Jurisprudencia extranjera

Estados Unidos

"Issue Conflict" in Arbitration as apparently [un]seen in 2011 by a U.S. Court in *STMicroelectronics vs. Credit Suisse Securities*

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Summary: I. Introduction. II. The *STMicroelectronics vs. Credit Suisse Securities* Decision. III. The Total Absence of Predisposition is indeed Utopic. IV. Investment Treaty Jurisprudence on Issue Conflict and the IBA Guidelines. V. The French ICC Perspective;. VI. The Difference between Judges and Arbitrators *vis–à–vis* Issue Conflicts. VII Difference in Approach to Issue Conflict.

I. Introduction

An issue conflict can be defined as a struggling, competitive or opposing drive caused by the wish, impulse or internal demand originated by statements made by a person in her private interests, against the responsibility of that same person as an arbitrator to decide a case without predispositions or preconceptions about a legal question or point that equal bias.[1] It is related to the concept of arbitrator impartiality and independence (and appearance thereof), albeit much more remotely than, for example, questions about connections with a specific party or the direct and immediate legal consequences of a case. An issue conflict relates to the state of mind and openness of an arbitrator about a subject matter.

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[1] In our view, all biases are predispositions, but not all predispositions equal a bias. For an issue conflict to disqualify an arbitrator, the predisposition must equal a bias, that is, a strong sentiment (or reasonable appearance thereof) not based only on reason, leading to a prejudice and a preconceived conclusion without just grounds and sufficient knowledge of the relevant case. Note that we have defined issue conflicts as derived from statements made by a person in her private interests, not in previous arbitral awards.

A common example of an issue conflict is about previous academic discourse: a person who has written a research article about a legal question or point and is later asked to serve as arbitrator in a case where that same question or point, or a very similar one, can have a direct bearing on the outcome of the case. Another example would be a person who has argued a question or point extensively as party advocate and, like the legal researcher in the previous example, is later asked to sit as arbitrator in a case where the same or a similar question or point can be controlling or at least legally relevant.

The choice of arbitrator can be the most important decision made on behalf of a party in an arbitration. Arbitrators can be legitimately and indisputably chosen partially based on how someone believes that he or she will rule on a particular issue. Conversely, if an arbitrator chosen by another party is believed likely to rule adversely on an issue, an effort can be made to challenge that arbitrator potentially under the umbrella of an issue conflict.

Taken to extremes, the issue conflict, it may be argued, limits the freedom of a party to choose as arbitrator a person with sufficient experience or expertise. It can also be argued that it is unreasonable to assume that no one can change their mind after hearing skillfully persuasive advocates, particularly because in arbitration precedent awards are not binding. It can also be said that it is different to write a legal article or research piece about what one believes the law should be, than to approach a case as an arbitrator that should apply existing law as it is, rather than as what it should be. Finally, it can be reasoned that legal issues are hardly exactly the same in separate cases because every case is truly different even if similar. All those arguments are not without merit.

An issue conflict should not be allowed to be abused as a delaying tactic or a trick to disqualify competent arbitrators. But issue conflicts should not be completely dismissed as always artificial. They can sometimes be important particularly if coupled with a potential economic impact for an arbitrator. It is difficult to formulate a general rule about issue conflict and impartiality or independence. Each case should be analyzed based on specific circumstances to determine if an arbitrator may truly have a bias with respect to the subject matter that may affect his or her impartiality and independence.

II. The *STMicroelectronics vs. Credit Suisse Securities* Decision

The case of *STMicroelectronics, N.V. vs. Credit Suisse Securities (USA), LLC* was decided by the United States Court of Appeals for the Second Circuit on June 02, 2011. The case was argued before that court on March 28, 2011 (docket No. 10–3847–cv). It related to a challenge to (petition to set aside) an arbitral award in a case in which Mr. John J. Duval, Sr. served as arbitrator. The decision of the Court of Appeals did not enter to analyze, as we believe it should have done, an issue conflict as we have defined it above.

