



# IBA Guidelines on Conflicts of Interest in International Arbitration

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# Foreword

The first *IBA Guidelines on Conflicts of Interest in International Arbitration* (the ‘Guidelines’) were prepared by the IBA Arbitration Committee (through a working group of 19 experts) and adopted by the IBA Council in 2004. They immediately gained wide acceptance within the international arbitration community and have been recognised as a solid soft law instrument reflecting standards expected to apply to impartiality and independence of arbitrators, as well as disclosures in specific circumstances. The innovative traffic-light system of red, orange and green lists has become a worldwide norm in many respects. Practitioners apply the Guidelines as a default; most arbitration institutions and even courts also refer to them as an essential set of principles in the field. The need for such Guidelines is unchallenged. The only question is how the Guidelines should evolve over time to take into account developments in arbitral practice.

Consistent with the IBA Arbitration Committee’s practice of assessing every ten years whether its rules and guidelines should be adapted, the Guidelines were first revised in 2014 (further to a review conducted by a 27-member subcommittee). Whether and how the Guidelines should be revised requires careful consideration, determining through empirical analysis whether the practical application of the Guidelines has raised the need for clarification or improvement. When dealing with a body of principles with wide recognition, deciding on the extent of the amendments is by definition a sensitive exercise, as the objective must be to refine the applicable regime without affecting its rationale. Possible tensions as to how strict the Guidelines should be may arise from the wide application of the Guidelines, covering commercial and investment arbitration, as well as specialised arbitration schemes (e.g., maritime, sports, commodities), legal and non-legal professionals serving as arbitrator, etc. All such criteria must be factored in.

Under the leadership of Co-Chairs of the IBA Arbitration Committee, Samaa Haridi (2022) and Valeria Galíndez (2023), and Erica Stein as Co-Chair of the IBA Arbitration Guidelines and Rules Subcommittee (the ‘Subcommittee’), later joined by Claudia Frutos-Peterson, a new Task Force was set up for the revision of the 2014 Guidelines. A survey carried out by the Subcommittee in 2022 among arbitration practitioners confirmed that the Guidelines remain a useful and effective tool, but that a complete overhaul of the Guidelines was not warranted. The survey did, however, suggest areas where the Guidelines might need to be modernised or fine-tuned: (i) arbitrator disclosures; (ii) third-party funding; (iii) issue conflicts; (iv) organisational models for legal professionals in different jurisdictions (e.g., barristers’ chambers, vereins, etc.); (v) expert witnesses; (vi) sovereigns or their agencies and instrumentalities; (vii) non-lawyer arbitrators; and (viii) social media. The members of the Task Force were thus divided into teams to address these issues, along with a ninth team to examine whether any issues not identified by the 2022 survey should also be covered by a revision of the Guidelines.<sup>1</sup> The Task Force team leaders and members (more than 60 in total) made tremendous efforts to complete their tasks in one year. The updated version of the Guidelines was submitted for public consultation, including to hundreds of arbitration institutions worldwide. The comments were gathered and analysed and, particularly when consensus was ascertained among the comments, they were taken into account when adopting the final version.

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The Introduction to the 2024 Guidelines describes the overarching goals of the Guidelines and their latest revision, followed by the General Standards regarding impartiality, independence and disclosure (Part I), and the practical application of the General Standards by way of lists of circumstances (Part II).

The amendments to the Guidelines have sought to emphasise the importance of the General Standards contained in Part I, which must always be taken into consideration - and cannot be considered subordinate to - the Application Lists contained Part II for evaluating conflicts of interest and the need for arbitrator disclosures. When the updates to the Application Lists in Part II are read in light of the reinforced General Standards in Part I, the Guidelines now reflect the degree of disclosure currently expected from arbitrators by users and the arbitration community at large.

The IBA Arbitration Committee addresses particular thanks to Valeria Galíndez and Erica Stein for their immense and outstanding work, as well as to the two Task Force Secretaries<sup>2</sup> and Task Force Team Leaders<sup>3</sup>. Special thanks too to former IBA President and Arbitration Committee Co-Chair David Rivkin for his continued support and enthusiasm in providing wise solutions.

