MEALEY'S™
International Arbitration Report

Conflicts Of Interest Affecting Counsel In International Arbitrations

by
John L. Jacobus, J.D.,
Andrew J. Hefty, J.D.

Steptoe & Johnson, LLP
Washington, D.C.

Thomas Rohner, Dr., LL.M.

Pestalozzi Lachenal Patry
Zurich, Switzerland

A commentary article reprinted from the August 2005 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

Conflicts Of Interest Affecting Counsel In International Arbitrations

By
John L. Jacobus, J.D.
Thomas Rohner, Dr., LL.M.
and
Andrew J. Hefty, J.D.

[Editor's Note: John L. Jacobus is a Partner, and Andrew J. Hefty is an Associate, in the Washington, D.C. office of Steptoe & Johnson, LLP. Steptoe & Johnson, LLP is a large, Washington, D.C.-based firm with offices throughout the United States and in Europe. Steptoe specializes in, among many other practice areas, the resolution of international commercial matters through arbitration. Dr. Thomas Rohner is an Associate with Pestalozzi Lachenal Patry, one of the largest law firms in Switzerland. Pestalozzi Lachenal Patry provides legal services in all areas of business law. It also offers a full range of dispute resolution services for all practice areas, and covers all aspects of litigation, arbitration, and mediation. Messrs. Jacobus, Rohner and Hefty represent clients in international commercial disputes, often involving reinsurance matters. The views expressed in this article are those of the authors and should not be considered the views of their respective firms or clients. The authors can be reached at jjacobus@steptoe.com, thomas.rohner@plplaw.ch, and ahefty@steptoe.com. *Replies to this commentary are welcome.]*

I. Introduction

Conflicts of interest are an ever-present concern in the world of litigation. An attorney first confronts the matter when he or she screens potential clients, and may be forced to re-visit the issue in on-going proceedings when an opposing party asserts the existence of a conflict and demands the attorney's disqualification from the proceeding. In situations involving litigation in court, the court resolves the situation by reference to the jurisdiction's established canons of ethics. Resolution of such issues in international arbitration proceedings becomes far more complex. While the International Bar Association has promulgated specific guidelines addressing the problems of arbitrators' conflicts of interest in international arbitration proceedings (see International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (May 22, 2004)), the IBA's ethical rules relating to attorney conflicts of interest appear to be less comprehensive to us and, as indicated below, leave unanswered certain questions that may arise within the complex setting of international arbitrations.

This article presents a short survey of cases and commentary that deal with conflict of interest matters regarding attorneys in national and international arbitrations, and proposes an analysis of how to approach the issue. The authors favor a system where the arbitrators are empowered to regulate those who appear before them, up to and including imposing an attorney's disqualification from the arbitration proceedings, all subject to judicial review after completion of the arbitration.

II. Overview Of Attorney Disqualification Issues

A. The Difficulty Of Conflicts Of Interest In International Arbitration

International parties doing business with each other often choose to arbitrate potential disputes in a neutral forum with a neutral set of rules. The neutral forum is frequently a country where neither party is located nor did business together. This situation can

give rise to a complex set of legal problems, particularly where disqualification issues arise.

For example, suppose a United States company and a Dutch company agreed to resolve their dispute in an arbitration proceeding. The parties selected London as the arbitration situs and agreed to use U.S. law as the applicable substantive law, but the contract is otherwise silent on the applicable procedural law. The U.S. company has retained attorneys licensed to practice law in particular jurisdictions within the United States, and the Dutch company has retained attorneys licensed to practice in the Netherlands. The Dutch company now seeks to disqualify the opponent's counsel from representing the U.S. company in the arbitration proceeding, based on an alleged conflict of interest. The Dutch company could theoretically seek relief from a number of authoritative bodies, including the arbitration panel, the judicial court of the arbitration situs (i.e., London), or perhaps the home jurisdiction of the attorney's state of admission. Assuming there is a proper authoritative body, there are again a number of different sources of rules for disqualification that the authoritative body could apply, including the rules at the situs of the arbitration, the attorney's home bar rules, international principles, or some combination of all three.

