International Arbitration of Crypto-related Disputes

MCLE: 1.5 Hours; 1.5 Legal Ethics

Tuesday, March 12, 2024

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Conference Reference Materials

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“Ethical Conundrums Faced by Parties and Arbitrators in International Arbitration”

California International Arbitration Week

March 12, 2024

Cedric Chao (moderator), Sally Harpole, Nilufar Hossain, Steven Smith, Eric Tuchmann, and Dana Welch

Singapore International Arbitration Centre (SIAC) Rules of 2016

Article 13: Qualifications of Arbitrators

13.1 Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the parties, shall be and remain at all times independent and impartial.

13.2 In appointing an arbitrator under these Rules, the President shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations that are relevant to the impartiality or independence of the arbitrator.

13.3 The President shall also consider whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner that is appropriate given the nature of the arbitration.

13.4 A nominated arbitrator shall disclose to the parties and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before his appointment.

13.5 An arbitrator shall immediately disclose to the parties, to the other arbitrators and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence that may be discovered or arise during the arbitration.

13.6 No party or person acting on behalf of a party shall have any ex parte communication relating to the case with any arbitrator or with any candidate for appointment as party-nominated arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings; to discuss the candidate’s qualifications, availability or independence in relation to the parties; or to discuss the suitability of candidates for selection as the presiding arbitrator where the parties or

party-nominated arbitrators are to participate in that selection. No party or person acting on behalf of a party shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

Article 14: Challenge of Arbitrators

14.1 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.

14.2 A party may challenge the arbitrator nominated by it only for reasons of which it becomes aware after the appointment has been made.

SIAC Code of Ethics for an Arbitrator

1. Appointment

1.1 A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias, he has an adequate knowledge of the language of the arbitration, and he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.

1.2 Should the prospective arbitrator be aware of any potential time constraints in the next 12 months in his ability to discharge his duties if he is appointed as an arbitrator, he shall, without breaching any existing confidentiality considerations and/or obligations, disclose details of such time constraints to the Registrar of SIAC in the attached Disclosure Sheet. SIAC reserves the right to refuse to appoint the prospective arbitrator should it take the view that the prospective arbitrator will not be able to discharge his duties due to such potential time constraints.

1.3 The prospective arbitrator confirms that he understands that the Registrar of SIAC will take into account any failure by the prospective arbitrator to discharge his duties to ensure the fair, expeditious, economical and final determination of the dispute when fixing the quantum of fees payable to the arbitrator.

2. Disclosure

2.1 A prospective arbitrator shall disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence, such duty to

continue throughout the arbitral proceedings with regard to new facts and circumstances.

2.2 A prospective arbitrator shall disclose to the Registrar and any party who approaches him for a possible appointment:

(a) any past or present close personal relationship or business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration;

(b) the extent of any prior knowledge he may have of the dispute.

3.Bias

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

3.2 Any close personal relationship or current direct or indirect business relationship between an arbitrator and a party, or any representative of a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence. Past business relationships will only give rise to justifiable doubts if they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed.

4. Communications

4.1 Before accepting an appointment, an arbitrator may only enquire as to the general nature of the dispute, the names of the parties and the expected time period required for the arbitration.

4.2 Save as may be permitted under the applicable arbitration rules, no arbitrator shall confer with any of the parties or their counsel until after the Registrar gives notice of the formation of the Tribunal to the parties.

4.3 Throughout the arbitral proceedings, an arbitrator shall avoid any unilateral communications regarding the case with any party, or its representatives.

5. Fees

5.1 In accepting an appointment, an arbitrator agrees to the remuneration as settled by the SIAC, and he shall make no unilateral arrangements with any

of the parties or their counsel for any additional fees or expenses, except with the express agreement of the Registrar.

5.2 All matters relating to arbitrators 'fees and expenses shall be dealt with in accordance with the Practice Note for Administered Cases (PN – 01/14, 2 January 2014).

6. Conduct

6.1 Once the arbitration proceedings commence, the arbitrator shall acquaint himself with all the facts and arguments presented and all discussions relative to the proceedings so that he may properly understand the dispute.

