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# THE indian arbitrator

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www.arbitrationindia.org
Tel: +91 484 4017731 / 6570101

## EDITOR'S NOTE

*IIAM is launching the IIAM Community Mediation Service in Kerala by establishing Community Meditation Clinics. It is intended to serve the society to help resolve conflicts and disputes. The CMS Clinics provide trained/certified mediators to facilitate conflict resolution and teach skills that can be utilized in the community to bring peace and reduce stress and anger among neighbours, friends, family and society. IIAM is looking forward to the support of NGO's, Community Organizations, Associations, Clubs, public spirited citizens etc. in establishing CMS Clinics. The CMS program gives the implementation partners, not only the opportunity to proclaim their social commitment and social responsibility, but also gives recognition and name. We welcome you to take part in this exiting attempt of social transition.*



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# 'Mediating Mars and Venus'

## Gender Matters in Mediation - Part I

: TONY WHATLING

*There seems to be a noticeable difference in communication patterns between males and females. The author analyses the principles of linguistics, communication theory and social sciences in the backdrop of mediation, in an effort to develop greater awareness, understanding and questions about the possible implications for mediation practice. The article attempts to address what might in some way account for the language and communication problem of parties in mediation.*

As the two female co-mediators prepared to start on their second meeting with a couple, the male partner produced a pen, notepad and some index cards. One of the mediators asked him about the purpose of these items. The man responded with something along the lines of - *'Well last time we were here, most of the time I didn't have a clue what you three were going on about, and afterwards I realised that because I had got so confused, there were several things I had wanted to talk about that we never got on to, so I want to be able to write some notes this time. The notes on these cards are reminders of what I want to bring up, so that I can make sure they don't get lost again'.*

The mediators skilfully acknowledged his concerns and went on to negotiate a compromise along the lines that, in return for his not taking detailed notes, they would take more care to flip-chart key issues, check with him about understanding through regular summarising, and agree the detail of the outcome summary before ending the session. It was also suggested that if he did still want to take any notes, they would be photocopied at the end, so that everyone had a copy, and also that he should feel free to check his 'cue-cards' regularly to ensure that his key issues did not get lost.

There are obviously many issues worthy of debate here and yet, as the professional practice consultant to the service, I observed the rest of the session, the extent of this mans struggle to stay on the same wavelength as the three females in the room was very apparent, both verbally and non-verbally, from his frequent facial expressions of confusion and incomprehension. In fact the scene was one that could be associated with observing four people converse where one spoke a different first language to the other three, and was constantly struggling to interpret meaning and nuance.

The most noticeable difference in communication patterns between the couple in this instance can be described as – for the female partner, one of thinking and talking in

interconnected 'big pictures' or gestalts. The male partner on the other hand clearly demonstrated a preference for logic and a linear thinking style and for dealing with one issue at a time.

This article will attempt to address what might in some way account for this language and communication problem. What was clear from my observation, and indeed was referred to by the father himself, was that he was less well educated than his partner and the mediators, yet he appeared to be intelligent and what could be described as 'streetwise', so this did not really adequately explain the problem.

For my part I had been interested for some time in Gender communication issues in mediation and had run several workshops on the topic. My primary influences on this topic came from writers such as Deborah Tannen (1991) - and before that the work of Deborah Borisoff and David Victor (1989). Most people are also familiar with the more lightweight pop-psychology text - 'Men are from Mars and Women from Venus, by John Gray, from which I paraphrase the title for this article.

It was seeing and experiencing these issues acted out in the mediation room that took me back to the writings of these and others in the field of linguistics, communication theory and social sciences, in an effort to develop greater awareness, understanding and questions about the possible implications for practice. In this article I shall attempt to focus on some key questions, namely:

1. To what extent do women and men think and communicate differently?

2. What can we learn from the nature versus nurture debate - are such differences genetically or socially constructed?

3. What scientific evidence is there of possible biological and physiological differences?

4. If indeed there are differences, then why might they matter in mediation and what could mediators do to manage them?

As a backcloth to addressing such questions it will help to recognise the value of using generalisations, so as to avoid the negative consequences of stereotyping, without which it becomes very difficult to develop debate and analysis of such often very highly contentious issues.