B. Survey Of Conflict Of Interest Guidelines And Cases

The IBA has promulgated two guidelines applicable to the issue of attorney conflicts of interest. First, the IBA Statement of General Principles for Ethics of Lawyers (1995) ("General Principles") provides that "[l]awyers shall not place themselves in a position in which their clients' interests conflict with those of themselves, their partners or another client." Second, the IBA International Code of Ethics (1988) ("Code of Ethics") contains a more general rule with potential applicability relating to attorney conflicts of interest, providing that "[a] lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working."

While the IBA's General Principles and Code of Ethics provide useful guidance, neither is specific enough to address all the possible permutations of attorney conflicts of interest that may arise in the international arbitration setting. For example, the IBA's General Principles do not specify which jurisdiction's laws govern whether there is in fact a "conflict" that justifies recusal of an attorney from an arbitration proceeding. Similarly, the IBA's Code of Ethics does not deal with potential differences concerning the law on attorney conflicts of interest that could arise between the jurisdiction (or jurisdictions) in which the attorney has been admitted and the law of the country where the attorney is practicing. Finally, neither the IBA's General Principles nor the Code of Ethics addresses which jurisdictional body resolves disputes concerning conflicts of interest between parties in an arbitration, i.e., the arbitration panel or a judicial court, and, if the latter, which jurisdiction's court.

The U.S. caselaw on recusals of counsel in arbitrations also appears underdeveloped, and is divided into two broad lines of authority. As will be seen below, the first holds that attorney disqualification issues are matters reserved to the courts only, precluding action by an arbitration panel. The second leaves the decision in the hands of the arbitrators, ultimately subject to judicial review.

1. The Bidermann Decision

The seminal authority on the disqualification of attorneys in arbitration proceedings under U.S. law is Bidermann Industries Licensing, Inc. v. Amvar N.V.[1] In Bidermann, counsel for the respondents, Amvar N.V., made an application to the arbitration panel to disqualify Bidermann Industries Licensing, Inc's (BILI) counsel. BILI moved to stay arbitration of the disqualification issue, contending that it could not be arbitrated.[2] Finding the issue to be one of first impression, the New York Supreme Court began by acknowledging that New York law generally encourages arbitration[3] as an easy, expeditious method of dispute resolution that "ideally dispenses with the need for protracted litigation."[4] The court noted, however, that arbitration was an inappropriate method for resolution of issues that implicate important public interests.[5] According to the court, "the regulation of attorneys, and determinations as to whether clients should be deprived of counsel of their choice as a result of professional responsibilities and ethical obligations, implicate fundamental public interests and policies which should be reserved for the courts and

should not be subject to arbitration."[6] Therefore, the policy favoring arbitration must be weighed against the public policy of "judicial determination of attorney disqualification."[7] The court noted that while there were no New York cases that specifically precluded arbitration of attorney disqualification issues, there were a number of cases that implied that attorney conduct was the exclusive province of the courts.[8] Consequently, the court concluded that the issue of attorney disqualification was not appropriate for resolution within the arbitration proceeding itself.[9]

The appellate court affirmed the trial court's decision, holding that "[i]ssues of attorney disqualification . . . involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing . . . and cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in."[10]

2. The Influence Of Bidermann

Other courts have followed Bidermann's holding that attorney disqualification is the province of the courts. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin, the New York Supreme Court Appellate Division noted in dicta that "issues of attorney disqualification involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules and cannot be left to the determination of arbitrators selected by the parties themselves for expertise in the particular industries in which they are engaged."[11]

