Beyond Cognition: Are Party-Appointed Arbitrators Truly Impartial?

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Abstract

The present paper examines the principle of impartiality and its significance in the context of party-appointed arbitrators in international investment and commercial arbitration. It reflects on how cognitive biases influence decision-making in arbitral disputes and how such biases can be mitigated to enhance the credibility and fairness of international dispute resolution procedures. Arbitration is a common mechanism for resolving disputes in international investment law, with parties often appointing tribunal members. However, the impartiality of these arbitrators is frequently questioned. Cognitive biases, such as confirmation bias and anchoring bias, can significantly impact the fairness of arbitration by affecting how evidence is perceived and evaluated. This study explores the relationship between cognitive biases and arbitrator impartiality, considering the role that such biases may play in the outcome of an arbitration process. Integrating doctrinal legal analysis with empirical insights from psychology, the paper aims to provide a comprehensive understanding of impartiality challenges faced by party-appointed arbitrators. It analyzes institutional measures like the duty of disclosure and ethical guidelines, alongside the theoretical framework of the 'devil's advocate' approach, to propose effective strategies for mitigating biases. By enhancing understanding of these issues, the paper aims to contribute to the ongoing debate on the fairness of arbitration in international investment and commercial law.

Keywords: *impartiality, cognitive biases, party-appointment, international arbitration, investor-State disputes, duty of disclosure.*

JEL Classification: K33, K40, K41

DOI: 10.62768/IILJ/2024/4/2/03

Please cite this article as:
Konstantinidi, Marina-Elissavet, 'Beyond Cognition: Are Party-Appointed Arbitrators Truly Impartial?', *International Investment Law Journal* 4, no. 2 (July 2024): 154-164.

1. Introduction

Arbitration is widely used as a mechanism for resolving disputes in international investment law and party-appointment has historically been the norm in both public and private international disputes. Despite the popularity of this method, several voices raise concerns as to the impartiality and perceived as biased conduct of party-appointed arbitrators. Starting from this point, this paper explores how cognitive biases may influence decision-making in investment arbitration, and examines proposed solutions aimed at enhancing the credibility and fairness of the arbitration process.

Impartiality in arbitration is paramount, ensuring arbitrators remain unbiased towards any party involved. Arbitrators perceived as partial risk losing credibility within

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the tribunal, particularly impacting their influence on other members of the arbitral tribunal, and especially with the President (in the case of a three-member tribunal). Furthermore, a partisan arbitrator is also subject to challenge procedures, which means additional costs and time burdens for the parties. Such implications do not only affect the immediate case but also influence the credibility of the international investment regime as a whole.

Arbitral rules and guidelines, such as the ICSID Convention, the UNCITRAL Rules, and the Code of Conduct for Arbitrators, contain factual situations where biased conduct is prohibited, in an attempt to ensure independence and impartiality of arbitrators. However, unconscious, or else known as 'cognitive' biases, pose a distinct challenge as they are harder to identify and regulate. These biases, which refer to systematic errors in judgment stemming from unconscious mental processes, can influence the way that arbitrators perceive and evaluate evidence, potentially compromising impartiality in decision-making.

To mitigate potentially biased decisions, most dispute resolution rules mandate arbitrators to disclose any fact that may influence their independence or impartiality and could reasonably be considered as possible grounds for disqualification. Different standards apply as to the facts that should be disclosed, depending on the arbitral rules in place Additionally, several theoretical frameworks have been developed to counteract the impact of biases on decision-making processes, such as reconceiving the role of the party-appointed arbitrator as one to challenge prevailing opinions and ensuring representativeness in the tribunal. Achieving impartiality, though, necessitates arbitrators of high moral character and recognized competence, who uphold professional integrity to ensure fair and equitable dispute resolution.

The present study combines doctrinal legal analysis with certain empirical insights from the field of psychology. It aims to provide a rounded understanding of the issues related to the impartiality of party-appointed arbitrators and the influence of cognitive biases. The paper is structured in three sections. The first section explains the method of party appointment and the duty of impartiality of arbitrators and judges. The second section analyses how cognitive biases influence decision-making. The third section examines several suggestions for mitigating cognitive biases, notably, the duty of disclosure, the theoretical approach of the 'devil's advocate' and ethical considerations for arbitrators.

