[…]

4. Facts relating to the arbitrator

190 In order to constitute doubts for a reasonable third person, a fact must relate to the arbitrator. This appears to be self-evident at first sight. However, it may be the case that a party successfully challenges numerous arbitrators appointed by the other party. This party may be very suspicious of a new party appointed arbitrator from the outset and construe every small error as grounds for challenge. They could argue that based on the history of the arbitration, their threshold of "reasonable" doubt has been lowered and therefore successfully challenge an arbitrator. As understandable as this argument and the distrust is, it cannot be a valid argument. Every arbitrator must be considered independently from his predecessors, if there happen to be any and from everything that happened prior to his appointment. He had no influence on those prior dealings and an objective third person would not associate the arbitrator with those circumstances. If this were not the case, a once, twice or three-times successful party in challenging an arbitrator would have a kind of "wildcard". The party could utilise every mistake by the current arbitrator in conjunction with the history of the arbitration prior to an arbitrator's appointment for further successful challenges. There would then be yet another successful challenge on record, which in turn would justify grounds for challenge of the next arbitrator, even where only small errors were made.

191 Therefore, the rule must be that an arbitrator cannot be challenged for anything that happened prior to his appointment, with no connection to him.[485] This is in line with a decision rendered by the SCC. In that case, the SCC accidentally failed to send a message to one of the parties informing them that an arbitrator would be appointed. The party could, therefore, not participate in the selection of the arbitrator. Based on this and the refusal of the (then by the SCC) appointed arbitrator to assess the mistake, the party challenged said arbitrator. The SCC rejected the challenge.[486] The SCC appears to have accepted that a mistake had been made, but that this mistake had nothing to do with the arbitrator and he could therefore not be successfully challenged.

192 In summary, the right to challenge an arbitrator is related only to an arbitrator himself and not the whole arbitral proceeding. Therefore, a party cannot frustrate the entire arbitration under the guise of arbitrator challenges.

5. No knowledge by the arbitrator required

193 If he can prove the absence of any knowledge of those circumstances, one might think that this automatically eliminates the legitimacy of such doubts.[487] The lack of knowledge does indeed indicate an absence of actual bias. However, a challenge of an arbitrator only requires

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[485] Cf. OLG Stuttgart, JR 1950, 760.

[486] *Jung*, SIAR 2008:1, 1, 7 et seq.: Case 2 SCC Arbitration V (078/2005).

[487] *W Ltd. V. M SDN BHD*, [2016] EWHC 422 (Comm), para. 24; *Overseas Private Inv. Corp. v. Anaconda Co*., 418 F.Supp. 107, 112:

> *»When the existence of a potentially prejudicial relationship is not known to an arbitrator, there is no possible way in which the relationship can affect his decision.«;*

reasonable doubts as to his impartiality. Such doubts can still arise, where an arbitrator has no knowledge of those circumstances.[488] This is supported by the fact that the arbitrator has a duty of reasonable inquiry .[489] If this duty is violated, this can be viewed as an indication of bias. Mere negligence or other grounds do not excuse the arbitrator.[490] Moreover, while an arbitrator may not have actual knowledge, he may presume such facts.[491] The arbitrator thereby turns a blind eye to the facts, he would otherwise have to disclose. Such behaviour itself is sufficient to infer bias. Finally, it is hard to impossible to prove, whether or not an arbitrator had actual knowledge. In most cases only circumstantial evidence, indicating that the arbitrator should have known the facts, will be available.

194 On the other hand, it may be the case that the arbitrator had absolutely no opportunity to gain knowledge of the facts that lead to a conflict of interest. For example, where a conflict of interest exists with a lawyer, but the arbitrator could not recognise that this lawyer is instructed in relation to this matter by a party to the arbitration.[492] Some argue that a lack of knowledge thereof, automatically eliminates it as a valid ground for challenge.[493] Therefore, a party who is aware of such circumstances is not under a duty to disclose, in accordance with General Standard 7 (a) IBA Guidelines on Conflict of Interest.[494] There is precisely no conflict of interest without the knowledge by the arbitrator. This notion, however, must to be rejected. If knowledge by the arbitrator were required, it would be an open invitation to abuse the right to challenge an arbitrator. A party would only have to instigate circumstances, which would give rise to doubts as to the arbitrator's impartiality if they were known to the arbitrator but are unknown to him for now. For example, by instructing certain counsel, of whom the arbitrator is not informed. If the instruction amounts to a conflict of interest ([…]) then the grounds for challenge must already arise at this point in time. Following the above rejected view, that the grounds for challenge would only exist after those facts are made known to the arbitrator, the party could control if and when the ground for challenge should come into existence by informing the arbitrator of those facts. It could then successfully challenge the arbitrator. As the grounds for challenge only arise with knowledge by the arbitrator, the time limits for any form of waiver or preclusion would also only commence at that time. There would be no ground of challenge beforehand and the time limits cannot start prior to the existence of said grounds. The only way to correct this outcome would be in accordance with the principle of good faith.