Developing generalisations has been helpfully described by Brooks Peterson as;

> *'….quite different from stereotypes (and more reliable). With generalisations, we look at a large number of people and we draw certain conclusions from what we see……There are exceptions to every rule but generalisations that come from research and from insights of informed international experts and professionals allow us to paint a fairly accurate picture of how people in a given country are likely (but never guaranteed) to behave'.* Peterson (2004 P27).

The same writer describes a stereotype as;

> '*…usually a negative statement about a group of people…. Stereotypes emerge when we apply one perception to an entire group..* Peterson (2004 P26).

Essentially the key difference between generalisations and stereotypes, is that the former are open to change in the light of contradictory evidence and experience, whereas the latter tend to be rigidly adhered to regardless of new learning.

Try asking a mixed gender audience the question – 'Will all those who, from their everyday experience, believe that women and men think differently and therefore communicate differently, put their hands up now'. You will almost certainly find that the majority of women will have their hands in the air in a split second. Men on the other hand will commonly be slower to react - often raising hands to about shoulder level, as if unsure quite how to respond. Looking very perplexed they tend to say things like 'well it all depends on the circumstances' or `well we need to look at this from a more theoretical perspective'.

I have wanted to write this article for a few years now but have tended to opt for other more straightforward and less contentious topics. Yet why is it that this should be so, in regard to a subject that to most of us is so easily recognised as one of our daily lived experiences, and yet at another level is so hard to pin down to theoretical explanations?

## Electrical circuits and wiring diagrams – the 'Nature' story.

If we start from a position of recognising that there are differences, we can move on to speculate about the extent to which they are the result of nature, - genetic and or physiological - or nurture - socially derived as a result of sex-role stereotyping - or indeed some complex combination of the two.

Moving on to the third of my original questions – 'What scientific evidence is there of possible biological and physiological differences?' What follows is a sample of some of the evidence from the literature.

In their book 'Why men don't listen and women can't read maps' – How we're different and what to do about it`, Allan and Barbara Pease write: *'In this book you will see how science confirms that men and women are profoundly different both physically and mentally – they are not the same. We have investigated the research of leading palaeontologists, ethnologists, psychologists, biologists and neuroscientists. The brain differences between women and men are now clear, beyond all speculation, prejudice and reasonable doubt.'*

The authors go on to acknowledge and give examples of how, for much of the 20th century psychology and sociology proposed that our behaviour and preferences were the result of social conditioning. They also describe chromosomal differences – in a section entitled 'Programming the Foetus' they point out that *'Almost all of us are made up of 46 chromosomes which are like genetic building blocks or a blueprint. Twenty three come from our mother and 23 from our father. If our mother's 23rd chromosome is an X chromosome, (its shaped like an X), and the fathers 23rd is also an X the result is called an XX baby, which is a girl. If the fathers 23rd chromosome is a Y chromosome we'll get an XY baby which will be a boy. The basic template for the human body and brain is female – we all start out as girls – and this is why men have female features such as nipples and mammary glands. At the 6-8 week point after conception, the foetus is more or less sexless and has the potential to develop both male or female genitalia.*' (Pease 1998 p61).

The writers go on to explain this, in far more detail than can be reproduced here, with an account of how genitals and brain are configured by doses or 'units' of either male hormones, particularly testosterone, or in the case of the girl foetus, an absence of this male hormone will form female genitalia. They also go into complex details of how variations in dosages of these hormones can result in variations in brain configurations for male and female in a way which effectively blurs the distinctions i.e. a male brain configuration may emerge as 2/3 male and 1/3 female and similar for a female brain configuration. The writers point out that it is estimated that about 85% - 90% of males have mainly male-wired brains and about 10% - 15% are feminised to a greater or lesser extent. Such variations also apply to women where some 15% develop brains wired for

masculine abilities. The terms 'masculinised' and 'feminised' brain wiring are deliberately chosen in an effort to differentiate the consequences from such behaviour traits as masculinity or femininity.