7. Confidentiality

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

7.2 This Code of Ethics is not intended to provide grounds for the setting aside of any award.

Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules of 2018

Article 11 – Qualifications and Challenge of the Arbitral Tribunal

11.1 An arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties.

11.2 Subject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole or presiding arbitrator shall not have the same nationality as any party unless specifically agreed otherwise by all parties.

11.3 Notwithstanding the general rule in Article 11.2, in appropriate circumstances and provided that none of the parties objects within a time limit set by HKIAC, a sole or presiding arbitrator may be of the same nationality as any of the parties.

11.4 Before confirmation or appointment, a prospective arbitrator shall (a) sign a statement confirming his or her availability to decide the dispute and his or her impartiality and independence; and (b) disclose any circumstances likely

to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

11.5 No party or its representatives shall have any ex parte communication relating to the arbitration with any arbitrator, or with any candidate to be designated as arbitrator by a party, except to advise the candidate of the general nature of the dispute, to discuss the candidate's qualifications, availability, impartiality or independence, or to discuss the suitability of candidates for the designation of a third arbitrator where the parties or party-designated arbitrators are to designate that arbitrator. No party or its representatives shall have any ex parte communication relating to the arbitration with any candidate for the presiding arbitrator.

11.6 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.

11.7 A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6.

11.8 The notice of challenge shall be communicated to HKIAC, all other parties, the challenged arbitrator and any other members of the arbitral tribunal. The notice of challenge shall state the reasons for the challenge.

11.9 Unless the arbitrator being challenged resigns or the non-challenging party agrees to the challenge within 15 days from receiving the notice of challenge, HKIAC shall decide on the challenge. Pending the determination of the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the arbitration.

11.10 If an arbitrator resigns or a party agrees to a challenge under Article 11.9, no acceptance of the validity of any ground referred to in Article 11.6 shall be implied.

Article 12 – Replacement of an Arbitrator

12.1 Subject to Articles 12.2, 27.13 and 28.8, where an arbitrator dies, has been successfully challenged, has been otherwise removed or has resigned, a substitute arbitrator shall be appointed pursuant to the rules that were applicable to the appointment of the arbitrator being replaced. These rules shall apply even if, during the process of appointing the arbitrator being replaced, a party had failed to exercise its right to designate or to participate in the appointment.

12.2 If, at the request of a party, HKIAC determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to designate a substitute arbitrator, HKIAC may, after giving an opportunity to the parties and the remaining arbitrators to express their views:

(a) appoint the substitute arbitrator; or

(b) authorise the other arbitrators to proceed with the arbitration and make any decision or award.

12.3 If an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

HKIAC Code of Ethical Conduct (for Arbitrators)

In some instances the ethics set down in HKIAC's Code of Ethical Conduct herein may be repeated in legislation governing the arbitration, case law or the rules which parties have adopted. In many instances, arbitrators will also be bound by other codes of practice or conduct imposed upon them by virtue of membership of primary professional organisations.

Rule One

An arbitrator has an overriding obligation to act fairly and impartially as between the parties at all stages of the proceedings.

Rule Two

An arbitrator shall be free from bias and shall disclose any interest or relationship likely to affect his or her impartiality or which might reasonably create an appearance of partiality or bias. This is an ongoing duty and does not cease until the arbitration has concluded. Failure to make such disclosure itself may create an appearance of bias and may be a ground for disqualification.

An arbitrator shall not permit outside pressure, fear of criticism or any form of self-interest to affect his or her decisions. An arbitrator shall decide all the issues submitted for determination after careful deliberation and the exercise of his or her own impartial judgment.

An arbitrator in communicating with the parties shall avoid impropriety or the appearance of impropriety. There shall be no private communications between an arbitrator and any party, regarding substantive issues in the case. All communications, other than proceedings at a hearing, should be in writing. Any correspondence shall remain private and confidential and shall not be copied to anyone other than the parties to the dispute, without the agreement of the parties.

An arbitrator shall not accept any gift or substantial hospitality, directly or indirectly, from any party to the arbitration, except in the presence of the other parties and/or with their consent.

Rule Three

An arbitrator shall only accept an appointment if he or she has suitable experience and ability for the case and available time to proceed with the arbitration.

