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THE INSIDER ADVERSARY IN INTERNATIONAL ARBITRATION

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Imagine that you are defending the respondent in an international arbitration administered by an institution headquartered in a distant country. The arbitrator is a lawyer at a prominent law firm there. Midway through the proceedings, claimant gives notice that it has appointed a new lawyer to its counsel team. The new lawyer is from the same country as the arbitrator and the institution. You review her curriculum vitae and are surprised to discover that she is the Vice-Chairperson of the very institution where the case is pending. You turn to the institution's rules and discover that under certain circumstances she has the power to unilaterally select arbitrators to serve in proceedings administered by the institution.

You know your client, and this is something that he will want to know about. Before you reach for the phone you imagine the range of possible reactions from him:

- *The arbitration institution is acting against me? The institution is sitting at counsel table for my opponent? I didn't agree to that. Who would ever agree to that?*
- *Your firm drafted the arbitration agreement. Why didn't they warn me that the institution permitted this? Had I been warned, do you think I would have agreed to this institution?*
- *Claimant's lawyer must have advised his client to retain the Vice-Chairperson. Why didn't you give me the same advice? (Also, is it too late for me to retain the Chairperson?)*

You scour the institution's rules for anything that would have put you on notice that the Vice-Chairperson might be allowed to serve as counsel for claimant. Once you are satisfied that the rules contain no such suggestion, you pick up the phone and call your client.

The lack of notice provided by the rules offers little solace to your client, however. As expected he expresses his conviction that claimant's appointment of the Vice-Chairperson means that the arbitration institution itself is sitting at counsel table as his adversary. Because it cannot be said that the Vice-Chairperson was the only lawyer qualified to represent the claimant, your client believes that the claimant must have retained her, at least in part, for the purpose of influencing the arbitrator. He believes that the arbitrator's independence is

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undermined by the potential for the arbitrator or others at his firm to receive, or not receive, future appointments by the Vice-Chairperson. He believes that this presents a conflict of interest between the Vice-Chairperson and the arbitrator.

It is left to you to explain that challenging the appointment of the arbitrator would likely achieve nothing inasmuch as this is an *institutional* conflict in which *any* arbitrator appointed by the institution would have the same conflict. Your client is left with three options: (1) waive the conflict; (2) challenge the Vice-Chairperson's ability to serve as claimant's counsel; or (3) seek to even the playing field by retaining some other high-ranking institutional insider to serve as his counsel.

This fact pattern is not purely hypothetical. It is based on facts taken from an international arbitration recently defended by one of the authors. In that case the respondent challenged the propriety of the institutional insider serving as counsel for claimant. The insider declined to voluntarily withdraw and the arbitrator declined to direct him to do so. For the remainder of the arbitration as far as the respondent was concerned the arbitration institution was sitting at counsel table for his adversary. Although the respondent ultimately won the majority of the case on a summary basis, he continues to believe that the entire process was tainted.

This article begins with the unremarkable assertion that ethical lapses undermine the perceived legitimacy of the arbitral process. It then asserts that institutional double-hatting of the sort described in the above fact pattern opens the door to judicial scrutiny in annulment and enforcement proceedings. Finally, the article concludes by asserting that institutions must either regulate double-hatting by preventing officials with significant appointment power from serving as party counsel, or they must structure their appointment mechanisms in a way that diffuses the power of appointment such that no single official possesses unilateral or even substantial influence over appointments.

I. ETHICAL LAPSES DAMAGE THE REPUTATION OF INTERNATIONAL ARBITRATION

Arbitration represents the gold standard for resolving international commercial disputes. It offers fair and neutral proceedings, as well as awards characterized by finality and capability of enforcement in summary proceedings worldwide. Without fairness and neutrality, the process would lose its legitimacy, parties would flee arbitration, and courts would be less inclined to enforce awards. For these reasons, ethical regulation constitutes a key ingredient for the continued success of international arbitration.

Unfortunately, ethics also remains one of the least developed and most poorly understood subfields within international arbitration.[1] Jan Paulsson describes the topic as the Achilles heel of international arbitration.[2] Doak Bishop observes that

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[1] Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 342 (2002).

[2] JAN PAULSSON, THE IDEA OF ARBITRATION 147 (2013).