Whilst the writers acknowledge that our understanding of brain functioning is still very basic, it is now clear that the right hemisphere of the brain is the creative side and controls the left side of the body. The left hemisphere controls logic reason, speech and the right side of the body. Much of the understanding of these differences came from studies of brain damaged patients, *'……men who suffered injury to the left side of the brain frequently lost much or all of their speech and vocabulary skills, whereas women who were similarly brain-damaged did not suffer speech loss to the same extent, indicating that women have more than one centre for speech.*

*Subsequent developments in the use of MRI brain-scanning equipment has led to far greater evidence in differences between man and women. For example the location in the brain of centres controlling not only speech but emotion, and in particular how the bundle of nerves connecting the right and left hemispheres of the brain, the Corpus Callosum is significantly thicker with up to 30% more connections in women than men*, (Roger Gorski, Neurologist – in Pease 1998 p56). Gorsky went on to prove that men and women use different parts of the brain when working on the same task.

*'Research also reveals that the female hormone oestrogen prompts more nerve cells to grow more connections within the brain and between the two hemispheres'* (Pease 1998 p57).

This appears to offer a possible explanation of a greater capacity for what has become known as 'multi tasking', commonly associated with women, - arguably also linked to a greater capacity to assess people and situations intuitively. Men on the other hand incline more towards the 'one job at a time' default position.

Ben Greenstein gives a very similar explanation on chromosomal differences and *concludes 'Whether one likes to hear it or not, there is no doubt that the brains of most, if not all mammals, are sexually differentiated in structure. That is to say, the wiring is different in males and females*, (Greenstein 1993 p49).

*(... to be continued)*

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*(Author: Tony Whatling is the Director of 'TW Training Works' Training & Consultancy', UK, with over 30 years experience as a family mediator and trainer. This Article was originally Published in College of Mediators Newsletter Issues 7 Feb. 2012)*

## The Lighter Side

A grandmother is giving directions to her grown grandson who is coming to visit with his wife:

"You come to the front door of the apartment complex. I am in apartment 14T. There is a big panel at the front door. With your elbow push button 14T. I will buzz you in. Come inside, the elevator is on the right. Get in, and with your elbow hit 14. When you get out I am on the left. With your elbow, hit my doorbell."

"Grandma, that sounds easy, but why am I hitting all these buttons with my elbow"?

"You're coming empty handed?"

Article

# Can an International Arbitrator dual up as a Counsel: Issue of Independence and Impartiality

: GANDHARV MAKKER

*Now it is common to find an International Arbitrator involved in the capacity of a counsel or advising one of the parties. When an arbitrator duals up as a counsel, questions may be raised regarding his independence and impartiality. To date, the publicly available outcomes of these challenges have been varied, but indicate that there currently is no clear or consistent regulation of arbitrators' abilities to change hats. The author looks at the issue based on decisions pertaining to the dual role as an arbitrator and counsel.*

These days it is very common to find an International Arbitrator involved in the capacity of a counsel or part of the law-firm who has advised or is advising one of the parties, especially in relation to arbitrations involving a State party. When an arbitrator duals up as a counsel, questions may be raised regarding his independence and impartiality. The way this practice questions the Rule of law cannot be put in better words than how *Judge Thomas Buergenthal* of the *International Court of Justice* (ICJ) described it:

"I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments - the Bilateral Investment Treaties, for example - are regularly at issue in different cases before it. These revolving-door problems - counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator - should be avoided. *Manus manum lavat*, in other words you scratch my back and I'll scratch yours, does not advance the rule of law."[1]

