# A PROPOSAL TO ESTABLISH AN INTERNATIONAL COMMERCIAL ARBITRATION ETHICS PANEL AND HOTLINE TO RESOLVE DISCLOSURE AND CONFLICTS ISSUES

*Nelson Edward Timken**

## I. Introduction

Guidelines called "soft laws" applicable to international arbitrator ethics provide a basis for self-regulation in the avoidance of conflicts.[1] They assume an ability on the part of the arbitrator to impose upon himself or herself an aspirational set of ethical guidelines in the face of an increasingly complex commercial world and lucrative financial incentives.[2] These guidelines are intended to preserve and promote the arbitrator's independence, the absence of bias, public confidence in and the continued viability of the arbitration process.[3] They are non-exhaustive, somewhat vague, qualitative, and both subjective and objective. They do not override national law, supersede local law, ethics rules, or the parties' arbitration agreements.[4] Professor Catherine A. Rogers (Penn State

* Nelson Edward Timken received an LLM in International Dispute Resolution at Fordham School of Law in May 2022. He is a Fellow of the Chartered Institute of Arbitrators, co-Chair of the New York County Lawyers ADR Committee, and a member of NYCLA's Board of Directors. This article would not be possible without the patience, guidance. support, and inspiration of former Fordham Dean Toni Jaeger-Fine. Thank you so much, Toni.

1 Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int'l L. Rev. 957 (2005).

2 *See* Thomas J. Stipanowich, *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings*, *in* Soft Law in International Arbitration (Lawrence Newman et al.) (forthcoming 2021).

3 Robert A. Holtzman, *The Role of Arbitrator Ethics*, 7 DePaul Bus. & Com. L. J. 481 (2009).

4 *See* A & Others v. B, 2 Lloyd's Rep 591 (UK) (2011). ("Furthermore, in my judgment that conclusion is not altered in any way by the IBA Guidelines, which do not assist the claimants for a number of reasons. First, as paragraph 6 of the Introduction to the Guidelines makes clear, the Guidelines are not intended to override the national law. It necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion.")

Law School, University Park, and Queen Mary University, London) likens arbitrator conflicts to "moving targets."[5]

This This Article suggests that an International Commercial Arbitration Ethics Committee or Panel[6] be established like professional ethics panels that govern attorney conduct. Such a body could assist arbitrators in interpreting the various codes, rules, and national laws used in making determination of disclosure and conflict in particular situations rather than leaving arbitrators to their own devices and consciences to make these difficult determinations. It will demonstrate the shortcomings in various static guidelines that could be avoided by the concerted consideration of such committee or panel.

Part I will discuss the need for comprehensive and universal conflict and disclosure determinations for international arbitrators. Part II will discuss the inadequacy of current rules governing disclosure requirements and ethics challenges to arbitrators. Part III will suggest a solution based upon the New York State Bar Association's Professional Ethics Committee model whereby international arbitrators could pose their ethics dilemmas to the panel or committee and receive a reasoned written or oral opinion to guide them.

## II. The Need for Comprehensive and Universal Conflict and Disclosure Guidance for International Commercial Arbitrators

The need for comprehensive and universal conflict and disclosure guidance for international commercial arbitrators is almost self-evident. The introduction to an article published in May 2015 by the co-Chairs of the International Bar Association Arbitration

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5 Julie N. Bloch, *Disclosure and Conflicts of Interest—A Recap of a Pragmatic Panel*, 3 ITA in Rev. 98 (2021).

6 This article will use the terms "panel" and "committee" interchangeably. The English Language Learners meaning of "panel" is "a group of people who answer questions, give advice or opinions about something, or take part in a discussion for an audience" or "a group of people with special knowledge, skill, or experience who give advice or make decision" *Panel*, Merriam-Webster, https://www.merriam-webster.com/dictionary/panel.) This is essentially the same as the definition of "committee" which is "a body of persons delegated to consider, investigate, take action on, or report on some matter." *Committee*, Merriam-Webster, https://www.merriam-webster.com/dictionary/committee [https://perma.cc/D4DJ-K2HS] (last updated Jan. 27, 2023).

Committee Eduardo Zuleta and Paul Friedland, aptly summarizes the problem:

> International arbitration today is in the public gaze like never before. Commensurate with its increased use to resolve disputes, there is greater scrutiny by users and observers alike. The alleged suspicion towards international arbitration stems in part from the fact that the arbitrators, unlike judges with fixed tenures, operate in a private and increasingly competitive domain. In a complex business environment with interlocking corporate relationships and a wide range of players, from solo practitioners to members of large firms, there is a growing challenge of preventing conflicts of interest and ensuring independence and impartiality in arbitral decision making.[7]

The problem identified is exacerbated by the fact that the nature of the concern over arbitrator conflicts is constantly evolving. Existing definitions meant to clarify what is or is not a conflict are circular and incoherent. Considering this, Prof. Rogers posits the question of how exactly the international arbitration community can hit this "moving target?"[8] International arbitration is expanding, the field of arbitrators is becoming more crowded and competitive, and relationships between parties and arbitrators are ever more complex. Societal values are changing, as in the increased use of social media and virtual arbitration platforms. Many disputes are handled by international commercial bodies and institutional dispute resolution providers by way of arbitration. This in turn has led to difficulties in selecting neutrals to sit on arbitral panels, along with challenges to those under consideration and selected to sit on a panel that can cause unwanted delays. Like any ethical conundrum, these challenges—which concern claims of arbitrator conflict or disclosure failures—are often ambiguous and not easily resolved. Often, they will involve a multiplicity of contacts, relationships, and prior engagements, which taken together form the basis for the challenge. Arbitrators are asked to make determinations that are increasingly complex and involve financial incentives that may impact an arbitrator's assessment of her or his suitability to hear a particular matter. The penalty for making the wrong determination is that they are challenged by the parties, which is embarrassing, and can lead to a vacatur of an award, which can serve as a public censure in court proceedings.

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[7] Eduardo Zuleta & Paul Friedland, *The 2014 Revisions to the IBA Guidelines on Conflicts of Interest in International Arbitration*, 9 DISP. RESOL. INT'L 55 (2015).

[8] *Id.*; Bloch, *supra* note 5.

There is no mandatory cohesive international code. There is no all-embracing authority from which a challenged neutral could pluck an answer to his or her dilemma. Likewise, there is no international arbitral ethics committee or panel to which an arbitrator may preliminarily submit the issue by email or telephone hotline and obtain a reliable, reasoned advisory opinion before committing himself or herself. Considering all these limitations, self-regulation is an insufficient mechanism to monitor these thorny issues.

### A. *Arbitrator Disclosure Miscues in International Commercial Cases*

Arbitrators have found themselves without guidance, as demonstrated by inconsistent holdings in American and British cases involving disclosure and disqualification under the Federal Arbitration Act (American cases) and the English Arbitration Act of 1996 (English cases).[9] These two jurisdictions were selected due to the wealth of commercial activity and vastly distinct way of handling the issues of arbitrator disclosure and disqualification.

The need for comprehensive and universal conflict and disclosure guidance is illustrated by the divergence in approaches by the courts discussed below. The arbitrators on these matters undoubtedly felt secure in their ability to self-regulate their disclosure activities. However, courts passing upon the propriety of their disclosures have sometimes found otherwise, resulting in sullied reputations and vacatur of arbitration awards following a massive expenditure of time and money, and an erosion of public confidence in the arbitration system.[10] Even where awards were upheld, this occurred after a tumultuous litigation history and questions as to the arbitrator's propriety and resulted in a patchwork of decisional law.[11]

The United States Federal Arbitration Act provides for the vacation of arbitration awards procured by corruption, fraud, or undue means, *where there was evident partiality* or corruption in the arbitrators, where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, in refusing to hear evidence pertinent and material to the contro-

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9 *See* Arbitration Act of 1996, c. 23 (Eng.).

10 A.S.M. Shipping Ltd. of India v. T.T.M.I. Ltd of England [2005] EWCH (Comm) 2005/45 (UK).

11 Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir, 2019).

versy; exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[12]

The concept of "evident partiality" has been subject to differing judicial definitions. In a holding that many feel went too far,[13] the U.S. Court of Appeals for the Ninth Circuit in *Monster Energy Co. v. City Bevs, LLC*[14] held that the FAA's "evident partiality" standard for vacating arbitration awards applied in a situation where the arbitrator failed to specifically disclose a partial ownership interest in the arbitral institution JAMS.[15] The Court held that the failure to disclose "nontrivial business dealings" with the parties created an impression of bias that required the award to be vacated. The Ninth Circuit found that the arbitrator expressly likened his interest in JAMS to that of each JAMS neutral, insofar as he disclosed an interest in the overall financial success of JAMS. However, the court found that the arbitrator, as a co-owner of JAMS, had a financial interest in all its arbitrations that was substantial and greatly exceeded the general economic interest that all JAMS neutrals had.[16] In addition since JAMS had administered ninety-seven arbitrations for Monster over five years the business dealing between the parties was hardly trivial. In sum, the court found that the arbitrator had a substantial interest in JAMS which had done more than trivial business with Monster—facts that created the impression of bias, should have been disclosed, and therefore supported vacatur.[17] There was a persuasive dissent in the case.[18]

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12 9 U.S.C. § 10.

13 Dustin Chase-Woods, Blaine I. Green, *Can the Beast Be Caged? Ninth Circuit Narrowly Interprets its* Monster Energy *Decision on Arbitrator Disclosure and Suggests Rehearing En Banc*, PILLSBURY WINTHROP SHAW PITTMAN LLP DAILY J. (July 14, 2021), https://www.pillsburylaw.com/en/news-and-insights/ninth-circuit-monster-energy-arbitrator-disclosure.html [https://perma.cc/D3MN-QYGC].

14 *Monster Energy Co.*, 940 F.3d 1130.

15 William Schmelter, *Setting the Standard for "Neutral" Arbitrators: The Risk of Evident Partiality and the Impact of Monster Energy v. City Beverages*, 61 SANTA CLARA L. REV., 839, 854 (2021).

16 *Id.* at 858.

17 *Id.*

18 *Monster Energy Co.*, 940 F.3d at 1143. The dissenting opinion by Judge Friedland argued that in light of the arbitrator's disclosure of an ownership interest, the additional information the majority believed should have been disclosed would not have made any material difference. On the other hand, the majority's opinion would generate endless litigation over arbitrations that were intended to resolve disputes outside the court system. In addition, Judge Friedland noted that the majority's opinion would require a vacatur of numerous cases decided by JAMS arbitrators who did not disclose their ownership interest. The dissent addresses issues of arbitrations

*Monster Energy* demonstrates one danger of arbitrator self-regulation, in that a lack of disclosure could result at least in theory in vacatur of numerous arbitrations conducted by one provider.[19] An objective ethics committee with no strong financial incentive vis a vis ownership of the provider and repeat business by one party could ameliorate the court's concerns in this regard by illuminating an otherwise murky ethical issue.

