SOFT LAW IN INTERNATIONAL ARBITRATION

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PART III

ETHICS IN INTERNATIONAL ARBITRATION: SOFT LAW GUIDANCE FOR ARBITRATORS AND PARTY REPRESENTATIVES

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INTRODUCTION

The integrity of the arbitration process is essential to preserve arbitration's ability to offer parties a fair forum for resolution of their disputes and to maintain trust in the process. To establish clarity and uniformity with respect to ethical obligations and assure such integrity, many arbitral institutions and bar associations have developed ethics codes, rules and guidelines. These soft law tools provide, along with applicable national law, the guidance required to foster ethical conduct and adherence to a common set of ethical obligations for the participants in an arbitration.

It is not possible to review all of the many codes, rules and guidelines that have been developed to address ethical considerations in arbitration. The four documents reproduced and discussed in this chapter are the most prominent:

- American Bar Association and American Arbitration Association Code of Ethics for Arbitrators
- International Bar Association Rules of Ethics for International Arbitrators
- International Bar Association Guidelines on Conflicts of Interest in International Arbitration
- International Bar Association Guidelines on Party Representation in International Arbitration.

The first three guidelines deal with the arbitrators themselves and are intended to ensure that the integrity of the arbitration process is not subverted by the participation of arbitrators who do not meet the standards enunciated. The fourth guideline is intended to level the playing field in international arbitration, where parties may be prejudiced by the often significant variances in the ethical obligations governing conduct by party representatives and to curb improper conduct by party representatives.

I. AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes

a. Background

As arbitration gained wider acceptance in the 1970s and the use of commercial arbitration to resolve a variety of disputes grew and formed a significant part of the system of justice, the maintenance of high standards and the need to assure confidence in the arbitration process became important concerns of the American Bar Association (ABA). Together with the American Arbitration Association (AAA), the ABA developed and issued the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes in 1977 (the "1977 Code"), the first set of guidelines to specifically address the ethics of arbitrators.

As the new millennium approached, a review was conducted to determine whether changes in the 1977 Code were needed in response to changes in the law governing arbitration, the increasing globalization of commercial transactions and changes in public expectations and perceptions. The 2004 Code of Ethics for Arbitrators in Commercial Disputes (the "2004 Code") emerged from that review. It largely mirrored the 1977 version and thus was labeled a revision of the 1977 Code. The most fundamental change in the 2004 revision, a change made to conform to international practice, was the application of a presumption of neutrality for all arbitrators, including party appointed arbitrators, a change from the presumption under the 1977 Code. As expected with the issuance of the 2004 Code and the changed presumption, U.S. practice has moved away from the appointment of non-neutral arbitrators and such a process is rarely employed now.

b. The Canons

Canon I describes the overall responsibilities of the arbitrator to uphold the integrity and fairness of the process. It requires self-judgment in assessing whether or not to accept an appointment. An arbitrator should accept an appointment only if fully satisfied that he or she can serve impartially, independently and competently. Significantly, in light of the criticism in recent years that arbitrators do not attend to arbitrations in a timely manner, the Canon also requires that the arbitrator be satisfied that he or she can be available to commence and conduct the arbitration in a timely manner. The Canon requires the arbitrator to avoid any relationship while serving as an arbitrator that might create the appearance of partiality and to avoid entering into such a relationship for a reasonable period of time after the final award is rendered. The Canon further requires conducting a fair and efficient process and obligates the arbitrator to take all reasonable efforts to prevent delaying tactics, harassment or other abuse or disruption of the arbitration.

Canon II addresses the arbitrator's disclosure obligations and requires disclosure of any direct or indirect financial or personal interest and disclosure of any relationship which any of the parties might reasonably believe could affect impartiality or lack of independence. This requirement includes disclosure of any relationship with any party, counsel, any co-arbitrator or any witness and requires disclosure of any such relationship involving the arbitrator's family or household members, current employer, partners or professional associates. The Canon requires arbitrators to make "reasonable efforts" to inform themselves of any such interests or relationships and to resolve any doubt as to whether or not disclosure should be made in favor of disclosure. There is no time limit set on disclosure obligations.

Canon III addresses communications with the parties and provides that there shall be no *ex parte* communications with limited specified exceptions.

Canon IV requires the arbitrator to conduct the proceedings fairly and diligently and to allow each party a fair opportunity to present its evidence and arguments and to allow the parties the opportunity to be represented by counsel or any other person chosen by the party.

Canon V requires that the arbitrator decide all issues submitted for determination by exercising independent judgment without delegation to any other person.

Canon VI requires maintaining the confidentiality of information acquired during the arbitration proceedings. It prohibits informing anyone about the substance of the deliberations.

Canons VII and VIII deal with compensation, advertising and promotion.

Canon IX establishes a presumption that all arbitrators are neutral unless they are specifically designated as Canon X arbitrators.

Canon X addresses the possibility that parties may in some cases elect to appoint non-neutral arbitrators even after the 2004 revision of the code. To assure the integrity of such an arbitration, Canon X imposes the same obligations as govern neutral arbitrators but provides for specific exemptions for non-neutral arbitrators.

c. Implementation

As recognized in its text, the 2004 Code does not take the place of or supersede applicable law, other applicable ethics rules or arbitration agreements to which the parties have agreed and must be read as being subject to any contrary provisions of applicable law, arbitration rules or party agreements. Although thus limited, the 2004 code has been tremendously influential. U.S. arbitrators sitting in domestic arbitrations in the U.S., and often arbitrators sitting in international arbitrations seated in the U.S. or where enforcement in the U.S. may be required, look to the 2004 Code for guidance as to their ethical obligations. The AAA and the AAA's international division, the International Centre for Dispute Resolution (ICDR), both require independence and impartiality and disclosures by arbitrators consistent with the requirements of the 2004 Code.

The 2004 Code is also sometimes, but infrequently, referenced in case law when challenges to an award are based on an arbitrator's partiality, disclosure or conduct.[1] But as has been expressly stated by the courts, the Code is "not the proper starting point for an inquiry into an award's validity . . . . The arbitration rules and code do not have the force

[1] For a compilation of cases which have made express reference to the ABA-AAA Codes, see AMERICAN BAR ASSOCIATION/COLLEGE OF COMMERCIAL ARBITRATORS ANNOTATIONS TO THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, available at http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/code_annotated_updated_feb_2013.pdf.

of law."[2] Thus, to fully appreciate what conduct and disclosure is required, one cannot look only to the 2004 Code, but one must also look—in the U.S., as in every jurisdiction—to the national law that has developed on the subject.

The U.S. Federal Arbitration Act (FAA) § 10 lists "evident partiality" as one of the bases for vacating an award.[3] It is applicable to domestic awards and, in some U.S. jurisdictions, to international awards as well. The seminal (and only) decision concerning "evident partiality" by the Supreme Court was *Commonwealth Coatings Corp. v. Continental Casualty Co*. in 1968.[4] No majority opinion was issued. Justice Black in the plurality opinion, referring to standards for the judiciary, held that for evident partiality the party only needs to show that an arbitrator failed to disclose "any dealings that might create an impression of possible bias."[5] In his often cited concurring opinion, Justice White stated that arbitrators should not be held to the same standards as judges and should not be subject to having their awards vacated if the relationship is trivial. Justice White noted that while early disclosure is best, an arbitrator "cannot be expected to provide his complete and unexpurgated biography."[6]

As a plurality decision, courts may find the holding of the court to be the position taken by those members who concurred in the judgment on the narrowest grounds.[7] Thus, looking to Justice White's concurrence, the majority of circuits follow standards akin to the Second Circuit's rigorous standard that "evident partiality" within the meaning of 9 U.S.C. § 10 will be found where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[8] The Second Circuit held that an award will not be set aside for failure to make a disclosure unless the arbitrator knows of a "material relationship" with a party and fails to disclose it.[9] The court elaborated, stating that an arbitrator is required to take steps to ensure that the parties are not misled

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[2] *E.g.*, *Freeman v Pittsburgh Glass Works LLC*, 709 F.3d 240, 254 (3d Cir. 2013) (internal citations omitted).

[3] 9 U.S.C. § 10(a)(2).

[4] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

[5] *Id.* at 149.

[6] *Id.* at 151.

[7] *Marks v. United States*, 430 U.S. 188 (1977).

[8] *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins.Co.*, 668 F.3d 60 (2d Cir. 2012). New York's highest court adopted this Second Circuit standard. *U.S. Electronic Inc. v. Sirius Satellite Radio Inc.,* 17 N.Y.3d 912 (2011).