By investigating the implications of cognitive biases to the impartiality of party-appointed arbitrators, this study ultimately seeks to contribute to the ongoing debate on the fairness and effectiveness of international dispute resolution mechanisms, ultimately aiming to enhance the credibility and integrity of arbitration outcomes.

2. How do party-appointed arbitrators get selected? The method of party-appointment

The method of party-appointment has historically been the norm in both public and private international disputes.[2] The tradition of party-appointed arbitrators evolved from ad hoc State-to-State arbitrations to the Permanent Court of International Justice,

[2] Catherine A. Rogers, *Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality*, Harvard International Law Journal 64 (Winter 2023): 407.

and later to the International Court of Justice, where States have the permission to select *ad hoc* judges.[3] This practice was then expanded and specifically endorsed in the initial bilateral investment treaties and in the ICSID Convention.[4]

One of the principal functions of this method of appointment is to give confidence in the process to the parties and their counsel.[5] Interestingly, the practice of party-appointment was originally introduced with the aim to eliminate biases. One of the main motivations for parties opting for international arbitration has been to steer clear of any prejudices, whether actual or perceived, in the national courts of their opposing party.[6] The provision for each party to select an arbitrator with the same nationality or other relevant to the case qualities was intended to guarantee that no party's nationality or legal culture dominates or is excluded from the tribunal.[7]

Procedurally, the dispute resolution clause of most Bilateral Investment Treaties typically provides for the arbitration selection method to be adopted in the proceedings.[8] For instance, the 2012 U.S. Model BIT provides for a typical method of appointment of three arbitrators, one by each party, and the presiding arbitrator by agreement between them: '*Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.* '[9]

In the absence of choice, institutional appointment is foreseen. The ICSID Convention and the UNCITRAL Rules contain default rules for appointing three arbitrators, while the ICC Rules provide for a sole arbitrator as a default choice.[10]

Despite the popularity of the practice, there is mounting criticism over the impartiality and the perceived as biased conduct of the party-appointed members of the tribunal.[11] The main argument against this method is that these arbitrators may have a financial or ethical incentive to improperly favor the party that chose them, in view of increasing the likelihood of future appointments.[12] However, potential predispositions are not necessarily connected to the party-appointment method and, as analyzed below, can also originate from inherent cognitive functions.

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[3] Statute of the International Court of Justice art. 31, paras. 2 & 3, June 26, 1945, USTS 993.

[4] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 37(2)(b), Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965), 1 ICSID Rep. 3 (1993) [hereinafter ICSID Convention]; Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the Republic of Tunisia art. 8, May 11, 1998.

[5] Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Texas International Law Journal 59 (1995):62; William W. Park, *Arbitrator Integrity*, in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds.), *The Backlash against Investment Arbitration*, Kluwer Law International, 2010, p. 189-191; Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 409.

[6] *Ibid.*

[7] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 409; Oscar G. Chase, *Legal Processes and National Character*, in *Cardozo Journal of International and Comparative Law* 5 (1997): 8.

[8] Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, in Litigating International Investment Disputes (January 2014): 3.

[9] Article 27 of the 2012 U.S. Model Bilateral Investment Treaty.

[10] ICSID Convention, Art. 37(2)(b); UNCITRAL Rules, Art. 9(1); ICC Rules, Art. 12(2).

[11] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 410, 414.

[12] John O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a 'Better Way?* in University of Pennsylvania Law Review 136 (1988): 1723, 1743; Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, in Osgoode Hall Law Journal 50 (2012): 211, 219.

2.1. Duty of impartiality

The principle of impartiality, in the context of arbitration, fundamentally means that an arbitrator does not have biases or predispositions towards any of the parties in the case.[13] As defined by the International Bar Association's Ethics for International Arbitrators: *'The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favors one of the parties or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.'*[14]

Although distinct, impartiality is closely related to the principle of independence, according to which, the arbitrator does not depend -financially, professionally, personally or in any other way- on either of the parties.[15] The appearance of bias often falls into the ambit of dependence,[16] which also explains why the principles of impartiality and independence frequently overlap. These principles are reflected, amongst others, in the ICSID Convention, and the UNCITRAL Rules with the aim to ensure a fair, free and unbiased arbitral procedure.[17]

