of any third

76. The two East Asian countries are separated by the East Sea (according to Korea) or the Sea of Japan (according to Japan). Japan occupied Korea for nearly four decades in the first half of the twentieth century until the Japanese surrender at the close of the Second World War. Although political and social relations have improved over the years, there is still continuing tension over, among other issues, Japan's acknowledgment of its treatment of the so-called "comfort women" during the Colonial era, and the disputed ownership of the Dokdo (according to Korea) or Takeshima (according to Japan) islets in the waters separating the two countries. See Jon M. Van Dyke, *Reconciliation Between Korea and Japan*, 5 CHINESE J. INT'L L. 215, 234-35 (2006).

77. This is a variation on the traditional saying, the original of which was attributed to Julius Caesar. "I wished my wife to be not so much as suspected." JOHN BARTLETT, *FAMILIAR QUOTATIONS* 99 (Emily Morrison Beck ed., Little, Brown & Co., 15th ed. 1980) (1855).

country—China, Australia, the United States, or Canada, for example.

The underlying hypothetical involves Japanese and Korean parties and a prospective arbitrator with varying indicia of national identification or affiliation with one of the countries. Assume for purposes of discussion that the traditional questions of independence and impartiality—apart from nationality—are not at issue, and that the arbitrator himself has declared his suitability to serve. Preliminarily, citizenship of the prospective arbitrator is likely to be known, but in all circumstances must be disclosed, given that citizenship and nationality are considered interchangeable terms in many circles, and nationality must be known to obtain national neutrality. Citizenship is the easiest factor.

Toward further discussion and thought on the subject, and to provide a source of comparative reference, the author conducted a survey of Korean lawyers experienced in international arbitration work at law firms in Seoul.⁷⁸ The lawyers were asked to assume that they are counsel to a Korean company that is involved in an arbitration matter with a Japanese company. The survey provided descriptions of the various prospective arbitrators provided for in the hypothetical herein. For each type of prospective arbitrator, survey participants were asked whether (1) the description raised a concern (none at all, some, or serious) about the arbitrator's impartiality or independence; and (2) they would or would not object to the prospective arbitrator being appointed.⁷⁹ Nineteen lawyers participated in the survey.⁸⁰ All nineteen responded that a prospective Japanese arbi-

78. The author requested contacts at the firms to forward to arbitration attorneys an e-mail message soliciting participation in the survey to be taken on the Internet. The message indicated that participation in the survey was voluntary, and that the results would be anonymous and confidential, other than their discussion and analysis in a resulting publication. It was not possible to ascertain the response rate. The survey was conducted in July and August 2007. The full survey is reproduced in the Appendix. The survey was approved by the Institutional Review Board at the author's university. Ilhyung Lee, *Survey on Korean Lawyers Experienced in International Arbitration Work (July-Aug. 2007)* [hereinafter *Survey*] (unpublished survey, on file with *Fordham International Law Journal*). The same survey taken of Japanese arbitration lawyers in Japan would also be informative, of course.

79. *See id.* Participants were also given the opportunity to provide comments or explanations for their responses.

80. *See id.* The author acknowledges that the small number of respondents is a limitation of the survey. Another is that the survey provided information on the nation-

trator, with Japanese citizenship and living in Japan, would raise concern about the independence or impartiality of the arbitrator. Two indicated "some" concern, and the remaining seventeen indicated "serious" concern. Of the nineteen participants, seventeen responded that they would object to such an arbitrator being appointed. One indicated that he or she would not, but this appears to be an inadvertent selection, in that this participant indicated serious concern as to the arbitrator's independence or impartiality.⁸¹ One of the nineteen participants in the survey did not respond to questions of objecting or not objecting to the arbitrator's appointment.

A. *Domicile and Residence*

What about another prospective arbitrator, a U.S. citizen (with no Japanese or Korean origin) whose domicile or residence of significant duration is either Japan or Korea? Should the domicile or residence be disqualifying? Should the arbitrator previously disclose it? This author is in agreement with the view that one's domicile and residence of significant duration should be given consideration in the appointment of arbitrators and must be disclosed.⁸² After all, national equidistance includes a *geographic* component, and the domicile of the arbitrator is "his true, fixed, and permanent home, and principal establishment, and to which whenever he is absent he has the intention of returning."⁸³ In some cases, the domicile would better satisfy the geographic concept of a home jurisdiction over citizenship, determined by the passport. Indeed, one commentator reports an ICC arbitration involving a U.S. party, in which a Swedish national who was a partner in a law firm based in New York could not serve as the chair of the tribunal.⁸⁴ Although it is

ality or national affiliation (or association) of the arbitrator, and little else, which could have exaggerated its significance for respondents.