[9] *Scandinavian Reinsurance Co.*, 668 F3d at 73.

into believing that no nontrivial conflict exists, and an arbitrator is required, if he thinks a nontrivial conflict may exist, to investigate or disclose his reasons for not investigating it.[10] However, the application of this standard is not uniform—some courts may apply a variation of the standard set by the Ninth Circuit that "a reasonable impression of partiality" is required to show evident partiality.[11]

Whatever the standard used, early disclosure can serve to forestall later challenges and consequent delays and expense in court proceedings. Regardless of the fact that applications to vacate awards or deny enforcement rarely succeed on grounds of evident partiality, attacks on arbitrators and awards based on claims of arbitrator partiality are frequent, as is the current practice of hiring investigators to unearth points of contact between arbitrators and parties or their representatives. As Justice White observed, "it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or distrustful party can seize on it as a pretext for invalidating the award."[12]

II. The IBA Rules of Ethics for International Arbitrators and the IBA Guidelines on Conflicts of Interest in International Arbitration

a. Background

The International Bar Association (IBA) issued the IBA Rules of Ethics for International Arbitrators in 1987 (the "IBA Rules") to create a framework for the manner in which the obligation of international arbitrators to be impartial, independent, competent, diligent and discreet should be assessed in practice. The IBA Rules reflected internationally acceptable practice and in many respects mirrored the provisions of the AAA-ABA's 1977 Code. The IBA Rules required that arbitrators (a)

[10] *Id.*

[11] *Schmitz v. Zilvetti,* 20 F.3d 1043, 1047 (9th Cir. 1994). It must be noted that several U.S. states have statutes and ethical codes that specifically address arbitrator ethics, including disclosure requirements, which must also be considered. *See e.g.,* California Ethics Standards for Neutral Arbitrators in Contractual Arbitration and California Code Civ. Proc. §1281.9 (setting forth specific and detailed disclosure requirements).

[12] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. at 151.

proceed diligently and efficiently, (b) accept appointments only if they can act without bias, (c) limit *ex parte* communications with the parties or their representatives, and (d) address matters relating to fees and confidentiality. The IBA Rules described the criteria for assessing questions relating to bias, impartiality and independence and required a prospective arbitrator to disclose "all facts or circumstances that may give rise to justifiable doubts" as to their impartiality or independence. The IBA rules further provided some specificity as to the nature of the relationships for which disclosure was required.

In the years following the issuance of the IBA Rules, the IBA found that arbitrators were still frequently unsure about what facts needed to be disclosed and that arbitrators in the same situation made different choices about disclosures. Challenges to arbitrators were increasing and disclosure of even minor relationships led to objections, challenges and withdrawal or removal of the arbitrator. There was a perceived tension between the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and the parties' right to select arbitrators of their choosing. An IBA working group studied the issue and concluded that the existing standards set forth in the arbitration rules and law lacked sufficient clarity and uniformity in application.

Following extensive study and peer review, the IBA issued the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Arbitrator Guidelines") reflecting the working group's understanding of best current international practice.[13] The IBA Arbitrator Guidelines enunciated a set of general standards (the "General Standards") relating to impartiality, independence and disclosure. In an effort to foster greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals, the working group also provided a non-exhaustive list of specific situations that commonly arise in practice, and assigned each situation to one of three color-coded lists: red, orange or green (together, the "Application Lists"), in descending order of "seriousness."[14] The IBA Rules remain in effect as to subjects not discussed in the IBA Arbitrator Guidelines but the IBA Arbitrator Guidelines supersede the IBA Rules as to the matters that are treated.

[13] For a history of the drafting of the IBA Arbitrator Guidelines and guide to its interpretation, *see* Otto deWitt Wijnen, Nathalie Voser and Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, BUSINESS LAW INTERNATIONAL Vol. 5 No. 3, 433 (2004).

[14] IBA Arbitrator Guidelines at Part II, ¶ 2.

The portions of the IBA Rules that remain in effect are uncontroversial. However, the portions that were superseded by the IBA Arbitrator Guidelines continue to be the subject of vigorous discussion and debate. The significant increase in recent years in the number of challenges to arbitrators, the growth in the monetary value of cases which has led to the devotion of substantial resources to setting aside unfavorable awards, and the growth of international law firms, which inevitably leads to increased conflicts for arbitrators, has made issues concerning impartiality, independence and disclosure a continuing concern.

b. The General Standards and the Application Lists

Standard 1 provides that the arbitrator shall be impartial and independent of the parties and shall remain so until the final award is rendered.

Standard 2 requires an arbitrator to decline an appointment or refuse to continue to act if he or she has any doubts as to his or her ability to be impartial or independent or that from a reasonable third party's point of view having knowledge of the relevant facts would give rise to justifiable doubts as to the arbitrator's impartiality or independence. Doubts are justifiable if a reasonable and informed third-party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits presented.

Standard 3 requires the arbitrator to disclose such facts as may in the parties' eyes give rise to doubts as to the arbitrator's impartiality or independence. If in doubt, an arbitrator should disclose, an obligation which continues throughout the proceeding.

Standard 4 states that if no objection is raised after receipt of a disclosure, the parties have waived any potential conflict of interest based on such facts and circumstances except for specified situations listed.

Standard 5 makes it clear that the guidelines apply equally to the tribunal chair as well as to party appointed arbitrators (but not to non-neutral arbitrators).

Standard 6 addresses the growing size of law firms and requires a reasonable consideration of potential conflicts based on activities within an arbitrator's law firm.

Standard 7 imposes an obligation on the parties to inform about any direct or indirect relationship between them and an arbitrator and imposes a duty on the arbitrator to make reasonable enquiries to investigate any potential conflicts of interest.

The working group imposed a *subjective* test for disclosure in the General Standards in recognition of the parties' interest in being fully informed about any circumstance that may be relevant in their view. However, the working group concluded that guidance as to situations likely to occur assessed against an *objective* test would create a desirable uniformity of approach. The working group found that counsel, arbitrators and parties from different cultures and legal systems often reached different conclusions as to whether a given situation raised a potential conflict of interest concern that required disclosure. There was also a concern that excessive disclosures would unnecessarily undermine confidence in the process.

While concededly non-exhaustive, the Application Lists were developed to create such an objective basis for assessing arbitrator relationships. The green list identifies situations in which disclosure is not required and describes relationships which do not constitute valid grounds for challenge or objection. The orange list identifies situations which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The red list identifies situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. The red list is also divided into non-waivable situations and waivable situations.

c. Implementation

Like the ABA-AAA's 2004 Code, the IBA Arbitrator Guidelines recognize that they are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. Rather it was hoped that the guidelines would find general acceptance and adherence within the international arbitration community and thus assist in the decision-making process on questions of impartiality, independence and disclosure.

The UNCITRAL Arbitration Rules, the AAA/ICDR rules, the London Court of International Arbitration (LCIA) rules and the rules of other institutions require impartiality and independence and require arbitrators to disclose "any circumstance likely to give rise to justifiable doubts" as to the arbitrator's "impartiality or independence."[15] The ICC requires a statement of impartiality and independence by arbitrators prior

[15] UNCITRAL Model Law on International Commercial Arbitration, Art. 12(1).

to appointment which calls upon them to attest as to any "facts or circumstances, past or present . . . that might be of such a nature as to call into question . . . independence in the eyes of any of the parties"[16] and "any facts or circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[17] Thus, from the standpoint of the institutions, the IBA General Standards are an acceptable enunciation of independence, impartiality and disclosure requirements.

The Application Lists have met with more limited institutional acceptance. The arbitral institutions have not adopted them due to concerns that the objective nature of the Application Lists is in conflict with the subjective disclosure requirements. As stated by Anne Marie Whitesell, former Secretary General of the ICC International Court of Arbitration, "there is a fundamental incompatibility between the [ICC] rules and the IBA guidelines. Article 7 (2) of the [ICC] rules requires a subjective approach to disclosure. . . . Hence, it is not possible in ICC arbitration to have a list of situations which are said to be objective and never to require disclosure as provided in the IBA guidelines green list."[18] Furthermore she states that the Application Lists may be helpful in deciding what may require disclosure but do not dictate the appropriate outcome in the many situations which fall in the orange list—moreover, there are many facts and circumstances giving rise to objections and challenges that were not covered by the IBA Arbitrator Guidelines at all.[19] This basic incompatibility between the subjective requirements of independence, impartiality and disclosure and the objective nature of the Application Lists caused other institutions to respond similarly in rejecting the Application Lists as controlling. Thus, from an institutional perspective, absolute reliance on the Application Lists by arbitrators may not be consistent with their ethical obligations.