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dealing with part-time state judges *Locabail (UK) Ltd v Bayfield Properties Ltd* (Leave to Appeal), [2000] Q.B. 451, 490 (para. 18, 63 ff.); not decisive but used as a supporting argument in *Rebmann v. Rohde*, 196 Cal.App.4th 1283, 1292.

[488] *HSMV Corp. v. ADI Ltd*., 72 F.Supp.2d 1122, 1128; *Schmitz v. Zilveti*, 20 F.3d 1043, 1048; *Domke/Edmonson/Wilner*, Domke on Commercial Arbitration, §25:5; Svea Court of Appeal, judgement of 27.09.2011, file no.: T 1085-11.

[489] [*Froitzheim*, Ablehnung von Schiedsrichtern, para 380.]

[490] *Schmitz v. Zilveti*, 20 F.3d 1043, 1048.

[491] *Schmitz v. Zilveti*, 20 F.3d 1043, 1048.

[492] *Hwang*, (2005) 6 (2) Bus. L. Int'l 235, 241.

[493] *Hwang*, (2005) 6 (2) Bus. L. Int'l 235, 241, 253.

[494] *Hwang*, (2005) 6 (2) Bus. L. Int'l 235, 241.

195 To avoid these issues, it is necessary that a valid ground for challenge arises without knowledge by the arbitrator. It would then not be advantageous to a party to keep such facts secret. The grounds for challenge exist irrespective of the arbitrator's knowledge. A party who has such knowledge and fails to disclose it, carries the risk that those grounds of challenge are precluded. A party is thereby prevented from creating grounds for a successful challenge at will and determining the commencement of the time limits.

196 Thus, it is not a requirement that the arbitrator is aware of the facts which could cast reasonable doubts on his impartiality.

[…]

(2) Law firms (law firm attribution)

230 A more controversial discussion exists in relation to law firm attribution . The international consensus, however, which is reflected in the judgements by the majority of state courts, arbitral tribunals and arbitral institutions is clear: law firm attribution exists. Every partner of a law firm is equated with the other partners and with the law firm as a whole.[550] Therefore, an arbitrator can be challenged, if the law firm of the arbitrator is closely linked to a party of the arbitration.

(a) Reasons for the discussion

231 The first and most important reason for the discussion about law firm attribution is its frequent occurrence in practice. An arbitrator can also work as legal counsel. This is universally accepted[551] and only different at the Court of Arbitration for Sport[552].

232 Only in those instances where it is possible for an arbitrator to also work as counsel, problems regarding the arbitrator's law firm can arise. Of course, such problems seldom arise in small law firms. However, there is a trend towards large and international law firms.[553] This is the second reason for this debate. Without the international links of law firms there would be fewer points of contacts with potential parties to arbitrations. The third and last reason does

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[550] *Domke/Edmonson/Wilner*, Domke on Commercial Arbitration, § 25:5; a.A. *Borris*, Die internationale Handelsschiedsgerichtsbarkeit in den USA, p. 72, who draws attention on *Sociedad Maritima San Nicolas, S.A. V. Pangalante Compania Naviera*, 248 N.Y.S. 2d 143, 145 […]; LCIA Reference No. UN96/X15, Decision Rendered 29 May 1996, 27(3) Arb. Int'l 317, 318 (para. 4.1):

> *»[...] However, it [the LCIA Division, which had to decide] reasoned that, in considering a possible lack of impartiality or independence, a partner in a law firm had to be identified with his partners, at least insofar as their professional activities were concerned.«*

[551] *Park*, (2009) 46 (3) S.D.L.Rev. 629, 649; skeptical: *Vrijman*, in: Blackshaw/Siekmann/Soek (eds.), The Court of Arbitration for Sport 1984-2004, p. 66.

[552] Section 5 paragraph 3 CAS Code; *de Witt Wijnen*, (2007) ICC Bull. Special Suppl. 107, 111; *Luttrell*, p. 119.

[553] *Yu/Shore,* ICLQ 2003, 935, 936; *Böckstiegel*, SchiedsVZ 2009, 3, 4; *Lawson*, (2005) 23 (1) ASA Bull. 22, 37; *Lew/Mistelis/Krö*ll, in Lew/Mistelis/Kröll (eds.), (2003), Nos.: 11-22.

not relate to the practical significance of this attribution, but rather to the nature of the debate itself. Members of large law firms who are often personally affected by the attribution also act as authors or members of research groups. Within this capacity they directly take part in this debate. Contributions from lawyers of large law firms[554] or results of research groups, whose members are predominantly lawyers, reject law firm attribution or qualify it. The best example for this, is the General Standard 6 (a) IBA Guidelines 2004. The IBA Working Group, of whose 19 members at least 13 were members of law firms with more than 275 lawyers,[555] appear to have tried to discount or at least limit the subject of conflict of interest for large law firms. The evolution of the General Standard 6 (a) is very interesting. The original wording excluded grounds for challenge arising by law firm attribution in the form of a directory provision.[556] Only after objections were raised by DIS, ICC Germany and arbitration practitioners was the wording moderated.[557] However, the fear that the IBA Working Group wanted to codify privileges for large law firms within the Guidelines remains.[558]

233 Despite the moderation of this General Standard, it is to be assumed that the IBA Guidelines 2004 did not reach the usual quality in this point. The majority of the working group were themselves not impartial in relation to this matter. They appear to have wanted to abolish or at least strongly curtail the principle of law firm attribution, by which they themselves are affected, which was and is contrary to international practice.[559] It is of note that the General Standard 6(a) has had no impact on the arbitral practice.[560] As mentioned above, criticism of the IBA Guidelines in this regard appears justified.[561] This is also supported by the fact that the wording of 2014 version of the General Standard 6(a) was (again) moderated. The IBA Guidelines 2014 now reflect the international consensus on law firm attribution.

