The Power (Or Otherwise) to Disqualify Counsel and Experts: A Review

Peter ASHFORD*

The controversial power to disqualify counsel is often deployed but rarely analysed from first principles: if such a power exists, it must derive from somewhere or something. The competing arguments are contractual and status. Although in many cases it will not make any difference, the basis for any such power ought to be known. Furthermore, is the power to disqualify restricted to counsel or can it extend to others involved in the arbitration process, such as an expert? If so, does the analysis of the source of such a power apply equally to participants other than counsel? If not, on what basis can the power to prevent an expert from appearing be exercised? Can connections involve more than one degree of connection or must there be a closer degree of proximity? If the power to remove or disqualify an expert does not apply on the facts, what is the result?

Keywords: counsel, expert, contract, status, removal, disqualify

Challenges to counsel[1] are not uncommon in international arbitration, in particular in the wake of *Hrvatska v. Slovenia*.[2] The power to do so remains controversial and far from universally accepted. The question then arises, does such a power exist and, if so, what is the rationale and basis for it and does it apply to others involved in the arbitral process, for example an expert[3] or more remote connections, or are counsel in a category alone?

The orthodox analysis recognizes both a contractual analysis and a so-called 'status' analysis: whether it is incident to the contractual relationship and/or whether it is the status of the tribunal *per se* that gives rise to powers, duties and obligations. More recently, there has been a decision founded on fiduciary duties.

* Co-Head of the International Arbitration group at Fox Williams LLP, London. The assistance of Kate Felmingham in the drafting of this article is gratefully acknowledged. This article was produced for the 2nd Fox Williams/CIArb Panel Debate on the legal issues in the 27th Vis Moot problem.
Email: pashford@foxwilliams.com.

1 The term 'counsel' is used throughout this paper. It is not intended to be exclusively a reference to a barrister in England but rather to a counsellor: a legal advisor or representative. This acknowledges that in international arbitration it is not necessarily domestic lawyers who will appear before the tribunal.

2 *Hrvatska Elektropivreda d.d. v. Republic of Slovenia* ICSID Case No. ARB/05/24 6 May 2008.

3 Conceptually, it could be others involved in the arbitration, perhaps interpreters or a tribunal secretary, but it is difficult to think of many others in the same position. Although this paper will refer only to experts it should be read as if referring to this wider category.

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1 CONTRACTUAL ANALYSIS

The contractual analysis starts with the original agreement to arbitrate (originally a bilateral agreement between the parties and latterly, it is generally understood to be typically, a tripartite agreement between the parties and the tribunal).[4]

As Sir Nicholas Browne-Wilkinson VC said in *K/s Norjarl A/s v. Hyundai Heavy Industries Co. Ltd.*[5]:

> *The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see* Compagnie Europeene de Cereals SA v Tradax Export *[1986] 2 Lloyd's Rep. 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status*.[6]

The arbitration agreement is the only instrument governing the parties' relationship with the tribunal.[7] To the extent that any contractual authority over legal representatives or others such as experts exists, it must, presumably, derive from the agreement to arbitrate but, as is often pointed out, a legal representative (and for that matter any expert) is not a party to the agreement to arbitrate.

By an agreement to arbitrate the parties agree to submit their dispute to decision by the tribunal. The arbitration agreement invariably says nothing about the process or procedure that should be adopted (save that it may be governed by institutional rules which give some, but not complete, direction as to the powers of the tribunal and the process that should be adopted). National law may also supplement the parties' agreement and the English Arbitration Act 1996 ('Act') includes mandatory and non-mandatory provisions. The mandatory provisions '*have effect notwithstanding any provision to the contrary*'.[8] The most important of these are sections 33 (duties of the tribunal) and 40 (duties of the parties).

Prior to the 1920s courts had required arbitration procedure to resemble proceedings in the High Court. Thereafter, there was a contract based *laissez faire* attitude: if the parties got the process they had bargained for, however clumsy or erratic, the courts would not intervene. The Act, especially by sections 33 and 40 marked a shift back to underlining minimum requirements that are independent

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4 There is an alternative, albeit underdeveloped, argument that the jurisdiction derives from Art. 18 of the Model Law: '*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*.' This provision is enacted by §33 Arbitration Act 1996 in England.

5 [1992] Q.B. 863.

6 At p. 884.

7 And in ICC proceedings the Terms of Reference. In Investor-State it may (also) be the relevant instrument e.g. the BIT.

8 Section 4(1).

of any agreement, express or implied between the parties. The arbitral process remains consensual and the agreement to arbitrate remains contractual (albeit one where some aspects of that contract are imposed by law).

A tribunal will, for example, be obliged to adopt suitable procedures for the circumstances of the particular arbitration. Thus, if the arbitration turns on a single issue of law it may be inappropriate to have extensive document production and witnesses, rather written submissions may be sufficient. The suitable procedures, so adopted, will also avoid unnecessary delay and expense. In the example above the written submissions may be considerably quicker and cheaper than the alternative of something aping a High Court process. Of course, institutional rules will invariably confer on the tribunal a broad discretion to make directions as the tribunal sees fit.[9]

Absent institutional rules, the parties do not expressly bestow the tribunal with any powers relating to process or procedure but there is undoubtedly an implied agreement. The arbitration agreement will define those claims that can and cannot be arbitrated, as stated by Lord Hoffmann in *Fiona Trust & Holding Corp v. Privalov*[10]*:*

> *Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language … If one accepts that [consensual dispute resolution outside of the national courts] is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts … If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.*

This logic can, and should, be extended to bestowing on the tribunal the implied power over the parties to determine process and procedure especially so as to ensure the integrity and fairness of the arbitration (as an incident to the arbitration agreement). Disputes and differences between the parties as to whether, when and to what extent there should be, for example, document production are no different, in principle, to disputes and differences over the substantive dispute – if the parties cannot agree, the tribunal must decide. As an implied term of the

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[9] *See* e.g. ICC Rules (2012) Art. 24; LCIA Rules Art. 14.