Similarly, in In re the Arbitration between R3 Aerospace, Inc., and Marshall of Cambridge Aerospace Ltd.,[12] the United States District Court for the Southern District of New York addressed the issue within the context of an international arbitration. After the arbitration was initiated, R3 brought a state court action seeking to disqualify Marshall's law firm for alleged violations of New York ethical canons. Marshall then attempted to remove the state court action to federal court, asserting that the Federal District Court had original jurisdiction pursuant to the Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C. §§ 201-207 (2000). The court, however, concluded that the Convention did not apply to the parties' state court action because, among other reasons, pursuant to § 201 art. II, the Convention only governs disputes "concerning a subject matter capable of settlement by arbitration."[13] Citing Bidermann, the court held that it could not exercise jurisdiction under the Convention because "[t]he subject matter of the dispute in this case — i.e., possible attorney disqualification — is not capable of settlement by arbitration."[14]

In Croushore v. Buchanan Ingersoll P.C.,[15] after a demand for arbitration was filed, but prior to completing the selection of arbitrators or scheduling any arbitration proceedings, Croushore filed a petition in Pennsylvania state court for disqualification of Buchanan Ingersoll due to alleged conflicts of interest from the firm's prior representation of Croushore. The court noted that under Pennsylvania law "in the absence of language to the contrary, a party is deemed to have given arbitrators the authority to decide any collateral matter that is related to a substantive dispute that is arbitrable."[16] The court found that the disqualification request was not a collateral matter because a former client alleging a conflict of interest "has the right to obtain a court order compelling disqualification through an independent action that does not arise out of underlying proceedings."[17] According to the court, "[t]he justification for allowing immediate judicial consideration of a claim that an attorney is breaching a duty of undivided loyalty owed to a former client is the protection of attorney confidences" as "it is the duty of the courts 'to be watchful and industrious' in seeing that 'confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.'"[18] Finally, the court noted that a party seeking disqualification after participating in arbitration proceedings may face a claim that it waived any objection to allowing the arbitrators to determine the issue of disqualification because of "its failure to seek court involvement at the earliest possible time."[19]

Finally, in Matter of the Interpublic Group of Cos. v. Trygg, a New York state court, citing Bidermann, concluded, without discussion, that "[a]n application to disqualify an attorney by reason of alleged violations of the canons of ethics involves substantial questions of public policy. Hence, the decision is one for the court rather than the arbitrator."[20]

3. Departure From Bidermann

The Bidermann decision has not been universally embraced. In Canaan Venture Partners, L.P. v. Salzman,

initial state court actions in Connecticut and California were stayed after the parties agreed to submit the dispute to arbitration.[21] Subsequently, the defendant moved in Connecticut state court to disqualify the plaintiffs' lead counsel due to a conflict of interest. Plaintiffs argued that the proper forum for resolution of the motion should be the arbitral forum, not the court. In essence, plaintiffs argued that the American Arbitration Association should arbitrate the dispute because the clause in the agreement was broad and contained no language limiting the arbitrators' power, the court had stayed the action in its entirety, and public policy favored the continuance of the arbitration. In response, the defendants argued that Connecticut courts do not permit arbitrators to determine issues involving important public policies, particularly matters involving attorney disqualification.

The court began by noting that it "has long endorsed arbitration as an alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation."[22] The court then explained that Connecticut had adopted the "positive assurance test" to govern when a particular dispute should be submitted to arbitration. According to the positive assurance test, "'[a]n order to arbitrate a particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,' and any '[d]oubts should be resolved in favor of arbitration.'"[23] The court found that the language in both the agreement to arbitrate and the stipulation to stay the state court actions was "sufficiently broad that it may not be said with positive assurance that this dispute is not covered by arbitration."[24] In addition, the court, citing a decision from a Connecticut Superior Court,[25] held that the issue of attorney disqualification did not fall within the public policy exception to the presumption of arbitration.[26] The court therefore declined to decide the motion and referred the issue to the arbitration panel.[27]