(b) Discussion
(aa) Liberal opinion

[554] *King/Giaretta*, p. 26 ff. (law firm: Ashurst, 700 lawyers in 10 countries); *Nicholas/Partasides*, (2007) 23 (1) Arb Int'l 1, 25, [...] (both: Freshfields, Bruckhaus, Deringer, 2500 lawyers in 27 offices); *Hunter/Paulsson*, (1985) 13 Int'l Bus. Lawyer 153, 157 (Hunter at that time at Freshfields London, Paulsson at that time at the French branch of Coudert Brothers).
[555] Bond, (2008) 5 (4) TDM 1, 7.
[556] Wilke, Interessenkonflikte, p.259; see for this version *Voser*, SchiedsVZ 2003, 59, 60. The original wording is found at General Standard 5 (a).
[557] *de Witt Wijnen/Voser/Rao*, (2004) 5 (3) Bus. L. Int'l 433, 445 f.; see also *Wilke*, Interessenkonflikte, p. 259 who reprints the different wordings of the drafts.
[558] *Schwarz/Konrad*, The Vienna Rules, para. 7-130.
[559] This was known by the Working Group members: Wilke, Interessenkonflikte, p. 259 Footnote 1087.
[560] [*Froitzheim*, Ablehnung von Schiedsrichtern, para. 271].
[561] [*Froitzheim*, Ablehnung von Schiedsrichtern, para. 71].

234 Many of the arguments put forward against law firm attribution are related to the size of a law firm. It is argued that where a party has dealings with the law firm of an arbitrator, but this is limited to the offices in a different country, the geographical distance itself negates the existence of a valid ground for challenge.[562] Further, it is apparently relevant whether an arbitrator has himself been (directly or indirectly) involved in the dealings between his law firm and a party.[563] Moreover, it is considered to be crucial, whether or not the arbitrator received any information about a party from a colleague. By implementing "Chinese walls", isolating the arbitrator within the law firm, he could not receive information and therefore could not be challenged.[564] Some also differentiate between cases in which the arbitrator's law firm acted for a party in relation to the arbitration at hand or solely in unrelated matters.[565] Only a differentiating approach would give appropriate consideration to the reality of the increasing number of big law firms, whose members are the specialists in the legal fields.[566] Further, a connection between the arbitrator through his law firm and a party only exists, if the law firm is instructed by the party on a regular basis or is otherwise intensively engaged with the party[567] Also to be considered, it is also argued, is that large and successful companies are very often in contact with the leading law firms in the specialist legal areas. If law firm attribution were recognised the legal specialists of those law firms would be regularly challengeable as arbitrators.[568] This would in turn lead to a kind of "reverse discrimination", since the economic success of a party would lead to disadvantages when it comes to the appointment of arbitrators. Moreover, the equality of arms could be threatened, where a party cannot appoint a specialist from large law firms due to law firm attribution, while the opposing party (possibly a smaller company) could appoint an arbitrator from a large law firm.[569]

(bb) Traditional opinion

[562] *Derains/Schwartz*, p. 124; *Telesat Canada v. Boeing Satellite Systems International Inc.*, 2010 CarswellOnt 10550, para. 146.
[563] *Decision on the Challenge to the President of the Committee, in Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, (ICSID Case No. ARB/97/3), para. 26 (against this criteria *Bottini*, (2009) 32 Suffolk Transnat'l L. Rev. 341, 349 et seq.).
[564] Suggested by *Lohmann/Hilbig*, IDR 2005, 160, 166, however, expresses doubts whether parties would accept this in real arbitrations.
[565] Lew/Mistelis/Kröll, in Lew/Mistelis/Kröll (eds.), (2003), para. 11-22; Decision on the Challenge to the President of the Committee, in Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, (ICSID Case No. ARB/97/3), para. 26 (cf. Bottini, (2009) 32 Suffolk Transnat'l L. Rev. 341, 349 f., who is very critical of this criteria).
[566] *Mankowski*, SchiedsVZ 2004, 304, 310; IBA Working Group, Explanation of GSt 6 (a).
[567] LG Mannheim BauR 1998, 403, 404 f., which, however, is of the opinion that arbitrators do not have to be independent in the same way as state judges.
[568] *Kitzberger*, p. 99.
[569] *Lotz*, AnwBl 2002, 202, 207; *Mankowski*, SchiedsVZ 2004, 304, 310.

235 The opposing opinion is the traditional opinion, according to which, a partner of a law firm is always equated with his whole law firm.[570] This traditional view is supported by a number of arguments which justify such an approach. These are examined below.