Credit Suisse Securities argued before the court that the arbitral award should be set aside based on Section 10(a)(3) of the U.S. Federal Arbitration

Act. It was alleged that Mr. Duval had incurred in a "misbehavior by which the rights of any party have been prejudiced" because when appointed as arbitrator Mr. Duval allegedly failed to disclose and affirmatively misrepresented facts about a previous professional relationship. The court adopted an interesting distinction, consistent with the position argued by Credit Suisse Securities (USA) LLC, which alleged evident partiality before the District Court but pursued only a misbehavior issue in the Court of Appeals[2]. Consequently, the Court of Appeals stated that the arguments of Credit Suisse were bearing not on partiality but on an alleged *predisposition*– ignoring, in our view, that some predispositions may affect impartiality. Credit Suisse argued that Mr. Duval's prior experience as an expert witness for different claimants in other disputes, as improperly not disclosed, either colored his outlook or demonstrated that his outlook was already too colored and that, either way, Credit Suisse was entitled to know about that experience before selecting him as an arbitrator. The case is very important for the subject of issue conflict in arbitration because a predisposition is normally the main basis argued to use an issue conflict to try to disqualify an arbitrator.

The Court of Appeals correctly noted "[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high," citing from *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). The court further noted that there was no contention that Mr. Duval had any prior knowledge of, or misconception about, the facts of the case. Credit Suisse's argument was that the testimony or Mr. Duval in other cases suggested that he had pre–existing views about potentially relevant propositions of law. Interestingly, Credit Suisse did not directly frame the case about referring to independence or impartiality but rather to prejudice to a party due to misbehavior resulting from non–disclosure by the arbitrator.

In rejecting the petitioner's effort to vacate the arbitral award, the court of appeals stated that:

> "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." Repub. *Party of Minn. v. White*, 536 U.S. 765, 777 (2002). This is all the more true for arbitrators, "[t]he most sought–after" of whom "are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose." *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981).

The rationale of the court, while not directly dealing with a specific issue conflict, would be applicable to issue conflicts in general: because the lack of predisposition or preconceptions about legal issues is not required from judges, it cannot be required from arbitrators. If followed in Federal courts elsewhere in the United States, *STMicroelectronics vs. Credit Suisse Securities* can be said to be an almost fatal blow to issue conflicts as basis to dis-

[2] Credit Suisse apparently concluded that under the Federal Arbitration Act non–disclosures with respect to partiality must relate to partiality to a person or entity, not to a subject matter.

qualify arbitrators in the United States because the existence of predispositions or preconceptions by arbitrators is the main basis why issue conflicts are relevant. As will be seen below, we argue that arbitrators have a significant difference with judges: the lack of a general or legally imposed requirement to act exclusively as decision makers in dispute resolutions that makes the analysis of predispositions and preconceptions more important for arbitrators than for judges. For arbitrators, sometimes predispositions and preconceptions can have economic reasons that make them harder to overcome. Therefore, for arbitrators some predispositions can be equal to bias and partiality.

The United States Court of Appeals for the Second Circuit should have gone into more detail about the apparent state of mind of Mr. Duval toward the subject matter. The *STMicroelectronics vs. Credit Suisse Securities* decision did not make reference to sufficient facts to conclude whether or not Mr. Duval indeed had an issue conflict. It simply equated arbitrators to judges, on a general basis, to apparently conclude that predispositions are always irrelevant and issue conflicts hence extraneous to arbitration.

III. The Total Absence of Predisposition is indeed Utopic

It is true that no human being can approach legal issues with an absolutely pristine mind and no preconceptions.[3] It has been argued that judges always bring a myriad of personal preference and experience to their cases.[4] It can even be argued that judges work in reverse, first reaching a conclusion of what is fair or should be decided, and then working backwards to build a formal basis or justification for that conclusion. In the foregoing, judges are no different from arbitrators. Both will also be inevitably influenced by what they perceive to be fair and just in any given case.[5] But that should not lead to the conclusion that arbitrators can or should approach cases exactly as judges do.

Even if one embraces the distinction between judicial activism and restraint, advocating for the latter, it is very difficult for judges not to allow their personal views about public policy, among other factors, to somewhat influence their decisions even if subconsciously. Some judges may be more empathetic about openly admitting that influence, but it is within the

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[3] *See*, Solove, Daniel: «Postures of Judging: an Exploration of Judicial Decisionmaking». *9 Cardozo Studies in Law & Literature* 173 (1997).

[4] *See*, Sisk, Gregory; Heise, Michael and Andrew Morris: *Charting the Influences on the Judicial Mind: an Empirical Study of Judicial Reasoning*. *New York University Law Review*, volume 73, n.º 5 (1998).

[5] In the same *STMicroelectronics vs. Credit Suisse Securities* case for instance, one can believe that the actions of certain individuals previously associated with Credit Suisse Securities sounded so egregious that judges may have subconsciously resisted an attempt to vacate an arbitral award adverse to Credit Suisse Securities. The arbitral award found that those individuals violated a clear investment mandate and even falsified e–mails to cover their tracks.

inherent nature of human beings to have distinguishing behavioral and emotional characteristics.