[10] [2007] 4 All ER 951, 956–957.

agreement to arbitrate it is a part of the agreement to arbitrate and affects and applies to both the parties and the tribunal.

The question that then arises is whether it is a necessary incident of the power to control process and procedure, as described, that that power includes a power to rule on matters affecting the legal representatives or experts just as much as it is to order a party to, for example, produce documents. Many tribunals have accepted that the power extends to deciding whatever may be necessary in the conduct of the arbitration.

Note, however, that the LCIA Rules[11] approach the authority over counsel by placing the obligation on the party to '*ensure*' that counsel adhere to the required behaviours[12] and the party also represents that the counsel has so agreed as a condition of his appearance. This implicitly recognizes that the only contractual right is over the parties and not directly over counsel.

Beyond the mere incident to general powers, and working from first principles, there may be a more principled approach to the contractual power. Any contractual power over counsel or experts (as opposed to the party) must logically derive from the agreement to arbitrate; that agreement is initially bilateral; and becomes trilateral when the dispute arises, and the tribunal is formed.

That trilateral agreement is usually formed by a Request for Arbitration and Answer/Response in institutional references (or a notice to concur in ad hoc references). The Request and Answer/Response will usually be submitted by counsel. They will act as agent for their clients, the parties,[13] who will be the (disclosed) principal for whom counsel act and do so as agent.

As a matter of orthodox agency law, the agent is not, generally, liable on a contract made for a disclosed principal. The reason for this, where it is the case, is that objectively construed the trilateral contract so formed is between the principal (in this instance the party for whom the legal representative acts); the other party; and the tribunal:

> *There is no doubt whatever as to the general rule as regards an agent, that where an agent contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and,* prima

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[11] LCIA Rules Art. 18.5: '*Each party shall ensure that all its authorized representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules …* '. Note, however that Art. 18.6 provides that the tribunal may decide '*whether or not the legal representative has violated the general guidelines. If such violation is found … [the tribunal] may order … sanctions against the legal representative …* '. Thus, although the obligation is solely on the parties and the parties must 'ensure' that counsel comply, the remedy includes determining whether counsel has violated and whether a, and if so what, sanction should be imposed directly upon counsel. There is, therefore, a tension in the Rules: the target of a sanction may be counsel who are not directly subject to any obligation.

[12] Set out in the Annex to the LCIA Rules.

[13] This paper does not touch on the issue of third-party funding, and for the purposes of the points being made it is assumed that it is a client who is funding the action themselves.

> facie, *at common law the only person who may be sue is the principal and the only person who can be sued is the principal.*[14]

An agent can, however, be liable to a third party without being able to sue (in this analogy, counsel can be liable to, i.e. subject to the authority of, the tribunal, and to a (very) limited extent may be liable to the other party). This can be so even though counsel stands to gain no benefit from the reference – other than being remunerated by its client, one of the parties. This liability of the agent counsel would be on the basis that a collateral contract can be inferred on the basis that the agent counsel, in return for the third parties (the other party and the tribunal) dealing with its principal (the party), undertakes personal liability on the main contract (i.e. the now trilateral agreement to arbitrate).

Thus there is nothing, at least in principle, to stop counsel as an agent entering into a contract on the basis that it will, itself, be liable to perform it, as well as the principal (the party).[15] The modern trend is to recognize such liabilities, for example, under such a collateral contract (the consideration for which is the entering into the main contract with the principal), an agent may warrant his authority. A specialized application of the warranty of authority is that given by counsel who issues process in litigation (or arbitration). In general, counsel warrants that he has been authorized by a client that exists.[16] There are clear limits on the warranty – it does not extend to the name of the client being correct; nor that the client is solvent; nor that the claim is valid or even arguable – but the basic, and limited, warranty is well recognized.

In litigation there is no need for the warranty of authority to extend to submitting to the discipline of the court as that is usually well covered by an inherent power of courts to control counsel appearing before the court. It follows that the warranty has never been analysed in that way in litigation. The reasoning of counsel's liability has, however, been applied to a property context: a lawyer acting for the proprietor seeking to mortgage a property has been found to warrant to mortgage lenders (who were separately represented and hence were not clients of the lawyer) that they acted for the (genuine) borrower and proprietor (in fact it was an identity fraud and there was an imposter pretending to be the borrower and proprietor).[17] Bearing in mind the general principles that an agent can be liable along with the principal, it is suggested that it is not a large leap of reasoning for

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[14] *Montgomerie v. UK Mutual SS Assn Ltd* [1891] 1 QB 370, 371. *See also Paquin v. Beauclerk* [1906] AC 148. The UNIDROIT Principles (2004) Art. 2.2.3 and Restatement of Agency, Third §6.01 both appear to have the same starting point.

[15] *See* e.g. *International Ry v. Niagara Parks Commission* [1941] AC 328, 342.

[16] *Nelson v. Nelson* [1997] 1 WLR 233.

[17] *Excel Securities plc v. Masood* 10 June 2009 Manchester Mercantile Court.

counsel to owe duties to the tribunal and hence for the tribunal to be able to enforce those duties.

The above analysis is based on contractual duties of the agent (counsel), principal (party) and third party (tribunal – and, perhaps, other party).