Lack of impartiality constitutes a ground for challenging an arbitrator's appointment or even the award of the tribunal, which means additional costs and time for the parties, but also potential damage to the arbitrator's reputation, which may cost them loss of future professional opportunities. A prominent example can be found in the case of *Loewen v. U.S.*[18]. In this case, although no challenge procedures where initiated, the arbitrator appointed by the United States, publicly revealed, after the proceedings were concluded with a U.S victory, that representatives of the Government intentionally and blatantly pressured him by indicating that the United States would withdraw from NAFTA if it lost.

In another example, *Burlington v. Ecuador* case, the initial arbitrator appointed by the claimant had been previously nominated by the claimant's counsel 8 times.[19] This created an appearance of dependence on the specific law firm, and, therefore, lack of impartiality, justifying his disqualification. In the case of *ICS v. Argentina,* the claimant-appointed arbitrator was partner in a law firm that had a concurrent representation in a separate case against Argentina.[20] This information, giving rise to objectively justifiable

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[13] Giorgetti, *op. cit. (The Arbitral Tribunal)*, 10.

[14] Section 3 of the of the International Bar Association's Rules of Ethics for International Arbitrators.

[15] Noah Rubins and Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, in Christina Knahr, Christian Koller, Walter Rechberger, and August Reinisch (eds.), *Investment and Commercial Arbitration – Similarities and Divergence*s, Eleven International Publishing, 2009, 154.

[16] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1986, 170.

[17] ICSID Convention, Art. 14; UNCITRAL Rules, Art.6(7), Art. 11-13; ICC Rules, Art. 11; SCC Rules, Art. 14.

[18] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98 /3.

[19] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petro Ecuador)).

[20] *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9.

doubts, was enough for the tribunal to conclude that there was a sufficiently serious conflict, and that it was prudent that another arbitrator be appointed by the claimant.

In the examples described above, biases could be identified through certain objective criteria, based on behavior. However, biases are not always reflected in the arbitrators' conduct, as they might often involve internal processes within decision-making.

3. How do cognitive biases influence decision-making?

A growing body of literature touches upon the issue of the adjudicators' biases. Some identified biases are connected to judges' personal background, political views, gender, cultural cognition, group identity.[21] Other factors influencing judgment are part of the human cognition and mainly have psychological origin. These unconscious or else known 'cognitive biases', which are examined in the present section, refer to systematic errors in judgment or perception that are caused by unconscious and automatic cognitive processes.[22] These biases are inherent in human thinking and can influence decision-making and reasoning, even in individuals who believe themselves to be impartial and objective. Adjudicators of investor-State disputes are not excluded from this condition. Conscious and sub-conscious thoughts affect not only their legal conclusions, but also their legal reasoning, and may take place internally even before seeing the evidence relevant to the case.[23]

Recognizing the different types of biases helps to identify behaviors and enhance awareness in decision-making in order to achieve more impartial and well-reasoned decisions. Common types of cognitive biases include, amongst others, the so-called 'confirmation bias' which refers to the tendency to favor information that confirms one's preexisting beliefs or opinions.[24] In the context of arbitration, this occurs when an arbitrator has a preconceived notion or preference and tends to seek out information that confirms their views, while ignoring information that contradicts them. An arbitrator that is affected by this type of bias may be, for instance, more likely to favor the arguments of the party that aligns with their personal beliefs or prior experience.

Another example, the 'anchoring bias' takes its name from the 'anchor', the piece of information one relies heavily on when making a decision.[25] This may occur

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[21] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 424-425.

[22] *Ibid.*

[23] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 425; Annelies Vredeveldt et al., *Legal Psychologists as Experts: Guidelines for Minimizing Bias*, in Psychology, Crime & Law (2022) 6-9. doi:10.1080/1068316X.2022.2114476.