Legal minds do not exist in a hypothetical primary blank or empty state before receiving outside impressions. That is why issue conflicts should be treated very carefully and perhaps with some general skepticism before disqualifying an arbitrator. But it is important, in the case of arbitrators, to recognize that predispositions can amount to bias more easily than in the case of judges. For an issue conflict to disqualify an arbitrator, a predisposition must equal a bias, that is, a strong sentiment – or reasonable appearance thereof – not based only on reason, leading to a prejudice and a preconceived conclusion without just grounds and sufficient knowledge of the relevant case.

IV. Investment Treaty Jurisprudence on Issue Conflict and the IBA Guidelines

The jurisprudence in investment treaty arbitration has clearly approached issue conflicts as a matter of independence and impartiality, taking into account the facts of each case, and not paying particular attention to differentiating those two terms. Issue conflicts have been particularly intense in investment arbitration because cases involve bilateral investment treaties with very similar provisions, with most ICSID awards made public, and the availability of a limited number of arbitrators with vast experience.

Article 57 of the ICSID Convention provides that a party may challenge an arbitrator on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14, which requires that arbitrators may be relied upon to exercise independent judgment. The Spanish text of Article 14 states that arbitrators must inspire full confidence ("*inspirar plena confianza*"). Comparatively, under Article 11 of the UNCITRAL Arbitration Rules a person nominated to serve as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality and independence. The existence of justifiable doubts is ground to challenge an arbitrator under Article 12(1) of the same Rules.

The IBA Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines) state that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment. If circumstances exist that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence (General Standard 2(b), then an arbitrator may be disqualified. The personal belief of an arbitrator as to his or her independence is irrelevant for a third person's point of view when dealing with a duty of the arbitrator to disclose potential partiality issues. The IBA Guidelines contain colored lists ranging from red to green, with orange in the middle, which may give rise to conflicts of interests or justifiable doubts, with red being the gravest and green the least strict.

The IBA Guidelines are not applicable as binding in investor–state arbitration, particularly because arbitrators, even if always – or almost always – lawyers in practice, are not technically required to be authorized to practice law by the ICSID Convention or the UNCITRAL Arbitration Rules. Most of the times, the arbitrators are not formally authorized to practice law in the jurisdiction of the respondent state or of the claimant's nationality. There are, however, precedents in which the IBA Guidelines have been persuasively followed in investment arbitration.

In *ICS Inspection and Control Services Ltd (United Kingdom) vs. The Republic of Argentina* the appointing authority designated by the Permanent Court of Arbitration, Mr. Jernej Sekolec, ruled that a conflict was sufficiently serious to give rise to objectively justifiable doubts as to the impartiality and independence of an arbitrator because the facts fit more than one scenario of the Orange List of the IBA Guidelines[6]. In *Perenco Ecuador Limited vs. the Republic of Ecuador* the IBA Guidelines were applied pursuant to an express agreement of the parties and served as basis to disqualify an arbitrator[7]. Even if the IBA Guidelines have no direct statutory value, they have been taken into account to try to harmonize and unify standards in international arbitration.

Probably the most important precedent about issue conflict in investment arbitration is *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia vs. The Republic of Argentina*[8], relating to academic writings of Professor Campbell McLachlan, a New Zealand national, who was nominated to serve as arbitrator by the Republic of Argentina. The subject matter of that case related to the most favored nation (MFN) clause in the Argentina–Spain bilateral investment treaty, about which Professor McLachlan had written in a book he co–authored and a legal article he wrote. Professor McLachlan had stated in his academic discourse that a previous arbitral award about that very same

[6] In this case, the claimant appointed Mr. Stanimir A. Alexandrov as an arbitrator. Mr. Alexandrov disclosed that: (i) his law firm had in the past represented an affiliate of claimant even though he was not personally involved in that past representation; and (ii) his law firm and he were personally involved in the ICSID case of Compañía de Aguas del Aconquija S.A. and Vivendi S.A. vs. Argentine Republic, ICSID Case No. ARB/97/3, representing claimants adverse to the Argentine Republic. The appointing authority noted that those circumstances as disclosed fit sections 3.1.2 and 3.4.1 of the orange list of the IBA Guidelines, and therefore decided that the conflict in question was sufficiently serious to give rise to objectively justifiable doubts as to Mr. Alexandrov's impartiality and independence. The challenge against Mr. Alexandrov was sustained. Decision on Challenge to Arbitrator dated December 17, 2009. Consulted at: http://italaw.com/documents/ICS ArbitratorChallenge.pdf in July of 2011.