In tort, the agent is generally personally liable where loss, damage or injury is caused to the third party by a wrongful act or omission of the agent just as if he was acting on his own behalf.[18] It will be no defence for the agent to say he was acting under instructions of his principal.[19] In torts connected to the contract it is clear that the agent may also be liable to a third party in deceit.[20] Equally, it is clear that the agent for one party may owe duties to the other party: the most obvious situation being negligent misstatement or representation but this analysis only goes so far – it may give a third party a cause of action but it is unlikely to give a third party a power to exercise a disciplinary function.[21]

It is therefore clear that, in a variety of situations, an agent (counsel) may owe enforceable duties to a third party (the tribunal) both in contract (and tort, to the extent relevant). So much is consistent with the application of existing authority in agency law. Those principles can (and, perhaps, might) be extended to afford the tribunal a contractual jurisdiction over legal representatives who act as agent when the trilateral arbitration agreement is formed for the tribunal to adjudicate on the particular dispute referred to it. The principles do not so easily apply to counsel who may join the legal team after the (trilateral) arbitration agreement is formed, however, on analysis, the notification of additional (or replacement) counsel can be seen as a variation of the original agreement (whereby in consideration of being allowed to appear, the new, or additional, counsel adopts duties and obligations).[22]

One thing that is clear is that the standards of behaviour and ethics – whether of a national bar (or similar) or international standards (whether the IBA Guidelines on Party Representation or otherwise) – are irrelevant to the existence of the power. Those standards are enforceable by professional bodies or national courts and not the tribunal or the administering institution (although they may assist in determining appropriate behaviours).

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18 Restatement of Agency, Third §7.01: '*An agent is subject to liability to a third party harmed by the agent's tortious conduct …* '.

19 *Bennett v. Bayes* (1860) 5 H&N 391.

20 *Standard Chartered Bank v. Pakistan National Shipping Corp* [2003] 1 AC 959 .

21 *See* e.g. *Esso Petroleum Co. Ltd v. Mardon* [1976] QB 801.

22 *See* e.g. *Bak v. MCL Financial Group Inc.* 88 Cal. Rptr. 3d 800 (Cal. App. 2009) where a tribunal ordered counsel to pay USD 7,500 as a sanction for copying privileged documents as 'by voluntarily appearing' counsel 'subjected himself to the jurisdiction of [the tribunal] and was subject to its rulings'. Note also LCIA Rules Art. 18.3: a change in legal representative, after the tribunal is formed, will only take effect when sanctioned by the tribunal.

In conclusion, absent express power, the proponents of the contractual analysis argue that the power is an implied function of the consent to arbitrate, party autonomy and the parties' agreement to arbitrate rather than via disciplinary recourse to either the state courts or professional bodies. The traditional argument is that, by consenting to arbitrate, the parties bestow on the tribunal a power to decide how the reference is to be conducted where agreement cannot be reached between the parties. A function of having the power to determine how the reference is to be conducted is to control counsel that appear before the tribunal.

2 STATUS ANALYSIS

In *Jivraj v. Hashwani*[23] David Steel J highlighted the status analysis advanced by Mustill & Boyd. He said "*This gives added emphasis in the present case to the plea made in Mustill & Boyd:*

> *the appointment of an arbitrator is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else. We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and the parties into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of the arbitrator.Indeed as the editors point out it can be said with some force that, even if there is a contract between the arbitrator and the parties, it is a very strange one:*
>
> *i) the arbitrator is immune from suit;*
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> *ii) he owes duties to act fairly and equally to all parties;*
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> *iii) neither party can remove him without order of the Court.*"[24]

This reflects that the status analysis moves directly to consider the powers of the arbitrator unhindered by a contractual analysis.

3 FIDUCIARY DUTIES

In *A v X, Y & Z*[25] O'Farrell J held that a fiduciary duty of loyalty was owed by X, an expert consulting firm, to C, the employer/owner for the design, procurement and construction of a petrochemical plant (the Project), in circumstances where X was employed by C to give expert evidence on delay in an arbitration between C and a sub-contractor (the Subcontractor) relating to part of the Project (Arbitration 1); Y and Z, other companies in the Defendant group which were strangers to C and had no contractual or other relationship with it, also owed C a duty of loyalty; it would be a breach of those duties of loyalty for Y to give expert evidence on quantum, in a

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[23] [2009] EWHC 1364.
[24] At 24 and 25.
[25] [2020] EWHC 809 (TCC) .

separate arbitration between C and a third party responsible for the management and supervision of the Project as a whole (the Manager) (Arbitration 2).

The decision is going on appeal. Undoubtedly, an expert is not an established category of fiduciary. The fundamental issue is whether the analysis should start with X and build it out to Y, or whether it should simply start with Y. The second issue is whether an expert can owe fiduciary duties at all. A fiduciary typically has powers over the property of another e.g. to make decisions and manage property; must act unselfishly in the interests of the principal/client; and whilst trust and confidence is usually necessary, it is not sufficient.[26] It can be said that the obligation to act unselfishly in the interests of the principal/client is inconsistent with a paramount duty to assist the tribunal (whether or not in the client's interests). Conversely, the expert is invariably also asked to advise (as well as give testimony to the tribunal) and that can create a legitimate advisory role as part of an advisory team and, it is said, to have similar duties to a solicitor.

There is no other English case where an expert has been found to owe fiduciary duties[27] and the decision on the appeal is awaited with interest.

4 ILLUSTRATIONS

The issue of disqualifying counsel came to the forefront of many people's minds with two ICSID cases: *Hrvatska v. Slovenia*[28] and *Rompetrol v. Romania*.[29]

In *Hrvatska*, some two years after the tribunal had been appointed and ten days before the substantive evidentiary hearing, the Respondent sought to add a counsel who was affiliated with the chambers of the President of the Tribunal. The Claimant sought an order that the Respondent '*refrain from using the services of*' the new counsel on the basis that there was a justifiable doubt as to the independence of the President – on the basis that the English chambers system was wholly foreign to the Claimant and its counsel. The application was put on the familiar basis of (lack of) independence of tribunal members and it can be seen that the relief sought was directed to the party (to refrain) rather than directly at counsel. The Parties agreed that they did not want the President to stand down for obvious cost and delay reasons.

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[26] *Al Nehayan v. Kent* [2018] EWHC 333 (Comm) 157–166.

[27] There is one Australian case where the issue of a fiduciary duty arose in relation to an expert, *Wimmera Industrial Minerals Pty v. Iluka Midwest,* [2002] FCA 653 where the plaintiffs sought to restrain the other side from conferring with or using an expert in subsequent litigation because the expert worked for them in what they said was a fiduciary capacity. Sundberg J looked at the expert's contract with the plaintiffs and found no undivided loyalty clause and held he had not been subject to a fiduciary obligation but merely an obligation of confidence.

