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INDEPENDENCE AND IMPARTIALITY IN ARBITRATION AND MEDIATION: CAESAR'S WIFE MUST BE ABOVE SUSPICION

1. Introduction

In 63 BC, Gaius Iulius Caesar was elected to the office of the Pontifex Maximus, the supreme priest of the Roman state religion. One of the benefits of this office was the entitlement to the official residence on the Via Sacra. Today, its ruins can still be spotted in Forum Romanum in Rome and one has to admit its central position was really convenient. According to some critics, this (and not the religious zeal) was the only reason why the young politician went after this office.

At this time, he was married to his second wife, Pompeia. As Pontifex Maximus's spouse, she was charged of hosting the festival of the Bona Dea ("good goddess"), which no male was permitted to attend. However, an *enfant terrible* of then Rome, Publius Clodius Pulcher, managed to sneaked into the house dressed as a woman, apparently for the purpose of seducing Pompeia. However, he was caught and later prosecuted for sacrilege. In fact, with highest probability, there was no affaire between Pompeia and Clodius. Anyway, the other day, Caesar divorced the poor woman. During the trial, he supposedly said that "*my wife ought not even to be under suspicion*"[1].

What do have this classical story of the ancient dictator and impartiality and independence of ADR neutrals in common? The level of caution that

[1] SVETONIUS, *The Lives Of The Twelve Caesars*, Divus Iulius VI, accessible online at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/home.html> (accessed on February 26, 2019).

is required. The mediators and arbitrators should take the issue of conflict of interest really seriously. A general saying "Better safe than sorry" is to be followed. Or, in other words, "*A mediator and an arbitrator ought not even to be under suspicion*".

2. Neutrality as a Core Issue

Independence and impartiality are considered to be fundamental principles of both arbitration and mediation. This is confirmed by the requirements of respective national laws and the ADR centres' regulations. Furthermore, the neutrality is one of the main qualities that warrants the right of the fair trial and thus it is considered as a core ethical principle[2].

This is also highlighted by the fact that impartiality and independence are used in numerous definitions of respective ADR procedures mentioned by scholars.

So on the one hand, mediation is depicted as "[…] *the non-binding intervention by an impartial third party who helps the disputants negotiate an agreement*"[3]. On the other hand, Garry Born defines arbitration as "*a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard*"[4].

Yet, this approach is not uncontested, especially in relation to mediation. For some of the scholars and practitioners, transparency and party control are by far more important issues due to the non binding nature of consensual alternative dispute resolution[5]. According to those opinions, the term of neutrality is imminent to the power. Since there is no power of mediators towards the parties, there is no need of impartiality and indepen-

[2] K. von Lewinski, *Professional Ethics in Alternative Dispute Resolution*, in *IDR*, 3/2004, p. 150.

[3] Ch. Bühring-Uhle, L. Kirchhof, M. Scherer (eds.), *Arbitration and Mediation in International Business*, Alphen aan Rijn 2006.

[4] G.B. Born, *International Commercial Arbitration*, Alphen aan Rijn 2009.

[5] H. Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, Legal Studies Research Paper No. 7/46, The University of Sydney – The Sydney Law School, July 2007, available at <http://ssrn.com/abstract=998202> (accessed on February 26, 2019).

dence[6]. In contrary, the control on the procedure is much more important, as it is a parties' consent that produces the outcome of said procedure. This approach, however interesting, has to be refused[7].

3. Chaos in the Terminology

The terms *independent*, *impartial* and *neutral* are sometimes used as synonyms though they do have a different meaning that needs to be distinguished.

According to the Black's Law Dictionary, the *impartial* is a synonym to *unbiased* or *disinterested*[8]. This seems to be confirmed by the praxis and national legislation, though some of them contradict this approach[9].

As such, the impartiality is the neutral's real absence of preference in favour of one of the parties[10] that is a *condicio sine qua non* of real neutrality. It is a state of mind of not being interested regarding the outcome of the procedure. In other words, the presence of bias causes absence of impartiality and vice versa, the absence of bias means impartiality.