α) Common financial interest of law firm members

236 The fundamental starting point is the common financial interest of the partners of a law firm.[571] Irrespective of the specific allocation and split of the revenue internally, a law firm is always comprised of a bundle of interests.[572] Internal policies regarding the allocation of revenue are generally irrelevant. An objective third person has no insight in these practices and can only speculate.[573] All partners want their law firm to generate revenue.[574] Should an arbitrator render an award which is disadvantageous for a client of a partner of his law firm,

[570] *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. And Another*, [2000] QB 451, 478, where according to British legal tradition this is not applied to barrister chambers; *Berwin, Leighton, Paisner*, p. 4; *Karl*, p. 168; OLG Frankfurt a.M., judgement of 28.01.1998, Case No.: 19 U 92/96; *de Witt Wijnen/Voser/Rao*, (2004) 5 (3) Bus. L. Int'l 433, 445; DIS - SV- 217/02, BB Beilage 2003 (Nr. 8) 24, 25 f.; *Tirado/Knapper/Wright*, (2008) 5 (4) TDM p. 12; *Mullerat*, (2010) 4 (1) Disp. Res. Int'l 55, 63; RhPfVerfGH, Decision from 20.10.2014, Case No. VGH N 7/14 (= NJW 2015, 2104); *Craig/Park/Paulsson*, p. 229; Reiner, p. 59; also *Derains/Schwartz*, p. 124, who in the end are against this practice of the ICC.

[571] *Tupman*, (1989) 38 (1) ICLQ 26, 50; *Craig/Park/Paulsson*, p. 228; *Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, in Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, para. 67; in *Locabail (UK) Ltd v Bayfield Properties Ltd. And Another*, [2000] Q.B. 451, 489 (para. 60) this financial interest was deemed to be insufficient to amount to justified doubts as to the arbitrator's independence of impartiality. It is doubtful whether this would also be held in a case without a valid waiver of the parties. Moreover, the financial interest in this case was of a more speculative nature. […].

[572] Swedish Supreme Court 19.11.2007, Case No.: T 2448-06:
»[...]it must be considered that the bonds of interest and loyalty between on one side the law firm's partners and employed lawyers and on the other side the client are such a circumstance that can call into question the impartiality of an arbitrator employed at the law firm when the client is a party in the arbitration procedure [...].«
This decision overrules a judgement of a lower court. The lower court ruling rejected the law firm attribution. The Supreme Court's ruling emphasized the existence of a law firm attribution and was seen with satisfaction by the Swedish arbitration community, Luttrell, p. 121 f.

[573] DIS - SV- 217/02, BB Beilage 2003 (Nr. 8) 24, 26; other opinion: W Ltd. V. M SDN BHD, [2016] EWHC 422 (Comm), para. 21, where it was held that the arbitrator worked within a law firm but more like a single practicing lawyer. The court did not investigate if this form of legal practice was noticeable for outsiders.

[574] *Kreindler/Schäfer/Wolff*, Schiedsgerichtsbarkeit, para. 532.

it is likely that the client will not instruct the law firm again.[575]

β) Loyalty to client

237 Additionally, in many jurisdictions, the client enters into a legal relationship with a law firm as a whole.[576] Hence, even from a purely legal perspective the relationship is not contained between the retained partner and the client. The clients generally expect loyalty and solidarity from all partners of the law firm they retain.[577] Clients also expect loyalty from an arbitrator who, from a legal point of view may not be personally retained, but his law firm is or was dealing with the subject matter of the arbitration on their behalf.[578] If those expectations are not met it is very likely that the party will instruct a different law firm in the future. It must be assumed that a member of a law firm does not want another partner to lose clients.[579] Without this common interest the lawyers would not have chosen to join law firms, but practiced independently.

[575] *Bishop/Reed*, (1998) 14 (4) Arb. Int'l 395, 408 f.; Swedish Supreme Court 19.11.2007, Case No.: T 2448-06.

[576] DIS - SV- 217/02, BB Beilage 2003 (Nr. 8) 24, 25 f.; this seems to be the ICC's opinion, which accepted a challenge which was supported (inter alia) with the fact that the arbitrator was a member of a law firm which was rendering performance for one of the parties. The lawyer – client relationship also extended tp the arbitrator. The arbitrator's defense, that he had nothing to do with this retainer, that the retained office was in another country, and that this relationship only existed for a single matter (not on a regular basis) appeared to be irrelevant for the ICC: *Whitesell*, (2007) ICC Bull. Special Suppl. 7, 28 et seq. (Case 2); *Lachmann*, FS Geimer, p. 518.

[577] Regarding part time state judges who also work in a law firm: *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. And Another*, [2000] QB 451, 478 (para. 20); DIS - SV- 217/02, BB Beilage 2003 (No. 8) 24, 26; also Mankowski, SchiedsVZ 2004, 304, 310, who, however, reject the idea of the law firm attribution because this would „go to far". In this context, he cites GSt 6 (a) IBA Guidelines 2004; Lachmann, Hdb, para. 989.

[578] Lachmann, FS Geimer, p. 519.

