

Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy?

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ABSTRACT

The partisanship of an ostensibly impartial party-appointed arbitrator will often be most evident where it is least visible: in the confidential deliberations of the arbitral tribunal. Fellow arbitrators will be reluctant to consider remedial measures - to indulge a presumption of neutrality absent irrefutable proof, and to preserve the collegial norm so essential to the smooth functioning of a tribunal in a complex and contentious case, but also because there is no clear-cut remedial path in law, rules, or custom. Indeed the confidentiality of the tribunal's deliberations is often thought to be a near-absolute and a presiding arbitrator may be inclined even in dire circumstances to honor the confidentiality norm even if means suppressing troubling evidence of bias that, if known to the parties, would likely result in a challenge by one of them. In this article, Marc Goldstein examines the normative collision between between deliberations confidentiality and arbitrator misconduct, and makes some proposals for constructive reform.

1. INTRODUCING THE PROBLEM: ARBITRATOR BIAS BEHIND THE CLOSED DOORS

In recent years considerable attention has been devoted to the types of bias that surely *cannot* result in disqualification of the arbitrator, but whose eradication would be seen as improvements to the arbitral process. I refer mainly to the matter of cognitive bias, sometimes called *implicit bias*, that is largely a function of elements of human personality derived from character, experience, and environment.¹ The literature advances the proposition that we would improve arbitration—provide

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1 Eg U Cartwright-Finch, 'A Beautiful Mind: Applying Psychology to International Arbitration Efficiently' (paper submitted for the ICC YAF–YAAP Joint Conference: Young Approaches to Arbitration, Vienna, 28 March 2015), reprinted on the website of Herbert Smith Freehills at <www.hsfnotes.com> accessed 27 May 2015; L Reed, 'The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?' (2013) 30(2) J Int'l Arb, pp 85–99; E Sussman, 'Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them' (2013) 24(3) Am Rev Int'l Arb 487; C Drahozal, 'Behavioural Analysis of Arbitral Decision Making' in C Drahozal and R Naimark (eds), *Toward a Science of International Arbitration: Collected Empirical Research* (Kluwer 2005) at 329 ff. Also beyond the scope of discussion here is the question of whether international arbitration is an inherently biased process for resolving disputes, ie what is sometimes called *systemic bias*. See S Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4(3) J Int'l Dispute Settlement 553–85.

more thorough and fair consideration of the arguments of all parties—if we would raise our consciousness about subconscious bias and train our minds to remain receptive to all points of view for as long as possible.

But these are exhortations addressed to arbitrators who, by the standards imposed by national laws and by the rules of institutional providers, are unimpeachably impartial. If arbitration would be improved by making this group even more impartial, what justification can there be for tolerating, as international arbitration systematically does, manifestly partisan comportment by party-appointed arbitrators, when that misconduct escapes detection by the party that would be aggrieved because the bias is evident only in the confidential Tribunal communications? The answer usually given—if the question is even raised, which it rarely is—is that there are other values at stake, notably the secrecy or confidentiality of the arbitrators' deliberations. The most probative evidence of partisanship among ostensibly impartial arbitrators is often unobtainable by the parties because it is revealed only within the 'black box' of deliberations.

This article asks whether the secrecy of the deliberation process is, or should be, as absolute as it is widely assumed to be. The reason for raising the question is, as this introduction suggests, to examine whether some process or standards might be developed for the potential exposure and removal of an arbitrator whose conduct in confidential deliberations shows persuasively that she² is a partisan masquerading as a neutral.

The problem of arbitrator bias (or other misconduct) that manifests itself only in confidential interactions of the Tribunal has recently begun to receive some attention.³ Institutional rules, national arbitration laws, and ethics codes and guidelines provide tribunals in international commercial arbitrations⁴ with little guidance either as to a procedure for addressing perceived misconduct by one of its members, nor with a legal framework for classifying arbitrator conduct as inappropriate (save for, eg corruption and fraud). Urging bar associations and arbitral institutions to fill this void, Eduardo Siqueiros has written:

In a situation of administered arbitration where, upon confrontation [of an arbitrator suspected of misconduct], the other arbitrators are not satisfied with the response, then the innocent arbitrators should be enabled to inform the relevant institution of their concerns. This action should not be deemed to involve a challenge, because an arbitrator cannot file a challenge. Nonetheless, the institution may under its applicable rules, after completing a process of examination of the arbitrator's conduct, decide to replace the arbitrator where it is satisfied that an ethical breach occurred, or continue the proceedings with the two remaining arbitrators where the stage of the proceeding allows.⁵

2 Except by inadvertence, 'all' pronouns referring to arbitrators in this article are in the feminine gender.

3 See E Siqueiros T, 'What Are the Responsibilities of an Arbitral Tribunal Faced With a Breach of Integrity of One of Its Members' (2012) 6(2) *World Arbit & Mediation Rev* 347.