Citation to and reliance on the IBA Arbitrator Guidelines by the courts has been limited. Few court decisions have cited the guidelines and those that have often have done so without deference to their provisions.[20] As in the U.S., some courts have expressly noted that the

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[16] Erik Schäfer, Herman Verbist, and Christophe Imhoos, ICC ARBITRATION IN PRACTICE, at 47 (Kluwer, 2005).

[17] ICC Rules of Arbitration Art. 11(2).

[18] Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC International Court of Arbitration Bulletin, Special Supplement No. 690E, 36-38 (2007).

[19] *Id.*

[20] For a collection and discussion of cases citing the IBA Arbitrator Guidelines through 2009, see Matthias Scherer, *The IBA Guidelines on Conflicts of Interest in International*

guidelines do not override national law and that a result dictated by the application of national law cannot be altered by the guidelines.[21] However, some courts have found the guidelines useful and have relied on them as part of the basis for their decision.[22]

Notwithstanding the general lack of expressed reliance on the IBA Arbitrator Guidelines by courts and institutions, in fact they have had tremendous impact. Many international arbitrators look to them in assessing whether they have a conflict, how serious the conflict is and whether they have a disclosure obligation. Citations to the IBA Arbitrator Guidelines are common in arguments offered in support of objections and challenges and they may have more influence on decisions reached than is acknowledged. The LCIA has stated that the LCIA Court will on occasion refer to the IBA Arbitrator Guidelines in making decisions on challenges and certain of its divisions have concluded that they "reflect actual practice in significant parts of the arbitration community."[23]

The IBA Arbitrator Guidelines should be interpreted in the context of the applicable national law of the seat and the place of possible enforcement, as well as with reference to such additional guidance as may be gleaned from the published discussions of institutional decisions on challenges. The LCIA, which prepares written decisions on challenges to arbitrators, published sanitized versions of a selected group of those decisions in 2011 that are instructive.[24] Discussions of numerous ICC decisions on objections and challenges have also been published.[25] These real-life conclusions reached by institutions can be utilized by arbitrators to assist them in deciding which cases they can accept and what disclosures they should make and by counsel in assessing whether or not there is merit to a challenge they are considering.

Arbitration: The First Five Years 2004-2009, DISPUTE RESOLUTION INTERNATIONAL Vol. 4 No. 1 (2010); *see also* Judith Gill, *The IBA Conflicts Guidelines—Who's Using Them and How?* DISPUTE RESOLUTION INTERNATIONAL Vol. 1, No. 1 (2007).

[21] *See, e.g.*, *A and Others v B* [2011] EWHC 2345, at ¶ 73 (Comm) (15 September 2011).

[22] *See, e.g.*, Swedish Supreme Court, Case No T 2448-06 (19 November 2007), *Anders Jilkén v Ericsson AB*, 5 Stockholm Int'l. Arb. Rev. 167 (2007); *see also New Regency Productions v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

[23] (2011) 27 ARBITRATION INTERNATIONAL at 288.

[24] *Id.*

[25] *See* Jason Fry and Simon Greenberg, *The Arbitral Tribunal: Applications of Article 7-12 of the ICC Rules in Recent Cases*, ICC International Court of Arbitration Bulletin, Vol. 20/2 (2009); Whitesell, *supra* n.12.

The IBA and the IBA working group recognized that the IBA Arbitrator Guidelines were the beginning rather than end to the process and planned from the inception to supplement, revise and refine the guidelines based on practical experience. At the time of this writing, the IBA arbitration committee is considering a revision of the guidelines and specifically considering changing the guidelines to address issues that have come to the fore in recent years, including the increasingly common use of advance waivers, the use of secretaries by the tribunal, the question of issue conflict, third party funding, lengthening the time intervals specified in the Application Lists, and the participation in an arbitration of barristers as both arbitrator and counsel who are members of the same chambers.

III. International Bar Association Guidelines on Party Representation in International Arbitration

a. Background

Suggestions that guidelines were necessary to govern the ethics of party representatives in international arbitration were first published many years ago.[26] With continuing attention to the topic, the IBA arbitration committee formed a working group to examine the issue in 2008. The topic continued to gain increasing attention. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land," should not be permitted to persist.[27] Doak Bishop, in his opening address at the ICCA Congress in 2010, proposed an international code of ethics for lawyers. Sundaresh Menon, in his opening address at the ICCA Congress in 2012, urged the development of a code of conduct and practice to guide international arbitrators and international arbitration counsel. These remarks helped galvanize attention on the issue.

In 2010, the IBA working group conducted a broadly disseminated survey to inform its work. The survey helped identify the divergent ethical practices of party representatives that presented the greatest

[26] *See e.g.*, Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Int'l Arb. 214 (1992); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996).

[27] Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012.

difficulties and confirmed support for the development of international guidelines for party representatives, with an overwhelming majority of the respondents calling for the issuance of such guidelines. In May of 2013, following extensive peer review, the International Bar Association Guidelines on Party Representation in International Arbitration (the "IBA Party Representative Guidelines") were issued. The objective of the guidelines was to assure the fundamental fairness and integrity of international arbitral proceedings. They address two issues relating to conduct by party representatives. First, they address the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, they address what has come to be known as "guerrilla tactics," tactics used to delay, obstruct or subvert the arbitration process.

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a third jurisdiction and physically held in yet another jurisdiction. The IBA working group survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration in such circumstances. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their party representative is bound by more restrictive ethical rules. Only a common set of ethical obligations could level the playing field. The examples most frequently used to illustrate the significant divergences in ethical obligations of party representatives include witness preparation, the nature of the party representative's obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.

Like counsel ethics, the use of "guerrilla tactics"—misconduct intended to obstruct, delay or derail an arbitration—has been the theme of much comment in recent years.[28] The most common examples of misconduct listed by practitioners include abuse of the information

[28] *See e.g.*, GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION (Günther J. Horvath and Stephan Wilske ed., Kluwer Publ. 2013).

exchange and party disclosure obligations, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect and courtesy towards the tribunal and opposing counsel and various other strategies to frustrate an orderly and fair hearing.[29]

b. The Guidelines

Guidelines 1-3 deal with the manner in which the guidelines should be applied.

Guidelines 4-6 preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline.

Guidelines 7-8 forbid *ex parte* communications apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance.

Guidelines 9-11 bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered.

Guidelines 12-17 address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay.

Guidelines 18–25 permit party representatives to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony—however, party representatives may not invite or encourage false evidence. The IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Evidence Rules") had set the international practice in arbitration in favor of allowing witness preparation, a practice that is unethical in many jurisdictions but is standard and ethical practice in others, but had not spelled out the limits of what is permissible in this context. These guidelines affirm and expand upon those rules to provide further guidance.

The IBA Party Representative Guidelines address most of the disparities in ethical obligations among party representatives most

[29] Edna Sussman & Solomon Ebere*, All's Fair in Love and War - Or Is It? The Call for Ethical Standards for Counsel in International Arbitration,* Am. Rev. Int'l Arb., 22 (2011): 612.

frequently cited by the survey respondents.[30] However, not all disparities in ethical obligations were addressed. A purposeful decision was made by the working group not to include guidance relating to the obligation in some jurisdictions to advise the court of adverse legal authority in deference to the difference between civil and common law jurisdictions in this regard.

The guidelines specifically deal with two of the obstructive and delaying tactics identified in the survey: tactics related to (a) information exchange and disclosure, and (b) creating a conflict with an arbitrator. The provisions relating to information exchange and disclosure amplify the provisions in the IBA Evidence Rules and provide further guidance as to those obligations of party representatives. As was the case with respect to the preparation of witnesses, more detailed guidance than was provided by the IBA Evidence Rules was found to be necessary.

Somewhat to their surprise, the working group found that a considerable number of survey respondents believed that the purposeful creation of a conflict with an arbitrator through the appointment of a party representative with a problematic relationship with a sitting arbitrator was an issue that required attention. The IBA Party Representative Guidelines resolve the tension between the parties' right to select their party representative and the right of the tribunal to preserve the integrity of the proceedings by providing that the tribunal has the power to exclude counsel who take on a representation that creates a conflict with an arbitrator after the tribunal is constituted.[31] This conclusion finds support in an ICSID decision in which the tribunal disqualified counsel finding that while the ICSID Convention and ICSID Rules do not explicitly grant arbitrators such a power, and, as a general rule, parties are entitled to choose their counsel, the tribunal may disqualify counsel under "its inherent power to take measures to preserve the integrity of its proceedings" under the ICSID Convention.[32] The IBA's promulgation of this guideline is a noteworthy balancing of the competing considerations and may be regarded as groundbreaking in

[30] The ICDR in its Guidelines for Arbitrators Concerning Exchanges of Information issued in 2007 sought to address these disparities in § 7 by providing that "the tribunal should to the extent possible apply the same rule [as to ethics and privilege] to both sides, giving preference to the rule that provides the highest level of protection." However, such provisions are not commonly found in institutional rules.