[24] Myrto Pantazi et al., *Is Justice Blind or Myopic? An Examination of the Effects of Meta-Cognitive Myopia and Truth Bias on Mock Jurors and Judges*, in Judgment and Decision Making 15, no. 2 (2020): 214. https://doi.org/10.1017/S1930297500007361. A contemporary example of confirmation bias linked to facebook's algorithm is evident in what is known as "filter bubble" effect. This occurs when facebook's algorithm selectively presents users with content that aligns with their existing beliefs and viewpoints, while filtering out content that contradicts them. As a result, users may experience increased polarization and closed-mindedness, as they are not exposed to alternative viewpoints or perspectives. The algorithm's confirmation bias reinforces users' pre-existing beliefs and can create a self-reinforcing cycle where users become isolated within their own ideological bubbles. See Pablo Barberá, et al., *Tweeting from Left to Right: Is Online Political Communication More Than an Echo Chamber?* in Psychological Science 26, no. 10 (2015): 1531-1542.

[25] Lieder, Falk et al., *The anchoring bias reflects rational use of cognitive resources*, Psychonomic Bulletin

when an arbitrator's initial impression of a case influences their subsequent decision-making, even if new information suggests a different conclusion. For instance, an arbitrator may place too much weight on the first piece of evidence they hear, or the initial argument made by a party, leading to a narrow consideration of the case. It often occurs when numerical figures are introduced into evidence and is particularly relevant in questions of quantum.

As concerns 'groupthink bias', due to a desire for harmony and consensus within the panel of arbitrators, a decision may be taken without really considering dissenting opinions.[26] The notion refers to a *'mode of thinking that people engage in when they are deeply involved in a cohesive in-group. In that setting, members' striving for unanimity can override their motivation to realistically appraise alternative courses of action.'*[27] The consensus-oriented panel of arbitrators is particularly susceptible to this type of bias.[28]

The above-mentioned, as well as other cognitive biases can have a significant impact on the impartiality and fairness of international investment arbitration. The unconscious processes of biases can be influenced by external factors, such as the arbitrators' personal and professional experiences. Different backgrounds (like civil or common law training) mean different perspectives and methods of reasoning. In this respect, as Judge Donoghue has commented, arbitrators could be compared to flamingos of variant colors.[29] Like these birds, whose pink color of feathers changes depending on their diet, Tribunal members' thought processes and methods of reasoning vary, based on their professional background. This is not necessarily negative, as diversity can serve in covering multiple facets of a case and reaching a decision more quickly. It is, though, useful to be able to identify when and why biases arise in order to avoid and limit their negative effects.

4. How can cognitive biases be mitigated?

Mitigating the impact of cognitive biases in decision-making is crucial for maintaining fairness and impartiality in arbitral disputes. This section examines certain strategies to address biases, including the duty of disclosure, the 'devil's advocate' approach, and ethical considerations for amelioration of the arbitration process. Implementing these institutional and theoretical approaches helps ensure more objective and unbiased decision-making in arbitration proceedings and can potentially enhance the impartiality and credibility of the arbitration process.

4.1. Duty of disclosure

An existing procedural safeguard is the duty of disclosure. Most of international

& Review 25 (2018), 322–349, https://doi.org/10.3758/s13423-017-1286-8.

[26] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 426.

[27] Irving Lester Janis, *Groupthink*: *Psychological Studies of Policy Decisions and Fiascoes*, 2nd ed., Cengage Learning, 1982, 17-75.

[28] Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, in Cornell Law Review vol. 96, issue 1, November 2010, 47-49.

[29] Pichrotanak Bunthan, *Arbitrators as Flamingos of Many Colors*, in Kluwer Arbitration Blog, February 9, 2021. https://arbitrationblog.kluwerarbitration.com/2021/02/09/arbitrators-as-flamingos-of-many-colors/.

arbitration rules demand arbitrators to disclose any fact that could be reasonably considered as possible grounds for disqualification.[30] This can be crucial in eliminating many problems that arise when alleged bias is the basis for challenging an arbitral award.[31]

Different standards apply as to the facts that should be disclosed, depending on the respective applicable rules. For instance, the ICSID Convention mandates disqualification only in circumstances where there is a 'manifest lack' of character, competence or independent judgment: *'A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14 […]'* [32]

The 'qualities required' by the ICID Convention include the following: *'(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.'*[33]

In practice, the term 'manifest' has been strictly applied to mean 'obvious' or 'evident' and highly probable, not just possible.[34]

On the other hand, as provided by the UNCITRAL Rules, the arbitrator should disclose any circumstance likely to give rise to '*justifiable doubts'* as to their impartiality or independence:

Regarding ethical guidelines, the International Bar Association Guidelines on Conflict of Interest supplement the threshold of 'justifiable doubts', and mention that the term refers to doubts arising to a reasonable and informed third party, and for reasons learnt after the appointment was made.