4 This article is focused on the bias problem in international commercial arbitration. In investment arbitration, the problem of party-appointed arbitrator bias is substantially focused on two inter-related dynamics: (i) alleged bias arising from historical relationships of the arbitrator or her law firm to either the investor community or the community of States, and (ii) repeat service by arbitrators in cases raising substantially similar legal issues on which the arbitrator has taken a position in prior cases. These species of bias are relatively open to detection by the parties, and thus do not necessarily raise as acutely or as often the issue discussed here, which is bias that is concealed from the parties by virtue of the confidentiality of arbitrator deliberations.

5 *ibid* at 349.

2. HOW PERVASIVE IS THE PROBLEM OF THE STEALTH PARTISAN ARBITRATOR?

It is difficult to say whether the appointment of biased party-appointed arbitrators in international commercial arbitration is a problem of epidemic proportions, or merely an occasional difficulty that receives an outsized attention in commentary. Statistics regarding the number of successful challenges lodged against party-appointed arbitrators may understate the problem, as some arbitrators challenged for bias may resign, and as to those institutions that do not publish their decisions on challenges it may not be possible to know what portion of the cases involved a true question of bias rather than a question of lack of independence.⁶ Also, some few clever biased arbitrators will manage successfully to conceal their predispositions from start to finish. And sometimes—perhaps most of the time—the Chair who detects bias in one of the party appointees would prefer not to elevate the issue to a process of investigation and potential removal, even if such a process existed. This preference is probably part instinctive caution, and part uncertainty about precisely what is the relevant combination of duty (to protect confidentiality, to protect process integrity) and discretion (to make exceptions to confidentiality in service of process integrity).

Most readers here require no introduction to the debates over the continued utility, or disfunctionality, of the institution of the party-appointed arbitrator. The debate continues, and the institution persists.⁷ An explicit, provider-sanctioned, process for ferreting out partisan party-appointed arbitrators, might eventually result in fewer such partisans being selected to serve, and in turn might take the sizzle out of the debate over the future of the supposedly pernicious institution.

3. STRUCTURAL ASPECTS OF THE PROBLEM

3.1 Bias-filters geared to party initiative

The bias-filters of provider organizations are geared (mainly but not entirely) to the resolution of party-initiated bias challenges. Rules for the filing, processing, and

6 See S Finzio and C Salas, 'Crying Foul: Challenges to Party-Appointed Arbitrators' Commercial Dispute Resolution November–December 2013 at 64–66 (noting difficulty of finding clear statistical evidence to support the anecdotal evidence that arbitrator challenges for bias in non-treaty cases are on the increase). See C Brower and C Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29(1) *Arbit Int'l*; AJ van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnouch Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill Academic 2011); J Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 *ICSID Rev* 339; H Smit, 'The Pernicious Institution of the Party-Appointed Arbitrator' 33 *Columbia FDI Perspectives* (2010) <<http://www.vcc.columbia.edu/content/pernicious-institution-party-appointed-arbitrator>> accessed 27 May 2015.

7 Notable contributions to the debate after the foregoing articles stoked it include: M Van Leeuwen, 'Pride and Prejudice in the Debate on Arbitrator Independence' in C Muller and A Rigozzi (eds), *New Developments in International Commercial Arbitration 2013* (Schulthess Juristische Medien AG 2013); J Paulsson, 'The Decline of Unilateral Appointments' in *The Idea of Arbitration* (OUP 2013), ch 9.4 at 276 ff; C Brower, M Pulos and C Rosenberg, 'So Is There Anything Really Wrong With International Arbitration As We Know It?' in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013* (Articles Presented at the April 2012 Fordham Law School annual conference in New York City); M Schneider, 'Forbidding Unilateral Appointments of Arbitrators – A Case of Vicarious Hypochondria?' (2011) 29 *ASA Bulletin* 273.