Rule Four

An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.

Rule Five

An arbitrator's fees and expenses must be reasonable taking into account all the circumstances of the case. An arbitrator shall disclose and explain the basis of fees and expenses to the parties.

Rule Six

Arbitrators may publicise their expertise and experience but shall not actively solicit appointment as arbitrators.

CIETAC Current Arbitration Rules (effective January 1, 2024)

Article 24 Duties of Arbitrator

1. An arbitrator shall not represent either party,and shall be and remain neutral and independent of the parties and treat them equally.
2. Upon acceptance of appointment/nomination, the arbitrator shall perform his/her duties in accordance with these Rules and carry out the arbitral proceedings diligently and efficiently.

Article 31 Disclosure

1. An arbitrator nominated by the parties or appointed by the Chairman of CIETAC shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.

2. If facts or circumstances that need to be disclosed arise during the arbitral proceedings, the arbitrator shall promptly disclose such facts or circumstances in writing.

3. The Declaration and/or the disclosure of the arbitrator shall be submitted to the Arbitration Court to be forwarded to the parties and other members of the arbitral tribunal.

Article 32 Challenge to Arbitrator

1. Upon receipt of the Declaration and/or the written disclosure of an arbitrator, a party wishing to challenge the arbitrator on the grounds of the disclosed facts or circumstances shall forward the challenge in writing within ten (10) days from the date of such receipt. If a party fails to file a challenge within the above time period, it may not subsequently challenge the arbitrator on the basis of the matters disclosed by the arbitrator.

2. A party having justifiable doubts as to the impartiality or independence of an arbitrator may challenge that arbitrator in writing and shall state the facts and reasons on which the challenge is based with supporting evidence.

3. A party may challenge an arbitrator in writing within fifteen (15) days from the date it receives the Notice of Formation of the Arbitral Tribunal. Where a party becomes aware of a reason for a challenge after such receipt, the party may challenge the arbitrator in writing within fifteen (15) days after such reason has become known to it, but no later than the conclusion of the last oral hearing.

4. The challenge by one party shall be promptly communicated to the other party, the arbitrator being challenged and the other members of the arbitral tribunal.

5. Where an arbitrator is challenged by one party and the other party agrees to the challenge, or the arbitrator being challenged voluntarily withdraws from his/her office, such arbitrator shall no longer be a member of the arbitral tribunal. However, in neither case shall it be implied that the reasons for the challenge are sustained.

6. In circumstances other than those specified in the preceding Paragraph 5, the Chairman of CIETAC shall make a final decision on the challenge with or without stating the reasons.

7. An arbitrator who has been challenged shall continue to serve on the arbitral tribunal until a final decision on the challenge has been made by the Chairman of CIETAC.

Article 33 Replacement of Arbitrator

1. In the event that an arbitrator is prevented de jure or de facto from fulfilling his/her functions, or fails to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of CIETAC shall have the power to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.
2. The Chairman of CIETAC shall make a final decision on whether or not an arbitrator should be replaced with or without stating the reasons.
3. In the event that an arbitrator is unable to fulfill his/her functions due to challenge or replacement, a substitute arbitrator shall be nominated or appointed within the reasonable time period specified by the Arbitration Court according to the same procedure that applied to the nomination or appointment of the arbitrator being challenged or replaced. If a party fails to nominate or appoint a substitute arbitrator accordingly, the substitute arbitrator shall be appointed by the Chairman of CIETAC.
4. After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated.

CIETAC Rules for Evaluating the Behavior of Arbitrators (Amendment)

Article 1 These rules are formulated to strengthen the management of arbitrators, improve the credibility of arbitration, and promote the development of arbitration.

Article 2 An arbitrator shall strictly abide by the Code of Conduct for Arbitrators, perform his or her duties independently, impartially, diligently and prudently. He or she also shall be upright and self-disciplined, and shall not represent the interst of either party of a case and shall treat both parties with equality.

Article 3 An arbitrator shall diligently study the arbitration theories, be proficient in the arbitration practices, frequently update their knowledge, refine their analytical ability and judgment, constantly improve their case handling skills, and maintain a high professional level in law and in their specialized areas.