In *Applied Materials Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,[20] the U.S. Court of Appeals for the Second Circuit vacated an arbitration award when the chair acted with "evident partiality," under the Federal Arbitration Act[21] by failing to either investigate a potential business relationship between his corporation and one of the parties or to inform the parties that he had walled himself off from learning more.

Following *Commonwealth Coatings Corp. v Continental Casualty Co*.,[22] the Court in *Applied Materials* held "where the arbitrator has a substantial interest in the firm which has done more than trivial business with a party, that fact must be disclosed."[23] An arbitrator who knows of the material relationship with the party and fails to disclose it meets the "evident partiality" standard, since a reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side.[24] Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are in-

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involving repeat players involving a lack of disclosure to the extent that the private arbitration system favors repeat players while at the same time requiring non-repeat players to agree to arbitration as a condition of contract for products or services or employment.

19 Other circuits' vacatur standards are stricter than the Ninth Circuit's. *See, e.g.*, Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012) (evident partiality "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" quoting Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 84 (2d. Cir. 1984)). Many circuits have adopted the Morelite standard. *See, e.g.*, Freeman v. Pittsburgh Glass Works LLC, 709 F.3d 240, 251–53 (3d Cir. 2013) (affirming Morelite's standard and listing cases from the 1st, 4th, 5th and 6th Circuits doing the same); see also Republic of Argentina v. AWG Grp. Ltd., 894 F.3d 327, 335–37 (D.C. Cir. 2018) (parties challenging awards based on evident partiality must meet a "heavy burden" in reaching the "onerous" vacatur standard by presenting "specific facts that indicate improper motives on the part of an arbitrator." In reaching its decision, the court considered the quantitative amount of the interest in question, unlike the Monster court, and warned of the upending effect that granting motions to vacate such as the one before it would have on arbitral awards in general).

20 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d. Cir. 2007).

21 Federal Arbitration Act, 9 U. S. C. S. §10(a) (2002).

22 Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

23 *Id.* at 151–152.

24 *See Morelite Constr. Corp.*, 748 F.2d at 84.

formed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.[25] The arbitrator was under an ongoing obligation to disclose conflicts. Once the arbitrator learned that a branch of his company was negotiating to enter a business relationship with one of the parties, he knew that a potential conflict existed. Once the arbitrator was aware that a non-trivial conflict of interest might exist the arbitrator had a continuing duty to ensure that neither he nor his corporation had a direct or indirect interest in the outcome of the arbitration.[26] The arbitrator demonstrated evident partiality by failing to investigate the circumstances of the prospective conflict or to disclose that he would make no further inquiries.[27] Perhaps had the arbitrator had better guidance in the form of an advisory international ethics panel or committee to which he could turn before refusing to vacate the arbitration panel or to advise the parties that he would not investigate further, vacatur of the award would not have been required.

The following case demonstrates the inconsistencies of standards among the courts in different circuits. *Nat'l Indem. v. IRB Brasil Resseguros S.A.*,[28] a second district court case applying Second Circuit analysis, involved a seven-year series of contentious arbitrations under the Federal Arbitration Act,[29] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[30] pertaining to Nat'l Indem. Co's (Nico's) alleged obligation to reinsure losses suffered by a Brazilian company in Brazil. The principal argument for vacatur of the Panel's awards was that Umpire Schmidt's allegedly untimely disclosure of his role as party-arbitrator in another arbitration, and his refusal to withdraw as umpire in the Nico-IRB arbitration, constitute "evident partiality" under the FAA.[31]

The court held that upon his initial nomination as an umpire candidate in 2009, Schmidt furnished the parties with a thorough and accurate response to their umpire questionnaire. In that ques-

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25 *Commonwealth Coatings Corp.*, 393 U.S. at 150.

26 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 139 (2d. Cir. 2007).

27 *Id.*

28 Nat'l Indem. v. IRB Brasil Resseguros S.A., 164 F. Supp.3d 457 (S.D.N.Y 2016), aff'd 675 F. App'x 89 (2d. Cir. 2017).

29 9 U.S.C.S. § 1 et seq.

30 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.

31 *Natl. Indem*, 164 F.Supp.3d at 474.

tionnaire, Schmidt disclosed extensive prior connections to the parties and their lawyers, including his participation in 25 past arbitrations involving the Nico-affiliate Gen Re, thirteen of those as Gen Re's party- arbitrator. In the more than five years since, IRB never once objected to any of these past assignments. Umpire Schmidt's 2009 questionnaire response had already disclosed many connections similar in kind to the Equitas matter, without objection from the parties. Schmidt also disclosed his participation in the Equitas arbitration voluntarily and rapidly after he was informed that he had been selected as umpire in the Nico-IRB matter. IRB objected, Schmidt ordered briefing, and he later published a written explanation of his decision not to withdraw.[32] The Southern District Court found the timing of Umpire Schmidt's supplemental disclosures reasonable, albeit not "continuous." His initial questionnaire response was met with two years of silence as the parties delayed, negotiated, and litigated. On the day he learned he was selected as umpire, he promised to quickly update his disclosures, and did so two days later, disclosing his assignment as party-arbitrator for Equitas after his 2009 questionnaire. The umpire's concurrent arbitration assignments did not approach the standard of partiality that would cause a reasonable person to conclude he was partial to petitioner.[33]

The Second Circuit, unlike the Ninth, is not quick to order vacatur due to evident partiality based on non-disclosure alone. "An arbitrator's failure to make a full disclosure may sully his reputation for candor but does not demonstrate evident partiality."[34] An international commercial arbitrator must consider logistics when determining the appropriateness of his or her disclosures.

English cases applying the English Arbitration Act of 1996 have often taken a more restrained view of not only the scope of disclosure by international arbitrators by disqualification resulting from non-disclosure.

The English Arbitration Act of 1996 ("AA")[35] in Section 24 empowers a court to remove an arbitrator when circumstances exist that give rise to "*justifiable doubts as to his impartiality.*"[36] The General Duty of a Tribunal is defined in Section 33 of the AA as

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32 *Id.* at 476–77.

33 *Id.* at 460.

34 Certain Underwriting Members of Lloyds of London v. Florida, 892 F3d 501, 506, n 2 (2d Cir 2018).

35 Arbitration Act of 1996, c. 23 (Eng.).

36 *Id. (emphasis added)*.

requiring an arbitration panel to act fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting his/her case and dealing with that of his opponent.[37] An award may be challenged for "serious irregularity," which is defined as failure of the Tribunal to comply with Section 33 (want of fairness and impartiality).[38] With that backdrop, we examine a few prominent English cases applying the AA to arbitrator conflicts.

The Court in *Newcastle United*[39] was concerned with two applications by the claimant ("NUFC") under section 24(1)(a) of the Arbitration Act 1996 ("AA") for the removal of the arbitrator on the ground that circumstances (of non-disclosure) existed that gave rise to justifiable doubts as to his impartiality (the "Section 24" Application).

With respect to the issue concerning the degree to which the arbitrator should have disclosed his role in other arbitrations and his role in advising PLL and EFL (the opposing parties) in relation to Section F of PLL's Rules, the Court dismissed the application to remove the arbitrator. It held that the previous appointments were irrelevant because the arbitrator had not been appointed in the reference that is the subject of the proceedings.[40] None of the other appointments were on behalf of either NUFC or PLL.[41] The arbitrator was not dependent for appointments by either PLL or its solicitors for his income, and the number of appointments relied on did not exceed the number referred to in the IBA Guidelines (IBAG).[42] The non-disclosure of the facts and/or the communications was not a breach of the IBAG and would not of itself have resulted in a real (as opposed to a perceived) possibility of bias when all the relevant facts were considered.[43]

By contrast, in *ASM* Shipping,[44] before the hearing in the arbitration, but after certain preliminary issues had been decided, the claimant's principal witness told their solicitors that the chairman of the Tribunal had a close connection with the other side's solicitors, including in a case in which serious allegations relating to disclosure were made against that witness. It also transpired that some seven months before the hearing the chairman had been in-

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37 *Id.*

38 *Id.*

39 Newcastle United FC Ltd. v. Football Ass'n Premier League Ltd., 349 EWHC (2021).

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 ASM Shipping Ltd. of India v. TTMI Ltd. of Eng., 2238 EWHC (Comm 2005).

volved in a disclosure exercise against the claimant in the matter in which he now found himself sitting as an arbitrator. The claimant objected to the chairman continuing to sit as an arbitrator. However, after the arbitrator refused to recuse himself, the claimant did not apply to the English Court to remove him pursuant to Section 24 of the EAA. It was only after the tribunal issued an unfavorable interim award that the claimant sought to set aside the award on the grounds of the chairman's lack of impartiality.

Mr. Justice Morison applied the House of Lords' "real possibility" test in *Porter v. Magill* and held that the chairman should have recused himself. Since the arbitral proceedings were still ongoing, his Lordship ordered the chairman not to continue sitting as an arbitrator even though no specific application had been made to remove him. His Lordship, however, refused to set aside the interim award on the basis that the claimant had waived its right to object to the chairman's past participation in the arbitral proceedings by failing to challenge the chairman after he had refused to recuse himself. It should be noted that this is the first case in which the English Court referred to the IBA Guidelines. However, it did not find them helpful in determining whether the relationship in question crossed the real possibility of bias threshold and noted that the lists contained therein were not comprehensive.[45]

The fine factual distinctions between the two cases above, the positive reference to IBAG in one, and the negative in the other, demonstrates the need for an ethics body to carefully consider the relevant nuances of national law and soft law under different factual circumstances.

*AT&T v Saudi Cable* involved a neutral's failure to disclose relevant information under the ICC Rules. AT&T, an international telecommunications company, successfully bid for a project in Saudi Arabia, a condition of which was that the cable required for the project would be purchased from Saudi Cable. After disputes arose between AT&T and Saudi Cable, an ICC arbitration took place in London, and awards were made in Saudi Cable's favor.

AT&T then discovered that, because of a clerical error, the CV of the tribunal chairman did not include reference to his non-executive directorship of Nortel, a rival to AT&T in bidding for the project. AT&T applied for the chairman to be removed on the grounds of lack of impartiality and applied for the awards to be set

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45 AT&T Corp. v. Saudi Cable Co., 2 All ER 625 (Comm 2000).

aside. However, the Court of Appeal held that there had to be a ''real danger'' of bias, and here such ''real danger'' did not exist. Further, the court held that although AT&T was deprived of the opportunity to object to the chairman's appointment, there was nothing in the ICC Rules to support an allegation that the chairman was guilty of misconduct because of the omission. The court held that if the chairman was not disqualified under the English common law test of bias applicable to judges, it was unreasonable to consider that he lacked the necessary independence required by the ICC Rules. It is, however, possible that the ICC Court would have accepted a challenge had the clerical error not occurred and had AT&T objected at the start of the proceedings.