By contrast, the term *independent* means absence of three links: absence of control or influence of another, absence of association with another entity and absence of dependence on something or someone else[11]. Thus, the term *independence* has more specific meaning. It could be presented as an absence of an economical, business, political or another relation between the neutral and the party. The occurrence of any relation *may* cause dependence and consequently, the absence of any of such relations means independence.

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[6] R. Delgado, *Shadowboxing: An Essay on Power*, in *Cornell L. Rev*, 77, 1992, p. 813-824.

[7] N. Alexander, *International and Comparative Mediation: Legal Perspectives*, Alphen aan Rijn 2009.

[8] B.A. Garner (ed.), *Black's Law Dictionary*[9], St. Paul 2009, p. 820.

[9] See M. Svatoš, *Independence and Impartiality of Arbitrators and Mediators – The Castor and Pollux of the ADR World*?, in A.J. Bělohlávek, N. Rozehnalová, F. Černý (eds.), *Czech (& Central European) Yearbook of Arbitration, Volume IV, "Independence and Impartiality of Arbitrators"*, New York 2014.

[10] A quite interesting view is proposed by linguistic comparison of the terms used by different languages for this phenomenon. In German, for instance, sometimes used term *Allparteilichkeit* means that the neutral is partial towards all parties. See N. Alexander, *op.cit*., p. 221.

[11] B.A. Garner, *op. cit*., p. 839.

It needs to be added that *dependence* as an opposite to *independence*, does not mean *per se* existence of a bias. But definitely, it causes *an appearance of bias* which state can by a sufficient reason to prevent the perspective neutral to become mediator and arbitrator[12]. In other words, just a pure appearance of bias can jeopardise the whole ADR proceedings in some circumstances.

The relation between impartiality and independence can be expressed as follows: there cannot be an impartial neutral, but there can be a dependant one. However, the later will be probably acceptable neither for the parties, nor for the majority of institutions. Furthermore, in the majority of jurisdictions, this will constitute a breach of law.

There is still a last word to tackle: *neutrality*. This is described as a state or quality of being impartial or unbiased[13]. Thus, the term *neutral* describes a quality of someone who is *impartial*. Although there are also different interpretations. According to them the term neutrality is superior to independence and impartiality. For purpose of this article, we will use this term as a synonym for *impartial* and *neutrality* as a synonym of *impartiality*.

When speaking about impartiality, independence and neutrality, one has in mind the quality of neutral third persons acting within respective ADR procedures. However, one of the most important legal institutes that needs some profound explanation is more objective: a conflict of interest. The latter might be defined as a real or seeming incompatibility between one's private interests and one's public or fiduciary duties[14].

4. Conflict of Interest and Ethics

So far, the discourse was quite simple and not causing significant difficulties. The problem of the ethics is not in searching for a definition but rather in its application. The main obstacle was aptly described by La Rochefoucauld: "*Virtues are lost in self-interest as rivers are lost in the sea*"[15].

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[12] Not according to all legislation and regulation, neither according to all scholars. See below.

[13] B.A. Garner, *op. cit*., p. 1140.

[14] *Ibidem*, p. 341.

[15] François VI, duc de La Rochefoucauld, also called (until 1650) Prince de Marcillac, (born September 15, 1613, Paris, France – died March 16/17, 1680, Paris), French classical author who had been one of the most active rebels of the Fronde before he became the leading exponent of the maxime, a French literary form of epigram that expresses a harsh or paradoxical truth with brevity.

Indeed, it is quite easy to denounce certain behaviour once it is on the theoretical level only, once discussed in the class or with the colleagues at the banquet of an international conference. However, the true trial will occur only once there is a real conflict of interest.

Typical situation is when the lawyer is about to be appointed as an arbitrator in multibillion USD case and he or she is considering revealing some information that might cause doubts of the parties as to her/his impartiality. Obviously, that person is putting at risk his/her appointment and consequently a significant financial income. His/her financial interest is in seeming conflict with his/her public duty to disclose and inform the parties.

In this threshold situation, the awareness of ethical rules might be of some use. Yet, it is easier said than done. First of all, it is already a quite difficult task to pin down the scope and meaning of ethics and to set the boundaries between deontological[16] and legal. Further, to make the situation more difficult, some scholars have raised a question of real and business ethics[17] as two branches of the same tree. According to such an approach, there is a need to adjusting the general deontological rules to the environment of international business[18].