[7] In this ICSID case No. ARB/08/6, the Secretary–General of the Permanent Court of Arbitration (case No. IR–2009/1, decision dated December 08, 2009) upheld a challenge against Judge Charles N. Brower stating that from the point of view of "a reasonable third person having knowledge of the relevant facts" the comments made by the arbitrator in a published interview constituted circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence. The parties to the arbitration had agreed to circumvent the procedure of Articles 57 and 58 of the ICSID Convention and follow the IBA Guidelines. Judge Brower was disqualified because he was seen as referring to Ecuador as one of several "recalcitrant host countries," which was considered pejorative.

[8] ICSID case No. ARB/07/26, decision of August 12, 2010.

MFN in the case *Maffezini vs. Spain* was "heretical." The co–arbitrators who decided on the challenge to Professor McLachlan held that his previous writings did not show a "manifest" lack or independence and impartiality, as required by articles 14 and 57 of the ICSID Convention, because he had criticized prior arbitral awards (cases) and not treaties. The challenge was dismissed.

Another relevant precedent is *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. vs. The Republic of Argentina*.[9] In this case, a challenge to Swiss arbitrator Gabrielle Kaufmann–Kohler was based on a previous arbitral decision which was allegedly flawed against one of the same parties, purportedly revealing her lack of impartiality for purposes of Articles 14 and 57 of the ICSID Convention. The challenge was dismissed, stating that an arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial. The participation of an arbitrator in a unanimous decision against the same party was not deemed sufficient to establish partiality.

V. The French ICC Perspective

The jurisprudence of French courts, which is particularly relevant because Paris is an important forum for arbitration as the location of the ICC headquarters, has approached issue conflicts with special attention to the circumstances of each case. Article 1520 of Decree 2011–48 of January 13, 2011, which contains the French Law governing arbitration and substituted former article 1484 of the French Code of Civil Procedure, provides that an arbitral award may be vacated, *inter alia*, if the arbitral tribunal was not properly constituted or due process was violated. Under the same Law, before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality and shall promptly disclose any such circumstance that may arise after accepting the mandate. The ICC Rules of Arbitration contain very similar language about independence and disclosure by arbitrators in their Article 7.[10]

Cases have been traditionally analyzed in France by reviewing whether arbitrators have demonstrated excessive vehemence or systematic hostility to a party in prior professional debates.[11] The analysis has been linked to whether

[9] ICSID case No. ARB/03/19, decision of October 22, 2007.

[10] Article 7. [...] Every arbitrator must be and remain independent of the parties involved in the arbitration. [...] Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration. [...] *See*, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

[11] Decision of the Paris Court of Appeals dated July 05, 1990 in *Société Uni–Inter vs. Société Maillard*.

the disclosure by arbitrators was sufficient, but not always equating improper disclosure to a presumption of lack of independence.[12] Disclosure, in and of itself, does not necessarily mean that an arbitrator cannot be neutral. French Courts have not dwelled on making a difference between "real danger of bias"[13] and "apprehension of bias"[14] (probability vs. possibility of bias) on which Australian courts have debated,[15] but do seem to require something graver than apprehension or remote fear of bias to disqualify an arbitrator.

VI. The Difference between Judges and Arbitrators *vis–à–vis* Issue Conflicts

In an ideal absence of corruption, judges will receive a stable and constant compensation from a government apparatus regardless of the number of cases they take or analyze in any given year. Judges are usually required to dedicate their professional activities to the bench on an exclusive basis. In contrast, arbitrators can, and some often do, switch roles to advocates or independent legal experts and earn more fees if they take and sit on a larger number of cases. Arbitrators have a human incentive to market their services, even if indirectly, by making themselves better known and developing certain reputations.

International arbitration forums and mediums normally act as loose associations of persons who reciprocally support each other, meet periodically, and share the common characteristic of wanting to be involved in more cases in one way or another, and earn more fees. With the limited exception of a relative few individuals who can take the decision to act only as arbitrators in their professional lives,[16] there is a revolving door that allows many arbitration specialists to repeatedly switch their functions from case to case from arbitrators to party advocates to independent experts. This role reversal has a simple explanation: a legitimate desire to earn as much fees as circumstances permit and obtain professional or academic recognition.