disposition of party-initiated arbitrator challenges can deal effectively with evidence of bias that is accessible to the parties: information disclosed voluntarily by the arbitrator or otherwise publicly available about her; and conduct during the proceedings in the form of comments or questions made during pre-hearing conferences, hearings, and other proceedings. Some arbitration rules provide for removal of an arbitrator based on misconduct, implying that certain misconduct warranting removal could be reported by a source other than the parties and that the removal could be initiated by the administrator/provider rather than the parties.⁸ But arbitration rules and national laws do not, at least not expressly, empower arbitrators to act upon evidence of the partisanship of a co-arbitrator on the same tribunal that emerges in intra-tribunal written and oral communications—what may broadly be embraced within the term ‘deliberations’—extending well beyond discussions about final and interim outcomes to essentially all communications among members of the Tribunal that they do not elect to share with the parties. These communications are understood to be strictly confidential under rules of arbitrator ethics, and in a few instances under national laws and institutional rules governing the comportment of international arbitrators. And we may fairly assume that the confidentiality of deliberations explains why there are few if any rules or national laws that adopt any arbitrator-initiated process to challenge and remove another arbitrator for bias. Exactly how categorical or flexible is the principle of deliberations confidentiality/secretcy? The answer necessarily informs whether a workable remedial process could be established.

3.2 The confidentiality of deliberations: reality and perception

Considering what is said to be the universality of deliberations confidentiality as an arbitration norm, the infrequency of its mention in statutes and rules pertaining to international arbitration is remarkable. There is no mention of the deliberations confidentiality in the United Nations Conference on International Trade Law

8 See, eg ICC Rules art 15(2) (arbitrator shall be replaced on the ICC Court’s own initiative when arbitrator ‘is not fulfilling [her] functions in accordance with the Rules’); LCIA Rules art 10.1 and 10.2 (allowing LCIA Court to revoke an arbitrator’s appointment ‘at the written request of all other members of the Arbitral Tribunal when ... circumstances exist that give rise to justifiable doubts as to that arbitrator’s impartiality’ and, separately, allowing LCIA court to determine that an arbitrator ‘is unfit to act ... if that arbitrator ... does not act fairly or impartially between the parties’); Stockholm Chamber of Commerce Arbitration Rules art 16(1)(III) (Board shall release an arbitrator from appointment where arbitrator ‘fails to perform his/her functions in an adequate manner’); Singapore International Arbitration Centre Arbitration Rules art 14.3 (president of SIAC Court after consulting the parties ‘may in his discretion remove an arbitrator ... if he is not fulfilling his functions in accordance with the Rules ... ’); Vienna International Arbitration Centre Arbitration Rules art 21(1)(5) (Arbitrator’s mandate terminates prematurely ‘if the arbitrator is removed from office by the Board’); CIETAC Arbitration Rules art 33(1) (Chairman of CIETAC may remove and replace arbitrator who ‘fails to fulfill his/her functions in accordance with the requirements of these Rules’). Among the institutional rules that contain no express provision authorizing removal of an arbitrator for failing to act impartially, other than by a party-initiated challenge process, are: British Columbia International Arbitration Centre; Kuala Lumpur Regional Centre for Arbitration Rules; Inter-American Commercial Arbitration Commission; AAA International Arbitration Rules (which refer in art 15(1) to the possible removal of an arbitrator ‘for any reason’ as a circumstance in which a substitute arbitrator would be appointed, but do not refer in any more specific terms to the possibility of administrative removal other than upon a party challenge for lack of independence or impartiality).

(UNCITRAL) Model Law, or in the arbitration laws of Switzerland,⁹ Singapore, Hong Kong, Sweden, the United Kingdom, the United States, or Germany. France seems to be the exception, as it provides in Article 1479 of the New Code of Civil Procedure (NCPC): ‘The arbitral tribunal’s deliberations shall be confidential.’ This simple statement in the French NCPC is rather modest in comparison with the rather absolutist position historically taken in France, where dissenting opinions were considered prohibited by law as a breach of the obligation to maintain deliberations confidentiality.¹⁰

In Australia, one could possibly derive a statutory position in support of non-absolute deliberations confidentiality from broader confidentiality language that seems geared mainly to other concerns. Thus, section 15 of the Australia International Arbitration Act 1974 defines ‘confidential information’ broadly to encompass ‘information that relates to the proceedings,’ including ‘any notes made by the arbitral tribunal of oral evidence or submissions’; section 23C generally prohibits disclosure of confidential information by the arbitral tribunal subject to exceptions in among other places section 23D; and section 23D permits disclosure of confidential information by the arbitral tribunal ‘if it is necessary for the purposes of the Act, or the Model Law, and the disclosure is no more than reasonable for that purpose’. One of the purposes of the Act and the Model Law, surely, is adjudication by a Tribunal of impartial arbitrators.

Among important compendia of commercial arbitration rules, the London Court of Arbitration in Article 30.2 of its rules that ‘[t]he deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by the applicable law’ So the argument can be made that where the applicable law imposes an obligation of impartiality on the Arbitral Tribunal,¹¹ an arbitrator’s disclosure of confidential deliberations communications to the extent required to expose partisanship by a member of the Tribunal to the authority competent to take remedial action does not violate London Court of International Arbitration (LCIA) Rule 30.2.