The Guidelines are available for download at [www.ibanet.org/resources](http://www.ibanet.org/resources)

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February 2024

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# Introduction

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1. In international arbitration, arbitrators are required to make disclosures to allow parties to identify and assess potential conflicts of interest, and institutions and national courts to address challenges properly. However, this exercise can be difficult, as conflicts questions may be nuanced, and answers are case-specific. Accordingly, in 2004, the IBA Arbitration Committee published guidelines on the subject, after having considered a variety of factors, including (i) the fundamental importance of independent and impartial arbitrators, (ii) the principle of party autonomy, (iii) the timing, nature, scope, burden, and other practicalities of disclosures, and (iv) the consequences and costs that could stem from frivolous challenges.
2. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The 2004 Guidelines, therefore, set forth 'General Standards and Explanatory Notes on the Standards' (the 'General Standards'). The General Standards were developed to be the primary source for evaluating the existence of conflicts of interest (adopting an objective, 'reasonable third person test') and the obligation to disclose (adopting a subjective, 'in the eyes of the parties' test).
3. Nevertheless, to promote greater consistency and avoid unnecessary challenges and arbitrator withdrawals and removals, the 2004 Guidelines listed specific situations (designated 'Red', 'Orange' and 'Green' Lists) with the aim of illustrating the General Standards, assisting arbitrators in making their disclosures, and aiding parties in assessing whether disclosed information may be such as to create a doubt as to the arbitrator's independence and impartiality. For the situations on the Red List, a conflict of interest is understood to exist. The situations on the Green List are understood not to create a conflict of interest or appearance thereof. The situations on the Orange List may, depending on the facts of a given case, give rise to a doubt in the eyes of the parties and must therefore be disclosed pursuant to General Standard 3. Such lists (the 'Application Lists') were updated in the 2014 revision to the Guidelines. In the 2024 revision, both the General Standards and Application Lists have been further updated and improved considering their use in practice since 2014.
4. The Guidelines embody the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes, practices, and case law and other decisions in a cross-section of jurisdictions, and upon the judgment and experience of the main participants in international arbitration. The Guidelines seek to balance the various interests of parties, counsel, arbitrators, and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation, and efficiency of international arbitration. Like their predecessors, the members of the Task Force for the Revision of the 2014 Guidelines and the Arbitration Guidelines and Rules Subcommittee in 2021–2023 have further sought and considered the views of leading arbitration institutions, corporate counsel, and other persons involved in international arbitration, through public consultations at IBA annual meetings and at other meetings with, and surveys of, the international arbitration community. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to all international arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether non-legal professionals serve as arbitrators.
6. These Guidelines do not override any applicable national law, arbitral rules, codes of conduct, or other binding instruments chosen by the parties. However, it is hoped that, as was the case for the 2004 and 2014 Guidelines and other sets of rules and guidelines of the IBA Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, counsel, arbitrators, institutions, and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee recommends that the Guidelines be applied with robust common sense and without undue formalistic interpretation.
7. Part I of the Guidelines contains the principles that must always be considered. The Application Lists contained in Part II cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.
8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

# Part I: General Standards Regarding Impartiality, Independence and Disclosure

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## (1) General Principle

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

### *Explanation to General Standard 1:*

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time the arbitrator accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable. This obligation does not extend to the time period during which the award may be challenged before any relevant courts or bodies. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests will be necessary.

## (2) Conflicts of Interest

- (a) An arbitrator shall decline an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if the arbitrator has any doubt as to the arbitrator's ability to be impartial or independent.
- (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.
- (c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator's decision.
- (d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

### **Explanation to General Standard 2:**

- (a) If the arbitrator has doubts as to the arbitrator's ability to be impartial and independent, the arbitrator must decline the appointment, or refuse to continue to act. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines to avoid confusion and foster confidence in the arbitral process.
- (b) The wording 'impartiality or independence' in General Standard 2 derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, addressing the disqualification of arbitrators. As provided in Article 12(2) of the UNCITRAL Model Law, the test for disqualification is an objective one (a 'reasonable third person test'), using an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator. In deciding whether to decline an appointment or refuse to continue to act, the arbitrator should bear in mind the objective standard to evaluate the relevant facts or circumstances. An arbitrator must decline an appointment or refuse to continue to act under General Standard 2(b) because an objective conflict of interest exists unless that objective conflict is waived pursuant to General Standard 4.
- (c) When justifiable doubts exist, an arbitrator should decline appointment or refuse to continue to act, for example in circumstances described in the Non-Waivable Red List. However, the existence of justifiable doubts may instead lead the arbitrator to make a disclosure in accordance with General Standard 3, such as in circumstances described in the Waivable Red List.
- (d) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination. For example, because no one is allowed to be their own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

### **(3) Disclosure by the Arbitrator**

- (a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules), and the co-arbitrators, if any, prior to accepting their appointment or, if thereafter, as soon as the arbitrator learns of them. Subject to the arbitrator's duty to investigate under General Standard 7(d), in determining whether facts or circumstances should be disclosed, an arbitrator should take into account all facts and circumstances known to the arbitrator.
- (b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).
- (c) It follows from General Standards 1 and 2(a) that arbitrators who have made a disclosure consider themselves to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing their duties as arbitrator. Otherwise, the arbitrators would have declined the nomination or appointment at the outset, or resigned.
- (d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.
- (e) If the arbitrator finds that the arbitrator should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, the arbitrator should not accept the appointment, or should resign.