[28] *Hrvatska Elektropivreda d.d. v. Republic of Slovenia* ICSID Case No. ARB/05/24 6 May 2008.

[29] *Rompetrol Group NV v. Romania* ICSID Case No. ARB/06/3 14 Jan. 2010.

The Tribunal found that the parties in an arbitral procedure '*as a general rule […] may seek such representation as they see fit*'.[30] However, the Tribunal found that this general rule is overridden by the principle of the '*immutability of properly constituted tribunal*'.[31] The Tribunal ruled that the barrister '*may not participate further as counsel in this case.*'[32] That appears to be the language of a direct power over counsel rather than the relief sought (which was, perhaps correctly, directed to the party).

The Tribunal observed that there is an '*inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction*'; that power '*exists independently of any statutory reference*'.

It appears that the Tribunal accepted that (1) the standard for disqualification of counsel was the same as if an application had been made to remove a member of the tribunal, and (2) that that standard was satisfied.[33] But it appears from the reasoning of the Tribunal that that, of itself, would not have been sufficient and it was only because it was supplemented by the failure to adequately disclose the instruction of the new counsel and the connection to the President. Among the particular features of this failure were: a '*conscious decision not to inform*' the Tribunal; the tardiness in notifying; and an '*insistent refusal to discuss the scope*' of the new counsel's involvement. All these may have been '*errors of judgment*' but they created '*an atmosphere of apprehension and mistrust which it was important to dispel.*'[34]

By contrast, in *Rompetrol* the Tribunal noted that it would be incorrect to attribute the power to remove counsel to the Tribunal but it was willing to '*assume*' that there were such powers but that any such power should only be exercised under '*extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself.*'[35] On the request to disqualify the Claimant's counsel who had, for four years – and until seven months previously – been in the same firm as the Claimant's party appointed arbitrator, the Tribunal observed that '*a power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument, the more so if the proposition is that the control ought to be exercised by excluding or overriding a party's own choice.*'[36] Whilst affirming its authority to rely on the *Hrvatska* doctrine, the Tribunal refused to disqualify counsel, holding

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30 *Hrvatska, supra* n.2, at 24.
31 *Ibid.,* at 25.
32 *Ibid.,* at Ruling 1.
33 It is important to have firmly in mind that there will be instances where the putative arbitrator must disclose connections, but those may well not necessitate withdrawal or disqualification. *See* e.g. IBA Guidelines on Conflicts.
34 *Ibid.*, at 31.
35 *Ibid.,* at 15.
36 *Ibid.,* at 16.

that '*the only justification for such extension in the arbitral context would be a clear need to safeguard the essential integrity of the arbitral process, on the basis that such integrity would be compromised were the exclusion not ordered*.' No such circumstances were found to exist as no '*risk … genuinely exist[ed]*' that the integrity of the Tribunal would be affected.

The *Rompetrol* Tribunal characterized the *Hrvastska* decision as '*an* ad hoc *sanction for the failure to make proper disclosure in good time*' rather than a holding of more general application. Underlying the *Rompetrol* decision was the clear finding that the presence of the new counsel would not (or, at least, not seriously) affect the neutrality of the Tribunal.[37]

The willingness of other ICSID tribunals to consider the disqualification of counsel in other circumstances can be seen in *Libananco v. Turkey*[38] and *Fraport v. Philippines*.[39] In the former, the Tribunal declared with respect to misconduct that '*if instructions [to counsel] have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information*.'[40] That does not seem objectionable. In the latter case the Respondent sought to remove Claimant's counsel on the grounds that he had represented the Respondent in a prior (and linked) ICC arbitration. The Tribunal quite correctly disclaimed any deontological responsibility – it made it plain that its only task was to ensure the fairness and integrity of the process that it was adjudicating. The Tribunal was not swayed by the relevant bar rules (although it asked to be briefed on them) and any remedy was to address any perceived harm only – on the facts it found no risk of harm that needed to be addressed.

The consequences arising from a tribunal's possible competence to remove counsel is 'draconian'[41] because it deprives the parties of the right to be represented by counsel of their choice. This deprivation would not only infringe this fundamental right but would also risk violation of Article VI(d) of the New York Convention and hence risk non-recognition of an award.

The IBA Guidelines on Party Representation do not have any contractual force but must be implicitly based on a status argument. Guideline 6 provides for the possibility of disqualification:

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37 *Ibid.,* at 15, 18 and 26.

38 *Libananco Holdings Co. v. Turkey* ICSID Case No. ARB/06/8 23 June 2008.

39 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ICSID Case. No. ARB/03/25 18 Sept. 2008.

40 *Libananco, supra* n. 38, at 80.

41 A. S. Rau, *Arbitrators Without Powers? Disqualifying Counsel, Arbitral Proceedings*, 9–10 (2014), http://ssrn.com/abstract=2403054 [accessed 28 Apr. 2020].

> *The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.*

5 CONCLUSIONS ON THE SOURCE OF THE POWER

As Sir Nicholas Browne-Wilkinson VC said in *K/s Norjarl A/s v. Hyundai Heavy Industries Co. Ltd.*[42]:

> *I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements.*[43]

The principal and logic for having such a power to disqualify can be tested by supposing that counsel returns to the hearing room at night to copy his opponent's private and privileged notes. It would be surprising if the tribunal were impotent and unable to act. Equally, it would be fair, reasonable and proper for the tribunal to have power to, at the very least, order the delivery up or destruction of such copies and, perhaps, to sanction counsel (and/or the party) for such behaviour. How far that jurisdiction extends, for example, whether it extends to removing counsel from the arbitration, is another matter. That there is a jurisdiction is, I suggest, clear. Whether it derives from status or contract/agency (or perhaps even a fiduciary relationship) is not immediately important, but the contract/agency argument appears more principled, albeit more restricted, than the status argument.