The role reversal does present certain unique challenges. For instance, the legal outcome of a case, even if in the form of a confidential award not bind-

[12] *See*, decision from the Paris Court of Appeal dated January 12, 1996 in *Government of Qatar (Ministry of Municipal Affairs) vs. Creighton Ltd (a U.S. company)*, which dismissed an application to set aside arbitral awards.

[13] *Gough* (1993) by Lord Goff, 2 WLR 883.

[14] Sussex Justices (1924) by Lord Hewart, 1 KB 256.

[15] *See*, http://www0.hku.hk/law/conlawhk/sourcebook/admlawcases/Gough.htm.

[16] While there is no direct evidence to scientifically support that only a few individuals act solely as arbitrators, it should be noted, for instance, that from the list of arbitrators currently maintained by ICSID no person is identified solely or simply as "arbitrator" (*see*, www.worldbank.org/icsid). Also, all the 600 members of www.iaiparis.com list some "experience as counsel" in their résumés. However, many positions and experiences identified by those bodies may well refer to past instances. A study by Brazilian Professor José Augusto Fontoura Costa (*Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, at: Oñati Socio–Legal Series, v. 1, n. 4; 2011) shows that appointment of arbitrators to ICSID tribunals from 1995 to 2009 was more or less evenly divided among persons with backgrounds in "private," "government," and "academic" sectors.

ing for other parties, can later be used by the arbitrator, in a different role, as persuasive precedent to argue the position of a client in another case. Even if most arbitral awards are theoretically confidential, there are publications that contain some abstracts and quotable references to international arbitration awards.[17] Also, an arbitrator may be reluctant to rule in a direction that may indirectly hurt the position of a client in another case or that, even worse, may affect his or her ability to attract certain clients. Judges normally do not have that preoccupation.

That is very relevant considering that arbitration is more casuistic than courts, even than courts for which the principle of *stare decisis* does not apply: arbitration normally focuses on resolving specific cases based heavily on their facts, with less attention to precedent cases. In domestic commercial arbitration, awards are generally kept confidential and it is more difficult to research substantive issues based on precedent awards. Arbitration positively recognizes that separating law from facts often sounds easier that it actually is. Arbitrators have less strict parameters than judges to decide what the law is in any given case and how it should be amalgamated with the facts, particularly when arbitrators are empowered to decide *ex aequo et bono*.[18]

But even in arbitrations of Law, for which most prominent arbitration rules expressly instruct arbitrators to decide in accordance with applicable law, in the United States –for instance– courts normally vacate an arbitral award only if the disregard of applicable law is "manifest," thereby allowing sometimes room for several possible interpretations of the law.[19] Modern domestic arbitration laws normally contain no provision requiring or controlling consistency in the application of law, or lack thereof, or merit reasons, as causes to vacate arbitral awards. In investment arbitration, the so–called Argentine state of necessity cases illustrate that arbitral tribunals can reach opposite and incompatible positions on virtually identical facts.[20]

All those characteristics of arbitration as dispute resolution mechanism are not negative. But they do, in or view, dictate that impartiality, while equally important for arbitration and courts, must be more carefully scruti-

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[17] See, for instance: Collection of ICC arbitral awards, 1996–2000, edited by Jean–Jacques Arnaldez, Yves Derains and Dominique Hascher, Kluwer Law International, 2003, 617 pages. In investment arbitration, ICSID publishes most arbitral awards on–line at its internet webpage.

[18] Even if one advocates, as we do, for the general philosophic recognition of the manifest disregard of applicable law as basis to vacate arbitral awards, it should be remembered that the United States Supreme Court has suggested that courts must be generally deferential toward arbitral awards and held that Sections 9 to 11 of the U.S. Federal Arbitration Act provide the exclusive grounds for judicial review of arbitral awards. *See*, Hall Street Associates LLC vs. Mattel, Inc. (128 S.Ct. 1396 (2008).

[19] See, *Willemijn Houdstermaatschappij*, 103 F.3d at 12.