Article 4 An Arbitrator shall not accept nomination or appointment if any of the following circumstances exists:

1. The arbitrator shall withdraw according to the law;
2. The arbitrator is unable to participate in an oral hearing within two months of nomination or appointment;
3. Due to his or her heavy workload, the arbitrator cannot ensure enough time and energy to handle the case with the necessary level of care;
4. The arbitrator is unable to examine the case due to health reasons;

5. The arbitrator is unable to handle the case due to his or her unfamiliarity with the professional field involved in the case; and
6. Other situations that make it inappropriate for the arbitrator to accept the nomination or appointment.

Article 5 The Chairman, Vice-Chairman or staff of CIETAC shall not accept the nomination by a party to serve as arbitrator unless otherwise being appointed by CIETAC according to the Arbitration Rules.

Article 6 When accepting an nomination or appointment, the arbitrator shall submit a declaration of acceptance truthfully. If any of the following circumstances exist which may raise reasonable doubt as to the independence and impartiality of the arbitrator, the arbitrator shall timely disclose in writing to CIETAC:

1. The arbitrator, or the organization he or she works for, is related to the case or had business contact with a party, its arbitration agent or the affiliated organizations of a party within the past two years;
2. The arbitrator is or was a colleague of another arbitrator of the case within the past two years;
3. The arbitrator and a party, its main manager or agent hold full-time positions in the same social organization and frequently come into contact with each other;
4. The arbitrator holds or held an official position in an organization that is related to the case within the past two years;
5. The arbitrator or the arbitrator’s close relative has a close personal relationship with a party or its agent;
6. The arbitrator has been nominated as the arbitrator by the same party, agent, or law firm more than three times within the past two years, unless in related cases or cases of the same nature;and
7. Other circumstances that may raise reasonable doubt of the parties as to the independence or impartiality of the arbitrator.
8. If the arbitrator becomes aware of a circumstance that needs to be disclosed in the arbitral proceedings, the arbitrator shall make the disclosure immediately.

CIETAC has the power to decide whether the arbitrator shall be replaced based on his or her disclosure.

Article 7 If any of the following circumstances exists, an arbitrator should make a request to CIETAC for withdrawal on his or her own initiative. The parties and the other members of the arbitral tribunal may also submit a written challenge against the arbitrator to the Chairman of CIETAC, with specific reasons stated therein. The

Chairman will then make a decision on the challenge. The Chairman may also make such a decision on his or her own initiative.

1. The arbitrator is a party to the case or is a close relative of a party or its agent;
2. The arbitrator or his or her close relative has a personal stake in the case;
3. The arbitrator has met with a party or its agent in private or has accepted improper benifit from the latter;
4. The arbitrator has other ties with a party or its agent that may affect the impartiality of the arbitration, mainly including the following circumstances:

    (1) The arbitrator has previously advised on the same case to a party or its agent;

    (2) The arbitrator has recommended or introduced an agent to a party;

    (3) The arbitrator has served as a witness, appraiser, forensic examiner, defense attorney, litigation or arbitration agent in the same case or a related case;

    (4) The arbitrator is currently a colleague of a party or its agent or used to be a colleague thereof within the past two years;

    (5) The arbitrator is currently the legal adviser or agent of a party or affiliated organizations of a party within the past two years;

    (6) The close relative of the arbitrator currently works for the same organization of a party or its agent;

    (7) The arbitrator or the arbitrator’s close relative has a possible right of recourse with regard to any party;

    (8) The arbitrator or his or her close relative shares collective rights or obligations with a party or its agent, or has any other kind of collective interests with a party or its agent; and

    (9) Other circumstances that may raise a reasonable doubt as to the impartiality of the arbitration proceeding.

Article 8 If any of the following circumstances exist in an arbitrator’s handling of a case that may seriously affect the justice and quality of the case and prevent its timely resolution, the arbitrator in question, other members of the arbitral tribunal or either of the parties may, pursuant to the Arbitration Law of the People’s Republic of China, submit a written petition to the Chairman of CIETAC to replace the arbitrator, with specific reasons stated therein. The Chairman will then make a decision on the replacement. The Chairman may also make such a decision on his or her own initiative.