In the Swiss Rules, Article 44(2) provides: ‘The deliberations of the arbitral tribunal are confidential.’

But there is no specific mention of deliberations confidentiality in the UNCITRAL Rules, or in the arbitration rules of (to mention only a few notables) the International Centre for Dispute Resolution (ICDR), ICC, Stockholm Chamber of Commerce, World Intellectual Property Organization, China International

9 The omission from codified Swiss arbitration law belies a very well developed position in Swiss case law and doctrine that there is a strict duty to maintain the confidentiality of the deliberations. See A Jolles, S Stark-Traber and M Canals de Cediell, ‘Confidentiality’ in 349 S§7.03(d) at 139.

10 See J-F Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) para 752 at 675, where the authors take note of a new trend in French scholarship that regards as dissenting opinion as acceptable provided it does not refer to the points of view expressed in the deliberations by the dissenting arbitrator’s fellow arbitrators. The authors consider this position ‘hardly convincing’ and state: ‘The simple fact that the opinion mentions that its authority is dissenting identifies not only the minority arbitrator but also the majority of the arbitrators who adopted the award, and this is sufficient to infringe the confidentiality of the deliberations.’

11 s 33(1) of the UK Arbitration Act 1996 provides that ‘[t]he tribunal shall – (a) act fairly and impartially as between the parties ... [and] (b) [t]he tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it’.

Economic and Trade Arbitration Commission (CIETAC),¹² American Arbitration Association (AAA) (Commercial), CPR Institute for Conflict Prevention and Resolution (CPR) (Administered), German Institution for Arbitration (DIS), or Singapore International Arbitration Centre.¹³

And yet scholars and commentators refer to deliberations confidentiality as a fundamental and general principle. Gary Born has written that arbitrators' deliberations are *treated as* confidential under 'most national laws and institutional rules . . . [and] by ethical and professional guidelines for the conduct of international arbitrators, and [such confidentiality is] universally recognized by commentators.'¹⁴ Emmanuel Gaillard has written that '[a]lthough . . . most laws do not explicitly require deliberations in international arbitration to be kept secret, such secrecy is generally considered to be the rule'.¹⁵ Alan Redfern with a credit to Matthieu Deboissésou has written that 'the rule that such a "deliberation" should be, and should remain secret, is a "fundamental principle", which constitutes one of the mainsprings of arbitration, as it does of all judicial decisions'.¹⁶ David Caron writes that '[i]t is a well established principle of international adjudication that the "deliberations" of an arbitral tribunal must 'remain confidential in perpetuity unless the parties release the arbitrators from this obligation', and he observes that '[a]bsent a rule of confidentiality, a party arbitrator would run the risk of being called upon by his or her appointing party to justify positions taken and concessions made during deliberations that are adverse to that party's interests'.¹⁷

Professor Caron also cites 1 Encyclopedia of Public International Law (1981) 185: 'Art. 54(3) of the ICJ Statute, which provides that "the deliberations of the Court shall take place in private and remain secret" represents a practice of such widespread application as to be arguably a general principle of law.' He observes that Article 31, Note 2 of the 1983 Rules of Procedure of the Iran–US Claims Tribunal enshrined the principle of deliberations confidentiality by providing that 'deliberations' of the Tribunal 'shall be and remain secret'. But he also points out that Article 31 Note 2 provided that deliberations sessions were open to Members of the Tribunal and the Secretary-General of the Tribunal.¹⁸ Thus there is precedent for the position that exposure of the deliberations to the responsible executive of the appointing authority/provider organization—to enable fulfilment of its function as guardian of the integrity of the arbitral process—ought not to be considered a violation of the deliberations confidentiality principle. This principle seems to be implicit in the practice of the ICC and other institutions that require tribunals

12 Art 35(4) of the CIETAC Rules permits a tribunal to 'hold deliberations at any place or in any manner that it considers appropriate', and thus appears to imply that the Tribunal may elect to deliberate in a confidential 'manner'.

13 Straying to the investment arbitration universe, it is noted that Rule 15(1) of the ICSID Arbitration Rules states: 'The deliberations of the Tribunal shall take place in private and remain secret.'

14 GB Born, *International Commercial Arbitration (2nd edition)* (Kluwer 2014) 2269–70.

15 E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) 750.

16 A Redfern, 'The 2003 Freshfields Lecture – Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly' (2004) 20(3) *Arb Int'l* 223, referring to M Boissésou, *Le Droit Français de l'arbitrage interne et international* (Paris, GLN-editions 1990) at 296.