[579] Therefore incorrect: *Mankowski*, SchiedsVZ 2004, 304, 310 who sees this as a stigmatization of big law firms. The same rule also applies to small law firms. Even a lawyer who is practicing as a single lawyer (cf. [Froitzheim, Ablehnung, para. 541, 557]) who was retained by one party in the past can be challengeable by the same facts. *Mankowski* disregards the circumstance, that the law firm attribution does not discriminate big law firms but only secures the equal treatment of those with small law firms and single lawyers.
Albers, p. 193 only mentions big law firms. However, this is not meant as a restriction of that rule to big law firms. It is apparent that *Albers* only mentions big law firms due to the fact that they are more relevant in practice, by virtue of their size.

238 This client loyalty is in fact accorded such significance, that law firm attribution is applied and constitute grounds for challenge of an arbitrator in cases where an opponent of the law firm's client is a party to an arbitration.[580]

γ) Law firm as an interest community

239 Furthermore, a law firm always pursues a unified strategic goal, which is also expressed through the regulations governing the acquisition of mandates.[581] Hence, this is another a direct connection between partners, without requiring personal knowledge of each other.

240 Moreover, the division of labour within law firms should not lead to the evasion of grounds for challenge, which would be present in the case of a single lawyer.[582] The lawyers enjoy the advantages of a division of labour in such a law firm,[583] they must also accept the disadvantages that arise from it. Additionally, the size of a law firm cannot have the consequence of allowing partners of large law firms to disregard conflicts of interest, which would undoubtedly be significant in a small firm. Big and small law firm must be treated equally.[584]

241 Also, the argument that a firm must have a particularly close relationship with a party to trigger law firm attribution does not prevail. It is based on the view, rejected here, that an arbitrator must only meet a significantly lower standard of impartiality than state judges.[585] This is precisely not the case,[586] which is why this argument must fail.

δ) No unreasonable results for users of arbitration

242 Furthermore, it is not apparent that the selection of an arbitrator who is not a member of a large law firm is a disadvantage. Although lawyers from larger law firms tend to have particular specialties, it cannot be said that such expertise are found exclusively in these law firms.[587] There are, for example, also professors and individual lawyers who act as arbitrators and have a very good reputation. The conceivable situation, where a party maintains relations with all relevant large law firms and, therefore, cannot appoint their members as arbitrators is not discriminatory towards the party. The equality of arms is also not endangered. If a party cannot appoint a partner of a firm as arbitrator due to particular contacts with that law firm, the other party cannot appoint that arbitrator or other partners from that firm either. An arbitrator is not only challengeable if he is biased positively towards the nominating party. An arbitrator may also be challenged if he is appointed by one party but is biased in favour of the

[580] Svea Court of Appeal, judegement from 27.09.2011, Case No: T 1085-11 (non-official translation. Accessible through: www.arbitration.sccinstitute.com, at p. 7 last paragraph).
[581] *Reiner/Jahnel*, in: Schütze (eds.), Inst. Schgbkt, p. 56, para. 8; *Lachmann*, Hdb, para. 988 f.
[582] Hä*berlein*, BB Beilage 2003, 7, 9 [...].
[583] *Mankowski* sees those benefits, SchiedsVZ 2004, 304, 310. However, he does not see that those can also lead to disadvantages.
[584] Cf. Böhlhoff, FS Schütze, p. 160.
[585] Like it was held in LG Mannheim BauR 1998, 403, 404.
[586] [*Froitzheim*, Ablehnung von Schiedsrichtern, para. 134 et seq.]
[587] Ball, (2005) 21 (3) Arb. Int'l 323, 340.

other party. Thus, it is ensured that arbitrators who cannot be appointed by one party also cannot be appointed by the other.

ε) No exceptions for international law firms

243 The previous arguments are also applicable to large, international law firm. Geographical distance alone cannot be a valid counterargument because of the modern possibilities of communication.[588] Nor can it make any difference, whether the individual offices are legally independent and are their own legal entities e.g. with a country supplement in addition to the name of the law firm.[589] The clients, most of them global corporations themselves, expect loyalty from all the offices of a major law firm.[590] Even the objection that the arbitrator has never met or spoken with the relevant colleagues is unconvincing.[591] Despite the fact that they have never met, they nevertheless share a common interest in the financial success of the firm as a whole. Both pursue a common strategic goal. Both enjoy advantages such as the good reputation and the opportunity of the division of labour provided by the law firm as a whole. Both must then bear the corresponding disadvantages.[592] They are free to no longer utilise the good reputation of a law firm and to work as an individual lawyer. Then they will no longer have a problem with law firm attribution. This does indeed occur. Many arbitrators from major law firms are setting up their own specialized ADR-boutiques, due to the challenges based on law firm atribution.[593] If they stay in a law firm, they must prevent such conflicts of interest. This is technologically possible as all major and larger law firms have high-performance computer-based conflict check systems. This allows every member of a law firm to check whether such conflicts exist, in a relatively short period of time.[594]

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[588] *Reiner/Jahnel*, in: Schütze (eds.), Inst. Schgbkt, p. 56, para. 8; the ICC apparently did not take into account that the said law firm is a large international law firm: Whitesell, (2007) ICC Bull. Special Suppl. 7, 23 (Case 3), 28 et seq. (Case 2, 6).