[31] It must be noted that the courts in some jurisdictions view the disqualification of counsel as exclusively within the court's jurisdiction.

[32] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* (ICSID Case No. ARB/05/24), Order of May 6, 2008.

light of the fundamental principle in arbitration that parties are free to select a party representative of their choosing.

Perhaps because of the multiplicity of possible obstructive tactics and the difficulty of itemizing all of them, other possible improper actions by party representatives are not specifically identified. However, such misconduct may be addressed by the tribunal under its broader powers. The guidelines empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include a "breach of the present Guidelines, or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative."

c. Implementation

Guidelines 26-27 of the IBA Party Representative Guidelines give the tribunal power to respond to behavior in violation of the guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award.

While these guidelines provide for such powers, like all of the guidelines discussed here, the IBA Party Representative Guidelines have no weight beyond that given to them by the party representatives and/or the arbitrators. As they state, the guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It was the intention of the drafters of the guidelines that the parties adopt the guidelines by agreement or that arbitral tribunals apply the guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so. One of the critical issues that will arise in the coming years as these guidelines are utilized concerns the delineation of the powers of the tribunal. What

steps are tribunals authorized to take with respect to party representative conduct and pursuant to what grant of authority?

The institutions have already taken some steps to provide arbitrators with greater authority and it appears further steps will be taken in the near future. The ICC 2012 Arbitration Rules provide in Article 37(5) that in the allocation of costs the tribunal may consider the extent to which the party "conducted the arbitration in an expeditious and cost effective manner," thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. At the time of this writing, the LCIA is reported to be planning to adopt a rule later this year which incorporates "basic norms expected of counsel in an arbitration under their auspices," and gives tribunals the power to exclude counsel who are found to be in serious and persistent violation of those norms.[33]

The new Commercial Arbitration Rules issued by the AAA effective October 1, 2013, specifically grant authority to the arbitrator under Rule 23 in the case of willful noncompliance with any order issued by the arbitrator to issue any order necessary to enforce rules relating to document production and the procedure set by the arbitrator with the parties to achieve a fair, efficient and economical resolution of the case. The arbitrator is authorized in such circumstances to allocate costs, draw adverse inferences, exclude evidence and other submissions, make special allocations of costs or interim awards of costs and issue any other enforcement order that the arbitrator is empowered to issue under applicable law. The new AAA Rule 58 grants the arbitrator authority, upon a party's request, to order appropriate sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator, upon notice and an opportunity to respond. Thus we see growing institutional support for increasing the powers of the tribunal to manage the proceedings to assure a fair process.

It remains to be seen how tribunals and the international arbitration community will utilize the IBA Party Representative Guidelines. Will tribunals seek the adoption of the guidelines? Will party representatives accept their application to their arbitrations? Will party representatives agree to make the guidelines binding obligations or limit their effect to serving as guidelines? Will tribunals make an effort to flush out differences in ethical obligations among party representatives acting before them to level the playing field? Will tribunals incorporate the

[33] Sebastian Perry, *Policing Ethical Conduct: Menon and Paulsson Debate Regulation*, Global Arbitration Review, June 5, 2013.

guidelines in whole or in part in their first procedural order? Will tribunals conclude that they have authority to exercise the powers granted to them under the guidelines to curb misconduct by party representatives? Pursuant to what grant of authority? Will the imposition of consequences on the parties themselves for misconduct by their representative be considered a violation of due process? Will tribunals find that following the process required to impose consequences for party representative misconduct gives rise to mini-hearings and increased costs and delays that make pursuing such a process unattractive? Will institutions amend their rules to provide greater and more explicit authority to the tribunal to address the issues covered by the guidelines? Will the IBA Party Representative Guidelines be as successful and utilized as widely as the IBA Evidence Rules? [34] These are all questions that will be answered as use of the guidelines evolves in the coming years.

[34] A survey conducted in 2012 found that the IBA Evidence Rules are used in 60% of arbitrations—in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirmed that they found the IBA Evidence Rules useful. Queen Mary University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.

PART III-1

INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION[1]

Introduction

1. Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.

2. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.

[1] Reproduced with the permission of the American Arbitration Association.

3. It is in the interest of everyone in the international arbitration community that international arbitration proceedings not be hindered by these growing conflicts of interest issues. The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts[2] in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality and independence and disclosure in international arbitration. The Working Group has determined that existing standards lack sufficient clarity and uniformity in their application. It has therefore prepared these Guidelines, which set forth some General Standards and Explanatory Notes on the Standards. Moreover, the Working Group believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator. Such lists – designated Red, Orange and Green (the 'Application Lists') – appear at the end of these Guidelines.[3]

4. The Guidelines reflect the Working Group's understanding of the best current international practice firmly rooted in the principles expressed in the General Standards. The Working Group has based the General Standards and the Application Lists upon statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration. The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration. In particular, the

[2] The members of the Working Group are: (1) Henri Alvarez, Canada; (2) John Beechey, England; (3) Jim Carter, United States; (4) Emmanuel Gaillard, France, (5) Emilio Gonzales de Castilla, Mexico; (6) Bernard Hanotiau, Belgium; (7) Michael Hwang, Singapore; (8) Albert Jan van den Berg, Belgium; (9) Doug Jones, Australia; (10) Gabrielle Kaufmann-Kohler, Switzerland; (11) Arthur Marriott, England; (12) Tore Wiwen Nilsson, Sweden; (13) Hilmar Raeschke-Kessler, Germany; (14) David W. Rivkin, United States; (15) Klaus Sachs, Germany; (16) Nathalie Voser, Switzerland (Rapporteur); (17) David Williams, New Zealand; (18) Des Williams, South Africa; (19); Otto de Witt Wijnen, The Netherlands (Chair).

[3] Detailed Background Information to the Guidelines has been published in *Business Law International* at BLI Vol 5, No 3, September 2004, pp 433-458 and is available at the IBA website www.ibanet.org

Working Group has sought and considered the views of many leading arbitration institutions, as well as corporate counsel and other persons involved in international arbitration. The Working Group also published drafts of the Guidelines and sought comments at two annual meetings of the International Bar Association and other meetings of arbitrators. While the comments received by the Working Group varied, and included some points of criticisms, the arbitration community generally supported and encouraged these efforts to help reduce the growing problems of conflicts of interests. The Working Group has studied all the comments received and has adopted many of the proposals that it has received. The Working Group is very grateful indeed for the serious considerations given to its proposals by so many institutions and individuals all over the globe and for the comments and proposals received.

5. Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).[4]

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation. The Working Group is also publishing a Background and History, which describes the studies made by the Working Group and may be helpful in interpreting the Guidelines.

7. The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover

[4] Similarly, the Working Group is of the opinion that these Guidelines should apply by analogy to civil servants and government officers who are appointed as arbitrators by States or State entities that are parties to arbitration proceedings.

many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be. Nevertheless, the Working Group is confident that the Application Lists provide better concrete guidance than the General Standards (and certainly more than existing standards). The IBA and the Working Group seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience.

8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

PART I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

Explanation to General Standard 1:

The Working Group is guided by the fundamental principle in international arbitration 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 Working Group considered whether this obligation should extend even during the period that the award may be challenged but has decided against this. The Working Group takes the view that the arbitrator's duty ends when the Arbitral Tribunal has rendered the final award or the proceedings have otherwise been finally terminated (eg, because of a settlement). If, after setting aside or other proceedings, the dispute is referred back to the same arbitrator, a fresh round of disclosure may be necessary.

(2) Conflicts of Interest

(a) *An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.*

(b) *The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).*

(c) *Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*

(d) *Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.*

Explanation to General Standard 2:

(a) It is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator's own point of view must lead to that arbitrator declining his or her appointment. This standard should apply regardless of the stage of the proceedings. This principle is so self-evident that many national laws do not explicitly say so. See eg Article 12, UNCITRAL Model Law. The Working Group, however, has included it in the General Standards because explicit expression in these Guidelines helps to avoid confusion and to create confidence in procedures before arbitral tribunals. In addition, the Working Group believes that the broad standard of 'any doubts as to an ability to be impartial and independent' should lead to the arbitrator declining the appointment.