17 D Caron and L Caplan (eds), *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) 711, quoting from para 9 of the IBA Code of Ethics for International Arbitrators (1987).

18 *ibid* at 349.

to submit drafts of their awards for scrutiny, comment, and revision before the award is finalized and distributed to the parties. If the principle of deliberations secrecy were so absolute as to prohibit *any* sharing of deliberations communications with the institution that administer the arbitration, the scrutiny process could not exist.

The underlying reasons deliberations confidentiality were well stated by two international jurists who served as Appointing Authorities at the Iran–US Claims Tribunal: first, ‘the practical consideration that secrecy of deliberations is essential if the deliberation is to produce a true discussion and argument and not become a mere exchange of cautiously expressed and selected views’,¹⁹ and second, ‘to protect members of the Tribunal from outside influence . . .’.²⁰

And yet one can find rumblings that the confidentiality of deliberations is not an absolute and that it must yield to the demands of due process and the interests of justice in a proper case. This was the conclusion of a Swedish court when the adequacy of the arbitral tribunal’s deliberations was called into question in an award vacatur proceeding, and the Court took the position that the obligation to testify before a court as set forth in the Swedish Procedural Code trumped any principle of deliberations confidentiality and that the duty to testify could be enforced by fines and ultimately detention. The Austrian commentators in whose work I found this report of the Swedish position suggest that Austrian judges, if called upon to decide the same issue might agree with the Swedes.²¹

3.3 Ambiguity in the conduct of the partisan arbitrator

The disruption of healthy deliberations by a partisan arbitration can involve a number of elements over the lifespan of the case that have predictable corrosive effects. When the Tribunal deliberates over disclosure disputes, this arbitrator may seem to be keeping score, wanting to know that a proportionate number of contested issues are resolved in favour of the party that appointed her. As the hearing unfolds, this arbitrator is conspicuously silent during the proceedings, but at the Tribunal’s lunches she predictably opines that the witnesses for her appointing party were credible and convincing, and those testifying for the other party were precisely the opposite.

Day by day, these lunches became more tense, interchange about the merits of the case becomes difficult, and the presiding arbitrator may strive to direct the conversation away from the case entirely. As the Tribunal returns to its hotel at the end of the hearing day, the partisan arbitrator may declare that she plans a few hours of client calls and then to have dinner with her locally-resident daughter, cousin, classmate, etc, and she objects to the other arbitrators sharing dinner together as it would

19 As stated by Sir Robert Jennings in his capacity as Appointing Authority at the Iran–US Claims Tribunal, quoted in Caron and Caplan (n 18) at 349 which in turn was quoting from a decision of the Appointing Authority on an arbitrator challenge at the Tribunal in 2001.

20 As stated by Judge WE Haak in his capacity as Appointing Authority at the Iran–US Claims Tribunal, quoted in Caron and Caplan (n 18) at 718 which in turn was quoting from a decision of the Appointing Authority concerning challenges to certain arbitrators in that Tribunal in 2008. Judge Haak like Sir Robert Jennings also made reference to the ability of the arbitrators ‘to freely exchange their views and arguments to reach a decision’.

21 F Schwarz and C Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009) ss 7.064–7.067 at pp. 140–42.

constitute in her view a deliberation from which she is unfairly excluded and at which the other party-appointee might prejudicially persuade the Chair with her partisan view of the case.

When the Tribunal convenes to deliberate in earnest about a framework for the Final Award, this arbitrator advocates a theory of liability (or exoneration) in favour of her appointing party that the party did not advance, and provides lengthy deliberations memoranda dissecting each step of the Chair's proposed solution, doing so in terms that distinctly resemble the appointing party's own submissions. This arbitrator's contributions to the deliberations typically are delayed for weeks by professed conflicting engagements, leaving the other members of the Tribunal to wonder if she is awaiting instructions and direct input from counsel for the appointing party.