So, what are the rules to be followed in case like this? In this regard, one may consider the following sources or rules to help the mediators and arbitrators to overcome conflicting situations:

a) Legal standards;
b) Institutional standards;
c) Professional standards;
d) Informal standards.

a) Legal standards

An approach grounding importance of two fundamental qualities of arbitrators and mediators is well accepted by the statutory provisions of

[16] The definition of ethics varies approach by approach and jurisdiction by jurisdiction. Aristoteles is considered to be a founder of modern ethics and yet, his definition ("*Attempt to offer a rational response to the question of how humans should best live*") would not be considered sufficient today.

[17] A form of applied ethics or professional ethics, that examines ethical principles and moral or ethical problems that can arise in a business environment.

[18] D. Cohen, *Indépendance des arbitres et conflits d'intérêts*, in *Revue de l'arbitrage*, 3/2011, p. 611.

different countries. It would be beyond the scope of this paper to undergo a survey on the provisions of all relevant jurisdictions' relevant provisions related to independence and impartiality of mediators and arbitrators. Thus, by way of illustration, it will mention the respective legal provisions of the Czech Republic, Germany, France and the USA.

The Czech Arbitration Law[19] in its Article 1 states that "*This act regulates the decision-making of property disputes by the independent and impartial arbitrators* […]"[20]. Similarly, the Czech Mediation Law[21] requires both impartiality and independence from the mediators. This is regulated by Article 8 stating that *"Mediator shall a) perform mediation personally, independently, impartially and with due diligence,* […]".

The Germany's law on arbitration is a reflection of the UNCITRAL Model Law on International Arbitration. A requirement of arbitrators' impartiality and independence is listed in Article 1036 of the German Code of Civil Procedure[22]. The German Mediation Law[23] states likewise in its Article 1 that "*the Mediator is an independent and neutral person without decision making power that leads the parties throughout the mediation*" and later on in its Article 3 that "*The mediator shall disclose to the parties all circumstances that could jeopardize his/her independence and neutrality*". Quite surprisingly, the German law has not used the word *impartial* as it has opted only for *independent* and *neutral*[24].

The French Civil Procedure Code[25] addresses both the arbitration and mediation. While the arbitrators are simply required to be *impartial* and *independent*[26], mediation regulation requires a brief commentary. The French law distinguishes two different mediation procedures: the *judicial mediation* and the *conventional* (out-of-court) *mediation*. Whereas the judicial media-

[19] Act No. 216/1994 Coll. on Arbitration and Enforcement of Awards.

[20] The placement of this declaration in the very first section highlights the importance that the Czech legislator attributed to this principle.

[21] Act No. 202/2012 Coll. on Mediation.

[22] BGBl. I S. 3202; 2006 I S. 431, Code of Civil Procedure.

[23] BGBl. I S. 1577, Act on Mediation.

[24] In original *Unabhängige* and *neutrale*. In this sense, the term neutral shall be understood as a synonym to impartial, although there is a term *unparteilisch* in German language.

[25] French New Code of Civil Procedure (CPC).

[26] Article 1456 CPC: "(…) *Il appartient à l'arbitre, avant d'accepter sa mission, de révéler toute circonstance susceptible d'affecter son indépendance ou son impartialité. Il lui est également fait obligation de révéler sans délai toute circonstance de même nature qui pourrait naître après l'acceptation de sa mission* (…)".

tors should be *independent*[27], there is no such a requirement in parallel article regulating judicial mediators[28]. However, Article 1530 demands the mediation procedure to be performed "*with the help of a* [conventional mediator] *chosen by the parties accomplishing its mission with impartiality, competence and diligence*".

In the case of US law, there is comparatively specific approach adopted. The Federal Arbitration Act[29] knows only provision related to set aside procedure, i.e. only a sanction for not respecting the obligation of neutrality. According to the said rule, an arbitral award might be set aside by a court "*where there was evident partiality or corruption in the arbitrators*"[30].