- (f) The stage of the arbitration must not influence the arbitrator's decision as to whether facts or circumstances should be disclosed.
- (g) An arbitrator's failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

***Explanation to General Standard 3:***

- (a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. For its part, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations, like those set out in the Green List, that could not give rise to doubts in the eyes of the parties, because no appearance of or actual conflict of interest exists from an objective point of view under General Standard 2, need not be disclosed. Further, as reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator. The duty of disclosure under General Standard 3(a) is ongoing in nature.
- (b) The IBA Arbitration Committee has considered the use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.
- (c) A disclosure does not imply the existence of a conflict of interest. Arbitrators who have made a disclosure consider themselves to be impartial and independent of the parties despite the disclosed facts, or else the arbitrator would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing the arbitrator's duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. This General Standard makes clear that disclosure itself cannot imply doubts sufficient to disqualify the arbitrator, or even create a presumption in favour of disqualification. Instead, any challenge should only be successful if the objective test, such as the one set forth in the Explanation to General Standard 2 above, is met.
- (d-f) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment, or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. While there may be practical concerns if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.
- (g) A corollary to the fact that, as explained in Explanation to General Standard 3(c), a challenge may only be successful if an objective test is met, is General Standard 3(g), which makes clear that a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.



## (4) Waiver by the Parties

- (a) If, within 30 days after
  - (i) the receipt of any disclosure by the arbitrator, or
  - (ii) a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator,

a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage.

A party shall be deemed to have learned of any facts or circumstances under 4(a)(ii) that a reasonable enquiry would have yielded if conducted at the outset or during the proceedings.

- (b) If facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.
- (c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met:
  - (i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and
  - (ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.
- (d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation, or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of the arbitrator's involvement in the settlement process, the arbitrator develops doubts as to the arbitrator's ability to remain impartial or independent in the future course of the arbitration.

### ***Explanation to General Standard 4:***

- (a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest if such party has not raised an objection in respect of such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.
- (b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

- (c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.
- (d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator's involvement in the settlement process as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the settlement process is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

## **(5) Scope**

- (a) These Guidelines apply equally to tribunal chairs, sole arbitrators, and co-arbitrators, howsoever appointed.
- (b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

### ***Explanation to General Standard 5:***

- (a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent of the parties, the General Standards do not distinguish between and among sole arbitrators, tribunal chairs, party-appointed arbitrators, or arbitrators appointed by an institution.
- (b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

## **(6) Relationships**

- (a) The arbitrator is in principle considered to bear the identity of the arbitrator's law firm or employer, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm or employer, if any, the law firm's or employer's organisational structure and mode of practice, and the relationship of the arbitrator with the law firm or employer, should be considered in each individual case. The fact that the activities of the arbitrator's law firm or employer involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which

the arbitrator's law firm or employer has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

- (b) Any legal entity or natural person having a controlling influence on a party, or a direct economic interest in, or a duty to indemnify a party for the award to be rendered in the arbitration, may be considered to bear the identity of such party.
- (c) Any legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party.

### ***Explanation to General Standard 6:***

- (a) There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a lawyer at a large law firm or employed by a company or another kind of organisation, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of the arbitrator's law firm or employer, but the activities of the arbitrator's law firm or employer should not automatically create a conflict of interest. The relevance of (i) the activities of the arbitrator's law firm or employer, such as the nature, timing, and scope of the work by the law firm or employer; (ii) the law firm's or employer's organisational structure and mode of practice; and (iii) the relationship of the arbitrator with the law firm or employer, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm or employer, should be considered in each individual case.

Evolution in the structure of international legal practices gives rise to questions about what constitutes a law firm for purposes of General Standard 6(a). As a general proposition, a law firm for these purposes is any firm in which the arbitrator is a partner or with which the arbitrator is formally associated, including in the capacity of an employee of any designation, as counsel, or of counsel. Structures through which different law firms cooperate and/or share profits may provide a basis for deeming an arbitrator to bear the identity of such other firms. Similarly, although barristers' chambers should not be equated with law firms for the purposes of conflicts, disclosure may be warranted in view of the relationships between and among barristers, parties, and/or counsel.

- (b) Particularly where a party in international arbitration is a legal entity, other legal and natural persons may have a controlling influence on this legal entity, and/or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such persons may be considered effectively to be that party. Such control, interests, or indemnification obligations may also arise for natural persons, and the same result is obtained.