The leading English case on arbitrator conflicts is *Halliburton Company v Chubb*.[46] In *Halliburton*, which concerned claims arising out of the Deepwater Horizon incident, the English High Court appointed Kenneth Rokison as the presiding arbitrator. Halliburton opposed his appointment on the grounds that Mr. Rokison was an English lawyer and the insurance policy in question was governed by New York law. After his appointment, Mr. Rokison disclosed that he had previously been an arbitrator in arbitrations involving Chubb, including some appointments on behalf of Chubb. He also disclosed that he was acting as arbitrator with respect to current matters involving Chubb. After he was appointed, he accepted two appointments in additional arbitrations relating to the Deepwater Horizon incident in December 2015 and August 2016. He did not disclose these appointments to Halliburton, but Halliburton became aware of them in November 2016.

Halliburton applied to the English court for his removal and was unsuccessful. It then appealed to the Court of Appeal which also rejected the challenge. It then appealed to the Supreme Court. Halliburton claimed that apparent bias was demonstrated by Mr. Rokison's failure to disclose his later appointments to Halliburton.[47]

The Supreme Court held that failure to disclose overlapping references can demonstrate "a lack of regard to the interests of the non-common party" and may in certain circumstances therefore constitute bias.[48] It confirmed that Mr. Rokison was under a legal

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46 Halliburton Co. v. Chubb Berm. Ins. Ltd., EWCA Civ 817 (2018); UKSC 48 (2020).

47 *Id.*; *See* Monster Energy Co. v. City Bevs., LLC, 940 F3d 1130 (9th Cir. 2019). Query: what effect would this failure to disclose the latter appointments have under the American Ninth Circuit precedent of Monster Energy? Better to discuss, per my comments above.

48 *Halliburton Co.*, EWCA Civ 817 (2018); UKSC 48 (2020).

duty to disclose his appointment in the subsequent overlapping proceedings because at the time of appointment in those arbitrations, those appointments might reasonably give rise to the real possibility of bias.[49]

However, the Supreme Court concluded that the fair-minded and informed observer would not determine that there was a real possibility of bias. Among its reasons for that conclusion was that at the time the disclosure failed to be made there had been uncertainty under English law about the existence and scope of an arbitrator's duty of disclosure; Mr. Rokison had explained that both of subsequent overlapping arbitrations would be resolved by way of preliminary proceedings, meaning that there would in fact be no overlapping evidence or submissions in the matters. He had offered to resign from the subsequent arbitrations if that was in fact not the case; therefore, it was unlikely that Chubb would benefit as a result of the overlapping arbitrations; Mr. Rokison had not received any secret financial benefit, and Mr. Camp Rokison's response to the challenge had been "courteous temperate and fair . . . And there is no evidence that he bore any animus towards Halliburton as a result."[50]

The *Halliburton* case deals with several important legal issues which require clarification for international arbitrators. Repeat appointing parties are likely to know an arbitrator's position in relation to issues from other cases. This information will not be available to newer users of arbitration, resulting in a boon to repeat users. Where there are overlapping proceedings, the common party may also obtain a tactical advantage over other parties by being able to test the efficacy of submissions before the arbitrator. The common party may have access to evidence unavailable to the other party which will allow it to utilize submissions to which the other party has not been privy. The arbitrator's best efforts to compartmentalize the multiple arbitrations may not prove effective. But being close to the situation, they fail to perceive this, which is why a third-party international arbitration ethics panel is needed. The court in this case also did not provide guidance on why the non-disclosure itself did not meet the threshold for "apparent bias." The English test for apparent bias in this case is likely at odds with other international norms such as those in the *Monster Energy* case in the United States. The case emphasizes that there is no clarity on the issue of "frequent flyers." For this

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[49] *Id.*
[50] *Id.*

reason, an international ethics committee would be assistive in aligning the various international standards on this issue.

Charles Kimmins, Nigel Rawding, Luke Pearce, and Olivia Valnor represented the London Court of International Arbitration as interveners in the Supreme Court appeal in *Halliburton*. In discussing the comparison of *Halliburton* with other jurisdictions, they wrote: "[T]he LCIA, ICC and CIArb as interveners, as well as many commentators in the international arbitration community, have expressed the concern that the tests set by the Court of Appeal were not sufficiently strict compared with international norms."[51]

They therefore acknowledge that English law may take a less strict approach than some other jurisdictions with respect to failures by an arbitrator to give proper disclosure of potential conflicts of interest. An American court, such as the Ninth Circuit in *Monster Energy,* would doubtless find the failure to disclose in the *Halliburton* case worthy of a finding of "evident partiality" mandating vacatur of the award.

Based upon the outcomes in the foregoing cases, and the notable lack of uniformity, it is argued that an advisory panel such as the one proposed in this article which is knowledgeable in the practices of other jurisdictions would go a long way towards bringing English law in line with that in other jurisdictions while helping to shed light upon arbitrator disclosure conflicts.

As will be discussed *infra*,[52] a helpful feature of the IBA Guidelines is that it provides several non-exhaustive lists categorizing various scenarios and the corresponding action that may be appropriately taken by the arbitrator who encounters such a situation: the Waivable and Non-Waivable Red Lists, Orange List, and Green List.[53] The Non-Waivable Red List includes situations in which acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. These situations should be considered waivable, but only when the parties, being aware of the conflict-of-interest situation, expressly state their willingness to have such a person act as arbi-

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51 Charles Kimmins, Nigel Rawding, et al., *The Test for Apparent Bias and Arbitrators' Duties of Disclosure Following Halliburton v. Chubb: Welcome Clarification, but Questions Remain*, 38 J. INT'L ARB. 359–76 (2021).

52 See *infra* note 81.

53 David Allen Larson, *Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?*, 49 S. TEX. L. REV. 894, 912 (2008).

trator.[54] The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Green List is a non- exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.[55]

It is neither expedient nor practical to constantly refine the applicable guidelines in circumstances where the facts do not fit neatly into the Red, Orange, and Green Lists of the IBA Guidelines, even if they are binding. Consider the difficulty to an arbitrator about to join the panel of one of these cases in determining what to disclose and whether he or she may accept the assignment.

How helpful it would be to have an advisory panel providing a learned opinion based upon both national law of the country of the seat along with soft law on whether the arbitrator could safely and logically join the panel.

Comprehensive and universal guidance in conflict and disclosure in the form of an ethics panel is also needed due to "late-in-the-game" arbitrator challenges and resignations.[56] An arbitrator challenge at an advanced stage of the proceedings can severely disrupt the arbitration.[57] Even where time limits are provided in the specified rules, an unforeseen change can still occur late in the game.[58] To minimize the effects of these late-in-the-game issues, these proposed changes should be referred to an ethics panel to determine their viability before the proceeding is delayed or disrupted.

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54 *IBA Guidelines on Conflicts of Interest in International Arbitration*, INT'L B. ASS'N 17 (Oct. 23, 2014), https://www.ibanet.org/MediaHandler?id=E2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/3JZ3-MQ2E].

55 *Id.* at 19.

56 Judith Levine, *"Late-in-the-Game" Arbitrator Challenges and Resignations*, 108 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 419–23 (Cambridge University Press 2014).

57 YVES DERAINS & ERIC SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 185, (1st ed. 1998).

58 For example, Hrvatska Elektroprivreda, d.d. v Republic of Slovn., ICSID Case No. ARB/05/24 (2008). Just prior to the hearing, the Claimant expressed concern at the addition to the Respondent's legal team of counsel affiliated with the same chambers as the President of the Tribunal at such a late stage in the proceedings, and requested that, pursuant to ICSID Arbitration Rules 19 and 39, the Tribunal order that the Respondent refrain from using his services. Following written submissions from the parties, the Tribunal ruled that the counsel could not continue to participate as counsel in the case.

## III. Inadequacy of Current Rules Governing Ethics Requirements And Challenges to Arbitrators

Much of the inadequacy of current rules regarding disclosure and conflicts of interest is that it is not always clear which conflict of interest and disclosure standard is controlling.[59] Thus arbitrators are left to guess which rules apply to their specific situation.

Some scholars are quick to point to the failure of some arbitrators to disclose properly. Authors Nathalie Allen and Daisy Mallett, in *Arbitrator Disclosure—No Room for the Colour Blind,* for example, claim that amendments to the IBA Guidelines are required "to bring about greater sanctions for arbitrators who do not disclose appropriately."[60] These authors state that:

> The parties' reliance on the integrity of the decision-makers is essential to the reputation of international arbitration. The ability of parties to challenge arbitrators on the basis that they do not meet the required standards of impartiality and independence is, therefore, integral to the parties' confidence in the arbitral process and to the parties' continued belief in arbitration as a viable and attractive alternative to state court litigation.[61]

However, this author opines that it is not primarily the fault of the arbitrators, but the lack of a universal code, the inadequacy of current rules along with the lack of guidance as to which standard is controlling.[62] Why is there no universal code? Diversification of the cultural and legal traditions among the ever-expanding pool of arbitrators makes it difficult to develop a universal code to guide arbitrator conduct.[63] By comparison, having one universal ethics panel in place, comprised of members from different cultural and legal traditions to navigate the differences and provide guidance would be assistive. It would be no great chore to assemble such a panel, based upon the diversity of the IBA, and the past success that it has had putting together such panels to draft the IBA Guidelines.[64]

As one commentator states:

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59 Larson, *supra* note 52 at 879-880.

60 Nathalie Allen & Daisy Mallet, *Arbitrator Disclosure – No Room for the Color Blind*, 7 Asian Int'l Arb. J. 118 (2011).

61 *Id.* at 118-19.

62 Peter Halpring & Stephan Wah, *Ethics in International Arbitration*, 2018 J. Disp. Resol. 87 (2018).

63 *Id*. at 88.

64 *See* Gabrielle Kaufman-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. Int'l Disp. Resol., 283, 289 (2010).

> Perhaps the most fractured area of international arbitration is the ethical standards of arbitrators. Ethical standards vary across arbitral institutions and case law provides little guidance. Moreover, there has been growing criticism against particularly with respect to repeat litigants.[65]

Another addresses the inadequacy of guidance from the courts thus:

> Even when the courts agree on the standard, it is applied inconsistently. The recent efforts by various organizations and states to develop codes of conduct and standards have resulted in a patchwork of rules.[66]

An ethics panel that would consider each situation on a case-by-case basis, and then publish an advisory opinion such as those available in other areas of ethics, is the answer. In the case of *W Limited v M SDN BHD*,[67] the High Court of Justice Queens Bench Division Commercial Court acknowledged the importance of the IBA Guidelines but identified weaknesses in the non-waivable Red List and the ability to apply the facts of a particular case to that list. Mr. Justice Knowles stated that "I therefore prefer to consider the 2014 IBA Guidelines, as I have done, and explain why I do not, with respect, think they can yet be correct."[68] Thus, the Guidelines, without human interpretation, and consideration of the national laws, cannot be determinative. This is precisely why an International Commercial Arbitration Ethics panel is needed.

What about the issue of confidentiality for the challenged arbitrator? When challenged, the arbitrator is challenged by the parties on notice to the arbitral organization.[69] There is generally no

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65 James Ng, *When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics Through the IBA Guidelies on Conflict of Interest and Published Challenges*, 2 McGill J. Disp. Resol. 23, 24 (2015-2016).