Furthermore, whether and how such jurisdiction should be exercised is entirely another matter as it may be incompatible with the tribunal's duty to determine the parties' dispute and may impact upon the impartiality of the tribunal or at least might raise the appearance of partiality.[44,45]

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[42] [1992] Q.B. 863.

[43] And *see* Leggatt LJ, at 876: '*I doubt whether analysis of an arbitrator's position in terms of contract will ordinarily yield a different result from analysis in terms of status.*'

[44] There is undoubtedly authority that holds that tribunals do not have the jurisdiction argued for here and it is recognized that the proposition is, to a degree, novel. Authorities holding the tribunal does not have such a jurisdiction include: *InterChem Asia 2000 Pte Ltd v. Oceana Petrochemicals AG* 373 F. Supp.2d 340 (SDNY 2005) (where an award of legal costs of USD 70,000 was made against counsel for 'peculiar and extremely harmful dealing with documents in the case' was set aside as it 'exceeded the arbitrator's authority'); *CBC Oppenheimer Corp. v. Friedman* 2002 WL 244820 (Cal. App.) (where an award holding counsel jointly and severally liable for costs of USD 700,000 for filing a frivolous claim without factual foundation was set aside as 'representation … at the arbitration cannot be construed as his agreement to become a party to the arbitration agreement'); and *see MCR of America Inc. v. Greene* 811 A.2d 331 (Md. App. 2002).

[45] Note that in the USA, tribunals appear to have no power to disqualify counsel: *Munich Reinsurance America Inc. v. ACE Prop & Cas Ins Co* 500 F.Supp.2d 272 (2007): '*Disqualification of an attorney for an alleged conflict of interest is a substantive matter for the Court and not arbitrators. Attorney discipline has historically been a matter for judges and nor arbitrators because it requires an application of substantive state law regarding the legal profession.*' And *see Northwestern Nat'l Insurance Co. v. INSCO Ltd.* No. 11 Civ. 1124

6 POWER OVER WHOM?

Should any power as may be found to exist be solely over counsel or could it be extended to others who appear before the tribunal, for example, an expert[46]?

If the power is founded on the agency analysis, then it is difficult to see how that could be applied to an expert. The broader contractual analysis (an incidence to the general powers) and the status arguments would not, however, be as restrictive.

The LCIA Rules do not extend to cover experts as the policing aspects of representation are expressly restricted to 'legal representatives' by Article 18.

There is no reason, in principle, why an expert cannot be the subject of a removal application and, in some circumstances, the test for the removal of an expert will be the same as with counsel – namely apparent bias[47]: *Bolkiah v. KPMG.*[48] In *Bolkiah* the expert (a firm of accountants) had provided litigation support services to Bolkiah and, in consequence, had in its possession confidential information and the issue was, whether the expert could, after the conclusion of

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(SAS), 2011 WL 4552997 at 5 (SDNY 3 Oct. 2011) *'[a]ttorney disqualification is a "substantive matter for the courts and not arbitrators" for the simple reason that "it requires an application of substantive state law regarding the legal profession". In other words, arbitrators are selected by the parties to a dispute primarily for their "expertise in the particular industries engaged in" and cannot be expected to be familiar with the standards of conduct applicable to the legal profession.' See also Reliastar Life Insurance Company of New York v. EMC National Life Company* 564 F.3d 81 (2d Cir. 2009), which held that the Tribunal had power to apportion costs for bad faith conduct notwithstanding a provision that there was agreement for an even apportionment of costs. In so holding, the Court distinguished *InterChem Asia 2000 Pte Ltd v. Oceana Petrochemicals AG* 373 F.Supp.2d 340 (SDNY 2005) where the Tribunal had sought to sanction counsel directly.

[46] A party usually has a clear right to present expert testimony: Model Law Art. 18 (s33 Arbitration Act 1996) provides for a 'full opportunity' of a party presenting its case.

[47] The law on apparent bias is well settled, namely whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: *Porter v. Magill* [2002] 2 AC 357. Bias is not used in a pejorative sense, rather it means the absence of demonstrated independence and impartiality: *Yiacoub v. The Queen* [2014] UKPC 22. That case coined the phrase that it 'surely cannot be right' that the tribunal judge the case. The question is one of law, albeit to be answered in light of all the relevant facts: *Helow v. S/S for Home Department* [2008] UKHL 62. It does not matter that had the matter been conducted before an independent tribunal it would have made no difference: *Millar v. Dickson* [2002] 1 WLR 1615. The Court of Appeal in *Locabail (UK) Ltd v. Bayfield Properties Ltd*, [2000] QB 451 then applying the *Gough* test (the precursor to the *Porter v. Magill* test), said the apparent bias test also applied to arbitrators. The same was said in *Gough* itself and in two subsequent cases involving arbitrators: *Laker Airways v. FLS Aerospace* [1999] 2 Lloyd's Rep 45; *AT&T Corp v Saudi Cable Co* [2000] 1 Lloyd's Rep 22, and *Rustal Trading Ltd v. Gill & Duffus SA* [2000] 1 Lloyd's Rep. 14. The Arbitration Act test is now generally treated as the same as the *Porter v Magill* test. In *AT&T Corp* the arbitrator was, unbeknown to one of the parties to an ICC arbitration, a non-executive director of a competitor company which was not merely a commercial rival of that party in business, but was also a disappointed bidder for the very contract which formed the background to the dispute submitted to arbitration. The submission that the different regime under the Arbitration Act imposed different rules was expressly rejected, as was the application. In *A v. B* [2011] 2 Lloyds Rep 591 Flaux J applied the *Porter v. Magill* test in an arbitration context; it does not seem to have been in issue that it applied.