Similarly, in Hibbard Brown & Co. v. ABC Family Trust, the Fourth Circuit affirmed the district court's dismissal, without prejudice, of plaintiff's motion to disqualify defendant's counsel on the basis of the counsel's prior improper conduct, including alleged conflicts of interest.[28] The court found that the district court did not abuse its discretion in dismissing the disqualification of counsel claim, "when that claim would be more appropriately decided after a full development of the facts surrounding the underlying claim."[29] The Fourth Circuit also noted that, "[b]eyond this, a decision on disqualification by the district court at this time could have the result of interfering with the arbitration proceedings."[30]

Two pre-Bidermann decisions from the Southern District of New York also declined to interfere in the arbitration process in response to requests for disqualification based on alleged conflicts of interest. In Wurttembergisch Fire Insurance Co. v. Republic Insurance Co., the United States District Court for the Southern District of New York was presented with a motion to enjoin an arbitration due to allegations of an attorney's unethical behavior.[31] Declining to grant the injunction, the court noted as follows:

> [w]ere I to do so, this Court would interfere directly in a pending arbitration, to which plaintiff's and PAG agreed by contract. That interference would deny PAG counsel of its choice in that arbitration, at least during the pendency of plaintiffs' motion to disqualify defendants' counsel in this litigation, thereby bringing the arbitration to a dead stop. . . .
>
> While I have the authority to disqualify the present defendants' counsel in this litigation — an issue not yet fully presented, and as to which I express no present opinion — any order doing so would have only advisory effect upon the arbitrators. Courts do not give advisory opinions. It is for the arbitrators to control their internal procedures, subject only to the very limited post-award remedies conferred by § 10 of the [Federal Arbitration] Act.[32]

Likewise, in Cook Chocolate Co. v. Salomon, Inc. the arbitration panel declined to grant plaintiff's request to disqualify the defendant's attorney, and plaintiff sought review of the panel's decision in the United States District Court for the Southern District of New York prior to the conclusion of the arbitration proceeding.[33] The court noted that "[a]s a general rule, judicial intervention into arbitration proceedings would frustrate the purpose of arbitration to resolve

disputes quickly and economically."[34] The court went on to reject plaintiff's motion, reasoning that "[i]t may be true, as Cook claims, that intervention by this court is allowable in 'extraordinary circumstances' or 'compelling necessity.' However, there are no such circumstances present here, for Cook will be able to challenge the arbitrators' award after the process is complete. . . ."[35]

Finally, the Southern District of California declined to hear the issue of attorney disqualification within the judicial context when there is a clear contractual provision between the parties that grants jurisdiction to a foreign government.[36] The Northern District of California has recognized that an international arbitration panel has authority to decide the issue of attorney conflicts, but that the court also retains jurisdiction to decide the issue (with such ruling not necessarily binding on the arbitration panel) so long as there remains "a substantial likelihood of further proceedings within [the court's] jurisdiction."[37]

The Bidermann decision is not without criticism from outside sources as well. Peter C. Thomas has criticized the Bidermann decision on several grounds.[38] Of particular significance is Mr. Thomas' observation that "the court (at least implicitly) created a rule of continuing jurisdiction of courts to intervene in proceedings to resolve questions of arbitrability."[39] This rule, he points out, "suggests that such courts have continuing power to intervene at any time in the midst of an arbitration to prevent arbitrators from exceeding their powers."[40] Thomas also criticizes the court's attempt to balance the use of arbitration with the court's role in attorney discipline, concluding that the court "failed to accord sufficient weight to the policy favoring arbitration . . . ."[41] Finally, as noted by Thomas, Bidermann's requirement that the issue of attorney disqualification be brought before a court would have even greater negative repercussions within the realm of international arbitrations.[42] To use our example above, extending Bidermann to apply in the international arbitration setting could subject the U.S. attorneys for the American company to the jurisdiction of a Dutch court — a result that was probably never contemplated by the businesspersons who contractually agreed to arbitrate any potential disputes in an attempt to, inter alia, avoid the uncertainties of international law.