66 Merrick Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What Is Sufficient to Vacate Award*, 81 St. John's L. Rev., 203, 255 (2007).

67 *W Limited v M SDN BHD* [2016] EWHC (QB) 422 (Eng.).

68 *Id.* at para. 44.

69 *See International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)*, Int'l Center for Disp. Resol. (June 1, 2014), https://www.adr.org/sites/default/files/ICDR_Rules.pdf [https://perma.cc/HG7C-F2BT] (Article 14(1) & (2) of the International Arbitration Rules ask for written notice to administrator within 15 days, notice to other party, notice to tribunal that a challenge has been received); *see also 2021 Arbitration Rules*, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_14 [https://perma.cc/A9VE-M4WJ] (last visited Jan. 29, 2021) (quoting Article 14(3) ". . .arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties

confidentiality insofar as the parties and the institution know of the challenge and grounds for it. A challenged arbitrator may suffer a stigma or face de-activation from the panel on which he or she sits. This is embarrassing and damaging for the arbitrator. Even more embarrassing and destructive is the vacatur proceeding in court, which is often a public forum. Judges generally name the challenged arbitrator in decisions in which they opine whether or not the arbitrator failed to disclose or to properly acknowledge a conflict of interest.

By contrast, the proceedings of ethics panels and the hotlines, as will be discussed,[70] are almost always confidential, thus sparing the arbitrator embarrassment and damage to his or her reputation.

This section will address guidance provided by several of the most often consulted standards for arbitrator disclosure and conflicts of interest, namely *The International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, *The American Bar Association and American Arbitration Association Code of Ethics for Arbitrators*, *The American Arbitration Association*, *Commercial Arbitration and Mediation Rules*, and *The International Chamber of Commerce (ICC) 2021 Arbitration Rules*.

### A. *IBA Rules on Conflicts of Interest in International Arbitration 2004 & 2014, International Bar Association*

#### i. 2004 Guidelines

*The IBA Guidelines on Conflicts of Interest in International Arbitration* were produced by a working group emanating from a presentation at the annual conference of the Swiss Arbitration Association in 2001 and comprised of members of Committee D of the IBA.[71] In 2002, the IBA Arbitration Committee appointed a Working Group of 19 experts in international arbitration from 14 different countries.[72] "The working group collected reports on national standards of impartiality for arbitrators. It then extracted

and to the arbitrators."); *see also* AAA, INTERNATIONAL ARBITRATION RULES (Article 8(3)) (2000) (Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge."); *see also Commercial Arbitration Rules and Mediation Procedures*, AAA (Oct. 1, 2013), https://adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/87SQ-3Z9F] (quoting R.18 whereby the AAA "shall inform the parties of its decision.").

[70] *See* Part III.

[71] Kaufman-Kohler, *supra* note 64, at 290.

[72] Otto L O de Witt Wijnen et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT'L. 433, 436 (2004).

their common features and codified them as general principles."[73] Their goal was to introduce international uniformity by providing guidelines for disclosure and arbitrator disqualification that fostered ". . . greater consistency, fewer unnecessary challenges, and arbitrator withdrawals and removals."[74] The product of their efforts was the *2004 Guidelines on Conflicts of Interest*, which was translated into 8 languages.[75].

The initial version of the *IBA Guidelines on Conflict of Interest in International Arbitration* was published in 2004.[76] Eight years later, the IBA Arbitration Committee created a 27-member Conflicts of Interest Subcommittee to undertake a review of the 2004 Guidelines.[77] The revised set of guidelines took almost 2 years to promulgate.[78] The 2014 guidelines include an introduction followed by two parts.[79] The first part contains seven general standards on impartiality independence and disclosure, each of which is followed explanatory comments.[80]

### ii. 2014 Guidelines

In the introduction to "The 2014 Revisions to Conflicts of Interest in International Arbitration" the authors state that "[i]nternational arbitration today is in the public gaze like never before. Commensurate with its increased use to resolve disputes, there is greater scrutiny by users and observers alike."[81]

The 2014 Guidelines contain different standards for disclosure and those for disqualification. As to disclosure, the 2014 Guidelines advocate a subjective standard (from the vantage point of the parties). That is, an arbitrator should disclose information that "may in the eyes of the parties give rise to doubts as to the arbitra-

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73 Kaufman-Kohler, *supra* note 64, at 290.

74 Ramon Mullerat, *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration*, 4 DISP. RESOL. INT'L 55, 56 (2010).

75 *Id.*; *The IBA Guidelines on Conflicts of Interest in International Arbitration*, IBA (Aug. 10, 2015), https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/U82E-7MPE] [hereinafter *2014 IBA Guidelines on Conflicts*]. For those interested in the drafting history of the Guidelines, and an in-depth understanding and interpretation of the Guidelines *see* Witt Wijnen, *supra* note 72.

76 *Id.*

77 *Id.*

78 *Id.* at iii.

79 *Id.*

80 *Id.* at 4-16.

81 Eduardo Zuleta & Paul Friedland, *The 2014 Revisions to the IBA Guidelines on Conflicts of Interest in International Arbitration*, 9 DIS. RESOL. INT'L. 55 (2015).

tor's impartiality or independence."[82] This standard requires the challenged arbitrator to attempt to read the parties' state of mind to determine how he or she or they would perceive the arbitrator's non-disclosure. It is not the usual fictitious "reasonable man" standard, but the standard looks to the parties and whether "in their eyes" they would have doubts as to the arbitrator's impartiality if certain facts were not revealed to them.[83] It is immediately apparent what a difficult task this is for the arbitrator. General Standard 2(b) states that an arbitrator must refuse to act if facts or circumstances exist that from a reasonable third parties' ". . . point of view with knowledge of the relevant facts give rise to justifiable doubts as to the arbitrator's impartiality or independence. . ."[84] Disclosure provides comfort to parties who might be concerned if they learned of the circumstances disclosed from other sources.[85] General Standard 2(c) states "[d]oubts 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."[86] Disclosure is mandated whether the arbitrator feels that the parties' doubts are justifiable. It is not how the relevant facts are perceived by the third parties or hypothetical observers, but how those facts would be or could be perceived. Disclosure must be made globally to the parties, arbitral institution, and co-arbitrators.[87]

As to disqualification, there is what is acknowledged to be an objective standard (reasonable fictitious third person with which we are familiar in the tort context). Thus, an arbitrator should be disqualified if the information disclosed would give rise to "justifiable doubts" of his or her impartiality or independence from the point of view of a fictitious reasonable third person having knowledge of the relevant facts and circumstances.[88]

The second part of the 2014 Guidelines contains the famous Red, Orange and Green Lists mentioned previously.[89] These are examples of practical applications of the General Standards set

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[82] John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 UNIV. MIAMI INTER-AMERICAN L. REV. 1, 17 (2004).

[83] *2014 IBA Guidelines, supra* note 75, at 19.

[84] *Id.* at 5.

[85] *Id.* at 7.

[86] *Id.* at 5.

[87] *Id.* at 6.

[88] *Id.* at 18.

[89] *See* Larson, *supra*, note 53.

forth by the Guidelines. The Red List consists of situations which arguably, based upon the particular facts of the case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. Within this set are two subsets of situations: (1) those that cannot be waived by the parties; and (2) those that can be waived by the parties.[90] The first subset is severe enough that it cannot be cured by party consent, since the situations violate the rule that one cannot act as his or her own judge. Likewise, one cannot be party and arbitrator at the same time, resulting in an irreconcilable and nonwaivable conflict. Those in the second subset are at least in theory situations that can be remedied by explicit, knowing consent following full disclosure. The Orange List consists of situations mandating disclosure, but not necessarily disqualification.[91] The Green List contains situations where there is no issue of partiality or of lack of independence, no conflict, and no duty of disclosure.[92] In situations falling within the nonwaivable Red List, the need for disclosure is obviated because the arbitrator must decline his or her appointment. For situations falling within the ambit of the waivable Red List and within the Orange List, disclosure must be made so that the parties can evaluate any potential conflicts of interest.[93] If the situation falls within the waivable Red List, the parties must make an explicit knowing waiver. If the situation falls within the Orange List, the parties must make an objection within thirty days after disclosure, or it is waived.[94] Situations that fall within the purview of the Green List do not require disclosure, since the relationship does not raise any doubts as to the arbitrator's independence or her impartiality.[95]

### iii. 2014 Revisions

Key revisions to the 2014 version of the Guidelines include raising several issues of concern to the arbitral community such as the tremendous growth of investment arbitration, the increasing popularity of third-party funding, and the impact of the proliferation of information technology and social media.[96] Since the release of the 2004 Guidelines, there has been a steady growth in the use of third-party funding in international arbitration which raises

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90 De Witt Wijnen et al., *supra* note 72, at 454.

91 *Id.*

92 *Id.* at 434.

93 *Id.* at 453–54.

94 *Id.* at 434.

95 *Id.* at 434–35.

96 Zuleta & Friedland, *supra* note 7, at 59.

issues of conflict of interest. There could be a relationship between the arbitrator's law firm and the funder, the arbitrator could receive repeat appointments from a party backed by the same funder, or the arbitrator may have had a direct financial interest in the third-party funding corporation. The revised guidelines provide that third-party funder may be the equivalent of a "party" for conflict analysis. In addition, the 2014 Guidelines require disclosure of an arbitrator's relationship with any entity providing funding.[97]

### iv. "Double-Hat" Issue

Another major concern is commonly known as the "double-hat" issue in which international arbitration practitioners wear two hats by representing parties before arbitral tribunals while also serving as arbitrators in other cases, or by expressing a legal opinion concerning an issue that also arises in the arbitration.[98] It is recurrently observed that international investment arbitration is marked by a "revolving door," which essentially means that an individual may sequentially or even simultaneously act as an arbitrator, legal counsel, tribunal secretary, and/or expert witness.[99] "Double Hatting" or "dual hatting" refers to the latter scenario wherein the arbitrators in one arbitration, simultaneously act as counsels in another arbitration. In this regard, it has been stated that the roles of an arbitrator and legal counsel are incompatible.[100] Double-hatting creates one of the circumstances in which parties are entitled to challenge arbitrators for bias.[101] Thus the issue of "double-hatting," which generates many different opinions among the international community, is one better handled by an ethics panel than by guidelines.[102]

### v. Advanced Waivers

Yet another issue addressed by the revised Guidelines is the invalidation of advanced waivers/disclosures of conflicts to the ex-

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97 *Id.* at 59–60.

98 *Id.* at 60.

99 Mehek Wadhwani & Rishi Raj, *Double Hatting and Issue Conflict in International Arbitration*, MNLUM L. Rev Blog (Feb. 15, 2021), https://mnlulawreviewblog.wordpress.com/2021/02/15/double-hatting-and-issue- conflict-in-international-arbitration/ [https://perma.cc/4FJN-JTF4].