[20] In *LG&E Capital Corp et al vs. Argentina* (ICSID case ARB/02/1) the tribunal considered that Argentina's financial crisis of 2001–02 amounted to a state of necessity (award dated October, 03, 2006). With identical facts, the tribunal in *CMS Gas Transmission Company vs. Argentina* (ICSID case ARB/01/8) reached the opposite conclusion 18 months earlier (award dispatched on May 12, 2005). The *dispositif* of the latter was subsequently partially annulled by decision of an *ad–hoc* committee on September 25, 2007.

nized and clarified in arbitration. A satisfactory impartiality can in practice be more difficult to reach by an arbitrator that often switches roles as party advocate, than by a judge. A desire to earn more money normally does not influence issue conflicts for judges, while that desire can extort psychological pressure and be an important factor for arbitrators. The United States Court of Appeals for the Second Circuit may have missed that general point in *STMicroelectronics, N.V. vs. Credit Suisse Securities (USA), LLC.*

VII. Difference in Approach to Issue Conflict

As mentioned above, the absence of predisposition to legal issues is utopic and unreal for human beings in general. Therefore, for issue conflicts in arbitration it is not relevant to determine if an arbitrator may or may not be generally predisposed to approach legal issues in a colored or non–pristine manner. But it is very important to determine whether a predisposition may have an economic effect for the arbitrator and is therefore harder to overcome than a more general inclination. It is crucial to determine if a predisposition may be equal to bias. The predisposition of arbitrators must be subject to a scrutiny stricter than the one applicable to the predisposition of judges.

Past and present professional, business and other relationships, with the parties and in general, must be analyzed together with "any other circumstance that might cause the reliability [of the arbitrator] for independent judgment to be questioned by a party."[21] It is unlikely albeit not impossible, in our view, that the mere writing of academic papers may serve as sole basis to disqualify an arbitrator for an issue conflict, unless a paper specifically related to the facts or the parties in dispute and not only to general legal issues, or if a position has been argued vehemently as means to achieve academic recognition.

Arbitrators, like judges, must have a substantial and apparent ability to consider and evaluate the merits of each case without relying on factors having no relation to those merits. For arbitrators, the question about issue conflict is whether, according to a reasonable and informed third party, there is an appearance of bias, derived from statements made in activities outside the arbitral decision making, beyond a mere general predisposition. Predispositions that can be rationally connected, beyond simple speculation, to statements made in the course of activities of the arbitrator that produce material fees in other roles are particularly important because they may be tantamount to bias. Each alleged instance of an issue conflict must be analyzed based on its particular circumstances.

In our view, the decision in *STMicroelectronics vs. Credit Suisse Securities* was improperly simplistic in equating arbitrators to judges in generally omitting the lack of predisposition as a requirement of impartiality. The pre-

[21] *See*, Rule 6 of the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID as adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention. Consulted at: www.worldbank.org/icsid in July of 2011.

disposition of arbitrators, unlike the one of judges, can sometimes be connected to the economic result of fee–earning non decision–making activities. Arbitrators are paid only if they are selected to conduct an arbitration; hence it is important to determine if an arbitrator has a financial incentive, albeit indirect, to rule in favor of a particular party. We believe that the court should have analyzed the circumstances of Mr. Duval's prior professional relationships in more detail.

The Court of Appeal, Fourth Appellate District, Division One, of the State of California made a better general analysis of arbitrator predisposition , even if not strictly of issue conflicts, in 2009 in *Coffman vs. Caltran*.[22] In that case, the California court held that the process for selecting arbitrators to hear disputes arising under the California State Contract Act did not necessarily result in arbitrator bias in favor of the state agency. In its analysis, however, the court implicitly recognized that bias could exist if an arbitrator must issue rulings favorable to a repeat party in order to obtain future employment as arbitrators. The court did not reject the issue of predisposition *ab initio* but rather went to the facts of the case to reject the arguments of alleged systematic bias. In the case, Coffman, one of the parties, alleged that "all" arbitrators appointed from a certified panel had a financial incentive to rule in favor of the state and therefore "all" arbitrators were biased. The court held that the broad disclosure and disqualification protections provided by the State Contract Act, and the automatic challenge rights given to parties in some circumstances, provided assurance that an arbitrator who ultimately presides over a public works arbitration hearing would be neutral and acceptable to both parties.

It should be remembered that in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[23] the United States Supreme Court, albeit in a plurality opinion, set aside an arbitral award because of "evident partiality." In that case the Court noted that disclosure is required of an arbitrator if the evidence establishes a "reasonable doubt that the proposed arbitrator would be able to be impartial" and that if an arbitrator undisclosed relationship creates an "impression of bias" an arbitral award may be vacated by a court. It should be remembered also, however, that Justice Byron White expressly said in his concurrent opinion that the Supreme Court did not "decide that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."

[22] *See, Coffman Specialties, Inc. vs. California Department of Transportation*. Super. Ct. No. 37–2007–00081224 CU–MC–CTL (2009)(Docket 053134).

[23] 395 U.S. 145 (1968).