To date, the publicly available outcomes of these challenges have been varied, but indicate that there currently is no clear or consistent regulation of arbitrators' abilities to "change hats."[2]

**(Footnotes)**

[1] Buergenthal, T., (2006, December), 'The proliferation of disputes, dispute settlement procedures and respect for the rule of law', *Transnational Dispute Manangement, 3*(5)

[2] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., 'Arbitrator Independence and Impartiality: Examining the dual role

It would be apposite to discuss here the view taken by the IBA Guidelines and the Burgh House Principles on the issue. The remnants of this issue are visible in both the waivable red list and the orange list of the IBA rules. The issue of arbitrator serving or previously served as a counsel has been scattered in the two lists under the IBA Guidelines. Clauses 2.1 and 2.3 under the waivable red list elucidate the relationship of the arbitrator to the dispute, and arbitrator's relationship with the parties and the counsel respectively. Clauses 3.1 and 3.2 under the Orange list represent previous services for one of the parties or other involvement in the case, and current services for one of the parties respectively. However, on a closer scrutiny instances of conflict under both the lists may overlap and look repetitious, yet the guidelines provide quite an exhaustive list on the instances of the dual role of the arbitrators, doubling up as counsels. Though these instances do not require mandatory disclosure, and may not be able to sustain a challenge on its own, yet if they are not disclosed then it can lead to a further inquiry.

While the *IBA Guidelines* seem to have been shaped with a view towards facilitating continuation of the status quo in international arbitration, the *Burgh House Principles* appear less affected by such considerations.[3] The IBA Guidelines' General Standard 6, for instance, explicitly distinguishes between arbitrators and their law firms for the purpose of determining whether conflicts of interest exist or disclosures should be made.[4] This dampens the IBA Guidelines' impact on the current system in which arbitrators are frequently associated with large law firms and both the arbitrators and their associated firms often concurrently serve as counsel in other arbitration matters.[5] In contrast, the *Burgh House Principles* do not similarly shield judges from imputation of conflicts.[6] This can be seen in Principle 11 which flatly prohibits judges from sitting in a case if either they, *or any persons or entities closely related to them*, have a material personal, professional or financial interest in the outcome of the matter.[7] Principle 9.2 of the Burgh House Rules stipulate: "Judges shall not serve in a case with the *subject-matter of which they have had any other form of association* that may affect or may reasonably appear to affect their independence or impartiality" (emphasis added).[8] Principle 14 provides for disclosure by the judges regarding the past and present links to the party or the case. One aspect of the Burgh House Principles relevant to arbitration, but not addressed in the IBA Guidelines, is the role of institutions.[9] These principles mandate each court to "establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case."[10] Such tasks are undertaken by the arbitration rules and procedures in the field of arbitration.

**(Footnotes)**

of arbitrator and counsel, Published by the International Institute for Sustainable Development' (2011), http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf, visited 15th July 2011.

[3] Ibid, page 29

[4] Ibid, page 30

[5] Ibid. See also General Standard 6 & Explanation to General Standard 6, IBA Guidelines on Conflicts of Interests in International Arbitration, Approved on 22 May 2004 by the Council of the International Bar Association, to be hereinafter referred to as the IBA Guidelines.

[6] Ibid, n. 3, page 30

[7] Principles 11.1 & 11.2, Burgh House Principles, www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf visited on 2 July 2011.

[8] Ibid., Principle 9.2, Burgh House Principles.

[9] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 3

[10] Principle 14.2, Burgh House Principles, n.7

It would be appropriate to analyze the decisions pertaining to the dual role as an arbitrator and counsel. Cases falling under this heading consist of matrices of facts which are diverse and the decisions thereupon are scattered. Such conflicts of interest would involve both arbitrators' relationship with one of the parties as well as the issues in the case.