81. *Id.* Of the four other types of arbitrators in the survey, this participant had indicated: serious concern and objection to one type of arbitrator; some concern and no objection to two other types of arbitrators; and some concern and an objection to the last arbitrator.

82. Some commentators have indicated that domicile more than citizenship should determine nationality. See *supra* note 57.

83. BLACK'S LAW DICTIONARY 435 (5th ed. 1985) (citing *Smith v. Smith*, 206 Pa. Super. 310 (Pa. Super. Ct. 1965)).

84. See W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26, 28 n.13 (1989).

not clear whether the decision was based on the prospective arbitrator's U.S. residence, domicile, or both, implicit in the decision is that national neutrality was lacking. Indeed, the ICC rules explicitly state that in the appointment and confirmation of arbitrators, the court will take into account the arbitrator's "nationality, *residence*, and other relationships with the countries of which the parties . . . are nationals."⁸⁵ If a prospective arbitrator's residence⁸⁶ can be disqualifying, the more permanent domicile should be more so.

Whether mere domicile or residence in the country of one of the parties would satisfy the objective standard of "justifiable doubts" as to the arbitrator's impartiality or independence under the arbitral rules, for purposes of challenge and disclosure, is uncertain. The question of whether a prospective arbitrator should disclose his domicile and residence if different than that of his citizenship is more easily answered under the subjective standard advanced in the ICC rules and the IBA Guidelines. One may speculate that some Korean and Japanese parties would have concerns about the partiality of an arbitrator whose domicile or residence of foreseeable duration is in Japan or Korea, respectively. On this question, the survey reveals that out of the nineteen participants, three indicated that an American arbitrator (with U.S. citizenship) living and working in Japan would raise no concern at all about the independence or impartiality of the arbitrator, eleven indicated some concern, and five indicated serious concern. Twelve out of the eighteen lawyers responding stated that they would object to such an arbitrator. One did not respond. One of the participants who expressed serious concern and preferred objection explained separately that an American arbitrator who lives and works in Japan "might have [a] deep understanding of Japanese culture and could be quite fond of it. In that case those arbitrators could see the case in the context of Japanese culture and way of thinking which will be detrimental to the Korean way of arguing the case."⁸⁷

85. ICC Rules, *supra* note 9, art. 9(1)(emphasis added).

86. "Residence implies something more than mere physical presence and something less than domicile." BLACK'S LAW DICTIONARY, *supra* note 83, at 1176 (citing *Petition of Castrinakis*, 179 F.Supp. 444, 445 (D. Md. 1959)).

87. Survey, *supra* note 78.

B. Prior Citizenship; Prior Domicile

In the continuing discussion of whether factors other than citizenship may indicate a nationality status as to give rise to challenge or disclosure, the question is ripe for a prospective arbitrator whose former status is that of a Japanese national, but whose citizenship, domicile, and residence have changed to those of a neutral country. In the hypothetical, assume that the prospective arbitrator was born in Japan to Japanese parents, immigrated to the United States, renounced Japanese citizenship in order to receive U.S. citizenship, and is now a U.S. domiciliary and resident. The question is whether one's prior citizenship, prior domicile, and unchanging national origin give rise to justifiable doubts as to the arbitrator's independence or impartiality; or specifically in the ICC setting, whether the same fits under the prospective arbitrator's "other relationships with the countries of which the parties are . . . nationals"⁸⁸ that the organization must consider. The question does not lend itself to easy answers. Perhaps this scenario best highlights the point that nationality is not only a function of citizenship and geographic presence, but also a matter of self-construction, and is in the eye of the beholder. In other words, does the arbitrator see himself as Japanese⁸⁹ to the extent that it should have a bearing on his suitability to serve, despite his declaration that he is independent and impartial? The difficulty is that this inquiry would require an unprecedented and unorthodox examination of the prospective arbitrator.⁹⁰

Regarding disclosure of national origin, birthplace, prior

88. ICC Rules, *supra* note 9, art. 9(1).

89. Or does he see himself as a "Japanese in America," "Japanese-American," "American of Japanese descent," or simply, "American."