(b) In order for standards to be applied as consistently as possible, the Working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording 'impartiality or independence' derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, to be applied objectively (a 'reasonable third person test'). As described in the Explanation to General Standard 3(d), this standard should apply regardless of the stage of the proceedings.

(c) Most laws and rules that apply the standard of justifiable doubts do not further define that standard. The Working Group believes that this General Standard provides some context for making this determination.

(d) The Working Group supports the view that no one is allowed to be his or her own judge; ie, there cannot be identity between an arbitrator and a party. The Working Group believes that this situation cannot be waived by the parties. The same principle should apply to persons who are legal representatives of a legal entity that is a party in the arbitration, like board members, or who have a significant economic interest in the matter at stake. Because of the importance of this principle, this non-waivable situation is made a General Standard, and examples are provided in the non-waivable Red List.

The General Standard purposely uses the terms 'identity' and 'legal representatives.' In the light of comments received, the Working Group considered whether these terms should be extended or further defined, but decided against doing so. It realizes that there are situations in which an employee of a party or a civil servant can be in a position similar, if not identical, to the position of an official legal representative. The Working Group decided that it should suffice to state the principle.

(3) Disclosure by the Arbitrator

(a) *If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or*

circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

(b) *It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.*

(c) *Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.*

(d) *When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.*

Explanation to General Standard 3:

(a) General Standard 2(b) above sets out an objective test for disqualification of an arbitrator. However, because of varying considerations with respect to disclosure, the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7(2) of the ICC Rules for this standard.

However, the Working Group believes that this principle should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need

not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required. Similarly, the Working Group emphasizes that the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other, and that a disclosure shall not automatically lead to disqualification, as reflected in General Standard 3(b).

In determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.

(b) Disclosure is not an admission of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned. An arbitrator making disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether or not they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. The Working Group hopes that the promulgation of this General Standard will eliminate the misunderstanding that disclosure demonstrates doubts sufficient to disqualify the arbitrator. Instead, any challenge should be successful only if an objective test, as set forth above, is met.

(c) Unnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process. Nevertheless, after some debate, the Working Group believes it important to provide expressly in the General Standards that in case of doubt the arbitrator should disclose. If the arbitrator feels that he or she should disclose but that professional secrecy rules or other rules of practice prevent such disclosure, he or she should not accept the appointment or should resign.

(d) The Working Group has concluded that disclosure or disqualification (as set out in General Standard 2) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act or whether a challenge by a party should be successful, the facts and circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. As a practical matter, institutions make a distinction between the commencement of an arbitration proceeding and a later stage. Also, courts tend to apply different standards. Nevertheless, the Working Group believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) *If, within 30 days after the receipt of any disclosure by the arbitrator or after a party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest by the arbitrator based on such facts or circumstances and may not raise any objection to such facts or circumstances at a later stage.*

(b) *However, if facts or circumstances exist as described in General Standard 2(d), any waiver by a party or any agreement by the parties to have such a person serve as arbitrator shall be regarded as invalid.*

(c) *A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator or continue to act as an arbitrator, if the following conditions are met:*

(i) *All parties, all arbitrators and the arbitration institution or other appointing authority (if any) must have full knowledge of the conflict of interest; and*

(ii) *All parties must expressly agree that such person may serve as arbitrator despite the conflict of interest.*

(d) *An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.*

Explanation to General Standard 4:

(a) The Working Group suggests a requirement of an explicit objection by the parties within a certain time limit. In the view of the Working Group, this time limit should also apply to a party who refuses to be involved.

(b) This General Standard is included to make General Standard 4(a) consistent with the non-waivable provisions of General Standard 2(d). Examples of such circumstances are described in the non-waivable Red List.

(c) In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration

proceedings is well established in some jurisdictions but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful. Thus, parties assume the risk of what the arbitrator may learn in the settlement process. In giving their express consent, the parties should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.

(5) Scope

These Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators. These Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws.

Explanation to General Standard 5:

Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards should not distinguish among sole arbitrators, party-appointed arbitrators and tribunal chairs. With regard to secretaries of Arbitral Tribunals, the Working Group takes the view that it is the responsibility of the arbitrator to ensure that the secretary is and remains impartial and independent.

Some arbitration rules and domestic laws permit party-appointed arbitrators to be non-neutral. When an arbitrator is serving in such a role, these Guidelines should not apply to him or her, since their purpose is to protect impartiality and independence.

(6) Relationships

(a) *When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether*

disclosure should be made, the activities of an arbitrator's law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.

(b) *Similarly, if one of the parties is a legal entity which is a member of a group with which the arbitrator's firm has an involvement, such facts or circumstances should be reasonably considered in each individual case. Therefore, this fact alone shall not automatically constitute a source of a conflict of interest or a reason for disclosure.*

(c) *If one of the parties is a legal entity, the managers, directors and members of a supervisory board of such legal entity and any person having a similar controlling influence on the legal entity shall be considered to be the equivalent of the legal entity.*

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. In the opinion of the Working Group, the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator's firm should not automatically constitute a conflict of interest. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be reasonably considered in each individual case. The Working Group uses the term 'involvement' rather than 'acting for' because a law firm's relevant connections with a party may include activities other than representation on a legal matter.

(b) When a party to an arbitration is a member of a group of companies, special questions regarding conflict of interest arise. As in the prior paragraph, the Working Group believes that because individual corporate structure arrangements vary so widely an automatic rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies should be reasonably considered in each individual case.

(c) The party in international arbitration is usually a legal entity. Therefore, this General Standard clarifies which individuals should be considered effectively to be that party.

(7) Duty of Arbitrator and Parties

(a) *A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so on its own initiative before the beginning of the proceeding or as soon as it becomes aware of such relationship.*

(b) *In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall perform a reasonable search of publicly available information.*

(c) *An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.*

Explanation to General Standard 7:

To reduce the risk of abuse by unmeritorious challenge of an arbitrator's impartiality or independence, it is necessary that the parties disclose any relevant relationship with the arbitrator. In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying the general standard, might affect the arbitrator's impartiality and independence. It is the arbitrator or putative arbitrator's obligation to make similar enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.

PART II: Practical Application of the General Standards

1. The Working Group believes that if the Guidelines are to have an important practical influence, they should reflect situations that are likely to occur in today's arbitration practice. The Guidelines should provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed.

For this purpose, the members of the Working Group analyzed their respective case law and categorized situations that can occur in the following Application Lists. These lists obviously cannot contain every situation, but they provide guidance in many circumstances, and the Working Group has sought to make them as comprehensive as possible. In all cases, the General Standards should control.

2. The Red List consists of two parts: 'a non-waivable Red List' (see General Standards 2(c) and 4(b)) and 'a waivable Red List' (see General Standard 4(c)). These lists are a non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (see General Standard 2(b)). The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict. The waivable Red List encompasses situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are

deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).

4. It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person's point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator's impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification.

5. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

6. The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes of the parties.'

7. Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated. An arbitrator may nevertheless wish to make disclosure if, under the General Standards, he or she believes it to be appropriate. While there has been much debate

with respect to the time limits used in the Lists, the Working Group has concluded that the limits indicated are appropriate and provide guidance where none exists now. For example, the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case.

8. The borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List of instead of another. Also, the Lists contain, for various situations, open norms like 'significant'. The Working Group has extensively and repeatedly discussed both of these issues, in the light of comments received. It believes that the decisions reflected in the Lists reflect international principles to the best extent possible and that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive.

9. There has been much debate as to whether there should be a Green List at all and also, with respect to the Red List, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the Working Group has maintained its decision that the subjective test for disclosure should not be the absolute criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the Working Group was that party autonomy, in this respect, has its limits.

1. Non-Waivable Red List

1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.

1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

2.1. Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator has previous involvement in the case.

2.2. Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

2.2.2 A close family member[5] of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3. Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate[6] of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

[5] Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner.

[6] Throughout the Application Lists, the term 'affiliate' encompasses all companies in one group of companies including the parent company.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. Orange List

3.1. Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

3.1.2 The 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.

3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.[7]

3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

3.2. Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.

3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.

3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

3.3. Relationship between an arbitrator and another arbitrator or counsel.

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.[8]

3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

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[7] It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.

[8] Issues concerning special considerations involving barristers in England are discussed in the Background Information issued by the Working Group.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

3.4. Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.

3.5. Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.

3.5.3 The arbitrator holds one position in an arbitration institution with appointing authority over the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1. Previously expressed legal opinions

4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

4.2. Previous services against one party

4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

4.3. Current services for one of the parties

4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

4.4. Contacts with another arbitrator or with counsel for one of the parties

4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.