1. The arbitrator lacks the necessary knowledge and ability to handle a case;

2. The arbitrator has failed to fulfill his or her due diligence obligations;
3. The arbitrator has failed to conduct arbitral proceedings in accordance with the Arbitration Rules; and
4. Other circumstances that demonstrate the arbitrator's inability to properly perform his or her duties.

Article 9 When an arbitrator commits a violation of the Code of Conduct for Arbitrators or the Case Management Standards for Arbitrators which might affect the parties ' confidence in CIETAC or damage the reputation of CIETAC, CIETAC has the power to give a reminder, make a suggestion, or issue a warning to the arbitrator according to the severity of the circumstances if it considers the violation does not warrant withdrawal, replacement or dismissal of the arbitrator:

1. The arbitrator prevents the timely resolution of the case under false excuses;
2. The abitrator fails to attend the oral hearing without justified reasons;
3. The arbitrator fails to participate in the deliberations or investigations of the arbitral tribunal or be late for an oral hearing without justified reasons;
4. The arbitrator changes the time for an oral hearing after it is confirmed without justified reasons, or fails to reserve enough time for an oral hearing, resulting in the scheduling of an additional hearing;
5. The arbitrator receives phone calls, messages, leaves the hearing room at will, or dresses inappropriately during an oral hearing;
6. The arbitrator displays bias during an oral hearing and in the arbitral proceedings, including either directly or covertly assisting one party by examining evidence, making arguments, raising claims or asking apparently leading questions for that party;
7. The arbitrator publish the information related to a case in any way to the outside without prior approval of CIETAC; and
8. Other circumstances that may raise a reasonable doubt in the eyes of the parties to the arbitrator.

Article 10 If any of the following circumstances exist during an arbitrator's term of office, CIETAC has the power to disqualify that arbitrator:

1. The arbitrator does not agree with the Articles of Association and Arbitration Rules of CIETAC, openly opposes or passively resists the implementation of the Articles of Association and Arbitration Rules, or intentionally acts in a way that damages the reputation of CIETAC;
2. The arbitrator was subjected to criminal penalties, or received serious administrative punishment for violation of law, or received the party disciplinary

and political sanctions above the serious warning level (excluding the serious warning level) within the past five years;

3. The arbitrator deliberately concealed facts or circumstances that would have resulted in his or her withdrawal, which resulted in serious consequences;
4. The arbitrator has acted against the impartial position of an arbitrator and received multiple warnings from CIETAC during the arbitral proceedings;
5. The arbitrator bears primary responsibility for the delays in the arbitral proceedings;
6. The arbitrator reveals his or her own opinion or the deliberations of the arbitral tribunal to a party;
7. The arbitrator fails to perform his or her duties in a diligent and cautious manner, fails to carefully read the case materials or familiarize with the case in a seriously irresponsible manner;
8. The arbitrator engages in favoritism and commits irregularities, or perverts the law in rendering an arbitral award;
9. The arbitrator meets a party in private, or accepts an invitation or gift or other improper benefits from a party;
10. The arbitrator inquires about the details of a case, entertains or gives gifts, or provides advantages or improper benefits to those involved in the case on behalf of a party;
11. The arbitrator intentionally misinterprets the facts and law, or insists on supporting one party's claims and arguments or opposing the other party's claims and arguments without explaining the reasons;
12. The arbitrator contacts another arbitrator of the same case in private to deliberatly create a majority opinion in disregard of the facts and law, for the improper interests of a party;
13. The arbitrator has received relatively more negative feedback from the CIETAC arbitrator evaluation and feedback mechanism, or lacks the necessary knowledge and ability to serve as an arbitrator;
14. The arbitrator fails to participate in the trainings for arbitrators in accordance with the Rules for Arbitrator Trainings;
15. The arbitrator's intentional or gross negligence has caused the arbitral award to be dismissed or not enforced;
16. The arbitrator has been dismissed by other arbitration institution, and it is verified that there are indeed circumstances against the renewal of the arbitrator's term of service;

17. The arbitrator never had a working contact with CIETAC within the past five years including but not limited to: failed to participate in the trainings for arbitrators, failed to publish articles in “Arbitration and Law” or other designated journals, and failed to promote CIETAC as required; and
18. Other circumstances that make it inappropriate for him or her continue to serve as an arbitrator.