In the case of *ICS v. Argentina*[11], the Secretary-General of PCA as the appointing authority had designated Mr. Jernej Sekolec as appointing authority in this matter for all purposes under the UNCITRAL Rules.[12] Argentina challenged the claimant-appointed arbitrator, Mr. Alexandrov, on the ground that his and his law firm's concurrent representation of Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. in a separate, long-running case against Argentina gave rise to justifiable doubts as to the arbitrator's independence and impartiality.[13] The challenge was sustained by the appointing authority. The IBA Guidelines were resorted to in the decision and Sekolec found that the that the facts underlying Mr. Alexandrov's disclosure were reflected in both of the scenarios set forth in the Orange list, i.e., Section 3.4.1 ("[t]he arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties") and Section 3.1.2 ("[t]he arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter"). It was held that the conflict in question is sufficiently serious to give rise to objectively justifiable doubts as to Mr. Alexandrov's impartiality and independence.[14] This decision therefore illustrates how appointing authorities or others evaluating challenges can use the *IBA Guidelines* to inform application of the arbitral rules, and can also take advantage of the flexibility inherent in the guidelines to account for unique aspects of investor-State arbitration, including the repeat occurrence of specific issues.[15]

The issue of a law firm associated with one of the arbitrators and simultaneously pursuing a separate claim against the same respondent host State, came up in the case of *CEMEX v. Venezuela*[16]. However, the issue could not be adjudicated on merits and the proposal was dismissed on procedural grounds. Venezuela did not file its proposal to disqualify Mr. Von Mehren "promptly" within the meaning of ICSID Arbitration Rule 9(1) and that therefore it has waived such objection under ICSID Arbitration Rule 27.[17]

A slightly contrasting view with regard to dismissing the proposal for timelessness and disclosure requirements was taken in *Gallo v. Canada*[18] which is a Chapter 11 NAFTA decision. The claimant alleged that Thomas's decision to continue providing legal services to Mexico following his appointment in the *Gallo* arbitration gave rise to justifiable doubts as to his impartiality or independence, given Mexico's right under Article 1128 of the NAFTA to intervene in *Gallo* on questions concerning interpretation of the NAFTA.[19] The Secretary-General of ICSID who was the adjudicating authority found that the Claimants had raised the objection timely. It held that, "allowing the Respondent to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of the continuing duty to disclose. This would unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator."[20] The decision concluded that for the purposes of assessing timeliness, the clock started running on the date on that the arbitrator informed the parties of his advisory work that raised the conflict issues.[21] Based on that date, the respondent had filed the challenge in a timely manner.[22] While discussing the merits, the adjudicating

**(Footnotes)**

[11] *ICS Inspection and Control Services Limited v. The Republic of Argentina*, Decision on challenge to Mr. Stanimir A. Alexandrov,, December 17 ,2009, http://italaw.com/documents/ICSArbitratorChallenge.pdf visited on 1st August 2011.
[12] Ibid, page 3
[13] Ibid.
[14] Ibid.
[15] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 3
[16] *Cemex Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. Arb. 08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, (Oct. 26, 2009), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C420
[17] Ibid, para 45
[18] *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC (NAFTA Ch. 11 Arb. Trib. Oct. 14, 2009), *available at* http://arbitration.fr/resources/Vito.Gallo.v.Canada.Arbitrator.Challenge.pdf
[19] Sharpe, J.K., 'Vito G. Gallo v. Canada— Challenge of Arbitrator (ICSID), Introductory Note', *International Legal Materials,* Vol. 49, No. 1 (2010), pp. 23-31, http://www.jstor.org/stable/10.5305/intelegamate.49.1.0023
[20] *Gallo v. Canada* (2009), n. 106, para 24
[21] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 90
[22] Ibid.

authority applied the "reasonable and informed third party" and "fair minded, rational, objective observer" standards under the IBA Guidelines and held that there would be justifiable doubts about Mr. Thomas' impartiality and independence as an arbitrator if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration.[23]