This brief provision was amended by a decision of the United States Supreme Court in the case *Commonwealth Coatings Corp v Continental Casualy:* "*'Evident partiality' means what it says: conductor at least an attitude or disposition – by the arbitrator favoring one party rather than the other*"[31]. This judgment also raised the question of application of the Rules of the American Arbitration Association (opted for by the parties) and the "*Canon of Judicial Ethics which provides: '33. Social Relations. '* * * (A judge) should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct' "*.

The Uniform Mediation Act (UMA)[32] enacted in 2003 emphasised the necessity of *neutrality* and *impartiality* for the credibility and integrity of the mediation process[33]. However, the UMA involves a very specific rule completely unknown to other comparing acts. On the base of a non-mandatory option, the Uniform Law Commission proposed the provision of Section 9 (g) of following wording: "*A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties*

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[27] *Ibidem*, Art. 131-5.

[28] *Ibidem*, Art. 1533.

[29] Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14 (2009).

[30] *Ibidem*, Section 10.

[31] *Commonwealth Coatings Corp v. Continental Casualty*, Co 393 US 145.

[32] It should be enacted voluntarily by the individual States of the USA.

[33] The National Conference of Commissioners on Uniform State Law: The Uniform Mediation Act – Comments Uniform Mediation Act (Last Revised or Amended in 2003), 10 December 2003, p. 9, available at: *http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf* (accessed June 24, 2012).

agree otherwise". This state of affairs is however not surprising because of well known liberal approach of the US law towards the independence and impartiality[34].

One can summarise that there is almost an omnipresent requirement in relation to impartiality and independence in national laws' provisions. Those have, however, failed to provide the users with some more detailed guidelines as to the application of said rules.

b) Institutional Standards

Given the importance of the role of ADR institutions in arbitration and, to certain extent, in mediation, it is interesting to undergo a research as far as the requirements of the leading arbitration and mediation centres are concerned. One of the most important ones is the International Chamber of Commerce (ICC) that provides for globally accepted and used system of arbitration and mediation.

The ICC Mediation Rules[35] states in Article 5 – Selection of Mediator: "(3) *Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them*". Furthermore, Article 7 of said document regulates the conduct of the mediation and demands: "*In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality*". Not surprisingly, the recently updated ICC Arbitration Rules states in Article 11 that "[e]*very arbitrator must be and remain impartial and independent of the parties involved in the arbitration*"[36].

The London Court of International Arbitration (LCIA) proposes the dispute resolution service that includes both arbitration and mediation. Ac-

[34] D. Cohen, *op. cit*., p. 635-636.

[35] International Chamber of Commerce (ICC), "*Mediation Rules of the International Chamber of Commerce*", in force as from 1 January 2014.

[36] International Chamber of Commerce (ICC), "*Rules of Arbitration of the International Chamber of Commerce*", in force as from 1 March 2017.

cording to the LCIA Arbitration Rules[37]: "*All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration*"[38].

Similarly, the LCIA Mediation Rules[39] state as follows: "*Before appointment by the LCIA Court* […] *the mediator shall furnish the Registrar with a written résumé of his or her past and present professional positions; and he or she shall sign a declaration to the effect that there are no circumstances known to him or her likely to give rise to any justifiable doubts as to his or her impartiality or independence, other than any circumstances disclosed by him or her in the declaration. A copy of the mediator's résumé and declaration shall be provided to the parties*"[40].

Also the leading Italian institution, the Chamber of Arbitration of Milan (CAM), requires the arbitrators to be and remain *independent* and *impartial*[41]. A bit more complicated situation occurs in the field of mediation as there are two tools to be applied. First, the Mediation Rules in force since December 6, 2012 which foresee "*the assistance of an independent, impartial and neutral mediator*". Further, there are the so called Fast Track Mediation Rules (in force as from May 1, 2015) prescribing for mediator to "*comply with the provisions of the Conduct of Ethics for Mediators. Before the first meeting with the parties, the mediator shall sign a declaration of impartiality, neutrality and independence*".

Finally, one has to briefly mention the UNCITRAL Rules. Although the United Nations Commission on International Trade Law (UNCITRAL) is not a proper ADR institution and thus, it is not administrating any international cases, it issued a set of rules that is frequently used for *ad hoc* procedures.