[48] [1999] 2 AC 222.

the first retainer work for another client with an adverse interest. Bolkiah sought an injunction restraining KPMG from providing services to another client with an adverse interest. The injunction was granted. The jurisdiction was founded on the right of a former client to have his confidential information protected and counsel or expert[49] have an unqualified duty to preserve confidentiality. KPMG failed to discharge the heavy burden of showing that there was no risk that the confidential information would come to the notice of the, admittedly different team, that would work for the new client.[50]

A v X, Y and Z[51] applied the same test. The Court held that, in principle, an expert could be compelled to give expert evidence in arbitration or legal proceedings by a party, even in circumstances where that expert had provided an opinion to another party: *Harmony Shipping Co SA v. Saudi Europe Line Ltd*.[52] When providing expert witness services, the expert had a paramount duty to the court or tribunal, which might require the expert to act in a way which did not advance the client's case: *Jones v. Kaney*.[53] As a matter of principle, the circumstances in which an expert was retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owed duties to the court that might not align with the interests of the client. However, the paramount duty owed to the court was not inconsistent with an additional duty of loyalty to the client. Therefore, there was no conflict between the duty that the expert owed to their client and the duty owed to the court.

As the expert was also engaged to provide extensive advice and support (in addition to expert testimony) throughout the arbitration proceedings, it was held that a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty. As both arbitrations were concerned with the same delays and there was a significant overlap in the issues there was, it was held, plainly a conflict of interest for the defendants in acting for the claimant in arbitration 1 and

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49 It was accepted in this instance that the test was the same for counsel and expert.

50 Note that in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36 (decision 11 June 2020) the award was annulled in circumstances where a tribunal member ('T') had undisclosed connections to an expert ('E') and his firm ('F'), specifically T had been appointed as arbitrator in four cases in which F had been instructed as the experts by the party that appointed him as arbitrator; in two of those cases, E was the appointed expert and three of those cases proceeded at the same time as the arbitration involving Spain; in a further eight cases, T had been appointed counsel where the client had engaged the F as expert; and in three of those cases, E was the testifying expert. In circumstances where there are such connections, there should be prompt disclosure and the tribunal member may have to stand down. Analogous to the position of counsel, an expert introduced very late in the process might be refused if replacing the tribunal member would cause considerable disruption.

51 op cit – *see* above for the facts.

52 [1979] 1 W.L.R. 1380.

53 [2011] UKSC 13, [2011] 2 A.C. 398.

against the claimant in arbitration 2. An injunction was granted to restrain the expert from acting in arbitration 2.[54]

The special status of experts is their duty to the tribunal as set out in the now classic statement in *The Ikarian Reefer*.[55] Following an eighty-seven-day trial, Cresswell J believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* the duties and responsibilities of experts, the first two of which are especially important:

> *"1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation […]*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise […]. An expert witness in the High Court should never assume the role of an advocate."*[56]

There is, however, a stark difference between references to counsel and experts in hard and soft law. There are numerous references to counsel[57] but none, at least that I am aware of, to experts in the context of disqualification or permission to appear.

An interesting analysis is to be found in *Bridgestone. v. Panama*.[58] The Claimants applied to disqualify an expert appointed by Respondent on the basis that it had earlier approached the same witness and specifically by a telephone conversation imparted information that it contended was both confidential and subject to legal professional privilege. Because of that, it submitted that the expert was disqualified from subsequently acting as an expert witness for the Respondent.

The Tribunal said:

> *There is a dearth of jurisprudence on the jurisdiction of an ICSID arbitral tribunal to disqualify an expert witness from giving evidence in an arbitration. The Respondent has not challenged our jurisdiction to accede to the Claimants' application.*[59]

The Claimants relied on Article 44 of the ICSID Convention: '*If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules*

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54 As above, note that the decision is being appealed.

55 *National Justice Compania Naviera S.A. v. Prudential Assurance Co*. [1993] 2 Lloyd's Rep. 68.

56 At 81. (These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at 496).

57 Including Art. 18 and the Annex to the LCIA Rules, the IBA Guidelines on Party Representation; s. 36 Arbitration Act 1996; UNCITRAL Rules, Art. 5; ICSID Arbitration Rules R.18; WIPO Rules, Art. 13(a); CIETAC Rules, Art. 20; and s. 1042 of the German Code of Civil Procedure.

58 *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* ICSID Case No. ARB/16/34 a tribunal presided over by Lord Phillips of Worth Matravers, decision 13 Dec. 2018. *See also Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v. Republic of Venezuela* (ICSID Case No. ARB/10/19) where the Tribunal found it did have power to disqualify as an incident to determine the admissibility of evidence; and *see also Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21) (also chaired by Lord Phillips of Worth Matravers).

59 At 11.

agreed by the parties, the Tribunal shall decide the question.' This would appear to be analogous to an incidence of a contractual right. The Claimants further relied on provisions of Articles 9.2(b) and 9.3 of the IBA Rules on the Taking of Evidence that required a tribunal to exclude any document, statement or oral testimony where this is necessary to give effect to any legal impediment or privilege under the legal or ethical rules. It does not appear that the Claimants relied upon a *Bolkiah*-type reasoning or *Bolkiah* itself, notwithstanding that they alleged that confidential information had been passed to the expert.

Nevertheless, the Tribunal clearly had this in mind and held:

> *We are in no doubt that, if [the expert] is disqualified from acting as an expert witness or his participation in these proceedings in that capacity will involve a breach of confidence, legal professional privilege or other legal impropriety, it falls within our competence to rule that his evidence is not to be admitted*.[60]

The Tribunal rejected that the same test be applied to arbitrators and experts:

> "*The Claimants have sought to draw an analogy between the principles that apply where the independence of an arbitrator is in issue and those that apply to the independence of an expert witness. We do not consider this analogy is apt. The role of an arbitrator is to reach a determination of the dispute between the parties that is fair, objective and unbiased. At the outset of proceedings it is vital that the Arbitrator should have no reason to favour the case of one party rather than the other. An arbitrator must be both independent and impartial. Thus if an arbitrator has some personal or professional connection to one of the parties, or to the lawyers acting for one of the parties, this may be ground for disqualification. Equally, if an arbitrator has expressed an opinion on the merits of the dispute, this may, of itself, be a ground for disqualification." … . "The role of a party-appointed expert witness is quite different. Such an expert is paid by one of the parties to give evidence in support of that party's case. A party-appointed expert witness will normally be, and be expected to be, independent of the party calling him. The best expert witnesses will also be impartial. They will give their evidence honestly and objectively in accordance with their sincere beliefs and experience. Judges and arbitrators are familiar, however, with the expert witness whose evidence manifestly lacks objectivity and favours the party paying his fees. An appearance of partiality does not result in the disqualification of an expert witness. It detracts from the weight that the Tribunal will accord to his evidence.*"[61] The application to disqualify the expert was dismissed.