"[i]nternational arbitration dwells in an ethical no-man's land. . . . Where ethical regulation should be, there is only an abyss."[3]

The profession has struggled to articulate basic standards of conduct for arbitrators,[4] and it has only recently taken the first, tentative steps to regulate the conduct of counsel in international arbitration.[5] Ethical standards for arbitration institutions represent an even more lightly examined frontier, which is surprising inasmuch as institutions administer the vast majority of international arbitrations, and the proliferation of regional institutions and new entrants creates a need for internationally accepted best practices.

A generation ago, when international arbitration consisted of a small and homogenous group of institutions and international attorneys, "implicit understanding and informal peer pressure effectively substituted for formal [ethical] regulations."[6] Now, however, the "growing ranks of arbitrators have been filled by men and women who are 'in essence business people in search of opportunities,' creating a 'tension between the personal commercial interests of the arbitrators and their public duty to do justice.'"[7] The increase in the number, size, and complexity of arbitration cases has led to a "judicialization of arbitration" in which parties have come to expect more of the procedural guarantees associated with the judicial process.[8] Thus, informal control measures can no longer suffice to maintain neutrality and impartiality of a large, sophisticated and "judicialized" system of arbitration.

Studies identify neutrality and impartiality as the main reasons parties choose international arbitration over litigation.[9] Under these circumstances "[c]onfidence in the [ability to regulate neutrality and impartiality through] ethical standards

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[3] Doak Bishop, Keynote Speech at the International Council for Commercial Arbitration: Ethics in International Arbitration at 1 (June 11, 2010) (transcript available at http://www.arbitrationicca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf), *quoting* Rogers, *supra* note 1, at 341.

[4] Rogers, *supra* note 1, at 342-43.

[5] *See* IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION, Part II (2014); IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION (2013); LCIA ARBITRATION RULES, Art. 18 & Annex to LCIA RULES (2014).

[6] Rogers, *supra* note 1, at 344.

[7] PAULSSON, *supra* note 2, at 148 (quoting Sundaresh Menon, Keynote Address, INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE, ICCA CONGRESS SERIES NO. 17 at 6, 15 (Albert Jan van den Berg ed., 2013)).

[8] Rogers, *supra* note 1, at 349.

[9] *See* 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitration Process, White & Case LLP, http://arbitrationpractices.whitecase.com/news /newsdetail.as px?news=3787; 2010 International Arbitration Survey: Choices in International Commercial Arbitration, White & Case LLP, http://www.whitecase.com/ files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_Internation al_Arbitration.pdf; Corporate Choices in International Arbitration: Industry Prospective, PricewaterhouseCoopers (2013), https://www.pwc.com/gx/en/arbitration-dispute-resolution/ assets/pwc-international-arbitration-study.pdf.

[for] arbitrators and arbitral institutions [becomes] the Alpha and Omega of the legitimacy of the process."[10] Without these qualities, parties lose a primary advantage of arbitration. By parity of reasoning, institutions must regulate ethics to the extent required to maintain confidence in the neutrality and impartiality of the entire process. If institutions do not "embrace their role in protecting" parties' interests by ensuring neutrality and independence, "it is likely that occasional judicial intervention will not be perceived as enough, and pressure will build on political actors to step in and provide stricter regulations . . . result[ing] . . . [in] unwelcome bureaucratization, and a gradual erosion of arbitration's advantages."[11]

II. INSTITUTIONAL DOUBLE-HATTING MAY COMPLICATE JUDICIAL ENFORCEMENT OF AWARDS

Closely following neutrality and independence, studies cite enforceability as a reason that parties choose international arbitration over litigation.[12] Critically, however, enforceability itself depends on the neutrality and fairness of arbitral proceedings. In fact, "the fairness of the arbitral procedure, and the reputation for fairness, of an arbitral centre . . . is at the heart of the arbitral process, and its acceptance."[13] Thus, Article V(1)(b) of the New York Convention establishes a ground to refuse enforcement where the tribunal has not given the resisting party the opportunity to present its case.[14] As the United States Court of Appeals for the Second Circuit has explained, this allows courts at the place of enforcement to apply their own standards of due process, [15] which may differ from the standards tolerated by particular institutional rules. Further, the United States Court of Appeals for the Seventh Circuit has clarified that Article V(1)(b) permits refusal to enforce awards that do not result from an impartial decision-making process.[16] As explained below, double-hatting by senior officials of institutions both interferes with the ability to present one's case and, at the very least, taints the perceived impartiality of the decision-making process.