100 *See, e.g.* Joshua Tayar, *Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting*, 5 McGill J. Disp. Resol. 107, 108-09 (2018-19), https://mjdr-rrdm.ca/files/sites/154/2019/07/Tayar_FINAL.pdf.

101 *Id.* at 113.

102 *Id.* at 112.

tent they purport to discharge an arbitrator's ongoing duty of disclosure. Issues arising due to members of "barristers' chambers" appearing as counsel and arbitrator, were addressed in the 2014 Guidelines by requiring the parties to disclose the identity of their advocates appearing in the arbitration, a more stringent standard than that in the 2004 Guidelines, which fell short of equating barristers' chambers to law firms.[103] Finally, recognizing the increased use of social media, the 2014 Guidelines clarified that academic or professional affiliations with another arbitrator or counsel to one of the parties do not require disclosure.[104]

An ethics hotline could be set up to disclose the nature of a conflict by the conflicted individual and to obtain a non-binding second (or third or fourth) opinion from panelists who are then polled by email as to the propriety of the arbitrator remaining on the case. In this manner, the portability and accessibility of the panel due to modern technology could be utilized to offer needed guidance. This could be an extremely valuable alternative to revising the Guidelines every time a significant number of issues arises due to advancement in commerce and society. The IBA Lists are admittedly non-exhaustive. They cannot be drafted to make them applicable to every set of circumstances or issues. They cannot dissuade an overly altruistic arbitrator who feels that the conflict is not serious enough to mandate his or her exit from the panel. The IBA Guidelines cannot counter the financial pressures that encourage an arbitrator to remain on a matter on which they should not remain. The panel could not overcome these financial pressures either, but there, the persuasiveness of a group of persons educated in the strictures of arbitrator disclosure and conflict would furnish a safe haven for an arbitrator searching for a solution. There presently is no third-party group to whom the arbitrator can turn for non-binding guidance in situations, though not directly addressed by the guidelines, are nonetheless troubling enough to give rise to justifiable doubts as to the arbitrator's impartiality or independence.

One author has noted that the Guidelines need to be "constantly supplemented, revised and refined."[105] As a practical matter, situations that fall into gray areas within each list are not likely to be reported to the IBA, which does not produce advisory opinions. The amount of time between revisions bears witness to the

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103 *Id.*

104 *Id.*

105 Mullerat, *supra* note 74, at 69.

tremendous amount of work required for redrafting, time that might be better spent on advising and problem-solving.

The IBA rules provide some specificity in the nature of the relationships for which disclosure is required, along with some practical guidance as to standards for conflict resolution. However, numerous scholars have criticized the Guidelines for their various inadequacies.[106] They are non-binding, non- exhaustive, and often subject to interpretation by those courts that even bother to consider them. The Guidelines themselves recognize that they are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties.[107] Moreover, the Guidelines have met with somewhat limited acceptance by the arbitral institutions.[108] The practical application lists, while somewhat comprehensive in the non-waivable Red List, do not dictate outcomes in the more subtle Orange List. The more subtle conflict situations are not explicitly covered, leaving the arbitrator to make educated guesses. Some authorities complain that "citation to and reliance on the IBA Arbitrator Guidelines by the courts has been limited."[109] National law has remained more authoritative than the guidelines. One notable exception has been the LCIA, which relies on the guidelines and prepares written reasoned decisions on arbitrator challenges and publishes them.[110] These real-life decisions are enormously helpful to arbitrators in deciding which cases they can accept they should make, as will be discussed later in this article.[111] They also assist counsel representing parties in the arbitration to determine whether there is merit to a particular challenge.

### vi. Proposed Amendments

Amendments to the Guidelines have been proposed, but these do not ameliorate their shortcomings. The stringent amendments

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106 *See, e.g.*, Markham Ball, *Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?* 21 ARB. INT'L 323, 323–324 (2005); EDNA SUSSMAN, *Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives in* SOFT LAW IN INTERNATIONAL ARBITRATION 239, 247–48 (2014); *see also* Peter Halprin & Stephen Wah, *Ethics in International Arbitration*, J. DISP. RESOL., 2018, at 1, 4; Judith Gill, *The IBA Conflicts Guidelines- Who's Using Them and How*? 1 DISP. RESOL. INT'L 58, 59–60 (2007) [available in Hein Law database].

107 Sussman, *supra* note 105, at 247.

108 *Id.* at 248.

109 *See id.* at 248; *see also* THE IBA CONFLICTS OF INT. SUBCOMM., THE IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION: THE FIRST FIVE YEARS 2004-2009 6 (2010); Gill, *supra* note 105, at 59–60.

110 Sussman, *supra* note 105, at 249.

111 *Id.*

suggested by Nathalie Allen and Daisy Mallett and the accompanying sanctions for noncompliance could be obviated by referring the issues of disclosure and conflict to ethics panel. In that way, highly skilled arbitrators will not be removed from service by overly restrictive rules. Having been directed to disclose by the ethics panel, it is likely that only the most willful and recalcitrant of arbitrators would not comply and thereby risk removal or worse.

Authors Nathalie Allen and Daisy Mallett argue that the sanctions they espouse as amendments to the IBA Guidelines would foster guidance and transparency and reduce the number of challenges to arbitrators, to the end of improving the functioning of the international arbitration process.[112] They further postulate that the fact that most international arbitrators refer to the IBA Guidelines to determine what must be disclosed to the parties and the complexity of the questions arbitrators may need to address mandates the amendments they propose.[113] The four amendments they propose are the introduction of a negative inference from an arbitrator's failure to disclose, automatic removal of an arbitrator who either negligently or willfully fails to disclose nonwaivable Red List facts or circumstances, removal of excessive disclosures in the explanation to General Standard 3(c), and introduction of further detailed guidance on the requirement that an arbitrator make reasonable attempts to disclose. These are no doubt based upon their belief that "some arbitrators pay little attention to standards and expectations of disclosures of conflicts of interest in each case, considering their own view of their ability to be impartial and independent in the proceedings, rather than also considering whether they would meet such standards in the eyes of the parties."[114] If that is indeed true, which this author doubts, then perhaps guidance, in the form of an ethics panel that arbitrators could consult, rather than punitive amendments to the Guidelines might prove more satisfactory and accomplish their goals without imposing a harsh burden on arbitrators.

Another commentator suggests greater flexibility in some of the Guidelines and greater scrutiny in others. These are precisely the qualities that would be supplied by an ethics panel whose purpose is to exercise discretion in tailoring its recommendation to the attendant circumstances. Ramon Mullerat suggests that the Gen-

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112 Nathalie Allen Prince & Daisy Mallett, *Arbitrator Disclosure — No Room For The Colour Blind*, 7 ASIAN INT'L ARBITRATION J. 118 (2011).

113 *Id.* at 127.

114 *Id.* at 130.

eral Standards need to be restructured, and that the Guidelines need to adopt a pro-disclosure attitude in some situations.[115] He proposes that the Guidelines should more greatly reflect the philosophy that "any doubt an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure."[116] He would make some situations in the Waivable Red List Non-Waivable. In addition, he would expand the lists to include more situations. In some situations, Mullerat suggests stricter Guidelines due to the need to protect and improve the reputation of the institution of arbitration. His recommendations underscore the flexibility that would be provided by an ethics panel rather than a static set of guidelines.

A panel would be in order because conflicts are by their very nature fact and case specific. This notion is supported by the 2007 profound critique of the Guidelines by Markham Ball,[117] who wrote that the Guidelines cannot "cover all fact situations that have arisen or may arise. Conflict of interest issues are fact specific and case specific. The difficult cases will always call for the application of reason and judgment."[118] This is perhaps the single most compelling endorsement of an international arbitral ethics committee rather than a static set of guidelines. He also postulates that some situations may call for disclosure or disqualification even though the cases fall within the ambit of the Green List. "A place in the Green List may not always be a green light."[119] Moreover, a general set of guidelines cannot be written to apply uniformly in all or most countries.

However, the same result can be achieved where a committee considers the laws and practices of the nation and/or institution involved in making its determination of disclosure or disqualification.

How IBA soft law instruments are received worldwide was addressed in a 2016 report produced by a 120-strong subcommittee of the IBA Arbitration Committee, led by Latham & Watkins partner Fernando Mantilla Serrano and a steering group of practitioners from 11 different countries.[120] The report showed that the IBA

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115 Mullerat, *supra* note 74, at 59.

116 *Id.* at 61 (citing General Standard 3C).

117 Markham Ball, *Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest*, 21 ARB. INT'L 323, 323–341.

118 *Id.* at 324.

119 *Id.* at 325.

120 Alison Ross, *How Are IBA Soft Law Instruments Received Worldwide?*, GLOB. ARB. REV. (Nov. 22, 2016), https://www.lw.com/thoughtLeadership/how-are-soft-law-instruments-recieved-worldwide [https://perma.cc/TNS3-W3CQ].

Guidelines on Conflicts of Interest in International Arbitration first issued in 2004 and updated in 2014 are the most frequently referenced soft law instrument relating to the field, in more than half (57 per cent) of the arbitrations reported in the survey.[121] While indicative of some acceptance, a panel of ethics experts reviewing and determining the parameters of disclosure and disqualification situations would likely garner more universal acceptance among the national courts and the international commercial arbitration community.

### B. *AAA/ABA Code of Ethics by the AAA and ABA — 1977–2004*

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

This code provides two steps. Canon I provides that "[a]n arbitrator should uphold the integrity and fairness of the arbitration process," has a responsibility "to the process of arbitration itself."[122] An arbitrator should not accept appointment unless fully satisfied "that he or she can serve impartially," and "that he or she can serve independently from the parties, potential witnesses, and the other arbitrators."[123]

Thus, the initial determination of whether to except an appointment must be made by the arbitrator. This is a highly subjective and introspective process, yet it is the "first level of protection" to safeguard the arbitration process.[124]

The disclosure process is the second level of protection which demonstrates the arbitrator's intention and ability to serve without bias or interest.[125] Canon I provides in pertinent part that "an arbitrator should disclose any interest or relationship likely to affect

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121 *Id.*

122 American Arbitration association, The Code of Ethics for Arbitrators in Commercial Disputes (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/P4G4-8DEU].

123 *Id.*

124 *Id.*

125 Holtzman, *supra* note 3, at 485.

impartiality or which might create an appearance of partiality."[126] Practically speaking this means that before accepting an appointment the arbitrator should disclose

> any known direct or indirect financial or personal interest in the outcome . . . 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 . . . any prior knowledge they may have of the dispute . . . 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.[127]

Deciding what to disclose also requires introspective analysis and is also a self-regulating process which must be done by the arbitrator fully and candidly to be effective.[128] A third party such as a committee or panel making this determination would be much less open to direct or indirect personal or financial interests. The term "financial interest" in Canon II may not be entirely clear, because there are many ways an arbitrator's financial status can be affected by the outcome of the case. The Code of Ethics does not define the term "personal interest." The College of Commercial Arbitrators states that "personal interest" plainly exists if the outcome of the matter might reasonably be expected to affect the arbitrator's reputation or that of his or her family or associates or personal or family relationships.[129] In addition, several highly skilled arbitrators will no doubt be barred from serving in cases based upon benefits of which they may or may not be aware. Of course, a written guideline as opposed to a live ethics consulting panel gives little opportunity for the arbitrator to explain the situation.