3.3 Only the duty of confidentiality seems well-defined, not a duty to protect process integrity

In an environment of insufficiently developed ethical principles, the arbitrator's general duty of confidentiality might appear to her to be more nearly categorical, while any general duty to ensure the impartiality of the arbitration process might appear to be quite limited and to consist mainly of the individual duties of each arbitrator provide assurances of her own impartiality. In Germany for example, the Arbitration Act 'does not itself provide for the confidentiality of arbitral proceedings . . . [but] it is widely accepted that arbitrators . . . are under an implied duty of confidentiality'.²² In the UK, 'the confidentiality of arbitration proceedings . . . is implied as a matter of law'.²³ And while the UK Arbitration Act imposes a 'General Duty of the tribunal' to 'act fairly and impartially between the parties', extracting from this general duty a specific duty or even a specific permission for a chair or other member of a Tribunal to report partisanship of an arbitrator is not charted in recognized sources of 'hard' or for that matter 'soft' law, and therefore is controversial. In Switzerland the confidentiality of the obligation is also 'implied', save as the parties might adopt the rules of particular institutions spelling out such an obligation more directly, and arbitrators are said to 'have an obligation to keep confidential *all facts and circumstances* relating to the parties and to the dispute that are not in the public domain and which become known to them in the course of the proceedings'.²⁴ But as to any duty of the Tribunal to secure the impartial handling of the arbitration by all members of the Tribunal, the Federal Statute on Private International Law, Chapter 12, addresses only the prospect of a party challenge 'if circumstances exist that give rise to justifiable doubts . . .'. And given guidance from commentators that 'the arbitrators' duty of confidentiality is all encompassing in Switzerland', and that arbitrators may 'incur civil liability for violating their duty of confidentiality',²⁵ the prevalence of the arbitral

22 R Kriendler, T Kopp and N Rothe, 'IBA Arbitration Committee Arbitration Guide/Germany (November 2013) at <www.ibanet.org> accessed 27 May 2015.

23 Norton Rose, 'Arbitration in Europe, November 2007, England and Wales' <www.nortonrosefulbright.com> accessed 27 May 2015.

24 N Radjai, 'Confidentiality in International Arbitration: The Position in Switzerland' (2009) 27 ASA Bull at 48–49 (republished on the website of Lalive & Partners, <www.lalive.ch> accessed 27 May 2015).

25 A Jolles and M Canas de Cediel, 'Chapter 6: Confidentiality at 349' in G Kauffmann-Kohler and B Stucki (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer 2004).

omertà²⁶ is understandable. The Tribunal chair at a Swiss seat, contemplating whether to report to the sponsoring institution/appointing authority upon the misconduct of one of her co-arbitrators, can take little comfort that her disclosure is even permitted, much less appropriate or required.

3.4 What is a presiding arbitrator to do?

The question more appropriately framed might be ‘what can the Presiding Arbitrator effectively do?’ And the conventional answer under prevailing rules and practices of most institutions administering international commercial arbitration is to grin and bear it, remain calm and decorous, and tolerate with unspoken misgivings the evident partiality of the offending party-appointed arbitrator (and perhaps reflect, during evenings of enforced solitude and room service during the hearings, upon the ultimate destiny of the institution of the party-appointed arbitrator). But the conventional wisdom seems to be that the Presiding Arbitrator’s primary duty in this context is to ‘protect’ the confidentiality of deliberations by not communicating about the offending arbitrator’s conduct to anyone—including the case manager and the executive-level officials of the provider organization/appointing authority, and arguably including the third arbitrator who might later breach the deliberations confidentiality by exposing the Chair’s own expression of concern.

This is the lamentable dysfunctional tribunal described so precisely by Yves Derains.²⁷ Me. Derains’ discussion is more descriptive than normative, distinguishing ‘pathologic’ deliberations from ‘harmonious’ ones, the former label being assigned to those deliberations that ensue if the presiding arbitrator has formed a provisional view that at least one of the party-appointed arbitrators is biased:

A deliberation can be qualified as being “pathologic” when an arbitrator (or even two arbitrators) does not make decisions based on an objective analysis of the issues submitted to the Tribunal but rather on a personal interest more or less disguised. Too often, the interest of the arbitrator is to favor the party that has appointed him, either by endorsing all those party’s positions or, more rarely, by suggesting creative and favorable solutions when he consider that such party is poorly advised by its counsel.

The fear of a possible breach of the principle of confidentiality by one of the members of the Tribunal is the source of a regrettable lack of spontaneity therein. When arbitrators are unsure of the impartiality of their colleagues,

26 Per Wikipedia: Omertà ‘is a cultural expression and code of honor that places legitimate importance on a deep-rooted family sense of a code of silence, non-aggravation with authorities, and non-interference in the legal actions of others. It originated and remains common in Corsica and Southern Italy, where the Sicilian Mafia and Mafia-type criminal organizations such as the ‘Ndrangeta, Sacra Corona Unita, and Camoprra are strong’.

27 Y Derains, ‘The Arbitrator’s Deliberation’ The Fifth Annual International Commercial Arbitration Lecture delivered at the American University School of Law, and republished in 27(4) *Am U Int’l L Rev* 911 (2012). For a more general soliloquy on techniques to foster harmonious deliberations among arbitrators who are not partisan—and by implication how to detect partisanship in the early going—see Y Fortier, ‘The Tribunal’s Deliberations’ in L Newman and R Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (Juris 2008) ch 34.

each of them refrains from discussing the merits of the case before it is absolutely necessary in order to make a final decision.