This passage, remembering it was a tribunal presided over by Lord Phillips, had echoes of his judgment as Lord Phillips MR in *Factortame (No 8)*[62] where he said:

> *"This passage*[63] *seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably*

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60 At 13.

61 At 14 and 16.

62 *Regina (Factortame Ltd and Others) v. Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] 3 WLR 1104 .

63 The passage referred to is the trial judge's comments in *Goldberg* referred to below.

> *exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a pre-condition to the admissibility of his evidence Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the Court as soon as possible The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the CPR."*[64]
>
> *The public policy in play in the present case is that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that outcome.*[65]

In *Hamilton v. Fayed (No 2)*[66] the court had to consider whether a number of individuals who had provided financial support to a claimant in an unsuccessful libel action, should be liable to satisfy the costs order. The court held that they should not. In the course of his judgment, Chadwick LJ made the following comments about the public interest in access to justice:

> *For my part I can see no difference in principle, in the context of facilitating access to justice, between the lawyer who provides his services pro bono or under a conditional fee arrangement, the expert (say an accountant, a valuer or a medical practitioner) who provides his services on a no win no fee basis and the supporter who—having no skill which he can offer in kind—provides support in the form of funding to meet the fees of those who have. In each case the provision of support—whether in kind or in cash—facilitates access to justice by enabling the impecunious claimant to meet the defendant on an equal footing.*[67]

Chadwick LJ did not contemplate any legal bar to experts providing their services on a conditional fee basis and it must be correct that such a course can assist access to justice. But the expert will often be able to influence the course of the litigation in a way the funder, or even the lawyer conducting the litigation will not, as neither directly provides evidence.[68]

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64 At 70. The main issue was whether an agreement between the claimants and accountants would be paid a percentage of the sum recovered as damages, was champertous. The accountants had not acted as expert witnesses in the litigation themselves but provided litigation support and engaged independent experts. The Court of Appeal held that if an expert held a significant financial interest in the outcome of the case, by e.g. giving evidence on a contingency basis, such an interest was highly undesirable and only in a very rare case indeed would the court be prepared to consent to an expert being instructed under a contingency fee agreement.

65 At 76.

66 [2003] 2 WLR 128.

67 At 152–153.

68 In an unreported Finnish case, counsel had also represented the party in the drafting of the contract in issue. He was to be called by the other party to give evidence (presumably the drafter's intent might have been relevant under Finnish law). The other party sought to disqualify counsel. The tribunal refused to do so but said it would be vigilant to ensure counsel respected his, separate, roles as witness and counsel. *See*, http://arbitrationblog.kluwerarbitration.com/2018/03/06/fai-arbitral-tribunals-decision-concerning-disqualification-counsel-arbitral-proceedings/.

7 MORE REMOTE CONNECTIONS

An unsuccessful party may leave no stone unturned in a search for some connection, however tenuous, to support a challenge to an award. The potential is enormous as a result of the vast amounts of information available on the internet, but a tenuous link from an internet search will generally fall well short of the sort of evidence that would give a fair-minded observer any cause for concern. In *Locabail (UK) Ltd v. Bayfield Properties Ltd*[69] the Court said:

> *We cannot … conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any members of the judge's family* [70]

Thus in any case where the judge's interest is said to derive from an interest of a spouse, partner or other family member the link must be '*so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from the interest of the judge himself.*'[71] The fair minded observer does not assume that the interests of a husband and wife are indistinguishable as they are not. There is also considerable practical difficulty if a judge or arbitrator has to research the connections of all his immediate family members.

In *A v. X*[72] it was held that an expert's duty was not limited to the individual expert concerned. It extended to the firm or company that employed the expert and might extend to the wider group: *Marks & Spencer Plc v Freshfields Bruckhaus Deringer.*[73] D1-D3 were all part of the same group. Their parent company had a common financial interest in the defendants, which were managed and marketed as one global firm. There was a common approach to identification and management of any conflicts. Accordingly, any duty of loyalty was not limited to D1; it was owed by the whole of the defendant group.

8 ADMISSIBILITY OR WEIGHT?

As is clear from the *Factortame* quote above, in most circumstances the evidence of an expert who has some connection and lacks independence will be admissible and any connection will go to the weight given to the evidence. In *Field v. Leeds City Council*[74] the issue was whether it was inappropriate for an expert to be an employee

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69 [2000] QB 451 – the special sitting of the Court of Appeal comprising Lord Bingham of Cornhill CJ, Sir Richard Scott VC and Lord Woolf MR (the 'Tom, Dick and Harry' case).
70 At 25.
71 *Locabail, supra* n. 47, at 10 and *see Jones v. DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071 at [18].
72 Op cit.
73 [2004] EWCA Civ 741, [2005] P.N.L.R. 4.
74 (2000) 32 HLR 618.

of one of the parties: the proposition that if an expert is properly qualified to give evidence, then the fact that he is employed by a party would not disqualify him from giving evidence was described as '*absolutely correct*'. Waller LJ said:

> *The question whether someone should be able to give expert evidence should depend on whether, (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence.*[75]

May LJ, concurring, said:

> *As to questions of opinion and generally, I entirely agree […], that there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight but that is another matter.*[76]