The failure by arbitrators to disclose relationships under Canon II has resulted in court vacatur of awards under the "evident partiality" standard of the Federal Arbitration Act.[130] Arbitrators must be cautious not to trivialize a potential conflict or conduct

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126 *Id.* at 484.

127 *Id.*

128 *Id.* at 486.

129 College of Commercial Arbitrators Guide to Best Practices in Commercial Litigation 25 (James M. Gaitis et al., eds., 4th ed. 2017).

130 9 U.S.C.A. § 10(a)(2); *see* Delta Mine Holding Co. v. AFC Call Props., Inc., 280 F.3d 815 (8th Cir. 2001); Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, 492 F.3d 132 (2d Cir. 2007); New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007).

what may be viewed as a faulty investigation into a potential relationship.[131] The practical difficulty is that there are no ground rules for how for an arbitrator must go back in disclosing prior relationships to avoid jeopardizing an award. Certainly, bringing these issues to an objective third-party committee or panel would assist in determining what relationship and how long-ago need be disclosed.[132]

Likewise, the failure to reveal the nature and extent of any prior knowledge an arbitrator may have of a dispute can serve to cast a pall upon any resulting award. Reliance upon self-regulation can prove far short of the mark as compared to having an objective set of eyes reviewing the situation. Vacatur of an award imposes a harsh penalty upon a prevailing party for what may or may not have amounted to malfeasance on the part of an arbitrator.[133] Independent review by a panel would, in this author's view, go a long way towards avoiding that outcome. Fortunately, the American Bar Association/ College of Commercial Arbitrators also drafted *Annotations to the Code of Ethics for Arbitrators in Commercial Disputes.*[134] The annotation provides citations to judicial decisions and other published writings citing the Code.[135]

### *C. Commercial Arbitration Rules and Mediation Procedures of the AAA 2013*[136]

The sections of the AAA Commercial Arbitration Rules and Mediation Procedures defining disclosure and disqualification are

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131 Holtzman, *supra* note 3, at 489.

132 *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (in which the failure to disclose a relationship with a party constituted evident partiality).

133 Holtzman, *supra* note 3, at 496.

134 Arb. Comm. of the Section of Disp. Resol. of the ABA and Ethics Comm. of the Coll. of Com. Arbs, *American Bar Association/College of Commercial Arbitrators Annotations to the Code of Ethics for Arbitrators in Commercial Disputes*, FINRA (2003), https://www.finra.org/sites/default/files/ArbMed/p123778.pdf [https://perma.cc/GRU5-T36P]. The initial annotation was prepared by a committee comprising members of the Arbitration Committee of the Section of Dispute Resolution of the ABA and of the Ethics Committee of the College of Commercial Arbitrators. Principally involved were Edna Sussman and Kurt L. Dettman, Co-Chairs of the Arbitration Committee of the ABA Section of Dispute Resolution and Robert A. Holtzman, Chair of the Ethics Committee of the College of Commercial Arbitrators, David Brainin, Judith Meyer, Bruce Meyerson and Carroll Neecemann,, Committee Members and Editors.

135 *Id.*

136 Commercial Arbitration Rules and Mediation Procedures, AMERICAN ARBITRATION ASSOCIATION, (Rules Amended and Effective October 1, 2013 Fee Schedule Amended and

Rules 17 (Disclosure) and Rule 18 (Disqualification of Arbitrator). Rule 17(a) provides:

> Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

Rule 18(a) provides that:

> Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith and shall be subject to disqualification for: partiality or lack of independence, inability or refusal to perform his or her duties with diligence and in good faith, and any grounds for disqualification provided by applicable law.

These rules are general and provide no indication of how they would be applied in specific situations. They leave it to the arbitrator to find his or her way through a maze of sometimes complex commercial and interpersonal relationships to determine what and when to disclose. In addition, there are no definitions of "partiality" or "lack of independence" or tangible examples of the same. To be safe from a challenge, the arbitrator must disclose, necessarily or unnecessarily. Arbitrators would benefit from having a committee or panel to whom they could turn to provide advisement on their situation rather than risking a sanction of removal or being placed on inactive status on the panel.

### D. *2021 Arbitration Rules of the International Chamber of Commerce (ICC)*[137]

On 1 December 2020, the International Chamber of Commerce (ICC) published the ninth iteration of its arbitration rules

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Effective July 1, 2016), https://adr.org/sites/default/files/Commercial%20Rules.pdf. [https://perma.cc/5AGX-TWAZ].

137 *2021 Arbitration Rules*, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/9SP7-N48B].

(the 2021 Rules). The 2021 Rules came into effect on 1 January 2021 and will apply to all disputes submitted to the ICC thereafter. One of the key goals of the amendments was to require parties to disclose "the existence and identity" of third-party funders to avoid conflicts either the parties or counsel might have should they have a connection with these outside funding entities.[138] One of the numerous issues raised by the involvement of third-party funders in international commercial arbitration proceedings is arbitrator conflict of interest due to nondisclosure of the involvement of the third-party funder in the process.[139] The latter was an issue that arose from a recent proliferation of the use of third-party funding for expensive litigation, which was not covered by the prior rules.

The only guidance in the Rules available to arbitrators on their disclosure obligations appears in Articles 11 and 12, which require that every arbitrator must be and remain impartial and independent of the parties involved in the arbitration, sign a statement of acceptance, availability, impartiality, and independence before appointment or confirmation and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.[140] In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal, and the other parties of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration.[141] These rules are general and vague, providing no specific guidance in particular circumstances. Accordingly, an ethics panel would be particularly helpful to arbitrators in these proceedings.

Perhaps in recognition of the vagueness of its rules, the ICC International Court of Arbitration unanimously adopted a Guidance Note for the disclosure of conflicts by arbitrators on Febru-

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138 *ICC Launches Revised Arbitration Rules for 2021*, LATHAM & WATKINS, 20 January 2021, https://web.archive.org/web/20210419005742/www.lw.com/thoughtLeadership/ICC-Launches-Revised-Arbitration-Rules-for-2021 [https://perma.cc/3V8C-RUME].

139 Burcu Osmanoglu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32 J. INT'L ARB., 325 (2015).

140 *2021 Arbitration Rules*, *supra* note 134.

141 *Id.*

ary 12, 2016.[142] The President of the Court, Alexis Mourre, stated that it "aims at ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts."[143] The Note invites arbitrators to consider certain situations that may call into question their independence or impartiality in the eyes of the parties (rather than a "reasonable person," in other words, a subjective test). These situations, which are relational, are far more specific and helpful than the Rules. The circumstances are where the arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates, acts or has acted against one of the parties or one of its affiliates, has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute, acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise, is or has been involved in the dispute or has expressed a view on the dispute in a manner that might affect his or her impartiality, has a professional or close personal relationship with counsel for one of the parties or its law firm, acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates, acts or has acted as arbitrator in a related case, or has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel for one of the parties or its law firm.[144] Because these situations are relational only, they do not begin to cover the other types of potential conflicts.

The Guidance Note also specifies that the duty to disclose is of an ongoing nature, that it applies throughout the duration of the arbitration, and that it is not discharged by an advance waiver.[145] It also stresses that arbitrators, in assessing whether a disclosure should be made, have the duty to make reasonable inquiries in their records, those of their law firm, and in other readily available materials.[146]

For the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm, and a legal entity will include its affiliates. The Note also invites arbitrators to consider in each case relationships between arbitrators or between members

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142 *ICC Court Adopts Guidance Note on Conflict Disclosures by Arbitrators*, ICC, (Feb. 23, 2016), https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/ [https://perma.cc/Q7QW-4LGS].

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

of the same barristers' chambers, as well as with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.[147]

While a step in the right direction, these guidelines cover far less territory than a group of empaneled individuals could in considering the nuances of a given situation. Relational rules are often rigid and do not consider the nature and quality of the contact. An ethics panel could hear and consider facts such as whether the arbitrator was even aware of the relationship, benefitted from the relationship, or the extent of the relationship.

### i. Steps in the Right Direction—ICC Provides Reasoned Decisions & LCIA Publishes Some of Its Conflict Decisions Online

On October 8, 2015, The International Court of Arbitration of the International Chamber of Commerce (ICC) announced that it would give reasons for decisions on challenges to Arbitrators under Article 14 of the ICC Rules.[148] The party requesting a reasoned decision must notify the Court before it renders a decision. There may be a fee for the reasoned decision, and the reasons will be provided solely to the parties.[149] As Professor Hanessian notes,[150] reasoned decisions serve many positive purposes. They contribute to the transparency of the process and thereby promote confidence in the process; educate arbitrators and parties in determining whether to disclose, when to accept appointments, and whether circumstances are likely to result in disqualification, which could reduce the number of challenges; may aid national courts in determining whether to set aside awards based on arbitrator conflicts if courts know the reasons for the panel's decision on the challenge; a precedent-related reasoned system such that instituted by LCIA and ICC,[151] would further understanding of the likelihood of success of challenges, permit more meritorious challenges, and lead to increased predictability and efficiency; facilitates confirmation and enforcement of awards.[152]

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147 *Id.*

148 Grant Hanessian et al., *ICC Court Decides to Provide Parties with Reasons for Administrative Decisions*, PRACTICAL LAW THOMPSON REUTERS, (Nov. 5, 2015) https://1.next.westlaw.com/w-000-7238?__lrTS=20230118230111970&transitionType=Default&contextData=(Sc.Default)&firstPage=true&bhcp=1 [https://perma.cc/3YTJ-34SV].

149 *Id.*

150 *Id.*; *see supra* Part III.

151 *Id.*

152 *Id.*

For the reasons set forth later in this article,[153] an International Commercial Arbitration Ethics Panel serves as a natural progression to having reasoned decisions on arbitral challenges by providing, in advance of the determination by the panel, guidance to the arbitrator by a panel of experienced, knowledgeable individuals applying the rules and precedents of the particular jurisdiction or institutional forum to the circumstances of the challenge.

