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# Practical Contemporary Problems in International Commercial Arbitration

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- Independence and impartiality of arbitrators
- International arbitration procedure
- Determination and proof of applicable law

# What is meant by impartiality and independence?

# Choosing an arbitrator

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- What do you want from “your” arbitrator?
  - Nationality
  - Professional qualifications
  - Free selection
  - Availability
  - Independence
  - Impartiality
  - Neutrality

# Impartiality and independence

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- Established in:
  - Most arbitration laws
  - Most arbitration rules
  - Codes of ethics
  - International conventions
  - IBA Guidelines on Conflict of Interests

# Legal requirements

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- **UNCITRAL Model Law**
  - *“justifiable doubts as to his impartiality or independence”* [Article 12]
- **Poland**
  - *“justifiable doubts as to his impartiality or independence”* [Article 1174]
- **England**
  - *“justifiable doubts as to his impartiality”* [Section 24(1)]
- **France**
  - *“personal cause of disqualification”* [Article 1452]
- **USA**
  - *“evident partiality or corruption in the arbitrators”* [Section 10(a)(2)]

# Why are impartiality and independence important?

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- Impartiality is needed to ensure that justice is *done*.
- Independence is needed to ensure that justice is *seen* to be done.
- First condition is internal.
- Second condition is external.

# Meaning of impartiality

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- Impartiality is a state of mind.
- It means
  - arbitrator does not favour one party – biased
  - arbitrator not predisposed to the question in issue
- Distinguish:
  - Neutrality
  - Nationality



# Meaning of independence

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- Independence means no actual or past dependent relationship likely to affect arbitrator's freedom of judgment
  - Financial interest, eg shareholders in company
  - Relationship with a party, eg law firm
  - Repeat appointments
  - Same arbitrator for related matters
  - Government employees

# Duty of disclosure

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- *All relevant facts*
- Most rules are not prescriptive as to what is relevant facts
- Duty has its source in arbitration rules and statutes but may also be derived from an implied term of the agreement between arbitrator and parties
- Normally same test applies as with judges
- When in doubt, disclose?

# When should arbitrators disclose?

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- Before appointment
- As soon as conflict issue is known

# IBA Guidelines on Conflict of Interests

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- Red
- Orange
- Green

# International Arbitration Procedure

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- What is procedure?
- The way to conduct the arbitration?
- Mechanisms to determine issues in dispute?
- Applies between arbitrators and parties

# What is procedure?

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- Method of bringing contentions, evidence, arguments, law and claim to tribunal
  - In an orderly fashion
  - Clarity is objective
  - Burden of proof

# Is there international arbitration procedure?

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- What is its source?
- Why does it apply?
- What are its rules?

# Sources for arbitration procedure

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- Party autonomy
- Applicable arbitration rules
- National procedural law
- Arbitrator's autonomy
- International arbitration practice
- IBA Rules



# Need for procedure in international arbitration

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- National laws unacceptable
- Procedure is fundamental to process

# Inquisitorial or adversarial

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- Common v. Civil law
- Inquisitorial proceedings in
- Adversarial proceedings in
- Hybrid systems

# International arbitration procedural rules

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- Written submissions
- Evidence: (a) documentary; (b) testimonial.
- Admissibility of evidence
- Burden and standard of proof
- Document production
- Legal privilege
- Experts
- Oral arguments
- Examination of witnesses
- Post-hearing submissions

# Fundamentals of international arbitration practice

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- Equal treatment of parties
- Due process

# Determination and proof of applicable law

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- Law/rules to be applied by arbitrators
- How to determine applicable law/rules?

# Criteria for determination

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- Party autonomy
- Tribunal
- Law of place of arbitration (*lex arbitri*)

# Choice of law by tribunal

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- Application of a particular choice of law system
- Directly without reference to a particular choice of law system

# Choice of law system

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- UNCITRAL Model Law – Article 28:

*(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*



- UNCITRAL Model Law – Article 28:

*(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*

*(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*

*(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*

- ICC Rules – Article 21: (new)

*(1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*

- ICC Rules – Article 21: (new)

*(2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*

*(3) The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.*

# Determination of applicable rules

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- Foreign law
- Jura novit curia
- Expert evidence
- Argue the law

# ICC statistics on Poland

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<b>Year</b>	<b>Number of parties from Poland</b>	<b>Number of Polish arbitrators</b>	<b>Number of cases with seat in Poland</b>
<b>2001</b>	15	4	2
<b>2002</b>	12	4	2
<b>2003</b>	9	1	N/A
<b>2004</b>	11	3	1
<b>2005</b>	11	10	3
<b>2006</b>	28	12	3
<b>2007</b>	29	19	9
<b>2008</b>	33	18	5
<b>2009</b>	22	18	7