4.5. Contacts between the arbitrator and one of the parties

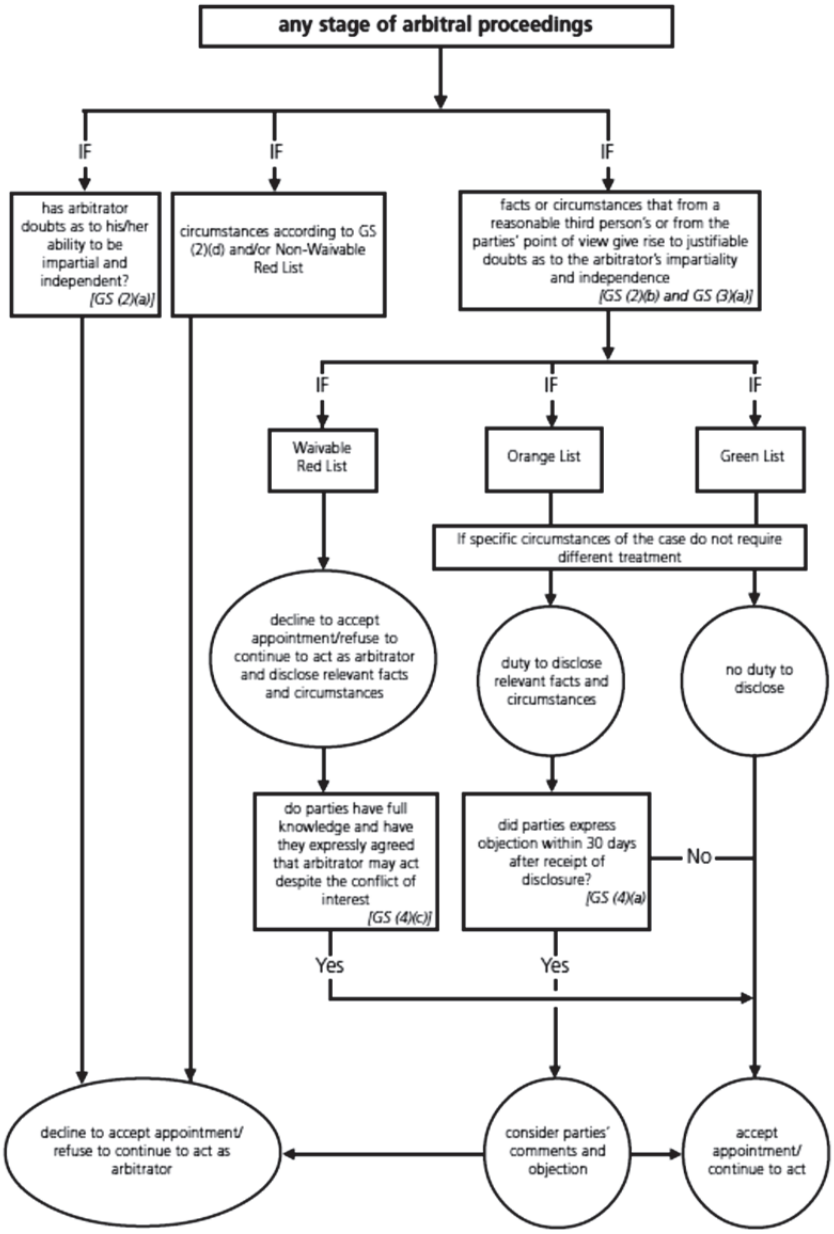
4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.

4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.

A flow chart is attached to these Guidelines for easy reference to the application of the Lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case prevail.

Flow chart IBA Guidelines on Conflicts of Interest in International Arbitration



PART III-2

INTERNATIONAL BAR ASSOCIATION RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS[1]

Introductory Note

International arbitrators should be impartial, independent, competent, diligent and discreet. These rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, they reflect internationally acceptable guidelines developed by practising lawyers from all continents. They will attain their objectives only if they are applied in good faith.

The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement. Whilst the International Bar Association hopes that they will be taken into account in the context of challenges to arbitrators, it is emphasised that these guidelines are not intended to create grounds for the setting aside of awards by national courts.

If parties wish to adopt the rules they may add the following to their arbitration clause or arbitration agreement:

> 'The parties agree that the Rules of Ethics for International Arbitrators established by the International Bar Association, in force at the date of the commencement of any arbitration under this clause, shall be applicable to the arbitrators appointed in respect of such arbitration.'

The International Bar Association takes the position that (whatever may be the case in domestic arbitration) international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations. Accordingly, the International Bar Association wishes to make it clear

[1] IBA Rules of Ethics for International Arbitrators is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

that it is not the intention of these rules to create opportunities for aggrieved parties to sue international arbitrators in national courts. The normal sanction for breach of an ethical duty is removal from office, with consequent loss of entitlement to remuneration. The International Bar Association also emphasises that these rules do not affect, and are intended to be cons1s.tent with, the International Code of Ethics for lawyers, adopted at Oslo on 25 July 1956, and amended by the General Meeting of the International Bar Association at Mexico City on 24 July 1964.

1 Fundamental Rule

Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias.

2 Acceptance of Appointment

2.1 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias.

2.2 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration.

2.3 A prospective arbitrator should accept an appointment only if he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.

2.4 It is inappropriate to contact parties in order to solicit appointment as arbitrator.

3 Elements of Bias

3.1 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.

3.2 Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.

3.3 Any current direct or indirect business relationship between an arbitrator and a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed. Examples of indirect relationships are where a member of the prospective arbitrator's family, his firm, or any business partner has a business relationship with one of the parties.

3.4 Past business relationships will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment.

3.5 Continuous and substantial social or professional relationships between a prospective arbitrator and a party, or with a person who is known to be a potentially important witness in the arbitration, will normally give rise to justifiable doubts as to the impartiality or independence of a prospective arbitrator.

4 Duty of Disclosure

4.1 A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though he non-disclosed facts or circumstances would not of themselves justify disqualification.

4.2 A prospective arbitrator should disclose:

(a) any past or present business relationship, whether direct or indirect as illustrated in Article 3.3, including prior appointment as arbitrator, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in

the arbitration. With regard to present relationships, the duty of disclosure applies irrespective of their magnitude, but with regard to past relationships only if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs. Non,-of an indirect relationship unknown to a prospective arbitrator will not be a ground for disqualification unless it could have been ascertained by making reasonable enquiries;

(b) the nature and duration of any substantial social relationships with any party or any person known to be likely to be an important witness in the arbitration;

(c) the nature of any previous relationship with any fellow arbitrator (including prior joint service as an arbitrator);

(d) he extent of any prior knowledge he may have of the dispute;

(e) the extent of any commitments which may affect his availability to perform his duties as arbitrator as may be reasonably anticipated.

4.3 The duty of disclosure continues throughout the arbitral proceedings as regards new facts or circumstances.

4.4 Disclosure should be made in writing and communicated to all parties and arbitrators. When an arbitrator has been appointed, any previous disclosure made to the parties should be communicated to the other arbitrators.

5 Communications with Parties

5.1 When approached with a view to appointment, a prospective arbitrator should make sufficient enquiries in order to inform himself whether there may be any justifiable doubts regarding his impartiality or independence; whether he is competent to determine the issues in dispute; and whether he is able to give the arbitration the time and attention required. He may also respond to enquiries from those approaching him, provided that such enquiries are designed to determine his suitability and availability for the appointment and provided that the merits of the case are not discussed. In the event that a prospective sole arbitrator or presiding arbitrator is approached by one party alone, or by one arbitrator chosen unilaterally by a party (a 'party nominated' arbitrator), he should ascertain that the other party or parties, or the other

arbitrator, has consented to the manner in which he has been approached. In such circumstances he should, in writing or orally, inform the other party or parties, or the other arbitrator, of the substance of the initial conversation.

5.2 If a party-nominated arbitrator is required to participate in the selection of a third or presiding arbitrator, it is acceptable for him (although he is not so required) to obtain the views of the party who nominated him as to the acceptability of candidates being considered.

5.3 Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.

5.4 If an arbitrator becomes aware that a fellow arbitrator has been in improper communication with a party, he may inform the remaining arbitrators and they should together determine what action should be taken. Normally, the appropriate initial course of action is for the offending arbitrator to be requested to refrain from making any further improper communications with the party. Where the offending arbitrator fails or refuses to refrain from improper communications, the remaining arbitrators may inform the innocent party in order that he may consider what action he should take. An arbitrator may act unilaterally to inform a party of the conduct of another arbitrator in order to allow the said party to consider a challenge of the offending arbitrator only in extreme circumstances, and after communicating his intention to his fellow arbitrators in writing.