90. In this regard, some information about the arbitrator can be gleaned from his publicly available curriculum vitae, e.g., his name (whether Neil Aoki or Ichiro Aoki), and language skills (fluency in Japanese or English only). For inquiring parties and counsel, these are surface characteristics, at best, and certainly not conclusive. Parties may be inquisitive about other questions, which would not likely be asked formally. Such questions would include whether the arbitrator: if married, has a Japanese or non-Japanese spouse; observes holidays of the mother country; has relatives in Japan whom he visits, and if so, the frequency and duration of the trips; and is a sports fan, and if so, which team he roots for in matches between Korean and Japanese national teams. These would be unwelcome questions that the rule of national neutrality (under non-citizenship grounds) has wrought, and sound of the very Pandora's box against which commentators have cautioned. See VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 266.

citizenship, and prior domicile (all based in Japan), it is, again, problematic whether this would arise to the objective “justifiable doubts” standard. Disclosure is recommended, in the view of the author, under the ICC or IBA approach, in that it could raise doubts as to the partiality of the arbitrator, in the eyes of the parties. Of relevance here is the (rarely addressed) explanation in the IBA Guidelines that “[i]n determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.”⁹¹ It is not clear what the intended scope of this passage is, or the meaning of “culture” and “customs.”⁹² Nevertheless, it is a fair statement that one whose birthplace, prior citizenship and domicile is Japan (or Korea) is likely to know that an arbitrator of Korean (or Japanese) descent deciding a case between Korean and Japanese arbitrators would raise concerns of partiality, despite the arbitrator’s physical and legal detachment from the mother country. A prospective arbitrator of Korean or Japanese descent more removed from the local culture might be less knowing of the societal mindset.⁹³ In the survey, all nineteen of the Korean lawyers responded that an arbitrator born in Japan to Japanese parents, with current citizenship and residence in the U.S. would raise concern about the independence or impartiality of the arbitrator. Nine indicated some concern, and ten indicated serious concern. Sixteen lawyers stated that they would object to such an arbitrator; two indicated no objection. This limited survey suggests that in some situations and for some counsel, the technicality of the present passport, or even of domicile or residence, should not be controlling in determining national neutrality; rather, national origin or ethnicity should be equally, if not more, impacting.

C. *National Origin*

This variation involves the prospective arbitrator who is a second generation Japanese, that is, one whose parents emigrated from Japan as adults, but who was born and reared in the

91. IBA Guidelines, *supra* note 8, at 10 (Explanation to General Standard 3(a)).

92. “Culture is one of the two or three most complicated words in the English language.” RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed. 1985).

93. This scenario is discussed in the next variation.

United States, with U.S. citizenship and domicile. Here, at least on the surface, the geographic presence is less than in the previous variation. Perhaps the detachment from the country of one of the parties is sufficient as not to raise "justifiable doubts" for the reasonably informed third party. Yet the question of arbitrator self-perception and the improbable examination of the arbitrator to ascertain his perception of his own nationality status are also apt here.⁹⁴ Some immigrant groups stateside, more than others, attempt to maintain the language, customs, and practices of their mother country, and may well identify themselves primarily with their originating country. Yet members of the second generation in other immigrant groups might see themselves as American. The reality of this uncertainty makes disclosure of national origin the safer course, again bearing in mind the local culture and customs of the countries of the parties. The survey of Korean lawyers is of interest: out of the nineteen participants, three responded that an arbitrator born in the United States to Japanese parents, with U.S. citizenship and residence, would raise no concern at all about the independence or impartiality of the arbitrator, ten indicated some concern,⁹⁵ and six indicated serious concern. Fourteen participants stated that they would object to such an arbitrator; four would not. Further discussion regarding the challenge of, and disclosure by, this type of arbitrator will invite other variations, e.g., a prospective American arbitrator one of whose parents, or one of his four grandparents, is Japanese (or Korean).⁹⁶ There must be a point where challenge must be rejected and disclosure deemed unnecessary far

94. See *supra* note 90.

95. The author would adjust these figures to read two expressing no concern at all and eleven expressing some concern. The reason is that one participant selected some concern, but also an objection to the arbitrator. This participant expressed some concern to the other four prospective arbitrators, and indicated an objection to all of the four.