IBA Guidelines, Part I (2) Conflicts of Interest: *'(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent. […] (c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*'[35]

In addition, the Draft Code of Conduct of Arbitrators lists certain factual circumstances creating such doubts and the relevant obligations for arbitrators: *'1. An Arbitrator shall be independent and impartial. 2. Paragraph 1 includes the obligation not to: (a) Be influenced by loyalty to any disputing party or any other person or entity;*

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[30] Giorgetti, *op. cit. (The Arbitral Tribunal)*, 12.

[31] Martin Hunter, *Ethics of the International Arbitrator*, in Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 53, no. 4 (1987): 219.

[32] Art. 57 of ICSID Convention referring to Art. 14 '*manifest lack of qualities*'.

[33] Article 14 of the ICSID Convention.

[34] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30.

[35] International Bar Association Guidelines on Conflicts of Interest in International Arbitration, Approved by the IBA Council, 25 May 2024, Part I (2) Conflicts of Interest.

(b) Take instruction from any organization, government, or individual regarding any matter addressed in the IID proceeding; (c) Be influenced by any past, present [or prospective] financial, business, professional or personal relationship; (d) Use his or her position to advance any financial or personal interest he or she might have in any disputing party or in the outcome of the IID proceeding; (e) Assume any function or accept any benefit that would interfere with the performance of his or her duties; or (f) Take any action that creates the appearance of a lack of independence or impartiality. '[36]

In a pre-IBA guidelines discussion, Hunter and Paulsson have criticized the practice of appointing biased arbitrators, differentiating between positive bias and general sympathy toward the appointing party.[37] The latter is acceptable, including efforts by the party-appointed arbitrator to choose a neutral third arbitrator. However, equating sympathy with the duty to avoid an adverse third arbitrator can be misleading.[38] It remains, therefore, upon the impartial party-appointed arbitrators to reject a third arbitrator who is not completely partial.[39]

4.2. The 'devil's advocate' approach

In view of mitigating cognitive biases, it has been suggested to reimagine the role of the party-appointed arbitrator as a form of a 'devil's advocate.'[40] In this reconceptualized role, party-appointed arbitrators would challenge prevailing opinions within the tribunal by expressing dissenting viewpoints.[41] This approach has the potential to counterbalance the impact of cognitive biases on the arbitration process by ensuring representativeness in the tribunal.

Similarly to the psychological debiasing strategy of 'considering the opposite', the devil's advocate should direct attention to contrary evidence that would not otherwise be considered.[42] This party-appointed arbitrator would challenge the testimony of those advocating the majority position.[43] Provided that their -often dissenting- opinion is justified and based on ethical principles, this approach has the potential to reduce decision-making shortcuts within the panel of arbitrators, and provide a safeguard against groupthink biases, especially when consensus emerges as a need within the group.[44] It is suggested that the devil's advocate cleverly presents arguments challenging the testimony of those advocating the majority position, and discreetly encourages suggestions to foster open dialogue and argumentation within the panel.[45] Finally, a

[36] Draft Code of Conduct for Arbitrators, Art. A3 (November 2022).
[37] Martin Hunter and Jan Paulsson, *A Code of Ethics for Arbitrators in International Commercial Arbitration?*, in International Business Lawyer 13 (1985): 153.
[38] Murray L. Smith, *Impartiality of the Party-Appointed Arbitrator*, in Arbitration International 6, no. 4 (1990): 320–342, https://doi.org/10.1093/arbitration/6.4.320.
[39] *Id.*
[40] Janis, *op. cit. (Groupthink)*, 268; Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 461.
[41] *Ibid.*, 435-436.
[42] R. P. Larrick, *Debiasing*, in D. J. Koehler and N. Harvey (ed.) *Blackwell Handbook of Judgment and Decision Making*, Blackwell Publishing, 2004, 316–337, https://doi.org/10.1002/9780470752937.ch16.
[43] Janis, *op. cit. (Groupthink)*, 268; Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 461.
[44] Rogers, *op. cit. (Reconceptualizing the Party-Appointed Arbitrator)*, 457.
[45] *Id.*

reconceptualized role of the party-appointed arbitrator's international role could facilitate the consideration of issues and concerns that might otherwise go unnoticed.