Article 11 When an arbitrator receives a party’s complaint forwarded by CIETAC, the arbitrator shall treat it seriously and provide a full and faithful explanation in writing.

Article 12 The evaluation and supervision of arbitrators are the responsibility of the Arbitrators ’Qualifications Review Board, while their daily matters are in the charge of the Secretariat of CIETAC.

The Secretariat of CIETAC shall collect and organize the complaint and evaluation information, record the main points of the facts in file and for compilation, and promptly notify the arbitrator in question.

Article 13 Based on the result of evaluation, the Arbitrators ’Qualifications Review Board may decide to issue a warning to the arbitrator or report the result to CIETAC for its decision on an immediate dismissal of the arbitrator or as its basis in deciding whether or not to renew the arbitrator’s term of office. The specific matters shall be handled by CIETAC in accordance with the Rules for the Engagement of Arbitrators.

Article 14 These Rules are amended by the Chairman’s Council of CIETAC on 27 April 2021, shall be effective as from 1 May 2021, upon which the former Rules of Evaluating the Behavior of Arbitrators of January 2009 shall be repealed.

CIETAC Code of Conduct for Arbitrators

The Code is deliberated and adopted by the Chairman’s Council on April 27, 2021 and shall come into force as of May 1, 2021.

I. The Code is formulated to regulate arbitrators ’behavior, strengthen professional ethics and enhance the credibility of arbitration.

II. Arbitrators shall hear cases independently, impartially, diligently and prudently.

III. In the arbitration case, arbitrators shall not represent either party and shall treat both parties with equality.

IV. Arbitrators shall render arbitral awards independently in accordance with the law, not be influenced by any administrative authorities, social organizations or individuals, and shall be responsible for arbitral awards and accept supervision.

V. One who has discussed the case with either party (or its arbitration agents, the same below) in advance or provided advisory opinions on the case shall not serve as the arbitrator or a case.

VI. Arbitrators shall not accept gifts or entertainment or any other improper interests from the parties directly or indirectly. Arbitrators shall not meet either party in private or discuss matters or accept documents relating to the case, except where the arbitrator meets either party separately according to the decision of the Arbitral Tribunal during the mediation process.

VII. An arbitrator who has a conflict of interests in a case that may give rise to reasonable doubts to his or her impartiality and independence shall take the initiative to disclose such conflict of interests to the Arbitration Commission. An arbitrator who is a near relative of a party, has any property and monetary relations, or has business and commercial cooperation with the parties shall request for withdrawal voluntarily.

VIII. Arbitrators shall hear cases in strict accordance with the provisions set out in the Arbitration Rules and the procedures agreed by the parties, and ensure that the parties are given adequate opportunities to present their case.

IX. Before accepting an appointment or nomination, arbitrators shall ensure his or her availability for oral hearings and deliberations. Arbitrators shall refuse competing obligations, and shall consult with the Arbitration Court in advance, if absence is required under exceptional circumstances.

X. Arbitrators shall review all documents and materials of a case carefully to summarize the key issues to hear the case.

XI. Prior to an oral hearing, an arbitrator shall participate in the deliberations to discuss the hearing scheme; the presiding arbitrator shall propose the draft of the hearing scheme as the basis for discussion. A sole arbitrator shall prepare the hearing scheme before the oral hearing.

XII. During an oral hearing, an arbitrator shall not show bias and shall pay attention to the manners of asking questions and expressing opinions, avoid making premature conclusions on key issues and avoid contention or confrontation with the parties.

XIII. Upon completion of an oral hearing, the presiding arbitrator shall organize the arbitral tribunal to have deliberations without delay, and provide opinions on subsequent procedures or the drafting of the arbitral award.

XIV. Arbitrators, in particular the presiding arbitrators, shall closely follow the overall progress of proceedings in a timely manner, strictly comply with the deadline for case closure set forth in the Arbitration Rules, and draft the arbitral awards diligently.