One requirement of due process is that "the decision-maker must be attentive, open-minded, and free of bias and undue influence."[17] In other words, to satisfy

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[10] PAULSSON, *supra* note 2, at 147.
[11] *Id*. at 149.
[12] *See* Corporate Choices in International Arbitration: Industry Prospective, *supra* note 9.
[13] Chief Justice James Allsop, *International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region*, 2014 FED. J. SCHOL. 22 (Nov. 11, 2014), *available at* http://www.austlii.edu.au/au/journals/FedJSchol/2014/22.html.
[14] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. 330 U.N.T.S. 3 [hereinafter New York Convention], Art. V(1)(b).
[15] Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974).
[16] Generica Ltd. v. Pharm. Basics, Inc. 125 F.3d 1123, 1129 (7th Cir. 1997).
[17] PAULSSON, *supra* note 2 at 90-91.

due process "an arbitrator must provide a fundamentally fair hearing."[18] A minimal requirement of fairness is that parties have "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[19] Thus, the fundamental element of due process is the *meaningful* opportunity to be heard.[20] As explained below, double-hatting by senior officials with substantial power over future appointments of arbitrators casts doubt on the opposing party's access to a "fundamentally fair hearing"[21] that provides a truly *meaningful* opportunity to be heard by the decision-maker.[22]

Admittedly, challenges to international arbitral awards under Article V(1)(b) rarely succeed.[23] However, unlike issues presented by double-hatting, most parties challenging awards rely on alleged procedural missteps.[24] Such challenges generally fail because "arbitrators enjoy a wide latitude in conducting an arbitration hearing."[25]

Typical procedural challenges differ dramatically from the issues created by double-hatting. Whereas most procedural challenges involve the exercise of discretion on peripheral issues that receive great deference from courts in enforcement proceedings,[26] double-hatting by senior officials does not. Instead, double-hatting taints the entire process by depriving the opposing party of any meaningful opportunity to present its case because the institution's senior leadership, quite literally, sits at the opposition's counsel table.

In addition, presenting one's case to a sole arbitrator who depends on opposing party's counsel for future appointments creates at least the appearance of bias. The arbitrator's inherent economic interest in gaining favor from the double-hatting official arguably denies the right to an impartial decision under Article V(1)(b).[27] Parties, and courts in enforcement proceedings, have a legitimate

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[18] *Generica*, 125 F.3d at 1130; *see also* Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992); Hoteles Condado Beach v. Union de Tronquistas, 763 F.2d 34, 40 (1st Cir. 1985); Hall v. Eastern Air Lines, Inc., 511 F.2d 663, 663-64 (5th Cir. 1975).

[19] *Iran Aircraft*, 980 F.2d at 146 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

[20] Bernard Hanotiau & Olivier Caprasse, *Introductory Report*, *in* THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 7, 44 (Emmanuel Gaillard ed., 2010).

[21] *Generica*, 125 F.3d at 1130.

[22] *Iran Aircraft*, 980 F.2d at 146 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

[23] Hanotiau & Caprasse, *supra* note 20, at 45.

[24] *See*, *e.g.*, *Generica*, 125 F.3d at 1130.

[25] Hanotiau & Caprasse, *supra* note 20, at 45.

[26] May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses To Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. 747, 755 (2006) (Courts defer to arbitrators in enforcement proceedings when challenges involve minor procedural errors. "Arbitration panels are free to choose how to conduct a fair hearing because the New York Convention's standards are vague.").

[27] New York Convention, *supra* note 14, at Art. V(1)(b).

expectation of impartiality and fairness in arbitration.[28] Presenting one's case to a tribunal whose impartiality and ability to act fairly are in justifiable doubt is not a meaningful presentation of one's case, and thus, could be subject to non-enforcement by courts.[29]

Moreover, Article V(2)(b) permits refusal to enforce foreign arbitral awards if "recognition or enforcement . . . would be contrary to the public policy of that country." The New York Convention does not define the term "public policy." Due to this lack of clarity, the public policy exception in Article V(2)(b) represents "a catch-all defense for all the other substantive and procedural shortcomings of an international arbitral award or proceeding . . . ."[30]