III. Analysis

A. Arbitrators Should Resolve Attorney Disqualification Issues

The issue of attorney conflicts in arbitration proceedings involves three primary considerations: (1) promoting and safeguarding the now prevalent use and acceptance of arbitration proceedings as an efficient and confidential method of dispute resolution, particularly in the international context; (2) respecting the parties' contractually bound choice to arbitrate the dispute; and (3) recognizing the respective governmental authorities' desire that proceedings conducted in their territory be perceived as fair. These three considerations are not, however, incompatible, and, in fact, complement one another in the context of attorney disqualification. The practical effect of prohibiting arbitration of conflicts of interest is a costly trip to the courts during the arbitration, adding expense and delay to its resolution. This exercise can be a deterrent on the assertion of unfounded conflict of interest claims, but can also be abused to delay the arbitration. The better solution is to give arbitration tribunals authority to decide issues of attorney disqualification due to conflicts of interest. If necessary, a judicial court can then review the final arbitration award. This procedure has the advantages of supporting parties' preference for arbitration, increasing the speed and the efficiency of the arbitration proceeding, and lowering the overall costs for the parties. At the same time, the public interest in proper attorney representation is protected by the judicial court's role in reviewing the final award.

Resolving a dispute with arbitration is a voluntary process in which the parties agree to submit their differences to a chosen decision maker, be it a sole arbitrator or a panel of arbitrators. There are advantages to this choice, including heightened confidentiality,[43] lower costs, and faster resolution of the proceedings in comparison to international litigation.[44] The agreement, however, is not without consequences. Having chosen this procedure, one party should not be allowed easily to abandon its contractual obligations and seek relief from a court.[45] To permit such action is, in effect, to disregard the bargained for contractual obligations to which both parties have agreed. Likewise, to effectuate the parties' goals of choosing arbitration, and to protect the integrity of the arbitration process, the arbitration tribunal should be given the

authority necessary to conduct a fair and expedient proceeding.

Granting arbitrators the power to resolve attorney conflicts of interest is not inconsistent with other disciplinary powers conferred upon arbitration panels. Arbitrators frequently possess the power, through various mechanisms, to sanction the conduct of attorneys who appears before them, including, for example, allocation of fees and costs relating to attorney misconduct.[46] Indeed, "[u]nder most national arbitration laws, and most institutional arbitration rules, the arbitral tribunal in an international arbitration has very substantial discretion to establish arbitral procedures where the parties have not agreed upon them."[47] Such procedural authority may extend to selection of the arbitration situs[48] and ruling on evidentiary issues.[49] National courts give deference to such decisions, generally refusing to review an arbitration tribunal's procedural orders or decisions on an interlocutory basis, and ordinarily reserving judicial review until the arbitrators make their final award.[50] As noted by Gary B. Born, "[t]he stated policy underlying this approach is to permit arbitral proceedings to be conducted expeditiously (without the delay that interlocutory judicial review would entail) and without the second-guessing of arbitral decisions by national courts."[51] As noted above, the court in Cook Chocolate Co. v. Salomon, Inc. observed that "[a]s a general rule, judicial intervention into arbitration proceedings would frustrate the purpose of arbitration to resolve disputes quickly and economically."[52]

Any concerns with granting authority to disqualify attorneys for conflicts of interest are belied by the right of post arbitration judicial review, which permits a party to set aside a final arbitration award at the place of the arbitration on the basis that the party was deprived of proper representation or, conversely, that there was a conflict of interest and therefore no fair trial. Article V.2.(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country." Therefore, the domestic judicial authority can refuse to enforce an award if it finds the award contrary to public policy due to attorney conflict of interest or improper disqualification.[53]