*Amco Asia v. Indonesia*[24], the first case to be adjudicated by ICSID, contributed two distinct principles to the ICSID jurisprudence: "confirmation of the de minimis exception to the rule of disqualification for prior services" and "the strict interpretation of the manifest lack of independent judgment standard".[25] Both these interpretations came under consideration in the *Vivendi case*[26], where the two members of the ad-hoc committee in the annulment proceedings after assuming jurisdiction to determine the challenge to the President of the committee, Mr. Fortier, concurred with the first principle and disagreed with the second. In the *Amco Asia case*, the two arbitrators while interpreting Art. 57 of the Convention laid stress on the term "manifest" which they held was "not a possible lack of the quality, but . . . a highly probable one."[27] In their view, legal advice given by someone who had never been "regular counsel of the appointing party" was minor and had no bearing on the reliability of the arbitrator; nor could the links between the two law firms "create any psychological risk of partiality".[28] Thus Mr. Rubin's lack of reliability was not manifest; indeed, in their view, it was not even reasonably apprehended.[29]

In the *Vivendi case* (2001), the two arbitrators diluted the strict test of the *Amco case* and showed an inclination towards the Sussex justices test. It was held that the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member.[30]

**(Footnotes)**

[23] *Gallo v. Canada* (2009), n. 18, para 36

[24] ICSID Case ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, Decision on the proposal to disqualify an arbitrator, of 24 June 1982, unpublished

[25] Luttrell, S., *Bias challenges in international commercial arbitration: the need for a 'real danger' test*, published by Kluwer Law International (2009)

[26] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the challenge to the President of the Committee, 3rd October 2001

[27] Tupman, M., "Challenge and Disqualification of Arbitrators in International Commercial Arbitration", *ICLQ*, v. 38, 1989.

[28] Ibíd.

[29] Ibíd.

[30] Ibid, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (2001), n. 26, para 28

## Think ... Letters

| | | |
|---|---|---|
| The most selfish 1 letter | – "I" | – Avoid it |
| The most satisfactory 2 letters | – "WE" | – Use it |
| The most poisonous 3 letters | – "EGO" | – Kill it |
| The most used 4 letters | – "LOVE" | – Value it |
| The most pleasing 5 letters | – "SMILE" | – Keep it |
| The most spreading 6 letters | – "RUMOUR" | – Ignore it |
| The most hardworking 7 letters | – "SUCCESS" | – Achieve it |
| The most enviable 8 letters | – "JEALOUSY" | – Distance it |
| The most essential 9 letters | – "PRINCIPLE" | – Have it |
| The most divine 10 letters | – "FRIENDSHIP" | – Maintain it |

All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently.[31] If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld.[32] Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not "manifest".[33]

It must be noted that in both *Amco* and *Vivendi*, 'inference' was expressly rejected as a basis for challenge. However, in *SGS v. Pakistan*[34] the two arbitrators held otherwise. Interpreting Article 57 of the Convention the two arbitrators concluded that, "the party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made."[35] Significantly the word manifest was taken as meaning 'clearly and objectively'; the deciding members identified its function as a test for whether the inference that independence is lacking should be drawn.[36]

A similar situation arose in an UNCITRAL dispute, *Eureko v. Poland*[37] where Judge Schwebel was challenged on the ground of having a close professional relationship with, but was not an attorney of, the law firm, Sidley Austin Brown & Wood ("Sidley Austin"), which was then representing claimant Cargill Corporation in another investor-State dispute against Poland. The Belgian Court of Appeals stated that "Mr. Schwebel has his own professional integrity which, when he is an arbitrator, can be considered as more important than his sensibility and the goals he pursues as a counsel, which he can share with the members of the firm Sidley Austin."[38] The appellate court's language suggests that it based its decision on its faith in Judge Schwebel's integrity and its belief that separating the two roles - arbitrator and counsel - was merely a matter of will.[39]