5.5 No arbitrator should accept any gift or substantial hospitality, directly or indirectly, from any party to the arbitration. Sole arbitrators and presiding arbitrators should be particularly meticulous in avoiding significant social or professional contacts with any party to the arbitration other than in the presence of the other parties.

6 Fees

Unless the parties agree otherwise or a party defaults, an arbitrator shall make no unilateral arrangements for fees or expenses.

7 Duty of Diligence

All arbitrators should devote such time and attention as the parties may reasonably require having regard to all the circumstances of the case, and shall do their best to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake.

8 Involvement in Settlement Proposals

Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other. Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration.

9 Confidentiality of the Deliberations

The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.

PART III-3

AMERICAN BAR ASSOCIATION AND AMERICAN ARBITRATION ASSOCIATION CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES[1]

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code,

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all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party- appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures

of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party- appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public,

to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;
(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
(3) that he or she is competent to serve; and
(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the

arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but

an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
(2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
(3) The nature and extent of any prior knowledge they may have of the dispute; and
(4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(3) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
(4) Withdraw.

CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
   (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
   (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party- appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper

for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.
(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to

prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an

established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the

content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

PART III-4

INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION[1]

Preamble

The IBA Arbitration Committee established the Task Force on Counsel Conduct in International Arbitration (the 'Task Force') in 2008.

The mandate of the Task Force was to focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms. As an initial inquiry, the Task Force undertook to determine whether such differing norms and practises may undermine the fundamental fairness and integrity of international arbitral proceedings and whether international guidelines on party representation in international arbitration may assist parties, counsel and arbitrators. In 2010, the Task Force commissioned a survey (the 'Survey') in order to examine these issues. Respondents to the Survey expressed support for the development of international guidelines for party representation.

The Task Force proposed draft guidelines to the IBA Arbitration Committee's officers in October 2012. The Committee then reviewed the draft guidelines and consulted with experienced arbitration practitioners, arbitrators and arbitral institutions. The draft guidelines were then submitted to all members of the IBA Arbitration Committee for consideration.

Unlike in domestic judicial settings, in which counsel are familiar with, and subject, to a single set of professional conduct rules, party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties in

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international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place. The Survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration. The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co- counsel relationship, are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.

In addition to the potential for uncertainty, rules and norms developed for domestic judicial litigation may be ill-adapted to international arbitral proceedings. Indeed, specialised practises and procedures have been developed in international arbitration to accommodate the legal and cultural differences among participants and the complex, multinational nature of the disputes. Domestic professional conduct rules and norms, by contrast, are developed to apply in specific legal cultures consistent with established national procedures.

The IBA Guidelines on Party Representation in International Arbitration (the 'Guidelines') are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.

As with the International Principles on Conduct for the Legal Profession, adopted by the IBA on 28 May 2011, the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies.

The use of the term guidelines rather than rules is intended to highlight their contractual nature. The parties may thus adopt the Guidelines or a portion thereof by agreement. Arbitral tribunals may also apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they determine that they have the authority to do so.

The Guidelines are not intended to limit the flexibility that is inherent in, and a considerable advantage of, international arbitration, and parties and arbitral tribunals may adapt them to the particular circumstances of each arbitration.

Definitions

In the IBA Guidelines on Party Representation in International Arbitration:

'Arbitral Tribunal' or *'Tribunal'* means a sole Arbitrator or a panel of Arbitrators in the arbitration;

'Arbitrator' means an arbitrator in the arbitration;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Domestic Bar' or *'Bar'* means the national or local authority or authorities responsible for the regulation of the professional conduct of lawyers;

'Evidence' means documentary evidence and written and oral testimony.

'Ex Parte Communications' means oral or written communications between a Party Representative and an Arbitrator or prospective Arbitrator without the presence or knowledge of the opposing Party or Parties;

'Expert' means a person or organisation appearing before an Arbitral Tribunal to provide expert analysis and opinion on specific issues determined by a Party or by the Arbitral Tribunal;

'Expert Report' means a written statement by an Expert;

'Guidelines' mean these IBA Guidelines on Party Representation in International Arbitration, as they may be revised or amended from time to time;

'Knowingly' means with actual knowledge of the fact in question;

'Misconduct' means a breach of the present Guidelines or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative;

'Party' means a party to the arbitration;

'Party-Nominated Arbitrator' means an Arbitrator who is nominated or appointed by one or more Parties;

'Party Representative' or *'Representative'* means any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar;

'Presiding Arbitrator' means an arbitrator who is either a sole Arbitrator or the chairperson of the Arbitral Tribunal;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Witness' means a person appearing before an Arbitral Tribunal to provide testimony of fact;

'Witness Statement' means a written statement by a Witness recording testimony.

Application of Guidelines

1. The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings.

2. In the event of any dispute regarding the meaning of the Guidelines, the Arbitral Tribunal should interpret them in accordance with their overall purpose and in the manner most appropriate for the particular arbitration.

3. The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty of loyalty to the party whom he or she represents or a Party representative's paramount obligation to present such Party's case to the Arbitral Tribunal.

Comments to Guidelines 1–3

As explained in the Preamble, the Parties and Arbitral Tribunals may benefit from guidance in matters of Party Representation, in particular in order to address instances where differing norms and expectations may threaten the integrity and fairness of the arbitral proceedings.

By virtue of these Guidelines, Arbitral Tribunals need not, in dealing with such issues, and subject to applicable mandatory laws, be limited by a choice- of-law rule or private international law analysis to choosing among national or domestic professional conduct rules. Instead, these Guidelines offer an approach designed to account for the multi-faceted nature of international arbitral proceedings.

These Guidelines shall apply where and to the extent that the Parties have so agreed. Parties may adopt these Guidelines, in whole or in part, in their arbitration agreement or at any time subsequently.

An Arbitral Tribunal may also apply, or draw inspiration from, the Guidelines, after having determined that it has the authority to rule on matters of Party representation in order to ensure the integrity and fairness of the arbitral proceedings. Before making such determination, the Arbitral Tribunal should give the Parties an opportunity to express their views.

These Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognise nor exclude the existence of such authority. It remains for the Tribunal to make a determination as to whether it has the authority to rule on matters of Party representation and to apply the Guidelines.

A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative.

Party Representation

4. Party Representatives should identify themselves to the other Party or Parties and the Arbitral Tribunal at the earliest opportunity. A Party should promptly inform the Arbitral Tribunal and the other Party or Parties of any change in such representation.

5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.

6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.

Comments to Guidelines 4–6

Changes in Party representation in the course of the arbitration may, because of conflicts of interest between a newly-appointed Party Representative and one or more of the Arbitrators, threaten the integrity of the proceedings. In such case, the Arbitral Tribunal may, if compelling circumstances so justify, and where it has found that it has the requisite authority, consider excluding the new Representative from participating in all or part of the arbitral proceedings. In assessing whether any such conflict of interest exists, the Arbitral Tribunal may rely on the IBA Guidelines on Conflicts of Interest in International Arbitration.

Before resorting to such measure, it is important that the Arbitral Tribunal give the Parties an opportunity to express their views about the existence of a conflict, the extent of the Tribunal's authority to act in relation to such conflict, and the consequences of the measure that the Tribunal is contemplating.

Communications with Arbitrators

7. Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration.

8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:

(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

(c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(d) While communications with a prospective Party- Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.

Comments to Guidelines 7–8

Guidelines 7–8 deal with communications between a Party Representative and an Arbitrator or potential Arbitrator concerning the arbitration.

The Guidelines seek to reflect best international practices and, as such, may depart from potentially diverging domestic arbitration practices that are more restrictive or, to the contrary, permit broader Ex Parte Communications.

Ex Parte Communications, as defined in these Guidelines, may occur only in defined circumstances, and a Party Representative should otherwise refrain from any such communication. The Guidelines do not seek to define when the relevant period begins or ends. Any communication that takes place in the context of, or in relation to, the constitution of the Arbitral Tribunal is covered.

Ex Parte Communications with a prospective Arbitrator (Party-Nominated or Presiding Arbitrator) should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the potential Arbitrator, as described in further detail below. A Party Representative should not take the opportunity to seek the prospective Arbitrator's views on the substance of the dispute.

The following discussion topics are appropriate in pre-appointment communications in order to assess the prospective Arbitrator's expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest:

(a) the prospective Arbitrator's publications, including books, articles and conference papers or engagements;
(b) any activities of the prospective Arbitrator and his or her law firm or organisation within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality;
(c) a description of the general nature of the dispute;
(d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration;
(e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and
(f) the anticipated timetable and general conduct of the proceedings.