Importantly, Article V(2)(b) of the New York Convention explicitly permits States to apply their own definitions of public policy.[31] Essentially, "Article V(2)(b) provides 'a certain latitude . . . to national courts to determine on a case by case basis the circumstances when an award cannot be enforced . . . .'"[32] Thus, what violates public policy and permits refusal of a foreign arbitral award in one jurisdiction might not violate another jurisdiction's definition of public policy. Therefore, whether enforcing an award subject to double-hatting would merit non-enforcement under Article V(2)(b) depends on the definition of public policy prevailing in the enforcement forum.[33]

In the United States, courts find that "[e]nforcement of foreign arbitral awards may be denied [under Article V(2)(b)] only where enforcement would violate the forum state's most basic notions of morality and justice."[34] Although courts in the

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[28] Lu, *supra* note 26, at 755, n.55 (quoting ICC 1998 Rules, Art. 15(2) "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case").

[29] Misbah Farid, *Stop! In the Name of Ethics, Before You Break My Bank Account: The "Conflicting" Rights Guaranteed to Parties in International Arbitration by Hrvatska v. Slovenia and Rompetrol v. Romania, and Their Potential As Tactical Weapons*, 20 U. MIAMI INT'L & COMP. L. REV. 163, 167 (2013); *see also* Hrvatska Elektroprivreda v. Slovenia, ICSID Case No. ARB/05/24, ¶ 30; *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2802-12 (2009).

[30] James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHIN. J. INT'L L. 81, 92 (2009), *available at* http://chinesejil.oxfordjournals.org/content/8/1/81.full.pdf.

[31] *Id.*; New York Convention, *supra* note 15, Art. V(2)(b) ("contrary to the public policy *of that country*" (emphasis added)).

[32] Fry, *supra* note 30, at 93 (quoting JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 731 (2003)) (quoting Hong-Lin Yu & Peter Molife, *The Impact of National Law Elements on International Commercial Arbitration*, 4 INT'L ARB. L. REV. 17, 19 (2001)) ("Public policy is a key issue of international arbitration as 'each state has its own rules, which may be different from those of other States. At the same time public policy shifts with time, reflecting the changing values of society.'").

[33] New York Convention, *supra* note 15, Art. V(2)b).

[34] *Parsons*, 508 F.2d at 974; Steel Corp. of the Philippines v. Int'l Steel Servs., 354 F. App'x 689, 694 (3d Cir. 2009); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan

United States read Article V(2)(b) of the New York Convention narrowly, double-hatting in this context arguably crosses the required threshold.[35] Even if there is no evidence of actual bias, "apparent procedural impropriety should not be condoned by finding that no injustice resulted in the particular case, because it leads to loss of confidence in the process . . . ."[36] If enforcing courts are permissive of the appearance of bias, judges and arbitrators could "abandon punctiliousness because they perceive that it would be hard for anyone to prove" actual injustice in any particular case.[37] If decision makers brush over potential impropriety there could be a loss of public confidence in the entire process. Thus, the public policy defense in enforcement proceedings emphasizes the public interest and not just the interests of the disputing parties. In this context, courts could find that enforcing awards where the institution seems aligned with one party might jeopardize public confidence in the arbitral system. After all, "[w]hat is the public to think if a system of justice tolerates, even endorses, a process which disregards [such] apparent [or potential] unfairness?"[38]

In addition to challenges based on due process and public policy, the enforceability of an award may be threatened if the parties were not given advance notice that this type of double-hatting might be permitted. Article V(1)(d) of the New York Convention provides that courts may decline to enforce awards if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ."[39] Arbitration is a matter of contract; therefore, "parties cannot be forced to exceed the limits of those [contracts]."[40]

Hence, the following inquiries seem appropriate in the context of Article V(1)(d): Did the parties agree to an arbitration procedure that permits high-ranking insiders to serve as counsel against them in matters administered by such official's own institution? Did they agree to an arbitral authority whose consideration for future arbitrator appointments might depend on the insider? Can it be fairly said that they agreed to either eventuality if the institution's rules gave no notice that the institution might tolerate such a practice? If not, can it be said that "the composition of the arbitral authority or the arbitral procedure was . . . in

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Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004); Gonsalvez v. Celebrity Cruises, Inc., 935 F. Supp. 2d 1325, 1331 (S.D. Fla. 2013).

[35] Sameer Sattar, *Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?* at 5-6, *available at* http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf (reviewing United States case law reading Article V of the New York Convention narrowly).

[36] PAULSSON, *supra* note 2, at 92.