The UNCITRAL Arbitration Rules work with the terms *independent* and *impartial*[42]. Likewise, the UNCITRAL Conciliation Rules[43] state in Ar-

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[37] London Court of International Arbitration (LCIA), "*LCIA Arbitration Rules*", 1 October 2014.

[38] *Ibidem*, Art. 5.3.

[39] London Court of International Arbitration (LCIA), "*LCIA Mediation Rules*", 1 July 2012.

[40] *Ibidem*, Art. 3.1.

[41] Chamber of Arbitration of Milan, "*Arbitration Rules*", 1 January 2010, Artt. 18 and 19.

[42] United Nations Commission on International Trade Law (UNCITRAL), "*UNCITRAL Arbitration Rules (as revised in 2013)*".

[43] United Nations Commission on International Trade Law (UNCITRAL), "*UNCITRAL Conciliation Rules (as revised in 2010)*", Art. 6 and Art. 7, 23 July 1980.

ticle 7 that the "*conciliator*[44] *assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute*".

On the one hand, the requirement of *impartiality* and *independence* is included in both the mediation and arbitration rules as a generally accepted quality. On the other hand, those documents usually do not provide with any further guidance as to application of said principles. Fortunately, some of the professional standards assists in this way quite profoundly.

c) Professional Standards

In 2004, the International Bar Association (IBA) created a tool frequently used in international arbitration, but also appreciated by scholars[45]: the IBA Rules on Conflict of Interest. This document was later revised in 2014 to reflect on its rich, ten-year-long application practice. Unfortunately, the IBA Rules do not address the neutrality of mediators.

The guidelines set out that "*the fundamental principle in international arbitration* (is) *that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings*".

The IBA Rules on Conflict of Interest are divided in two parts: Part I. – *General Standards Regarding Impartiality, Independence and Disclosure* that addresses the general obligations and requirements of arbitrators and Part II. – *Practical Application of the General Standards* that in a non-exhaustive manner lists specific situations that might occur in international arbitration. This latter part is further subdivided in three sub-chapters mirroring the colours of traffic lights. It is mostly this tool that is especially appreciated by ADR practitioners as it gives them a practical advice as to specific conflicting situations.

First of the list is the *Red* one consisting of two sub-parts: *Non-Waivable* and *Waivable*. Both the part covers the situations in which an objective conflict of interest exists. The situations described in the *Non-Waivable Red List* are in breach of the basic legal principle that no person can be his or her own judge. Thus, acceptance of such a situation by parties cannot cure

[44] The UNCITRAL Conciliation Rules work with the term of conciliator instead of mediator.

[45] J. Gill, *The IBA Conflicts Guidelines – Who's Using Them and How?*, in *DRI*, 1.1, 2007, p. 58; L. Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, in *International Arbitration Law Rewiev*, 2007, p. 999.

the conflict. In contrary, the *Waivable Red List* covers situations that are serious and constitute a conflict of interest, but the parties can waive, i.e. agree that the concerned person might serve as an arbitrator. In order to do so, they have to be completely informed.

The Orange List enumerates specific situations that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence and the arbitrator has a duty to disclose such situations. After such a disclosure is made, parties have to raise an objection in a given period of time. Should they fail to do so, they are deemed to have accepted the arbitrator. It is necessary to underline that pure disclosure does not imply the existence of a conflict of interest. The purpose of disclosure is to inform the parties of a situation that they may wish to explore.

Should a situation included on the Green List appear, there is generally no need of disclosure as neither appearance, nor an actual conflict of interest exists. However, a person involved is obliged to assess on a case-by-case basis circumstances of the case. If there are, nevertheless, aggravating conditions such as to give rise to justifiable doubts as to his or her impartiality or independence, he or she needs to disclose. In such a case, the procedure is similar to the case of the Orange List.

The IBA Guidelines on Conflict of Interest provide the arbitrators, lawyers, ADR institutions and national judges with a useful set of practical directions on how to proceed in more concrete and detailed situation. It is also for this reason that they are very popular and well appreciated.

As already mentioned, they are, in principle, not applicable to mediation. The tool that gives certain, yet limited guidance in this regard was issued by the European Commission – the European Code of Conduct for Mediators. This non-binding codex enumerates general deontological duties of mediators and it addresses the issue of independence and impartiality too. In quite an interesting way, Article 2 addresses the obligation of *independence* and the obligation of *impartiality* separately.