But Me. Derains' lamentation ends without any suggestion for reform in the nature of permitting the presiding arbitrator to call out egregious partiality through confidential reporting to the administrator or a court or a body responsible for the enforcement of rules of professional ethics. One often hears or reads that the appointment of a partisan party appointee frequently backfires, because the partisan arbitrator's position will usually be discredited and rejected by her colleagues and the Award will not be tainted by the bias.²⁸ That might be a reason for a party, perceiving bias in the behaviour of her adversary's appointee, not to challenge. But is this a sufficient justification for retaining the present system of tolerance of bias by the Tribunal and impotence or unwillingness to act on the part of sponsoring institutions? In this regard, it is not inevitable that the final Award will be untainted because the two impartial arbitrators will agree. The two impartial arbitrators may disagree, at least to some extent, and the presiding arbitrator and the partisan arbitrator may form a majority on the entire Award or in resolving issues or claims within the Award, and that Award or elements of that Award are therefore tainted because there can be no assurance that a less partisan party-appointed arbitrator would have accepted that result and indeed a less partisan party-appointed might have persuaded the presiding arbitrator to a different result. Do we genuinely believe that the parties to an international commercial arbitration bargained for an outcome that is the product of a deliberation among three neutrals, and that they are deprived of the benefit of the bargain if the deliberation is corrupted by partisanship? Or do we regard that supposed bargain more cynically, and conclude that in the *realpolitik* of international arbitration, the parties bargain only for a neutral presiding arbitrator and the option to select either a neutral or a hopefully-undetected-partisan party appointee?

My point here, in making a modest dissection of deliberations confidentiality, has been to show that we need not tolerate partisanship in the name of vindicating the general principle of deliberations confidentiality, because that principle exists to preclude undue influence upon the Tribunal by persons with a stake in the outcome (who might be parties or sympathizers with parties). The principle never existed to shield the deliberations from the view of the institutions sponsoring arbitrations, who have no stake in the outcome but have a material stake in the integrity of the process which is the product they sell. Analytically, if the confidentiality of the deliberations were an absolute, 'scrutiny' of a draft Award by the provider institution would be an

28 Eg J Uff, 'Party-Appointed Arbitrators: What Is Their Proper Role?' <www.mondaq.com > (7 October 2013) ('In most cases, the problem is readily resolved by the other two arbitrators agreeing or acknowledging that the Award will in effect be given by them and that the inevitable dissenting opinion of the partial arbitrator will be effectively neutralised'); J Lew, L Mistelis and S Kroll, *Comparative International Commercial Arbitration* Kluwer 2003) paras 13–46 at 316 ('[A] biased arbitrator will often be treated with suspicion by the rest of the tribunal, so that the chairman will be more prepared to listen to the other party appointed arbitrator. As a result the biased arbitrator may have little influence on the content of an award so that a challenge may actually not be necessary'). G Sacerdoti, 'Is the Party-Appointed Arbitrator a "Pernicious Institution"? A Reply to Professor Hans Smit' Columbia FDI Perspectives No 35 (5 April 2011) (<<http://ccsi.columbia.edu>> accessed 27 May 2015) ('If a party-appointed arbitrator is biased he or she will end up in the minority').

egregious violation. Scrutiny of draft Awards is accepted in the practices of provider institutions, and in their rules, and by the parties that choose those rules, because the provider institutions are presumed to have a stake only in the integrity of the process and not in any particular outcome. Precisely the same rationale should serve to answer objections that deliberations confidentiality should prevent a presiding arbitrator from reporting to the provider organization concerning intolerable manifestations of bias by party appointee. Further, whereas the rationale for deliberations confidentiality is to promote uninhibited intellectual discourse among the arbitrators, that rationale is not served but undermined if the *Arbitral omertà* results in a Tribunal feeling compelled to tolerate intolerable bias, and therefore to sacrifice its ability to deliberate seriously.