[37] *Id.*

[38] *Id.*

[39] New York Convention, *supra* note 15, Art. V(1)(d).

[40] Calbex Mineral Ltd. v. ACC Res. Co., L.P., 99 F. Supp. 3d 442, 462 (W.D. Pa. 2015) (citing China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 283 (3d Cir. 2003)).

accordance with the agreement of the parties?"[41] It seems reasonable to conclude that the more "no" answers to these questions the greater the risk that a court might decline to enforce an award under Article (V)(1)(d) of the New York Convention.[42]

In conclusion, double-hatting by high-ranking institutional officials jeopardizes three of the most important reasons that parties choose international commercial arbitration over national litigation: neutrality, independence, and enforceability.[43]

III. CONTROLLING DOUBLE-HATTING OFFICIALS THROUGH INSTITUTIONAL APPOINTMENT STRUCTURE AND REGULATION

For the foregoing reasons, institutions that permit insiders to serve as party counsel should disclose this in their rules and should limit the practice to insiders who lack the power to unilaterally or substantially influence the appointment of arbitrators.

A. *Potentially Vulnerable Institutions*

The China International Economic and Trade Arbitration Commission ("CIETAC") has one Chairman and a number of Vice-Chairmen.[44] CIETAC puts the power of appointment in the hands of one individual, generally CIETAC's Chairman, although each Vice-Chairman may be vested with the Chairman's appointment power.[45] If parties agree to a three-arbitrator tribunal, for example, the parties may either agree upon the arbitrators or rely on the Chairman to appoint the arbitrators.[46] The Chairman essentially has the power over residual appointments. The Chairman will make any appointment required of the institution, subject to those appointments that the Chairman authorizes a Vice-Chairman to make.[47] CIETAC allows unilateral appointments by one individual: either the Chairman or an authorized Vice-Chairman. Therefore, if either the Chairman or a Vice-Chairman vested with the power of appointment were to serve as party counsel in a CIETAC arbitration, he or she would be double-hatting in a manner that would threaten the fairness of the arbitral proceeding.[48]

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[41] New York Convention, *supra* note 15, Art. V(1)(d)
[42] *Id.*
[43] Corporate Choices in International Arbitration: Industry Prospective, *supra* note 9.
[44] Articles of Association of China International Economic and Trade Arbitration Commission (CIETAC), Chapter III, Art. 5, *available at* http://www.cietac.org (Follow the About Us tab to the Articles of Association tab).
[45] CIETAC ARBITRATION RULES, Art. 2(1) (2014), *available at* http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en.
[46] *Id.* Art. 27.
[47] *See generally id.* Arts. 25, 26, 27.
[48] *See, e.g.*, Grant Hanessian, *BRICs, Not CRIBs: The "Rebalancing" of International Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION

The London Court of International Arbitration ("LCIA") leaves its institutional appointments of arbitrators to the LCIA Court.[49] Although the LCIA Court is comprised of up to 35 members,[50] most functions of the court "are performed, on its behalf, by the President, or a Vice President, or an Honorary Vice President, or a former Vice President, or by a 3 or 5-member Division of the LCIA Court."[51] The appointment of arbitrators is carried out by the President or a Vice President.[52] The court has seven Vice Presidents and four Honorary Vice Presidents.[53] Parties may agree in their arbitration agreement to nominate potential arbitrators from which the LCIA Court will make the final selections.[54] In fact, most parties preferred to nominate their arbitrators in 2013.[55] However, if the LCIA Court determines that there is a justifiable doubt as to a nominee's independence and impartiality the LCIA Court may disregard the nomination process and appoint an arbitrator on its own accord.[56] The default position of the LCIA is that, absent party agreement, the LCIA Court will appoint a sole arbitrator.[57] Thus, in the absence of party agreement, the default rule grants the President or Vice President free-ranging power to appoint future arbitrators.[58] There are eight individuals in the LCIA Court who could have unilateral appointment power. If one of those individuals were to serve as counsel in an LCIA arbitration, this would threaten the fairness of the arbitral proceeding.

In arbitrations administered by the Singapore International Arbitration Centre ("SIAC") under the SIAC Rules, subject to party agreement, arbitrators are appointed at the discretion of the President.[59] If a party fails to nominate an arbitrator the President will appoint one on the party's behalf.[60] The "President" as defined by the Rules includes the President of the Court, a Vice President, or the Registrar.[61] Thus, under the SIAC Rules the President, Vice President, or Registrar, makes future appointments. The SIAC has one President, two Vice

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257 (Arthur W. Rovine ed., 2012) (description of a CIETAC arbitration where party counsel was a Vice-Chairman of CIETAC).