In June 2006, the London Court of International Arbitration (LCIA) announced that it was going to publish reasoned decisions on challenges to arbitrators.[154] The introduction to the IBA Guidelines notes that the lack of guidance in the areas of disclosure and qualification has led to members of the international arbitration community applying different standards when making decisions concerning independence and impartiality.[155] It was hoped that the publication of reasoned decisions would be helpful in conforming to standards and introducing certainty. The decision to publish the abstracts of decisions was based upon the recommendations of a report written by Geoff Nicholas and Constantin Partasides of Freshfields Bruckhaus Deringer. After considering the pros and cons of publication, the report concluded:

There is something troubling about institutions choosing to withhold the guidance upon which they rely in making challenging decisions from the parties that are making or defending those challenges. Such withholding is unnecessary and increasingly difficult to justify to users (parties, counsel, and arbitrators alike) in ever-greater need of such guidance. The LCIA can make a unique contribution in this regard by making publicly available the wealth of learning that it is accumulating in its reasoned challenge decisions.[156]

On February 12, 2018, LCIA announced that as part of its ongoing commitment to transparency, the LCIA would be making available online digests of 32 LCIA arbitration challenge decisions from between 2010 and 2017.[157] This release, together with the LCIA's 2011 publication of 28 challenge decision summaries from

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153 *Id.*

154 Nick Gray & Deborah Crosbie, *Winds of Change? The Pending Publication of LCIA's Reasoned Decisions on Arbitral Independence*, PRACTICAL LAW THOMPSON REUTERS (Feb. 1, 2009), https://uk.practicallaw.thomsonreuters.com/8-385-7892?transitionType=default&contextData=(Sc.Default)&firstPage=true [https://perma.cc/WAF8-KTSA].

155 IBA Guidelines, *supra* note 54, at 1.

156 Gray & Crosbie, *supra* note 154.

157 *LCIA Releases Challenge Decisions Online,* LCIA, (Feb. 12, 2018), https://www.lcia.org//News/lcia-releases-challenge-decisions-online.aspx [https://perma.cc/7XS9-YCWB].

between 1996 and 2010, provides users with an increasingly significant research tool, and one which illustrates the effectiveness of the LCIA's challenge procedure.[158]

By way of background, the LCIA Rules establish a similar ethical standard to IBA Guidelines General Standards 2(b)-(c), 3(a), and 7(d). The LCIA Rules provide that an arbitrator must "remain at all times impartial and independent of the parties" and may be challenged "if circumstances exist that give rise to justifiable doubts as to his [or her] impartiality or independence."[159] Before appointment, each arbitrator must sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence other than any circumstances disclosed by him in the declaration.[160] Once challenged, "[u]nless the challenged arbitrator withdraws, or all other parties agree to the challenge," a division of members of the LCIA Court decides whether the arbitrator should be disqualified.[161]

In comparing the IBA Guidelines to the LCIA published holdings, author James Ng was able to make some general observations regarding challenges to arbitrators that are very insightful and will serve as guidelines for future ethical challenges to arbitrators.

The foundation inquiry into a challenge for an arbitrator's lack of independence evaluates whether the arbitrator has a substantial financial stake in the outcome of the case.[162] Multiple appointments by a single party or counsel are not a disqualifying circumstance so long as the arbitrator maintains diversified sources of appointments.[163] The general rule is that multiple appointments, without more, are insufficient to sustain an ethical challenge.[164] Nevertheless, multiple appointments by a party or counsel can disqualify an arbitrator if he or she demonstrates a financial dependence on that particular party or counsel.[165] Challenges involving an arbitrator's relationships evaluate whether accepting the arbitral

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158 *Id.*

159 *LCIA Arbitration Rules 2014*, LCIA, (Oct. 1, 2014), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules- 2014.aspx#Article%2010 [https://perma.cc/AJ9G-NCF4].

160 *Id.* at article 5.4.

161 James Ng, *When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics Through the IBA Guidelines on Conflict of Interest and Published Challenges*, 2 McGill J. Disp. Resol., 23, 27 (2016).

162 *Id.* at 40.

163 *Id.*

164 *Id.*

165 *Id.*

appointment creates any substantial financial incentives.[166] The financial holdings cases indicate that merely owning shares in a party is unlikely to be a disqualifying circumstance so long as the award to be rendered does not have a significant effect on that party's share price.[167]

Along similar lines, cases involving challenges to the legal services provided by the arbitrator's law firm turn on the relatedness of the work to the current arbitration.[168] If the work done by the arbitrator's law firm involves a benign and specific transaction unrelated to the current arbitration, it would not be a disqualifying cause.[169] However, if an arbitrator's law firm is currently acting adversely to a party, even if the matter is unrelated, that adversity can be grounds for a challenge because the arbitrator may benefit financially from an unfavorable award against that party.[170] In an arbitrator challenge for a lack of impartiality, the touchstone inquiry is whether the arbitrator's prior opinions are so inflexible that he or she is deemed to have prejudged the issues arising in the current arbitration.[171] An impartiality challenge must be based on specific facts and cannot be sustained by general conjectures.[172] Mere disagreement with an arbitrator's prior opinions is insufficient for disqualification.[173] An analysis for a lack of impartiality considers whether the arbitrator had issued pointed statements or decisions of "binding" effect on his or her judgment. The prior opinion must have been the determinative factor in the outcome.[174]

Finally, an evaluation of a non-disclosure challenge assesses whether the arbitrator has taken reasonable steps to be transparent. As a rule, mere non-disclosure, without more, is insufficient for disqualification. A non-disclosure challenge considers the underlying facts and circumstances of the arbitrator's ethical conflict. Consideration is given to an arbitrator's willingness to be transparent and make additional disclosures. Even if an arbitrator is found to have failed to disclose a conflict of interest, there is no violation of duty if he or she made reasonably diligent efforts to comply with the duty to disclose.

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166 *Id.*
167 Ng, *supra* note 161 at 40.
168 *Id.*
169 *Id.*
170 *Id*. at 41.
171 *Id.*
172 Ng, *supra* note 161 at 41.
173 *Id.*
174 *Id.*

## IV. Proposed Solution: An International Commercial Arbitration Ethics Committee or Panel Based on NYSBA Professional Ethics Committee Model

What is needed, it is postulated, is an International Commercial Arbitration Ethics Panel and/or Hotline like the many panels and hotlines provided by bar associations in the United States as a service to attorneys seeking information and guidance regarding their ethical obligations. This section will describe the many panels that are operated in the United States, their benefits and attributes, and then ascribe those qualities to a similar panel functioning as an advisory guide to international commercial arbitrators.

In New York, practitioners have a ready forum in which to vet potential ethics issues. Before taking any action that may be ethically questionable, they may contact the Professional Ethics Committee of the New York State Bar Association (NYSBA) to request an opinion from the committee with respect to the ethical efficacy of their conduct under the Rules of Professional Conduct. In fact, petitioners in New York would be well-advised to do so before taking any action that might subject them to scrutiny. If nothing else, they may claim reliance upon the advice given by this longstanding and austere panel of experts appointed by the President of NYSBA.

Noted ethics expert (and former Professor) Roy Simon, himself a member of the committee, has explained that "[t]he purpose of an ethics committee is to help you determine whether a proposed future course of conduct is ethical. An ethics committee will not tell you whether you have done something unethical in the past. Nor will an ethics committee give generalized legal advice."[175]

The Committee on Professional Ethics was formed on June 1, 1952. Its "Stated Purpose" is as follows:

> The Committee on Professional Ethics, in its discretion, shall answer inquiries as to whether conduct of a member of the legal profession complies with the applicable New York rules of legal or judicial ethics and may issue sua sponte opinions on issues of

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175 Roy Simon, *How Bar Association Ethics Committee Operates,* New York Legal Ethics Reporter, http://www.newyorklegalethics.com/how-bar-association-ethics-committees-operate/ [https://perma.cc/DP5P-6Y5K].

> ethics if it believes guidance on such issues would benefit the profession.[176]

The committee meets once per month to discuss the incoming inquiries, review draft opinions of the committee members, and, in some difficult cases, vote on the official opinion of the committee. There is an element of objectivity in the opinions, derived from the Rules of Professional Conduct, as well as infusion of the experience and backgrounds of the committee members, which emanates from many different areas of the law. The committee is comprised of practitioners, law professors, judges, and former judges. While not binding, the opinions generally are considered authoritative, and are posted online where they may be searched. Courts in New York have referenced the opinions in their decisions, and to a great extent, follow them. The Committee advertises its services in the Member Support section of the NYSBA web site by clicking a button entitled "Who do I contact if I am an attorney with an ethics question."[177]

The New York County Lawyers Association ethics hotline is staffed by attorney volunteers.[178] They aim to return all calls within 24 hours.[179] The State Bar of Michigan ethics hotline receives approximately 20 questions per day and has frequently asked questions posted on their website.[180]

The State of Florida has a Professional Ethics Committee, whose function is as follows:

> The Professional Ethics committee is charged with the duty of answering ethics inquiries from members of the Bar concerning the inquirer's own proposed conduct. The committee reviews informal advisory opinions issued by Florida Bar ethics department attorneys. Additionally, the committee publishes formal advisory opinions to guide bar members in interpreting and applying the ethics rules. A formal opinion is published in accor-

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176 Committee on Professional Ethics, NEW YORK STATE BAR ASSOCIATION (Nov. 19, 2014), https://archive.nysba.org/A15000/ [https://perma.cc/B6L9-HK7B].

177 *Who Do I Contact if I am an Attorney with an Ethics Question?,* NEW YORK STATE BAR ASSOCIATION (2021), https://support.nysba.org/hc/en-us/articles/1500008003661-Who-do-I-contact-if-I-%20am-an-attorney-with-an-ethics-question [https://perma.cc/DK95-TADK].

178 Ethics Hotline, *Ethics Hotline for New York State Lawyers,* ONONDAGA BAR ASSOCIATION, https://www.onbar.org/member-benefits/ethics-hotline-for-new-york-state-lawyers/ [https://perma.cc/M36D-BUQL].

179 NEW YORK COUNTY LAWYERS ASSOCIATION, *Ethics Hotline*, https://www.nycla.org/attorneys-ethics-hotline/. *See also* Barry R. Temkin, Gordon Eng, *How to Staff an Ethics Hotline: the New York County Lawyers Association Experience*, Bar Leader, Volume 35, No. 3 (April 2011).

180 Thomas K. Byerley, *Ethics Hotline-Frequently Asked Questions*, State Bar of Michigan, https://www.michbar.org/opinions/ethics/articles/july98 [https://perma.cc/PCK3-MLTH].

> dance with Board of Governors approved procedures as a proposed advisory opinion to which Bar members may submit comments.[181]

Many bar associations in the United States feature "ethics hotlines" which members can call to address ethics concerns and receive guidance.[182] The opinions are informal, advisory, and confidential (but generally not privileged).[183]

The International Commercial Arbitration Ethics Committee/Panel could be formed in similar fashion as the IBA working groups and subcommittees, with members from various jurisdictions/nations representing diverse legal systems, cultures, and values, using the NYSBA Professional Ethics Committee as a model. It could also be comprised of representatives from the various national law systems, arbitral institutions, and fellow arbitrators.

The IBA currently has a Professional Ethics Committee. Its mandate is as follows:

> The Committee provides a forum for all international lawyers who are interested in discussing and debating issues affecting the practice of law. In today's world a lawyer may face conflicting duties and the application of professional standards may be far from apparent. The Committee focuses on developments of international significance and seeks active collaboration with other committees and constituents in providing programmes at the IBA conferences.