96. Challenging questions of a similar nature in hypothetical arbitrations have been raised elsewhere. For example:

[2.] In an arbitration between a Croatian party and a Serbian party could one of the arbitrators be a person of Croatian ethnic origin, born and raised in Croatia while it was part of Yugoslavia, who had moved to Switzerland and become a Swiss citizen?

Could a Turkish Cypriote arbitrate a dispute between a Greek and a Turkish party?

Would a Turkish Cypriote born and raised on Cyprus, who had moved to the U.S. and become a U.S. citizen be acceptable?

[3.] In a dispute between an Israeli company and Egyptian company, could

before the “one-drop rule” once seen in U.S. law and policy.⁹⁷

D. *Spouse*

The final variation addresses the prospective American arbitrator, with U.S. citizenship, domicile, and residence, with no Japanese (or Korean) national origin, but whose spouse is Japanese (or Korean). Responses to this author from a small number of colleagues in the field indicate that this circumstance, by itself, should not give rise to “justifiable doubts” as to the arbitrator’s impartiality or independence, and the challenge should be unsuccessful and disclosure unnecessary. Indeed, an official of a major arbitral organization, posed with this situation, suggested to this author that such a challenge would be rejected out of hand, stating, “We don’t do spouses.” Disclosure under the subjective standard of the ICC and IBA Guidelines, however, merits more discussion. The subjective approach refers to doubts as to partiality in the eyes of the parties, the specific parties, and not to “reasonable” parties, nor even to reasonable parties of a given nationality. Moreover, this is an instance where the distinction between the subjective standard for arbitrator disclosure and the objective standard for challenge is stark.⁹⁸ For the curious, in the survey, out of the nineteen Korean lawyers, one responded that an American arbitrator with a Japanese spouse would raise no concern at all about his independence or impartiality, seventeen indicated some concern, and one indicated serious concern. Over half of the participants—ten out of eighteen—would object to this arbitrator. The view expressed by the official of the arbitral organization above would be disappointing news to some Korean lawyers.

A brief summary of the survey results is in order. Korean lawyers in the survey were nearly unanimous in indicating serious concern of the independence or impartiality of a Japanese arbitrator, with Japanese citizenship, who lives in Japan, and also

an American of Jewish background be an arbitrator? An American of Arab background?

VÁRADY, BARCELÓ & VON MEHREN, *supra* note 16, at 287.

97. This is “the idea that anyone with any African ‘blood’ is legally black.” Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule 1600-1860*, 91 MINN. L. REV. 592, 593 (2007).

98. See IBA Guidelines, *supra* note 8, at 10 (Explanation to General Standard 3(a)).

in objecting to the appointment of such an arbitrator. This was quite expected, according to commonly held notions of national neutrality in the international arbitration setting. Importantly, all participants in the survey also indicated concern of an arbitrator with U.S. citizenship and residence, but born in Japan to Japanese parents; a great majority of the participants would also oppose such an arbitrator. The numbers were only slightly lower for an arbitrator with U.S. citizenship, born in the U.S. to Japanese parents, indicating the difficulty for the survey participants of segregating national origin from nationality. Finally, the majority of the participants expressed concern (though less serious in degree) for the American arbitrator living in Japan, as well as the American arbitrator living in the United States, or who has a Japanese spouse, and more than half indicated that they would object to both types of arbitrators. As one participant explained succinctly, "Any affiliation with Japan would be a cause for concerns from a practitioner's perspective, I believe. Vice versa."⁹⁹ Again, a survey of Japanese lawyers on the same subject would be revealing.

As indicated above, the two countries in the hypothetical were not selected by coincidence or haphazard chance. First, Korea and Japan are countries with significant economies, and many business entities in both countries are actively engaged in international business transactions. Korean and Japanese companies in significant number also do business with each other. Second, and more relevant here, the choice of Korean and Japanese parties for the hypothetical arbitration was to highlight the potential realities of nationalism and sensitivity to national identification. Arbitrations involving parties of countries with uneasy and complex histories might result in the same considerations,¹⁰⁰ while those without this dynamic (perhaps arbitrations involving U.S. and Canadian parties, for example) might present less opportunity for concern and discussion.