[49] LCIA ARBITRATION RULES, Art. 5.7 (2014), *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Organization, LCIA, http://www.lcia.org/LCIA/or ganisation.aspx.

[50] Organization, LCIA, *supra* note 49.

[51] *Id.*

[52] Constitution of the LCIA Court, D(2) (2011), *available at* http://www.lcia.org/LCIA/constitution-of-the-lcia-court.aspx.

[53] The LCIA Court, LCIA, http://www.lcia.org/LCIA/the-lcia-court.aspx.

[54] LCIA ARBITRATION RULES, *supra* note 49, Art. 2.1(v).

[55] Sarah Lancaster, LCIA's 2013 Registrar's Report 4, *available at* http://www.lcia.org/LCIA/reports.aspx.

[56] LCIA ARBITRATION RULES, *supra* note 49, Art. 11.1.

[57] LCIA's 2013 Registrar's Report 4, *supra* note 55.

[58] LCIA ARBITRATION RULES, *supra* note 49, Art. 5.7.

[59] SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC), ARBITRATION RULES, Rule 6 (2013), *available at* http://www.siac.org.sg/our-rules/rules/siac-rules-2013.

[60] *Id.* Rule 8.2.

[61] *Id.* Rule 1.5.

Presidents, [62] and one Registrar.[63] This leaves four individuals who may have the unilateral power to appoint arbitrators in SIAC arbitration proceedings. If one of these four individuals were to serve as party counsel in a SIAC arbitration, it would be difficult to deny at least the appearance of potential bias.

B. *Institutions That Limit Double-Hatting*

The International Chamber of Commerce ("ICC") appears not to expose its arbitration proceedings to double-hatting by officials with unilateral appointment power. The ICC vests the appointment power in the International Court of Arbitration ("Court"). If the parties choose to nominate arbitrators, the Court will confirm their nominations so long as certain requirements are met.[64] In the absence of an agreement that the parties will nominate arbitrators, the Court will appoint either a sole arbitrator or three-arbitrator panel.[65] If the parties require appointment of an emergency arbitrator, the President of the Court will make such appointment.[66]

The ICC disperses the power of appointment away from a single individual. In almost every occasion, the confirmation or appointment is left up to the Court.[67] When the Court makes an appointment, it "shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate."[68] Thus, the Court is not the sole party in the appointment process. It must still consider the proposal of a National Committee or another similar group.[69]

There are some cases under the ICC Rules, however, where the confirmation or appointment is left to one individual. In cases that require emergency arbitrator appointment, the President is solely responsible for such appointment.[70] Although unilateral appointments are limited to the Court's President, if the President were to serve as party counsel the same potential bias mentioned above would exist.[71] However, Article 2 of Appendix II of the ICC Rules regulates the participation of

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[62] SIAC Court of Arbitration, *available at* http://www.siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration.

[63] SIAC CEO & Secretariat, *available at* http://www.siac.org.sg/2014-11-03-13-33-43/about-us/ceo-and-secretariat.

[64] INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, Art. 13(1) (2012), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration.

[65] *Id.* Art. 12(2).

[66] *Id.* Appendix V, Art. 2(1).

[67] *See id.* Art. 13(1), (3); *but see id.* Art. 13(2) & Appendix V, Art. 2(1)(Secretary General may unilaterally confirm nominated arbitrators and President of the ICC Court may unilaterally appoint emergency arbitrators).

[68] *Id.* Art. 13 (3).

[69] *Id.*

[70] *Id.* Appendix V, Art. 2(1).

[71] *See supra* Section II.

the member of the Court in ICC arbitrations.[72] Critically, Article 2(1) states, "The President and the members of the Secretariat of the Court may not act as arbitrator[] or as *counsel* in cases submitted to ICC arbitration."[73] Thus, the ICC uses a combination of structural mechanisms and regulation to prohibit officials with unilateral appointment power from double-hatting.