Third-party funders and insurers may have a direct economic interest in the prosecution or defence of the case in dispute, a controlling influence on a party to the arbitration, or influence over the conduct of proceedings, including the selection of arbitrators. These distinctions may be relevant when considering whether such entities should be considered to bear the identity of a party.

- (c) With respect to companies, General Standard 6(c) means that where a parent company is a party to the proceeding, its subsidiary may be considered to bear the identity of the parent company

when the parent company has a controlling influence over it. The same result is obtained for natural persons. For example, if a natural person is a party to the proceeding, their closely held company, over which they have a controlling influence, may be considered to bear their identity.

With respect to States, their organisation typically comprises separate legal entities such as regional or local authorities, or autonomous agencies, which may be legally and politically independent from the central government. Such relationships are not necessarily covered by the criteria of 'controlling influence' or 'direct economic interest'. Because the relationships between such entities vary widely, a catch-all rule is not considered appropriate. Instead, the particular circumstances of the relationship and their relevance to the subject matter of the dispute should be considered in each individual case. Thus, whenever a State or a State entity, subdivision, or instrumentality is party to the arbitration, even when the status of such entity is disputed, the arbitrator should consider disclosing relationships with entities such as regional or local authorities, autonomous agencies, or State-owned entities, irrespective of whether they are part of the organisation of the State or have a private status, and vice-versa.

## **(7) Duty of the Parties and the Arbitrator**

- (a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of
- (i) any relationship, direct or indirect, between the arbitrator and
- the party;
  - another company of the same group of companies;
  - a person or entity having a controlling influence on the party in the arbitration;
  - a person or entity over which a party has a controlling influence; or
  - any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration; and
- (ii) any other person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3.

The party shall do so on its own initiative at the earliest opportunity.

- (b) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide all relevant information available to it.
- (c) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.
- (d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to the arbitrator's impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge if the arbitrator does not perform such reasonable enquiries.

### ***Explanation to General Standard 7:***

- (a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (and/or another company of the same group of companies, and/or an individual having a controlling

influence on the party in the arbitration and/or any legal or natural person over which a party has a controlling influence), extends to relationships with a legal entity or natural person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, such as an entity providing funding for the arbitration.

When providing the list of persons or entities the parties believe an arbitrator should take into consideration when making disclosures, the parties are required to explain these persons' and entities' relationship to the dispute.

- (b) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the General Standards, might affect the arbitrator's impartiality or independence.
- (c) Counsel advising on or appearing in the arbitration must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel advising on or appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.
- (d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

# Part II: Practical Application of the General Standards

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1. To have an important practical influence, the Guidelines address situations that are likely to occur in today's arbitration practice in the Application Lists. However, these lists cannot cover every situation, and in all cases, the General Standards should control the outcome; in other words, the General Standards govern over the illustrative Application Lists.
2. The Red List consists of two parts: a 'Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and a 'Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, a conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be their own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).
3. The Orange List is a non-exhaustive 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 Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).
4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, the arbitrator can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, the arbitrator can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification described in the Explanation to General Standard 2.
5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification, or a successful challenge to any award. As provided in General Standard 3(g), nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that the arbitrator failed to disclose can do so.

6. In respect of situations not listed in the Orange List or falling outside the time limits used in parts of the Orange List, there is no presumption that a disclosure should be made. However, the arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to doubts in the eyes of the parties as to the arbitrator's impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated matter in which similar issues are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not always require disclosure of the fact that an arbitrator has in the past served on the same tribunal with another member of the Arbitral Tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, tribunals with another member of the Arbitral Tribunal may create, in the eyes of the parties, a perceived imbalance within the Arbitral Tribunal that may, depending on the facts and circumstances of the case, give rise to doubts as to an arbitrator's impartiality or independence. If the conclusion is 'yes,' the arbitrator should make a disclosure.
7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest can exist either under the subjective or the objective standard. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), the Green List reflects the fact that there is a limit to the duty to disclose, based on reasonableness.
8. The borderline between the categories that comprise the Lists can be thin. It can be debated whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

## **(1) Non-Waivable Red List**

- 1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative in the arbitration, or employee of a person or entity that is a party in the arbitration.
- 1.2 The arbitrator is a manager, director, or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.
- 1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.
- 1.4 The arbitrator currently or regularly advises a party, or an affiliate<sup>1</sup> of a party, and the arbitrator or the arbitrator's firm or employer derives significant financial income therefrom.

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<sup>1</sup> Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company, and/or an individual having a controlling influence on the party in the arbitration, and/or any person or entity over which a party has a controlling influence.