In accordance with the theoretical approach described above, the duty of independence is related to the absence of all of the following circumstances: "*any personal or business relationship* [of Mediator] *with one or more of the parties*; *any financial or other interest* [of Mediator], *direct or indirect, in the outcome of the mediation*; *the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties*"[46].

[46] Under such circumstances, Code however prevail the possible continuance of media-

In the following sub-article, the European Code of Conduct for Mediators explains the problem of impartiality: "*Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation*". Thus, the Code is one of the rare instruments that implicitly distinguishes the difference between the two terms. On the other hand, it fails to provide the parties and mediators with any further practical guidelines as to the assessment of possible biases.

d) Informal standards

Finally, there is quite an extensive list of less formal standards and tools that might be applied to impartiality and independence, as well as to other ethical topics. They should be regarded as rather auxiliary instruments that might help to shed light on different shades of neutrality. Certain advantage of those approaches might be found in their flexibility. As they are not written documents, but rather ethical constructions, they are more flexible for specific circumstances that might occur.

First of them is a *Mentor Approach* based on hypothetical decision-making procedure of some admired personality. This might recruit among more senior colleagues, professors from the university and even among some historical or fictional characters. The method is constituted by a single question: "*What would be an approach taken by that person in similar situation*?" The answer is obviously a sub-conscious analysis of a given situation, not a historical or sociological research.

Second one is a *Gut Test.* Being ethical is clearly not a matter of following one's own feelings – frequently emotions deviate from what is ethical. On the other hand, there is a certain informative value in the way one is *feeling* about the situation. If by considering the circumstances, one "*does have a bad gut feeling*", he or she should definitely pay more attention to the case. This approach too is profiting from subconscious perception of the situation.

Another method worth mentioning is known as *Newspaper Test.* It was introduced by the US tycoon Warren Buffett: "*I want employees to ask themselves whether they are willing to have any contemplated act appear the*

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tion: "*In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent*". Compare *ibidem*, 2.1.

next day on the front page of their local paper – to be read by their spouses, children and friends – with the reporting done by an informed and critical reporter"[47]. This is a very useful test as it is not only taking into consideration your own ethical standards, but the sense of self-perception by the closest persons. Sometimes, a slight variation on this approach is called the *Family Test*. As one can imagine, this is just a narrower approach which only differs in the perception construction.

Last but not least, another useful tool is called *Golden Rule*. It is less flexible than the previous ones and certainly more rigid. Its application, on the other hand, is easier. It is basically only a simple ethical rule that is to be used in certain situation. One of them was already mentioned in the very beginning of this paper: "*Caesar's wife must be above suspicion*". This sentence gives a quite straightforward view as to the mediators' and arbitrators' strictness. Another example is the sentence the author of this paper was told by one of the leading Italian professors on arbitration law: "*You only have one name. Once damaged, forever damaged…*".

5. Same duty, different sanctions…?

Despite the fact that both the mediators and arbitrators share the same duty of impartiality and independence, their breach will be sanctioned differently. At least partly. The reason for this might be sought in the fundamentally different outcome of both proceedings.

In the case of arbitration, the award as a binding decision of a neutral can be set aside. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, foresees in its Article V (1) d), that the recognition and enforcement of an award may be refused when "[t]*he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*".

So far, there is no such instrument in relation to mediation. However, the recently prepared Article 5 of the UNCITRAL Draft on Convention on International Settlement Agreements Resulting from Mediation also foreseees the reasons for grounds for refusing to grant relief:

[47] *Code of Business Conduct and Ethics*, online text available at: http://www.berkshirehathaway. com/govern/ethics.pdf.

"*1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:…*

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement"[48].

Apart from the sanction in relation to the outcome of the procedure, the absence of impartiality and independence might in both of the cases lead to general liability of mediators and arbitrators. One has to take into the consideration aspects of criminal law too. Anyway, the result will always depend on the respective jurisdiction.

[48] UNCITRAL, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/012/07/PDF/V1801207.pdf?OpenElement.