Of the four major international arbitration institutions discussed above, only the ICC has successfully taken action to prevent double-hatting. The CIETAC, LCIA, and SIAC all vest the potential power of appointment in a single person or small group of people and all of them grant unilateral appointment power. The grant of unilateral appointment power is a structural flaw in the appointment process of these institutions, particularly when coupled with a lack of institutional regulation preventing those with unilateral power of appointment from serving as party counsel. Thus, CIETAC, LCIA, and SIAC arbitrations seem poorly protected from the potential negative effects of double-hatting officials.[74]

Comparatively, the ICC deals with the perils of double-hatting by structurally limiting unilateral appointment powers and, where necessary, prohibiting those with unilateral power from serving as party counsel.[75] The ICC accomplishes this in three steps. First, when confirming party-nominated arbitrators, parties essentially remove some power from the institution[76] because the institution will confirm nominations so long as neither party challenges a nominee for lack of independence or impartiality and the institution believes the arbitrator is qualified.[77] Second, when the ICC makes direct appointment decisions in the normal course of arbitration the Court, not a single individual, makes the final decision. Third, in doing so the Court "*shall* make the appointment upon proposal of a National Committee" or similar group.[78] By requiring the Court to act on the proposal of a National Committee or similar group, the ICC leaves virtually no room for unilateral decision-making in the ordinary course of the appointment process.

Although there are instances in which the ICC rules permit a single individual to possess the unilateral power of appointment or confirmation, the ICC guards against double-hatting by explicitly prohibiting such individuals from serving as counsel in ICC arbitrations.[79] Thus, unlike the other institutions examined above, the ICC utilizes multiple safeguards to insulate its processes from the institutional conflicts created by double-hatting officials. [80]

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[72] *Id.*
[73] *Id.* Appendix II, Art. 2(1) (emphasis added).
[74] *See supra* Section III.A.
[75] ICC RULES OF ARBITRATION, *supra* note 64, Appendix II, Art. 2(1).
[76] *Id.* Art. 12(2).
[77] *Id.* Art. 13(2).
[78] *Id.* Art. 13(1) (emphasis added).
[79] *Id.* Appendix II, Art. 2(1).
[80] It is unclear whether the problems identified in this article are a concern at the International Centre for Dispute Resolution ("ICDR"), a division of the American Arbitration Association. The ICDR Rules provide that the "Administrator" has arbitrator-

IV. CONCLUSION

Institutional commercial arbitration represents the gold standard for resolving international commercial disputes. However, an underdeveloped system of ethical regulation represents an Achilles heel that threatens to undermine the very properties that have contributed to the popularity of international arbitration.[81] In particular, the weak regulation of counsel and the generally non-existent regulation of institutional conflicts have created opportunities for double-hatting by institutional officials who possess unilateral or substantial control over future appointments, thereby creating the appearance that one party's counsel has inappropriately placed their finger on the scales of justice. Additionally, absent explicit regulation, the lack of advance notice that a potentially biased tribunal can be created simply by a party's choice of counsel can blindside parties agreeing to and entering institutional arbitration.

Although many institutions seem vulnerable to double-hatting,[82] the ICC has developed a model that virtually eliminates such peril. The ICC generally diffuses its appointment power away from a single individual to two separate groups;[83] when necessity dictates that one person exercise the power of appointment, the ICC explicitly prohibits that individual from serving as counsel in ICC arbitrations, thereby removing the opportunity for double-hatting.[84]

In short, the diffusion of appointment authority away from a single individual represents the single most important safeguard against the perils of double-hatting. That diffusion permits high-ranking officials to serve as party counsel while maintaining the integrity of the arbitral process. If the necessity for expedited procedures requires a single individual to make appointments, regulations should prevent that person from serving as counsel in arbitrations administered by that particular institution. In the authors' view, these simple precautions strike the optimal balance among a party's right to select counsel, institutional officials' interest in counsel work, and the universal interest of justice.

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appointing powers. *See*, *e.g.*, Art. 12. Although Article 1.1 of the ICDR Rules defines the "Administrator" as "The ICDR," it does not identify by title or otherwise the individual or individuals at the ICDR possessing the power to appoint nor does it provide clarity regarding the process by which the Administrator makes the appointment decision, or whether or when those individuals can serve as advocates in arbitrations administered by the ICDR.

[81] PAULSSON, *supra* note 2, at 147.

[82] *See supra* section III(A).

[83] ICC RULES OF ARBITRATION., *supra* note 64, Art. 13.

[84] *Id.* Appendix II, Art. 2(1).