## (2) Waivable Red List

### 2.1 Relationship of the arbitrator to the dispute:

- 2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.
- 2.1.2 The arbitrator had a prior involvement in the dispute.

### 2.2 Arbitrator's direct or indirect interest in the dispute:

- 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.
- 2.2.2 A close family member<sup>2</sup> of the arbitrator has a significant economic interest in the outcome of the dispute.
- 2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

### 2.3 Arbitrator's relationship with the parties or counsel:

- 2.3.1 The arbitrator currently or regularly represents or advises one of the parties, or an affiliate of one of the parties, but does not derive significant financial income therefrom.
- 2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.
- 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
- 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.
- 2.3.5 The arbitrator's law firm or employer had a previous but terminated involvement in the case without the arbitrator being involved themselves.
- 2.3.6 The arbitrator's law firm or employer currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.
- 2.3.7 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with counsel representing a party.
- 2.3.8 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

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<sup>2</sup> Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.



### (3) Orange List

#### 3.1 Services for one of the parties or other involvement in the case:

- 3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.
- 3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.
- 3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.<sup>3</sup>
- 3.1.4 The arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on two or more occasions by one of the parties, or an affiliate of one of the parties in unrelated matters.
- 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator or counsel in another arbitration on a related issue or matter involving one of the parties, or an affiliate of one of the parties.
- 3.1.6 The arbitrator currently serves, or has acted within the past three years, as an expert for one of the parties, or an affiliate of one of the parties in an unrelated matter.
- 3.1.7 The arbitrator's law firm or employer is currently rendering or regularly renders services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm or employer and without the involvement of the arbitrator, and such services do not concern the current dispute.
- 3.1.8 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm or employer renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

#### 3.2 Relationship between an arbitrator and another arbitrator or counsel:

- 3.2.1 The arbitrator and another arbitrator are lawyers in the same law firm or have the same employer.
- 3.2.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.
- 3.2.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.
- 3.2.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute on a related issue or matter involving the same party or parties, or an affiliate of one of the parties.
- 3.2.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
- 3.2.6 A close personal friendship exists between an arbitrator and counsel of a party.
- 3.2.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

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<sup>3</sup> In certain types of arbitration, such as maritime, sports or commodities arbitration, arbitrators may be drawn from a specialised pool of individuals or selected from a mandatory list. Parties active in those fields may be aware of a custom or practice for appointing parties frequently to appoint the same arbitrator in different cases. In that event, while disclosure of multiple appointments may still be desirable consistent with section 3.1.3, the scope of disclosure and consequences of repeat appointments may differ from those set forth in these Guidelines.

- 3.2.8 The arbitrator has, within the past three years, been appointed as arbitrator on more than three occasions by the same counsel, or the same law firm.
  - 3.2.9 The arbitrator has, within the past three years, been appointed as an expert on more than three occasions by the same counsel, or the same law firm.
  - 3.2.10 The arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on more than three occasions by the same counsel, or the same law firm.
  - 3.2.11 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.
  - 3.2.12 An arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration.
  - 3.2.13 An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration.
- 3.3 Relationship between arbitrator and party and/or others involved in the arbitration:
- 3.3.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.
  - 3.3.2 The arbitrator has been associated with an expert, a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.
  - 3.3.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.
  - 3.3.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence on one of the parties or an affiliate of one of the parties or a witness or expert.
  - 3.3.5 If the arbitrator is a former judge, and has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.
  - 3.3.6 The arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel.
- 3.4 Other circumstances:
- 3.4.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.
  - 3.4.2 The arbitrator has publicly advocated a position on the case, whether in a published paper or speech, through social media or on-line professional networking platforms, or otherwise.
  - 3.4.3 The arbitrator holds an executive or other decision-making position with the administering institution or appointing authority with respect to the dispute and in that position has participated in decisions with respect to the arbitration.
  - 3.4.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

## (4) Green List

### 4.1 Previously expressed legal opinions:

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

### 4.2 Current services for one of the parties:

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

### 4.3 Contacts with another arbitrator, or with counsel for one of the parties:

- 4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.
- 4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.
- 4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.
- 4.3.4 The arbitrator was a speaker, moderator, or organiser in one or more conferences, or participated in seminars or working parties of a professional, social, or charitable organisation, with another arbitrator or counsel to the parties.

### 4.4 Contacts between the arbitrator and one of the parties:

- 4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.
- 4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.
- 4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.
- 4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

### 4.5 Contacts between the arbitrator and one of the experts:

- 4.5.1 The arbitrator, when acting as arbitrator in another matter, heard testimony from an expert appearing in the current proceedings.

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