CONCLUSION

Business entities have a strong interest in engaging in operations with international partners. When disputes inevitably oc-

99. See Survey, *supra* note 78.

100. In this group, perhaps arbitrations between nationals of Iran and Iraq, India and Pakistan, and Israel and Egypt could be included.

cur, parties invariably resort to national self-identification, and insist on national neutrality of the deciding tribunal. The reasons are based more on instinctive human reaction than reason, and are quite impacting. This Essay offers a focused examination of arbitrator nationality, including its meaning, relation with neutrality, independence, and impartiality, and how it may present challenging questions in practice. Questions of party challenge of the arbitrator and arbitrator disclosure will require consideration of what standard to apply, as illustrated in the hypothetical variations. Perhaps no issue better highlights the international character of arbitration disputes than the nationality or the national affiliation of the parties and arbitrators. Questions of national neutrality will continue to be of interest.

APPENDIX

Arbitration Survey

Assume that your client is a Korean company that is in a legal dispute over a contract with a Japanese company. The two parties have agreed to resolve the dispute by *arbitration*. A sole arbitrator will decide the case.

Regarding the selection of the arbitrator, descriptions of various prospective arbitrators appear below. For each description, please click on your preferred responses.

A. The prospective arbitrator is American, with U.S. citizenship, lives in the U.S., and is married to a Japanese woman.

1. In the selection of the arbitrator, the description of the prospective arbitrator described in "A":

does not raise any concern at all about the arbitrator's independence or impartiality

raises some concern about the arbitrator's independence or impartiality

raises serious concern about the arbitrator's independence or impartiality

2. Please select one of the following concerning your views on the suitability of the prospective arbitrator described in "A" for the arbitration.

I would object to this arbitrator being selected.

I would not object to this arbitrator being selected.

B. The prospective arbitrator is American, with U.S. citizenship, and lives and works in Japan.

3. In the selection of the arbitrator, the description of the prospective arbitrator described in "B":

does not raise any concern at all about the arbitrator's independence or impartiality

raises some concern about the arbitrator's independence or impartiality

raises serious concern about the arbitrator's independence or impartiality

4. Please select one of the following concerning your views on the suitability of the prospective arbitrator described in “B” for the arbitration.

I would object to this arbitrator being selected.

I would not object to this arbitrator being selected.

C. The prospective arbitrator was born in the U.S. to Japanese parents, now has U.S. citizenship, and lives in the U.S.

5. In the selection of the arbitrator, the description of the prospective arbitrator described in “C”:

does not raise any concern at all about the arbitrator’s independence or impartiality

raises some concern about the arbitrator’s independence or impartiality

raises serious concern about the arbitrator’s independence or impartiality

6. Please select one of the following concerning your views on the suitability of the prospective arbitrator described in “C” for the arbitration.

I would object to this arbitrator being selected.

I would not object to this arbitrator being selected.

D. The prospective arbitrator was born in Japan to Japanese parents, moved to the U.S. years ago, and now has U.S. citizenship and lives in the U.S.

7. In the selection of the arbitrator, the description of the prospective arbitrator described in “D”:

does not raise any concern at all about the arbitrator’s independence or impartiality

raises some concern about the arbitrator’s independence or impartiality

raises serious concern about the arbitrator’s independence or impartiality

8. Please select one of the following concerning your views on the suitability of the prospective arbitrator described in “D” for the arbitration.

- I would object to this arbitrator being selected.
- I would not object to this arbitrator being selected.

E. The prospective arbitrator is Japanese, with Japanese citizenship, and lives in Japan.

9. In the selection of the arbitrator, the description of the prospective arbitrator described in “E”:

- does not raise any concern at all about the arbitrator’s independence or impartiality
- raises some concern about the arbitrator’s independence or impartiality
- raises serious concern about the arbitrator’s independence or impartiality

10. Please select one of the following concerning your views on the suitability of the prospective arbitrator described in “E” for the arbitration.

- I would object to this arbitrator being selected.
- I would not object to this arbitrator being selected.

11. If you have any comments relating to Questions #1 through #10 or any of your answers, please provide them here:

[]

When you have answered all of the above questions, please be sure to click “DONE” below.

[DONE]

Thank you!