Finally, granting arbitrators authority to decide issues concerning conflicts of interest promotes the goal of maintaining confidentiality of arbitration proceedings. Confining the dispute to the arbitration proceeding decreases the risk that confidential arbitration information becomes a matter of public knowledge, as is apt to happen in judicial proceedings, which are, with few exceptions, public.[54]

B. Applicable Rules To Decide Attorney Disqualification

Granting arbitrators authority to determine issues of attorney disqualification necessarily raises the related question of which law to apply in deciding the dispute. In the absence of a provision in the arbitration agreement addressing the issue, the arbitration tribunal is left with applying one of three potential standards: (1) the arbitration law of the situs; (2) the "home" ethical standard of conduct rules of the jurisdiction or jurisdictions where the attorney practices; or (3) the arbitrators' own discretion, informed by generally understood international principles of fairness. For the following reasons, we believe application of the arbitration law of the situs should be applied and, if silent, the arbitration panel should turn to its own collective discretion, taking into consideration international norms informed by the goals of denationalization and fairness that apply in the international arbitration setting.

In the absence of an arbitration provision addressing the issue, applying the arbitration law of the situs as the default standard for attorney disqualification accomplishes numerous goals. First, it ensures that both parties (or their attorneys) are judged by the same ethical standards involving attorney disqualifications. Second, in the absence of agreement, it comports with the parties expectations, given the well-established principle that arbitrations are governed by the law of the place that serves as the "situs," or seat of the arbitration.[55]

In addition, application of the rules of the situs satisfies the government authorities' desire to ensure the fairness of proceedings conducted within their borders. The fairness of a hearing is contingent in part on the ethical standards involving attorney disqualifica-

tion governing counsel participating in the hearing. Such standards balance the rights of the parties to select whoever they want to represent them against the right to disqualify those whose participation would prejudice one of the parties. For these reasons, the governmental authority in which the arbitration is conducted has a strong interest in the conduct of counsel practicing within its boundaries, and courts have recognized this interest.[56] Preservations of such interests are achieved, in part, though application of the forum's ethical code, as attorneys would consequently be expected to consider and comply with the conflict of interest rules of the situs.

Finally, applying the disqualification rules of the situs presents a solution far more simplistic than other alternatives. At first blush the opposite seems true. As noted by Jan Paulsson, "[t]he simple solution would be that a lawyer participating in an international arbitration would be judged by the standards of his bar, whatever it may be."[57] However, as Paulsson points out, such an approach raises complications. For example, if the attorney whose representation is being challenged is a member of more than one bar, which bar's standard should the arbitration panel apply?[58] Also, a party may, under this approach, "be tempted to chose representatives who are subject to no professional discipline."[59]

If, however, the parties have no contractual agreement concerning which law regarding attorney disqualification shall apply, and the arbitration law of the situs does not address the issues, the arbitration panel should apply its own discretion, giving due consideration to the goal that ethical decisions in international arbitration proceedings should reflect a sense of denationalization and internationally accepted standards of fairness and justice. Of course, to the extent possible, the arbitrators should strive to achieve a decision that is perceived by both parties as fair and, as such, the arbitrators should also take into consideration the ethical standards governing conflicts of interest where the allegedly conflicted attorney is licensed to practice law, as well as the rules of attorney disqualification applicable to the party propounding the request. The ultimate goal is to achieve a result that conforms to accepted standards of fairness in the international community and that, to the extent possible, offends neither parties' notions of justice.

It is the authors' collective belief that the international community will at some point address and clarify the issue of attorney disqualification in international arbitrations through adoption and codification of specific guidelines, which, as noted above, it has done with respect to conflicts involving arbitrators. Until then, for the reasons outlined above, the most logical and fair choice in the absence of agreement by the parties is the arbitration situs.