In *Liverpool Roman Catholic Archdiocesan Trustees Inc. v. Goldberg (No. 3)*[77] the Court disapproved an earlier judgment in the case given at a pre-trial review where Neuberger J (as he then was) dealt with an application to rule an expert's evidence inadmissible on the grounds, first, that his close relationship with the defendant (they had known each other for twenty-eight years and were good friends, they are also in the same chambers) rendered the expert incapable of fulfilling the role of an expert witness, and, secondly, that his evidence amounted to no more than saying what he would have done and advised in the defendant's position. In the result Neuberger J stood the application over to trial but remarked that:

> *the fact that [the expert] has had a close personal relationship and a close professional relationship with the defendant in the sense that they had been friends and in the same chambers for a long time does not mean as a matter of law, or even as a matter of fact, that [the expert] is incapable of fulfilling the functions described by Lord Wilberforce and Cresswell J in* Whitehouse v Jordan *[1981] 1 WLR 246 and* National Justice Cia Naviera SA v Prudential Assurance Co Ltd *(The Ikarian Reefer) [1993] 2 Lloyd's Rep 68 respectively*

The expert's report included the following passage:

> *I do not believe that this [relationship with the defendant] will affect my evidence: I certainly accept that it should not do so. But it is right that I should say that my personal sympathies are engaged to a greater degree than would probably be normal with an expert witness.*

The trial judge held[78]:

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[75] At 841.

[76] At 842.

[77] [2001] 1 WLR 2337. The case involved a claim for professional negligence in relation to advice given by a Queen's Counsel specializing in tax law to the plaintiff about its tax affairs. The defendant called to give expert evidence a Queen's Counsel who shared his chambers and was a friend of long standing. The question of whether, in these circumstances, the expert's evidence was admissible was raised at an early stage of the trial. The judge decided not to deal with admissibility at that stage, but to deal with that question in the course of his judgment. The action then settled, but the judge felt it appropriate to deal with the admissibility of the expert's evidence.

[78] Evans-Lombe J at 12.

> *It seems to me that this admission rendered [the expert's] evidence unacceptable as the evidence of an expert on grounds of the public policy that justice must be seen to be done as well as done.*

This latter statement was disapproved in *Factortame* and also in *Armchair Passenger Transport Limited v Helical Bar Plc*.[79] In the latter Nelson J summarized the position as follows:

> *"The following principles emerge from these authorities:—*
>
> *i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.*
>
> *ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.*
>
> *iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*
>
> *iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.*[80]
>
> *v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.*
>
> *vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the CPR.*
>
> *vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."*

In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility. As the Court of Appeal of the State of Victoria put it: ' … *to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an "interested" witness from being competent to give expert evidence*'[81]

In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*.[82] This also seems to be a fair characterization of the situation at a state level.[83]

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79 [2003] EWHC 367 (QB).

80 But it might render an award vulnerable to challenge – *see* fn 51 above.

81 (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII). And also *see Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

82 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*,757 F.3d 1286 (Fed. Cir. 2014), at 1321.

83 *Corpus Juris Secundum*, vol. 32 (2008), at 325: '*The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.*'.

To much the same effect is the fully reasoned decision of the Supreme Court of Canada in *WBLI v. Abbott and Haliburton Company Limited*.[84] The Court considered the Australian, United States and English cases referred to above. The facts were that shareholders started a professional negligence action against the former auditors of their company after they had retained a different accountant, ('GT'), to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained an expert, a forensic accounting partner at a different office of GT, to review all the relevant materials and to prepare a report. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out the affidavit on the grounds that the expert was not an impartial expert witness.

Cromwell J giving the judgment of the Court said:

> *the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.*[85]

9 CONCLUSION

There is, I suggest, plainly a power held by a tribunal to regulate counsel's conduct at least in extreme cases where the facts or conduct threaten the integrity of the proceedings, and perhaps if the expert is found to be a fiduciary. A review of the cases (mostly ICSID ones)[86] on the disqualification of arbitrators shows that (1) there is a very low chance of success by the party making the application[87]; and (2) that there is no fully developed objective legal test that is consistently applied. If we cannot properly assess an impartial arbitrator yet, then it seems that we are some way away from being able to assess when an expert witness or counsel should be removed. Although this article does not touch on challenges to arbitrators, it seems relevant in conclusion that even this (much written about) area of law is

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84 [2015] 2 SCR 182.

85 At 50. But *see* fn 51 above.

86 At the time of writing the outcome of the *Haliburton v. Chubb* UKSC 2018/0100 appeal is unknown and it is unclear whether *Monster Energy Company v. City Beverage LLC* Nos. 17–55813 & 17–56082 (9th Cir. 22 Oct. 2019) is going to the US Supreme Court.

87 But it could make an award vulnerable to challenge – *see* fn 51.

underdeveloped, then that of counsel/experts is still further away from being a developed area that lawyers can refer to and rely on.

The basis for such power as may exist is more debateable but whatever the jurisprudential foundation, it probably makes little difference in practice when it is analysed on a contractual or status basis.[88] In extreme cases both counsel and an expert might be disqualified but the basis of removal is different for counsel and for an expert. The former is capable of removal on the conventional ground that there is a situation of apparent bias which threatens the integrity of the arbitration process by reason of a connection to the tribunal. An expert, however, can only be removed where there is a risk that confidential information held by the expert would come to the notice of another and perhaps, in an extreme case, where before giving evidence, it is apparent that the expert cannot fulfil the overriding duties to the court or tribunal. An expert is not subject to removal on the grounds of apparent bias as would apply to counsel, rather, and assuming the relevant degree of expertise and understanding of the role of an expert, the question will be whether the expert, despite whatever connections and lack of independence might exist, can meet the requirements of having a primary duty to a court or tribunal (rather than to the appointing party).[89] Factors such as a connection to a party or an interest in the outcome will go to the weight that will be given to the evidence.

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[88] Or fiduciary.

[89] Caution may be needed, however, if any award would be vulnerable to challenge – it may be that the relevant tribunal member needs to stand down.