Applications to the Arbitral Tribunal without the presence or knowledge of the opposing Party or Parties may be permitted in certain circumstances, if the parties so agreed, or as permitted by applicable law. Such may be the case, in particular, for interim measures.

Finally, a Party Representative may communicate with the Arbitral Tribunal if the other Party or Parties fail to participate in a hearing or proceedings and are not represented.

Submissions to the Arbitral Tribunal

9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.

10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.

11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly

take remedial measures, which may include one or more of the following:

(a) advise the Witness or Expert to testify truthfully;

(b) take reasonable steps to deter the Witness or Expert from submitting false evidence;

(c) urge the Witness or Expert to correct or withdraw the false evidence;

(d) correct or withdraw the false evidence;

(e) withdraw as Party Representative if the circumstances so warrant.

Comments to Guidelines 9–11

Guidelines 9–11 concern the responsibility of a Party Representative when making submissions and tendering evidence to the Arbitral Tribunal. This principle is sometimes referred to as the duty of candour or honesty owed to the Tribunal.

The Guidelines identify two aspects of the responsibility of a Party Representative: the first relates to submissions of fact made by a Party Representative (Guidelines 9 and 10), and the second concerns the evidence given by a Witness or Expert (Guideline 11).

With respect to submissions to the Arbitral Tribunal, these Guidelines contain two limitations to the principles set out for Party Representatives. First, Guidelines 9 and 10 are restricted to false submissions of fact. Secondly, the Party Representative must have actual knowledge of the false nature of the submission, which may be inferred from the circumstances.

Under Guideline 10, a Party Representative should promptly correct any false submissions of fact previously made to the Tribunal, unless prevented from doing so by countervailing considerations of confidentiality and privilege. Such principle also applies, in case of a change in representation, to a newly-appointed Party Representative who becomes aware that his or her predecessor made a false submission.

With respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable.

Guideline 11 addresses the presentation of evidence to the Tribunal that a Party Representative knows to be false. A Party Representative

should not offer knowingly false evidence or testimony. A Party Representative therefore should not assist a Witness or Expert or seek to influence a Witness or Expert to give false evidence to the Tribunal in oral testimony or written Witness Statements or Expert Reports.

The considerations outlined for Guidelines 9 and 10 apply equally to Guideline 11. Guideline 11 is more specific in terms of the remedial measures that a Party Representative may take in the event that the Witness or Expert intends to present or presents evidence that the Party Representative knows or later discovers to be false. The list of remedial measures provided in Guideline 11 is not exhaustive. Such remedial measures may extend to the Party Representative's withdrawal from the case, if the circumstances so warrant. Guideline 11 acknowledges, by using the term 'may', that certain remedial measures, such as correcting or withdrawing false Witness or Expert evidence may not be compatible with the ethical rules bearing on counsel in some jurisdictions.

Information Exchange and Disclosure

12. When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.

13. A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.

14. A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.

15. A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced.

16. A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce.

17. If, during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, but was not produced, such Party Representative should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so.

Comments to Guidelines 12–17

The IBA addressed the scope of Document production in the IBA Rules on the Taking of Evidence in International Arbitration (*see* Articles 3 and 9). Guidelines 12–17 concern the conduct of Party Representatives in connection with Document production.

Party Representatives are often unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of preserving, collecting and producing documents in international arbitration. It is common for Party Representatives in the same arbitration proceeding to apply different standards. For example, one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents. In these circumstances, the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings.

The Guidelines are intended to address these difficulties by suggesting standards of conduct in international arbitration. They may not be necessary in cases where Party Representatives share similar expectations with respect to their role in relation to Document production or in cases where Document production is not done or is minimal.

The Guidelines are intended to foster the taking of objectively reasonable steps to preserve, search for and produce Documents that a Party has an obligation to disclose.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to: (i) identify those persons within the Party's control who might possess

Documents potentially relevant to the arbitration, including electronic Documents; (ii) notify such persons of the need to preserve and not destroy any such Documents; and (iii) suspend or otherwise make arrangements to override any Document retention or other policies/practises whereby potentially relevant Documents might be destroyed in the ordinary course of business.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to, and assist such Party to: (i) put in place a reasonable and proportionate system for collecting and reviewing Documents within the possession of persons within the Party's control in order to identify Documents that are relevant to the arbitration or that have been requested by another Party; and (ii) ensure that the Party Representative is provided with copies of, or access to, all such Documents.

While Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration requires the production of Documents relevant to the case and material to its outcome, Guideline 12 refers only to potentially relevant Documents because its purpose is different: when a Party Representative advises the Party whom he or she represents to preserve evidence, such Party Representative is typically not at that stage in a position to assess materiality, and the test for preserving and collecting Documents therefore should be potential relevance to the case at hand.

Finally, a Party Representative should not make a Request to Produce, or object to a Request to Produce, when such request or objection is only aimed at harassing, obtaining documents for purposes extraneous to the arbitration, or causing unnecessary delay (Guideline 13).

Witnesses and Experts

18. Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself or herself, as well as the Party he or she represents, and the reason for which the information is sought.

19. A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.

20. A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

21. A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances.

22. A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion.

23. A Party Representative should not invite or encourage a Witness to give false evidence.

24. A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.

25. A Party Representative may pay, offer to pay, or acquiesce in the payment of:

(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing;

(b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and

(c) reasonable fees for the professional services of a Party-appointed Expert.

Comments to Guidelines 18–25

Guidelines 18–25 are concerned with interactions between Party Representatives and Witnesses and Experts. The interaction between Party Representatives and Witnesses is also addressed in Guidelines 9–11 concerning Submissions to the Arbitral Tribunal.

Many international arbitration practitioners desire more transparent and predictable standards of conduct with respect to relations with Witnesses and Experts in order to promote the principle of equal treatment among Parties. Disparate practises among jurisdictions may create inequality and threaten the integrity of the arbitral proceedings.

The Guidelines are intended to reflect best international arbitration practise with respect to the preparation of Witness and Expert testimony.

When a Party Representative contacts a potential Witness, he or she should disclose his or her identity and the reason for the contact before seeking any information from the potential Witness (Guideline 18). A Party Representative should also make the potential Witness aware of his or her right to inform or instruct counsel about this contact and involve such counsel in any further communication (Guideline 19).

Domestic professional conduct norms in some jurisdictions require higher standards with respect to contacts with potential Witnesses who are known to be represented by counsel. For example, some common law jurisdictions maintain a prohibition against contact by counsel with any potential Witness whom counsel knows to be represented in respect of the particular arbitration.

If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal.

As provided by Guideline 20, a Party Representative may assist in the preparation of Witness Statements and Expert Reports, but should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances (Guideline 21), and that any Expert Report reflects the Expert's own views, analysis and conclusions (Guideline 22).

A Party Representative should not invite or encourage a Witness to give false evidence (Guideline 23).

As part of the preparation of testimony for the arbitration, a Party Representative may meet with Witnesses and Experts (or potential Witnesses and Experts) to discuss their prospective testimony. A Party Representative may also help a Witness in preparing his or her own Witness Statement or Expert Report. Further, a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers (Guideline 24). This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion.

Finally, Party Representatives may pay, offer to pay or acquiesce in the payment of reasonable compensation to a Witness for his or her time and a reasonable fee for the professional services of an Expert (Guideline 25).

Remedies for Misconduct

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:

(a) admonish the Party Representative;

(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;

(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;

(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account:

(a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;

(b) the potential impact of a ruling regarding Misconduct on the rights of the Parties;

(c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;

(d) the good faith of the Party Representative;

(e) relevant considerations of privilege and confidentiality; and

(f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.

Comments to Guidelines 26-27

Guidelines 26–27 articulate potential remedies to address Misconduct by a Party Representative.

Their purpose is to preserve or restore the fairness and integrity of the arbitration.

The Arbitral Tribunal should seek to apply the most proportionate remedy or combination of remedies in light of the nature and gravity of the Misconduct, the good faith of the Party Representative and the Party whom he or she represents, the impact of the remedy on the Parties' rights, and the need to preserve the integrity, effectiveness and fairness of the arbitration and the enforceability of the award.

Guideline 27 sets forth a list of factors that is neither exhaustive nor binding, but instead reflects an overarching balancing exercise to be conducted in addressing matters of Misconduct by a Party Representative in order to ensure that the arbitration proceed in a fair and appropriate manner.

Before imposing any remedy in respect of alleged Misconduct, it is important that the Arbitral Tribunal gives the Parties and the impugned Representative the right to be heard in relation to the allegations made.