IV. Conclusion

There are compelling justifications for allowing arbitrators to decide the issue of attorney disqualification in an arbitration proceeding. Such an approach furthers the goals of arbitration, including confidentiality and efficiency, and comports with arbitrators' general authority over procedural matters that come before them during the hearing. Any concerns are negated by access to recourse through judicial channels after the arbitration's conclusion. With regard to the applicable law, in the absence of a provision in the arbitration agreement addressing the issue, the arbitration law of the situs should be applied to resolve conflict of interest issues. If the arbitration law of the situs is silent on the issue, the dispute should be left to the arbitration panel's discretion, based on internationally accepted principles, and guided by the above referenced considerations.

Endnotes

1. Bidermann Indus. Licensing, Inc. v. Avmar N.V., N.Y.L.J., Oct. 26, 1990, at 23 (N.Y. Sup. Ct.).

2. Id.

3. Id. ("[T]hose who agree to arbitrate should be made to keep their solemn, written promises." (quoting Matter of Grayson-Robinson Stores, Inc., 8 N.Y.2d 133, 138 (1960))).

4. Id. (citing Cooper v. Ateliers de la Motobecane, 57 N.Y.2d 408 (1982)).

5. Id.

6. Id.

7. Id.

8. Id.

9. Id.

10. Bidermann Indus. Licensing, Inc. v. Avmar N.V., 173 A.D.2d 401, 402, 570 N.Y.S.2d 33, 33 (N.Y. App. Div. 1991) (citations omitted).

11. 1.A.D.3d 39, 44, 766 N.Y.S.2d 1 (N.Y. App. Div. 2003) (citing Bidermann Indus. Licensing, Inc. v. Avmar N.V., 173 A.D.2d at 402).

12. 927 F. Supp. 121, 123 (S.D.N.Y. 1996).

13. Id. at 123 (quoting 9 U.S.C. § 201, art. II).

14. Id. (citing Bidermann, 173 A.D.2d at 402).

15. No. GD96-7690, 1996 WL 932086 (Pa. C.P. Aug. 2, 1996).

16. Id. at *3 (citation omitted).

17. Id. at *5.

18. Id.

19. Id. at *6.

20. N.Y.L.J., Feb. 4, 2000, at 26 (col. 4).

21. No. CV950144056, 1996 WL 62658 (Conn. Super. Ct. Jan. 28, 1996).

22. Id. at *1 (quoting New Haven v. AFSCME, Council 15, Local 530, 208 Conn. 411, 415, 544 A.2d 186 (1988)).

23. Id. (quoting Board of Education v. Frey, 174 Conn. 578, 582, 392 A.2d 466 (1978)).

24. Id. at *2.

25. Id. (citing Kainen & Starr v. Siegel, O'Connor, Docket No. 526200, 12 Conn. L. Rptr. 345 (Super. Ct. Aug. 22, 1994) (Corradino, J.) (judicial district of Hartford-New Britain at Hartford)).

26. Id.

27. Id. at *3.

28. 959 F.2d 231, 1992 WL 69314 (4th Cir. Apr. 8, 1992) (unpublished opinion).

29. Id. at *3.

30. Id.

31. No. 86 Civ. 2596-CSH, 1986 WL 7773 (S.D.N.Y. July 9, 1986).

32. Id. at *1.

33. No. 87 CIV 5705 (RWS), 1988 WL 120464 (S.D.N.Y. Oct. 28, 1988).

34. Id. at *1 (citing Aerojet-General Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973)).

35. Id. (citations omitted).

36. Richards v. Lloyd's of London, No. 94-1211-IEG-CPDR), 1995 U.S. Dist. LEXIS 6888, Fed. Sec. L. Rep. (CCH) ¶ 98,801, 1995 WL 465687 (S.D. Cal. Apr. 28, 1995), aff'd en banc with regard to enforcement of forum agreement only, 135 F.3d 1289 (9th Cir. 1998), cert. denied, 525 U.S. 943 (1998).

37. Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 816 (2004).