The Committee works closely with the IBA Standing Committee on Professional Ethics which is concerned with the maintenance and periodical reform of the International Code of Ethics.[184]

The IBA Committee does not entertain and respond to disclosure and conflict inquiries, or issues reasoned written opinions reflecting the consensus of its members. This function is being suggested by this article. However, the committee should not be limited solely to members of the IBA but to representatives of nations, institutions, and other international arbitration organizations that can provide additional cultural and national input and infuse

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181 *Professional Ethics Committee,* THE FLORIDA BAR, https://www.floridabar.org/about/cmtes/cmtes-cm/cmte-%20cm170/ [https://perma.cc/TJ5G-J8JG].

182 *See generally Additionally Legal Ethics and Professional Responsibility Resources,* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/ [https://perma.cc/8ND2-HCKA].

183 Ethics Hotline, *supra* note 178.

184 *Professional Ethics Committee*, International Bar Association, https://www.ibanet.org/unit/Section+on+Public+and+Professional+Interest/committee/Professiona%20l+Ethics+Committee/3123 [https://perma.cc/GYW2-2LBS].

the panel with a sense of the national, cultural, and other key differences that play important factors in arbitrator selection and acceptance.

Unfortunately, there is no comparable International Commercial Arbitration Professional Ethics Panel or Committee and Ethics Hotline. And the many concerns about the soft law solutions to international arbitrator disclosure and conflict issues makes clear that one is needed as guidance to arbitrators seeking to see their decisions upheld by the courts.

Since most challenges occur prior to the commencement of the hearing, the arbitrator who finds himself in a quandary regarding the need to disclose or face a prospective conflict situation or challenge, and/or his co-arbitrators could contact the panel for an opinion on whether there is a need for disclosure or cause for concern, whether there would be viability to a challenge, or whether a greater degree of disclosure is required. These inquiries would be submitted to an intake department. The names of the arbitrators, and the captions and parties of the matters at issue would be redacted and kept confidential. Only the salient facts and issues involved would be disclosed to the panel. The panel could meet monthly to discuss the disclosure and conflict issues presented and reach a consensus.

Once a recommendation is made, the arbitrator could follow the guidance, or not, accepting the risks inherent in its decision. A national court would be well-advised to review the reasoned opinions of the committee in making its determination as to sustain or vacate an award. The IBA Guidelines, other soft law guidelines, institutional rules and/or national law could be utilized by the panel in arriving at their opinion, which would then be documented in a fully reasoned decision that would be released to the conflicted arbitrator or tribunal. It could also serve to enlighten future arbitrators facing a similar or the same issues, or attorneys seeking guidance on the efficacy of a particular challenge. It would infuse an element of third-party oversight to arbitrator conduct that would enhance the reputation of international arbitration. Some will invariably argue that the panel would face empirical problems in its formation or operation. But these issues have been dealt with efficiently and creatively by the NYSBA Committee for many years. The author feels that reality militates against a system which fails to furnish the ability to provide timely guidance in specific situations that arise in international arbitration. The effort required to populate and operate an international ethics panel would be far

less then than continued revision of non-specific guidelines and return benefits far exceeding the human capital required to conduct this type of endeavor.

Publication of decisions has many advantages. It will result in the development of a body of jurisprudential conflict and disclosure case law which can be utilized by a committee or panel of international ethics as a tool to determine disclosure and disqualification issues which arise before a particular institution. It will promote consistency of standards across the international arbitral community and lead to better decision-making. Current domestic and international case examples notably those in this article demonstrate that there is a need for education about conflict and disclosure situations.[185] Lack of familiarity with the conflict conventions of other countries can be fully explored and explained in reasoned decisions by arbitral institutions which can then facilitate opinions by an International Commercial Arbitration Ethics Committee. In addition, national courts may be more willing to consider the guidelines of an International Arbitration Ethics Committee which are premised upon published fleshed out decisions by arbitral institutions.[186]

### A. *Composition and Implementation*

In 2011, the Chair and Vice-Chair of the New York County Lawyers Association Professional Committee authored an article in the American Bar Association's Bar Leader on how to staff an ethics hotline.[187] They found that virtually all the callers they served were genuinely appreciative of the pro bono guidance that is provided by the ethics hotline. Their advice, some of which could also apply to the ethics panel and hotline, would be to limit the inquiries to the neutral's own conduct, defer from giving legal advice, or interpreting questions of law.

As previously noted, the LCIA is one of a few arbitral institutions to write reasoned decisions in arbitrator challenges, provide those decisions to the parties, and publish digests of its decisions in

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185 *Id.*

186 *See also* Dattilo, *Ethics in International Arb: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives*, 44 GA, J INT'L & COMP. L. VOL (2016), 637.

187 *See* Barry R. Temkin, Gordon Eng, *How to Staff an Ethics Hotline: The New York County Lawyers Association Experience*, 35 Bar Leader 3 (April 2011); *see also* Barry R. Temkin and Wally Larson Jr., *Guidelines on NYCLA's Ethics Hotline*, 2 NEW YORK COUNTY LAWYER 7 (September 2006).

its journal, Arbitration International and online. The benefits of shining a light upon the decision-making process cannot be overemphasized. Instead of forming "caselaw" that encourages strategic challenges for the purpose of delaying or blocking the arbitral process, a catalog of published conflicts and reasoned outcomes assists parties in choosing arbitrators and in deciding when to challenge an arbitrator. Thus, all formal opinions of the International Arbitration Ethics Committee/Panel should be reasoned, written, and published in writing and to the Internet. The panel could issue advisory decisions *sua sponte* on issues it feels are of particular concern to the international commercial arbitration community.

In the same manner that a multi-national, multi-cultural Working Group was formed by the IBA to draft the guidelines and their revisions comprised of individuals from members different nations representing users of international commercial arbitration, the panel would be chosen by the leaders of the IBA, the arbitral institutions, the national bar groups for the various countries, and the national courts. The committee/panel could be formed by nominating individuals from the major commercial nations involved in international commercial arbitration, along with appointees of major commercial organizations, institutional providers and national courts and bar groups. They would serve five-year terms, subject to renewal to maintain stability. They would serve under an obligation to recuse themselves from making determinizations on issues that would subject them to a personal conflict. The committee would have an intake bureau that would receive issues, categorize them, and refer them to the chair of the committee to assign to individual whose backgrounds best fit the issue. On a monthly basis, the panel would meet (more often if necessary) to discuss the situations presented and formulate their positions. A subgroup or subgroups would be assigned to draft opinions, which would be distribute to the full committee for discussion at the next meeting. In situations requiring more expedient treatment, the panel would meet more frequently on an *ad hoc* basis.

Many of the shortfalls of static written guidelines could be remedied in this manner by a live panel addressing specific questions arising out of actual pending arbitrations. The panel could consider situations that fall into a gray area, not covered by written rules, debate them, and arrive at a consensual solution. Unique circumstances could be addressed in written decisions, making it unnecessary to constantly update the Guidelines so frequently. Representatives from various nations could be invited to sit as

members of the ethics panel, infusing the panel's decisions with cultural elements of their countries' national law as well as making them part of the process, which would go a long way towards convincing countries to incorporate the panel's determinations into their national law. The fact that written reasoned decisions would be available would facilitate arbitrators in deciding whether to accept the matter, as well as informing counsel as to the likelihood of success of a particular challenge. In sum, it would convert the process of addressing arbitrator challenges in international arbitrations from a self-policed, educated guessing game to a process which is no longer self- regulating and can craft decisions from many different sources.

As has been previously noted, most challenges are fact-based, and more than one factor may be present in a particular challenge, replete with cultural, national, and factual nuances. Many circumstances are not covered specifically by the examples in the IBA Guidelines and other organizational rules. Expansion of the rules to include every situation that arises is impractical and would entail further debate concerning which of the lists is predictive and under which a particular circumstance should be listed. The more complicated and changing the arguments for disclosure and disqualification become the less predictive and helpful the various written rules become. For this reason, human intervention in the form of an ethics panel or committee and advisory hotline is needed to homogenize the various soft-law standards, cultural differences, clarify the factual scenarios and objectively determine the issues regarding disclosure and conflict of interest arising currently in the changing world of international arbitration.

James H. Carter, an expert and scholar in international arbitration, correctly notes that "[t]he absence of consensus about arbitrator conflicts is largely the result of a lack of publicly available information," since most disputes regarding arbitrator conflicts are resolved without any reasoned decision or public record.[188] The efficacy of reasoned decisions in arbitrator challenges is also espoused by Professor Margaret L. Moses who writes:

> Reasoned decisions are important and should be encouraged. They provide transparency and help parties understand how the process works. The reasoned decisions teach what relationships and what conduct cannot be tolerated in the arbitral arena. They educate counsel about what circumstances may cause an

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188 James H. Carter, *Reaching Consensus on Arbitrator Conflicts: The Way Forward*, 6 DISP. RESOL. INT'L 1, 17 (May 2012).

> arbitrator to be challenged, and they educate arbitrators as to what circumstances should cause them not to accept an appointment.[189]

As noted by Carter, computers make organization of data simple, and the Internet ensures that data are available anywhere at any time of the day or night. The opinions could be stored in a searchable database format, accessible online. This should be done by the Committee/Panel.

By embracing and applying national laws including their corresponding case authorities, and including officials of various nations on the committee, it is hoped that the committee could obtain a mandate from various foreign nations for its activities. Similarly, it is hoped that responsiveness to various institutions and inclusion of their representatives on the committee could convince them to accept the committee's opinions on issues of disclosure and conflict. Even if an official mandate is not forthcoming, stringent adherence to a recent process could result in the rulings of the committee being viewed as highly persuasive.

## V. Conclusion

What is the threshold for disclosure? How much independence and impartiality should a user seek from arbitrators? What is the arbitrators' duty to investigate? How important is a right of each party to appoint an arbitrator? Hitting a "moving target" with a static set of guidelines which are non-exhaustive, aspirational, and somewhat vague is a non-progressive way to preserve and promote the absence of bias, arbitrator independence, public confidence in, and the continued viability of the arbitration process. By contrast, using an International Commercial Arbitration Ethics Committee or Panel can provide a vehicle which can pivot quickly and adapt to the ever-changing landscape of international commercial arbitration to reactively interpret and apply those guidelines to arbitrator ethical conundrums. It can provide guidance to international commercial arbitrators that can assist them in avoiding a slippery slope if, for no other reason than that it will subject these issues to scrutiny by a set of objective eyes that are not susceptible to financial incentives. It will also subject interna-

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[189] Margaret L. Moses, Reasoned Decisions in Arbitrator Challenges, in Volume III of the Yearbook on International Arbitration 199 (2013).

tional arbitral disclosure and conflict issues to a group of individuals schooled in in cultural and national nuances that may affect these issues. Removing the process from the arbitrator's self-interest and self-regulation will assist in promoting the positive reputation of international commercial arbitration and promote its use to more skeptical parties. While not binding, the committee's opinions may well deter an arbitrator from taking a path that he or she knows may cause issues of enforcement, thus avoiding the case examples cited earlier in this article. Finally, its implementation would likely require less human capital than continually revising various guidelines that then require interpretation and suffer the risks inherent in any self-policing procedure.