4.3. Ethical considerations

The intricate relationship between cognitive biases and arbitration outcomes presents challenges that extend beyond procedural guidelines. Consequently, ensuring fair and impartial dispute resolutions, demands arbitrators who possess certain qualities that ensure an unbiased and just resolution process.

As stipulated by the ICSID Convention, they should be '*persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.*'[46] Although this provision refers also to professional competence, the ICSID requirement goes beyond this factor. Cultivating professional integrity and clarity of conscience becomes imperative. A deep understanding of relevant legal issues combined with the ability to methodically analyze intricate information, is vital for rendering sound judgments. The practice in international arbitration demands that arbitrators act with professional integrity and fairness in the process toward the parties, elements paramount for a proper functioning of the arbitration system and consequently, the successful resolution of the disputes.

In this context, it is interesting to note a domestic court decision regarding ethical standards, *Wingate and Evans v. SRA, Jackson LJ*[47] case, where the Court of Appeal referred to the quality of integrity: *'In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. ... The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards. ... Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty.'*[48]

Integrity requires self-reflection and an awareness of one's own susceptibility to biases.[49] Ultimately, what is important is that party-appointed arbitrators have the freedom of thought to decide against the nominating party if the evidence so warrants.[50] By doing so, they can rise above influences that are external to the merits of the case, and effectively listen to the story of both sides. Such an approach represents a significant step forward in the quest of advancing equity and fairness in international dispute resolution.

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[46] Article 14(1) of the ICSID Convention.

[47] *Wingate and Evans v. Solicitors Regulation Authority; Solicitors Regulation Authority v. Malins* [2018] EWCA Civ 366, Case No: C1/2017/1002 & 1003 & C1/2017/1249.

[48] *Ibid*, par. 100.

[49] Annelies Vredeveldt et al., *Legal Psychologists as Experts: Guidelines for Minimizing Bias*, in Psychology, Crime & Law (2022): 9-10. doi:10.1080/1068316X.2022.2114476.

[50] Murray L. Smith, *Impartiality of the Party-Appointed Arbitrator*, Arbitration International 6, no. 4 (1990): 323.

5. Conclusion

The pursuit of impartiality within the party-appointed framework stands as a paramount objective. However, the intricate relationship between cognitive biases and arbitration outcomes presents challenges that extend beyond procedural methods.

Stemming from internal, conscious, or sub-conscious thoughts, cognitive biases, can influence judgment and reasoning, without necessarily being associated with intent or awareness on the part of the individual. They may appear in various forms, such as the confirmation, anchoring, and groupthink bias, affecting decision-making in different ways. And although, it is not only normal but also desirable for thought processes and methods of reasoning to vary, it is important to identify and separate diversity of backgrounds from biased behaviors and decisions.

In this context, different standards of disclosure can put limitations to situations of conflict of interest and lack of independence or impartiality. These include, but are not limited to, the standard of 'manifest lack' of character, competence, or independent judgment in the case of the ICSID Convention, and the standard of 'justifiable doubts' as to the arbitrator's impartiality or independence provided by the UNCITRAL Rules. Such institutional measures can mitigate to a certain extent the influence of biases on decision-making. From a more theoretical approach, the concept of the 'devil's advocate' emerges as a potential tool to mitigate biases, encouraging party-appointed arbitrators to adopt critical perspectives and thereby enhance impartiality and credibility in arbitration outcomes.

Institutional and theoretical constructions to mitigate biases should always be accompanied, though, by self-reflection, awareness of one's own susceptibility to biases and commitment to integrity. Arbitrators, whether party-appointed or not, must be reminded of their special role in society and remain committed to their duty of freedom of thought. By cultivating such qualities, party-appointed arbitrators can uphold impartiality and ensure the fairness of arbitration, thereby laying a strong foundation for fair and equitable dispute resolutions.

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