38. Peter C. Thomas, Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?, 1 Am. J. Int'l Arb. 562 (1990).

39. Id. at 566.

40. Id. at 567.

41. Id. at 566.

42. Id. at 580-84.

43. See Lawrence W. Newman & Grant Hanessian, International Arbitration Checklists 204 (2004) ("Throughout the United States, Europe[,] and Asia, litigation is a public process, while arbitra-

tion is private. Consequently, documents, proceedings and awards in arbitration are generally kept confidential, while the rule in litigation, with few exceptions, is that documents, proceedings and judgments will be made public."). See also Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration 27* (4th ed. 2004) ("The confidentiality of arbitral proceedings is often taken to be one of the important advantages of arbitration. Unlike proceedings in a court of law, where press and public are generally entitled to be present, an international commercial arbitration is not a public proceeding. It is essentially a private process. . . .").

44. Although international arbitration proceedings can be expensive and confidentiality can be broken when one party runs to a judicial court, "arbitration often offers the least ineffective way to finally settle the contentious disputes that arise when international transactions go awry." Gary B. Born, International Commercial Arbitration 11 (2d ed. 2001).

45. See, e.g., Matter of Grayson-Robinson Stores, Inc., 8 N.Y.2d 133, 138 (1960) ("[T]hose who agree to arbitrate should be made to keep their solemn, written promises.").

46. Such an allocation would aim at the party represented by the attorney in question. However, there might be a liability issue for the attorney if the fees and cost-allocation changes because of the attorney's unethical behavior. See Detlev F. Vagts, Comment, The International Legal Profession: A Need for More Governance?, 90 Am. J. Int'l. L. 250, 255 (1996).

47. Gary B. Born, supra note 44, at 437 (footnotes omitted).

48. Id. at 457

49. Id. at 449, 469-70.

50. Id. at 461.

51. Id.

52. Cook Chocolate Co. v. Salomon, Inc., No. 87 CIV 5705 (RWS), 1998 WL 120464, at *1 (S.D.N.Y. Oct. 28, 1988).

53. While the standard under Article V.2.(b) is high, an attorney's conflict of interest can justify a country's refusal to enforce a foreign arbitration award. See, e.g. Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc., No. 94 C 2029, 1994 WL 700173, **3-4 (N.D. Ill. Dec. 13, 1994) ("defense based on alleged violation of public policy . . . must demonstrate circumstances which offend 'the forum state's most basic notions of morality and justice,'" but a party alleging attorney conflict of interest can prevail under this standard by showing "that a clear, direct conflict existed that could have affected the outcome of the proceeding"). In many countries, including the United States, the applicable standard under Article V.2.(b) is based on international notions of right and wrong. See Alan Redfern & Martin Hunter, supra note 43, at 457, 458 (While "[i]t is clear that the public policy referred to . . . is the 'public policy' of the enforcement state," courts in both the United States and "in other countries have . . . recognised that, in applying their own public policy to Convention awards, they should give it an international and not a domestic dimension.").

54. See supra note 43.

55. Alan Redfern & Martin Hunter, supra note 43, at 83; see also Born, supra note 44, at 413.

56. For example, see Tekni-Plex, Inc. v. Meyner & Landis, 220 A.D.2d 326, 632 N.Y.S.2d 565 (N.Y. App. Div. 1995), aff'd and modified, 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996), where the court found in a conflicts of interest dispute that New York law properly applied because it had the strongest interest in the conduct of counsel in a New York forum.

57. Jan Paulsson, Standards of Conduct for Counsel in International Arbitration, 3 Am. Rev. Int'l Arb. 214, 214 (1992).

58. Id.

59. Id. ■

MEALEY'S INTERNATIONAL ARBITRATION REPORT
edited by Edie Scott
The Report is produced monthly by

LexisNexis®

P.O. Box 62090, King of Prussia Pa 19406-0230, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
Email: mealeyinfo@lexisnexis.com Web site: http://www.mealeys.com
ISSN 1089-2397