A view opposed to the *Eureko v. Poland case*, was taken in *Telekom Malaysia v. Ghana*[40], another UNCITRAL case. Although the Secretary-General of PCA rejected the challenge, the challenge was later upheld by the District Court of Hague who applied the Dutch law which is similar to the UNCITAL Model law, the law which the Secretary-General of PCA applied. The Court held: "Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Morocco award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated."[41] The court thus recognized the issue conflicts that would arise if the arbitrator were arguing one position as counsel but obligated to remain open and unbiased toward the opposing opinion as an arbitrator.[42] The decision also affirms and applies the general rule that the appearance of bias, not just actual bias, can support a challenge.[43] It also shows that not only this ground of disqualification can be interpreted differently by different adjudicating bodies, but the same set of rules can also be interpreted in a different way by the same or different adjudicating bodies. This diversity is a characteristic feature of arbitrations that involve a state party and sets it apart from commercial arbitration, where the decisions are somewhat more consistent.

**(Footnotes)**

[31] Ibíd.

[32] Ibid, para 25 | [33] Ibíd.

[34] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (December 19, 2002) 8 ICSID Rep. 398, 402 (2005)

[35] Ibid.

[36] Ibid.

[37] *Republic of Poland v. Eureko*, RG 2006/1542/A, 22 December 2006

[38] Verbruggen, C. (2008, February), Belgian court confirms independence of Judge Schwebel, *International Arbitration Newsletter*.

[39] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 3

[40] *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667

[41] District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No., HA/ RK 2004.667, Decision of 18 October 2004, reprinted at 23 ASA Bulletin 186, 192 (2005).

[42] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 3

[43] Ibid.

Another striking feature that is quite surprising is that in certain cases like *Azurix v. Argentina* (2006) which involved a similar dual role challenge was referred to PCA by the Chairman of the ICSID Administrative council; the challenge was rejected without providing any reasons for the rejection.[44]

In *Vivendi v. Argentina*[45], Argentina objected to Vivendi's reliance on an award issued in *Eureko v. Poland* on the ground that the *Eureko* award was co-written by Judge Stephen Schwebel, one of Vivendi's lawyers, while the *Vivendi* arbitration was underway.[46] Argentina requested that all references to the *Eureko* award be stricken from the record in *Vivendi*, questioning the ability of Judge Schwebel, or indeed, of any arbitrator, to draft an award in one proceeding without being affected by the impact that award might have in another proceeding in which similar issues are raised and in which he was acting as an advocate. The tribunal in the *Vivendi* case nonetheless cited the *Eureko* award, among others, in its own award, thereby at least implicitly rejecting Argentina's argument.[47]

After analyzing the cases referred to above, one chief observation that comes out is that there is uncertainty with regard to how the dispute would proceed, which is evidenced from the fact that the arbitrators accepted appointments with full knowledge of their dual roles, and in many cases even refused to withdraw when a challenge was filed against them. Although certain decisions have, in fact, recognized that the dual arbitrator/ counsel role is problematic and can warrant a successful challenge, the rules regarding disclosure and disqualification nevertheless remain unclear.[48] Exacerbating the resulting uncertainty and further threatening the proceedings' legitimacy, many of the decisions are either kept secret or issued without supporting reasons.[49]

Nevertheless, this ground raises justifiable doubts with regard to an arbitrator's independence. Advocates of separating the pool of arbitrators from the pool of advocates have correctly argued that such a separation would go a long way toward alleviating problems created by both the "club" perception and issue conflicts, thereby restoring much of the confidence in international arbitration that seems to have been lost.[50]

**(Footnotes)**

[44] Sheppard, A. (2009), Arbitrator independence in ICSID Arbitration. Also see Binder, C.; Kriebaum, U.; Reinisch, A. & Wittich, S., (Eds.), *International investment law for the 21st century: Essays in honour of Christoph Schreuer,* Oxford: Oxford University Press, p.146.