Many if not most of the world's major institutional sponsors of international commercial arbitration reserve to themselves the power to revoke the appointment of an arbitrator on the basis of misconduct.²⁹ But the arbitration rules of those institutions deal separately with challenge of a sitting arbitrator for bias, and treat this as a matter for decision by the institution upon a challenge application made by a party. It is certainly within the discretion of the institutions to elect to treat serious manifestations of bias as a species of arbitrator misconduct, especially where the arbitrator has taken an oath that she is and will remain impartial, and the arbitrator is bound as a matter of law and/or has agreed to be bound by a code of ethics that requires impartiality. That this is not done may be explained by the relatively undeveloped state of law and practice concerning the confidentiality of deliberations, a situation that leads to the reflexive conclusion that the deliberations confidentiality principle presents an insurmountable obstacle to policing of arbitrator bias. Arbitrators may view the *Arbitral omertà* as categorical, and even if they believe there is an exception permitting an arbitrator to report to the administering institution concerning misconduct by another member of the tribunal, they may justifiably fear that the institution does not share this more flexible approach to deliberations confidentiality and that the institution may treat the report of misconduct chiefly as an ethical breach by the informer.³⁰

These are surmountable difficulties. Institutions might adopt protocols concerning arbitrator misconduct that inform the parties and members of the Tribunal:

- that in appropriate cases an arbitrator appointment may be revoked by the institution when the institution based on its own inquiry following a report from the Presiding Arbitrator concludes that there are serious doubts about the impartiality of a co-arbitrator that warrant removal of that arbitrator, taking into consideration the stage of the proceedings and the right of the appointing party to appoint a replacement arbitrator;

29 E.g., LCIA 2014 Rules Art. 10.2; Stockholm Chamber of Commerce Arbitration Institute (SCC) 2010 Rules Art. 16 (1) (III); ICDR 2014 Arbitration Rules Art. 14.4; ICC 2012 Arbitration Rules Art. 15 (2).

30 Professor Caron, again writing in reflection upon the experience of challenge proceedings at the Iran–US Claims Tribunal that focused upon alleged breaches of the confidentiality of deliberations by certain arbitrators, allows that ‘it is not clear if the duty [of deliberations secrecy] is absolute’ and that a guiding principle that the secrecy of deliberations may be transgressed where avoidance of injustice requires the transgression ‘has much merit’. D Caron, ‘Regulating Opacity: Shaping How Tribunals Think’ Kings College London Dickson Pool School of law Legal Studies Research Paper Series: Paper No 2015-07 (<<http://poseidon01.ssrn.com>> accessed 27 May 2015) at 20.

- that it is expected of a Presiding Arbitrator that she shall report on a confidential basis to the Case Manager if she has serious doubts about the impartiality of a co-arbitrator and if such serious doubts are based entirely or so substantially on conduct occurring within the Tribunal's deliberations that the parties are effectively prevented from considering whether to lodge a challenge;
- that insofar as confidentiality of deliberations is an explicit or implicit facet of the arbitration rules of the administering institution, such a report by the Presiding Arbitrator shall be treated as a permitted exception to such confidentiality and entails no ethical violation by the Presiding Arbitrator;
- that a co-arbitrator other than the Presiding Arbitrator who seeks to raise a concern about bias of the other co-arbitrator shall do so only with the Presiding Arbitrator and communications that are entirely for this purpose shall not be considered to be deliberations from which the other arbitrator has been improperly excluded;
- that the institution upon receipt of such a report from a Presiding Arbitrator shall conduct such investigation and take such remedial action, including revoking the appointment of an arbitrator, as it considers appropriate;
- that it is the duty of all members of a Tribunal to cooperate fully with any such investigation, and the imparting of information in confidence to the institution at its request in the context of such an investigation shall not be considered a breach of the confidentiality of deliberations under the rules of the institution; and
- that in consideration of the confidentiality of the deliberations, the parties may expect to have the opportunity to comment upon the proposed removal of the arbitrator, but that this right will not include an opportunity to comment upon the evidence of bias obtained by the institution from the members of the Tribunal.³¹

4. CONCLUSION

An under-considered palliative for the problem of party-appointed arbitrator partisanship is to permit appointing authorities to remove such arbitrators based upon information furnished by the presiding arbitrator. The general principle of the secrecy of deliberations exists to protect the arbitrators from undue pressures from the parties and the public, and surely not to facilitate the concealment from the parties of an arbitrator's partisanship. If this is more broadly recognized, and indeed codified in the rules of provider organizations, presiding arbitrators should become less reluctant to report offensive conduct by a party appointee and the risk of removal of a partisan arbitrator should operate to discourage parties from making partisanship and important consideration in nominating an arbitrator.

31 For a discussion of the difficulties of accommodating the ICC's process for removal of an arbitration on the ICC's own motion with the rights of the parties to be heard on the proposed removal, and the risk of exposing confidential Tribunal communications in such a party-comment process, see N Voser, 'Removal, Resignation, Dismissal and Replacement of Arbitrator' in P Habegger and others (eds), *Arbitration Institutions Under Scrutiny: Asa Special Series No 40* (Juris 2013), ch 5 at 76–77.