[589] Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, in Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, para. 67, where the distinction between Baker & McKenzie Madrid on one hand and the offices in New York and Caracas on the other hand was held irrelevant.

[590] *Lachmann*, Hdb, para. 990.

[591] Cf. *Lachmann*, SchiedsVZ 2009, 9, 12,[...].

[592] This, in principle, also sees *Wilke*, Interessenkonflikte, p. 261, who calls on law firms to create opportunities for a member of the firm, who is to be an arbitrator, to quickly investigate possible conflicts of interest; so apparently also *Lachmann*, Hdb, para. 990.

[593] *Fellas*, SIAR 2007:3, 175, 178 with some examples; *Schwarz/Konrad*, The Vienna Rules, para. 7-129; Jung, Standard, p. 5.

[594] *Häberlein*, BB Beilage 2003, 7, 9; *Ball*, (2005) 21 (3) Arb. Int'l 323, 339 reports that he personally always carries out such computer-aided conflict checks before accepting the appointment as an arbitrator; *Böckstiegel* gave an insight into his experience as an arbitrator at the DIS Spring Event 2011. He said that these "conflict checks" are increasingly carried out by the arbitrators utilizing their law firm's software; probably unaware of this software and therefore opposed to a conflict check *Hunter/Paulsson*, (1985) 13 Int'l Bus. Lawyer 153, 157; In this respect incomprehensible *Kitzberger*, p. 99, who assumes that conflict check systems

244 Even the concept of a "Chinese wall" completely misses the mark. It is precisely not a question whether the arbitrator could receive information from a colleague. It is much more about the membership of a law firm itself and the associated bundling of interests of (possibly unacquainted) lawyers. Consequently, despite the internal isolation of an arbitrator within his firm, a ground for challenge was answered in the affirmative.[595] The fact that the firm is or was only active in a single, unrelated proceeding cannot refute the financial interest of the arbitrator.[596]

245 The ICC defines financial interest very broadly for the purpose of confirming arbitrators. For instance, it refused to confirm an arbitrator whose law firm had previously represented a party. The law firm had in fact lost this mandate before the arbitration commenced, when a partner left the firm and took the current party as a client with him. The arbitrator had not been involved in the work for the party.[597] The ICC appears to have based its decision on either, the firm's financial interest in recovering the client or an assumption that the arbitrator had in fact discussed the case with his colleague at the time and was thus prejudiced. Unfortunately, the precise grounds for refusing to confirm the arbitrator cannot be determined, due to the lack of reasoning provided by the ICC. More convincing is a challenge decision by the LCIA, which dealt with a similar case of a partner leaving a law firm. In that case, the arbitrator had previously (4 years beforehand) been a member of the law firm, which now represented a party to the arbitration. The arbitrator has not been in contact with the party since leaving the firm. In addition to the time passed, it should be noted that the arbitrator in question no longer had any interest in the law firm retaining the party as a regular client. A financial interest or a sense of loyalty towards the former law firm was apparently not assumed. Consequently, the LCIA rightly rejected a challenge of the arbitrator.[598]

[…]

regularly only cover one country and do not allow global checks. Even if this were true, it would not be an argument. A global conflict check system can also be set up, without significant any technical difficulties. The mere fact that this may not be done universally does not release the law firms from their obligation to carrying out global conflict checks.

[595] *Whitesell*, (2007) ICC Bull. Special Suppl. 7, 28 et seq. (Case 2); Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, in Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, para. 67.

[596] *Whitesell*, (2007) ICC Bull. Special Suppl. 7, 23 (Case 3) [confirmation refused] und p. 28 et seq. (Case 2, 6) [successful challenge].

[597] *Whitesell*, (2007) ICC Bull. Special Suppl. 7, 24 (Case 6) [confirmation refused].

[598] LCIA Reference No. UN3476, Decision Rendered 24 December 2004, 27(3) Arb. Int'l 367 et seq.

(c) Scope and limits of law firm attribution

(aa) Only professional facts

247 Since law firm attribution is primarily based on a lawyer's financial interest in the success of the firm and the loyalty between clients and the firm as a whole, law firm attribution can only be based on professional facts.[601] The regular instruction of a law firm by a party must for example, be treated as the regular instruction of the arbitrator himself. On the other hand, a personal enmity or friendship between a party and the partner of the arbitrator's law firm is not a professional fact that could have an effect on the arbitrator by law firm attribution.[602] This enmity is a personal fact that does not affect financial success or loyalty to a client. Such a fact could only constitute a ground for refusal if one had to assume that the arbitrator shared the hostility of his colleague out of a deep friendship with him. However, such a deep friendship cannot be assumed per se between law firm partners and therefore this falls outside law firm attribution.