[45] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/07/ 3), Award, 20 August 2007

[46] Hranitzky, D.H. and Romero, E.S., The 'Double Hat' Debate In International Arbitration- Should advocates and arbitrators be in separate bars?, *New York Law Journal*, June 14, 2010, www.nylj.com

[47] Ibid.

[48] Bernasconi-Osterwalder, N.; Johnson, L. and Marshall, F., n. 3

[49] Ibid.

[50] Hranitzky, D.H. and Romero, E., n. 46

*(Author: Gandharv Makker LL.M (UK) is a lawyer in India)*


# IIAM Community Mediation Clinics to be launched

IIAM is launching the IIAM Community Mediation Clinics in Kerala. The Mediation Clinics are being formed in association with corporate houses, NGO's, Community Organizations, Associations, Clubs, public spirited citizens etc. IIAM Mediation Clinics enhances access by helping to bring justice to the society. It aims to prevent the underlying conflict (or the need to go to court) and advance compliance of the law in general. People would get a platform near home to settle their cases without the trappings of a court. It helps preserve relationships by avoiding the embarrassment of being hauled into court, and by giving people the opportunity to air concerns that a court would rightly ignore when evaluating a legal claim. Through a system that resolves disputes before it requires adjudication, it is hoped the legal system will be freed up to deal with more serious cases. The Mediation Clinics will have the service of trained and accredited community mediators. The first batch of community mediators has been trained for empanelment with the Mediation Clinics. If you are interested to become a community Mediator or to start a Community Mediation Clinic, contact dir@arbitrationindia.com. For further details, log on to www.communitymediation.in


# Indian Courts not to interfere with Arbitral Proceedings held outside India

A constitutional bench of the Supreme Court of India issued a judgment by which it restricted the scope of interference by Indian courts in arbitrations conducted outside the territorial boundaries of India by excluding the applicability of Part I of the Arbitration and Conciliation Act 1996 to such arbitrations. The Supreme Court, through its September 6 2012 judgment, held that the rationale laid down in *Bhatia International* and *Venture Global* did not flow from the provisions of the Act. The Supreme Court clarified that the law that it had laid down would apply only prospectively to arbitration agreements entered into hereafter - all proceedings arising from agreements dated before September 6 2012 would be subject to the law as it stood before the judgment. The judgment is expected to come to the aid of firms which obtain arbitral awards in their favour abroad but face hurdles as these come under the judicial scrutiny in Indian courts.

# Optional Arbitration Clause declared invalid in Russia

Russia's top commercial court has ruled that an arbitration clause granting one party the additional, unilateral option to bring claims in a competent court is invalid under Russian law.

# International Arbitration Centre proposed in Sri Lanka

An International Arbitration Centre is to be opened in Sri Lanka to attract international arbitrators to the island, according to Justice Ministry Secretary Kamalini de Silva. She said Sri Lanka has been identified as an ideal location for such a centre due to its geographical position.

# Asian-Pacific Mediation Conference 2012 - Hong Kong

Conference titled "Mediation and its Impact on National Legal Systems", scheduled on 16 and 17 November 2012 is being organized and hosted by the City University of Hong Kong with the support of UNCITRAL (United Nations Commission on International Trade Law). The conference will promote the modernization and harmonization of the law and practice of mediation in the region and the expansion of the role of mediation and mediators both within Asian-Pacific and internationally.

The objective of the conference is to provide a collegiate platform where different experiences and ideas can be shared and exchanged. The conference will bring together international legal scholars and experts from around the world to promote a better understanding of the current social, political and legal realities and how mediation law and practice has been developing over time to meet the changing needs and aspirations in the Asian-Pacific region and internationally. For details and registration, see http://www.cityu.edu.hk/slw/APMC2012

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You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to training@arbitrationindia.com