(bb) Partner

248 It is undisputed that law firm attribution applies to the partners of a law firm. Since the primary reason for law firm attribution is the joint financial interest of the partners of a law firm, this attribution cannot apply where such a common financial interest is not given. Law firm attribution also applies, where an arbitrator does not join the firm until after the party in question has contacted a law firm.[603] From the moment of admission, he shares the same financial interest in the law firm's success. He also enters into the relationship of loyalty with the clients.

249 However, grounds for refusal no longer exist, where an arbitrator left the law firm long ago (such as the 3-year period in the IBA Guidelines) and has not had any business dealings with the previous clients since.[604]

[…]

[601] LCIA Reference No. UN96/X15, Decision Rendered 29 May 1996, (2011) 27(3) Arb. Int'l 317, 318 (para. 4.1).

[602] *Lachmann*, Hdb, para. 1004.

[603] LCIA Reference No. 9147, Decision Rendered 27 January 2000, (2011) 27(3) Arb. Int'l 334, 335 (para. 4.2).

[604] LCIA Reference No. UN3476, Decision Rendered 24 December 2004, (2011) 27(3) Arb. Int'l 367, 369 (para. 4.1). In this case, the resignation from the firm was four years ago; OLG Frankfurt a.M., 28.03.2011, Az. 26 SchH 2/11, para. 35 ff. = SchiedsVZ 2011, 342, 344, where the resignation from the law firm was about two years ago and the mandate relationship between the law firm and the present arbitration party was terminated approximately one year before the resignation of the arbitrator; cf. Al Harbi v. Citibank, NA 85 f.3d 680, 682 (DC Cir., 1996).

(d) Interim result regarding law firm attribution

271 Law firm attribution is still common practice of the arbitral tribunals, institutions[646] and state courts[647]. The literature in this field predominantly accepts the existence of law firm

[646] DIS - SV - 217/00, SchiedsVZ 2003, 94, 96 (= DIS - SV- 217/02, BB Beilage 2003 (Nr. 8) 24), where in an obiter dictum it was expressly stated that law firm attribution also applies to large law firms; even without a request by one of the parties the ICC refused to confirm an arbitrator whose colleague acted for a party: Whitesell, (2007) ICC Bull. Special Suppl. 7, 22 (Case 2); confirmation was refused, where the arbitrator's law firm had acted against one of the parties three times in the past, p. 23 (Case 1); Bond, in ICC (ed.), The Arbitral Process and the Independence of Arbitrators (1991), p. 14; Greenberg/Fry, (2009) 20 (2) ICC Bull. 12, 20 (para. 48); this practice by the ICC is also seen by Derains/Schwartz, p. 124 et seq., despite their critical stance towards the law firm attribution; Fellas, SIAR 2007:3, 175, 179; Öhrström, SAR 2002:1, 35, 41 et seq. (Case 60/1999); Jung, Standard, p. 19; cf. ICSID Case No ARB/05/24, Harvatska Elektroprivreda, d d v Slovenia, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, para. 17 ff. […]; different view: Decision on the Challenge to the President of the Committee, in Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, (ICSID Case No. ARB/97/3), para. 26. The Tribunal there appears to grant the arbitrator a "bonus" for immediately revealing the connections of his law firm to a party. This decision is criticized: Bottini, (2009) 32 Suffolk Transnat'l L. Rev. 341, 349 et seq.; Here very strict as, despite the termination of the firm a little less than a year ago, it refused a confirmation, Azzali/Coppo, (2007) 5 (7) ITA Monthly Report at the end. Here you can hardly recognize a financial interest. It could only have been based on the personal attachment to the ex-partner who now represents a party; Judgment: Rsp 53/95 (cited after Bělohlávek, Arbitration Law and Practice in the Czeck Republic, p.154); Turner/Mohtashami, para. 4.40.

[647] Schmitz v. Zilveti, 20 f.3d 1043, 1049; Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc., 11 A.D.2d 166, 169 at the end (New York Supreme Court, 1960), where the arbitrator's law firm together with the law firm representing a party to the arbitration, represented third parties during the arbitration, and the arbitrator had been a member of that firm in the past. The NY Supreme Court assumed that this was unquestionably a ground for challenge (»Unquestionably, the foregoing relationships disqualified the attorney arbitrator from acting in this case [...]«); different view: Evans Industries, Inc. v. Lexington Ins. Co., Westlaw-Database WL 803772 (E.D.La.), p.5; OLG Bremen NJW-RR 2007, 968; different view: Mankowski, SchiedsVZ 2004, 304, 310 and followed by OLG München, Beschluss vom 05.07.2006, Case No: 34 SchH 5/006, para. 17; LG Bautzen, BB 1996 (Beilage 5), 29 et seq.; this practice also applies to state judges. For example, the BGH ensures that no judge participates in a decision whose spouse or partner is a member of a (large) law firm that has participated in the previous instances for one of the parties, FAZ v. 08.02.2011 (Nr. 32), p. 11: »Bundesrichter in Sippenhaft Der BGH sorgt sich um die Unabhängigkeit seiner Richter«; however, it is not sufficient that the law firm of the spouse is involved in other proceedings in which the same legal issues are concerned, BGH NZG 2011, 518; BGE 92 I 271, 276 et seq.,

attribution.[648] Even some critics affirm its existence, where a partner of the arbitrator's law firm acts as a party representative in the same arbitration.[649] Where this attribution applies, the professional activities and contacts of the law firm are treated as those of the arbitrator himself.
[…]

(7) No unilateral exclusion by the arbitrator ("carte blanche clause")

376 It is reported that in practice, members of major law firms in particular, adopt a certain passage in their acceptance of the arbitrator office, with the aim of limiting their duty of disclosure. This passage often makes it clear that the candidate is a member of an international or at least large national law firm. Additionally, that the law firm would not be prevented from accepting mandates from the parties or affiliated companies, by his acceptance of the arbitrator office. That the arbitrator has no influence on this. The disclosure of such future mandates of the firm is either expressly excluded or it is at least indirectly implied that no such disclosure will be made later.[828] The users of this "carte blanche clause"[829] appear to be under the impression that such general and diffuse references to possible future grounds for challenge suffice to discharge their disclosure obligation and that they can exclude future disclosure unilaterally by such an announcement.

377 This however, is a double fallacy. The reference to possible future grounds for challenge is not itself objectionable. It may be an indication to the parties that such disclosure may be forthcoming in the future. It does not, however, fulfil the arbitrator's duty of disclosure. In particular, it cannot extend the waiver-effect of disclosure to future facts. Only when the disclosable fact exists or is certain to occur, can the arbitrator disclose it. Statements about possible future facts can never satisfy the purposes of the arbitrator's duty to disclose. The parties are not informed of possible grounds for challenge and their extent. The arbitrator fails to create a trustworthy environment when he intends to divest himself from his ongoing duty to disclose by such a passage. In the end, it is an attempt to deny the parties a possible right to challenge from the outset. As, at the time of the disclosure, with merely a reference to possible grounds for challenge in the future, a party cannot successfully challenge an

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where the Swiss supreme court combined law firm and family attribution; Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. And Another, [2000] QB 451, 478 (para. 20); Telesat Canada v. Boeing Satellite Systems International Inc., 2010 CarswellOnt 10550, para. 161 (with the intimation that this result may differ for large international law firms: para. 146).

[648] Lew/Mistelis/Kröll, in Lew/Mistelis/Kröll (eds.), (2003), para. 11-26; Walter, Unabhängigkeit, p. 208 et seq., […]; Gehle, Challenging the arbitrator, aufrufbar unter: http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20090922/challenging_the_arbitrator.page (last visited 24.02.2015); different view: Mankowski, SchiedsVZ 2004, 304, 310; Born, International Commercial Arbitration, p. 1893 et seq.

[649] E.g. IBA Guidelines, Part II, 2.3.3 (waivable red list).

[828] *Fry/Greenberg/Mazza*, para. 3-403; *Turner/Mohtashami*, para. 4.40; *Schütze*, Wieczorek/Schütze, § 1036 para. 11.

[829] This name goes back to Prof. Klaus Peter Berger.

arbitrator. There are precisely no grounds for challenge (yet). If such grounds were to arise later, however, the time limit for challenging the arbitrator can only begin at the time of the new disclosure. If the time limit began with the first disclosure containing only a vague reference to possible future grounds for challenge, a party to the arbitration would be precluded from asserting their rights where the deadline has already expired, but possibly before the right to challenge has even arisen. The party would then at no time have had the opportunity to challenge the arbitrator. Consequently, according to the practices of the ICC, such statements are not deemed to have any effect for the purposes of disclosure.[830] This is also the approach taken by the LCIA.[831] Similarly, the new IBA Guidelines 2014 in GSt 3 (b) and GSt 4 (b) make it clear that such a statement does not discharge the arbitrator of his continuing obligation of disclosure. However, the working group in GSt 4 (b) explicitly leaves the question open, whether such pre-emptive disclosure is in fact valid and what effect it has.

378 In addition, an arbitrator cannot unilaterally limit his duty of disclosure. Only the parties to the arbitration can do so. Such an agreement from the parties may be requested by the arbitrator. He cannot, however, unilaterally impose such an agreement like a standard term. By virtue of such behavior, the arbitrator demonstrates the fact that he considers certain generally binding rules of arbitration to be non-binding upon himself. He also shows that he wants to deny the parties a possible future right to challenge him from the outset. It is therefore questionable, whether the decision of this arbitrator will still be based on due process, as he aims to exclude the application of mandatory procedural rules to himself. This raises objective doubts as to his impartiality. He is therefore challengeable, according to this author's view.

379 It is however, possible that the parties themselves, also at the request of the arbitrator, waive their right to further disclosure and thus also forgo waivable[832] grounds for challenge. However, this would be an explicit waiver by all parties.[833] The arbitrator can indeed encourage such a waiver. He may not, however, unilaterally impose such a requirement and thus introduce it into the procedure independent of the will of the parties involved.

[830] *Fry/Greenberg/Mazza*, para. 3-403.
[831] *Turner/Mohtashami*, para. 4.40.
[832] [*Froitzheim*, Ablehnung von Schiedsrichtern, para. 291 et seq.]
[833] *Schütze*, Wieczorek/Schütze, § 1036 para. 11.