XV. Arbitrators shall observe the principle of confidentiality of arbitration and shall not disclose any information including but not limited to the procedures, facts of the case, process of the arbitral proceedings, and deliberations of the tribunals; they shall not

disclose, in particular, their own opinions or the deliberations of the tribunal to the parties.

XVI. Arbitrators shall attend activities or events organized by CIETAC for arbitrators to exchange experience or enhance their knowledge and skills.

XVII. In the event that an arbitrator needs to attend a meeting or event, publish an article, or make a speech, in the name of arbitrator of CIETAC, he or she shall obtain the approval of CIETAC in advance.

XVIII. Every arbitrators has an obligation to comply with the applicable provisions of this code.

AAA-ICDR® Arbitrator Guidance on the Use of Generative AI

The legal profession, mirroring global trends, is quickly incorporating Generative AI into its business and practice, and arbitrators are encouraged to become knowledgeable of this technology. Because some risks come with using this technology, and because it is rapidly changing, arbitrators must understand how their obligations, including those arising under the Code of Ethics for Arbitrators in Commercial Disputes, impact their use of Generative AI in their arbitration practice1.

The AAA-ICDR anticipates that Generative AI will have a positive impact on arbitration by introducing tools that will offer time and cost efficiencies to the arbitration process. As these tools continue to evolve, however, the AAA-ICDR recommends that arbitrators proceed with caution when using Generative AI.

Accuracy of Information:

A primary concern about Generative AI is that it can generate information that is not accurate. The use of Generative AI, or any technology, does not absolve arbitrators from responsibility for verifying the accuracy of information in all aspects of their work.

Party Expectations and Transparency:

1. Maintaining Confidentiality: Arbitrators must ensure that their use of Generative AI does not violate their confidentiality obligations under Canon VI of the Code of Ethics or any applicable arbitration rules. Arbitrators should read and understand the terms of service, privacy policy, and best practices of a particular Generative AI platform and should avoid entering confidential case information into a tool that does not protect that information from use or disclosure.
2. Competence: If an arbitrator uses Generative AI to summarize information, including legal research, that summary will only be as good as the database it is trained on and can therefore produce inaccurate or biased information.

Arbitrators should understand these limitations and verify the accuracy of the information they rely upon.

3. Fairness: Under Canon I of the Code of Ethics, arbitrators have a responsibility to preserve the fairness of the arbitration process, and parties expect that arbitrators will decide cases based on the evidence and legal arguments presented to them. To the extent an arbitrator obtains information from a Generative AI tool that could impact their process or decision-making, the arbitrator should provide that information to the parties and give them an opportunity to address it.
4. No Delegation of Duty to Decide: Canon V of the Code of Ethics provides that an arbitrator "should decide all matters justly, exercising independent judgment" and "should not delegate the duty to decide to any other person." If an arbitrator uses Generative AI tools in an arbitration, they must still exercise independent judgment.

1 This Guidance cites to the Code of Ethics for Commercial Arbitrators, but arbitrators have the same or similar obligations under other applicable ethical guidelines, such as the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

ICDR International Arbitration Rules

Article 14: Impartiality and Independence of Arbitrator

6. No party…shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to:

- advise the candidate of the general nature of the controversy and of the anticipated proceedings
- discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or
- discuss the suitability of candidates for selection as a presiding arbitrator

Where the parties or party-appointed arbitrators are to participate in that selection.

No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

ABA – AAA Code of Ethics

Note on Neutrality

In some types of commercial arbitration…it is the practice for each party…to appoint one arbitrator (a "party-appointed arbitrator").

The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards.

IBA Guidelines on Conflicts of Interest in International Arbitration

(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

1. the party;

2. another company of the same group of companies;

3. a person or entity having a controlling influence on the party in the arbitration;

4. a person or entity over which a party has a controlling influence; or

5. 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

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 affiliate1 of a party, and the arbitrator or the arbitrator's firm or employer derives significant financial income therefrom.

1 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 member2 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.

2 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.3

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.

3 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.

Ethical Considerations for Counsel Participating in Arbitrations and Mediations

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2018

The ethical conduct and participation of counsel in commercial arbitrations and mediations is fundamental to the success of these dispute resolution processes. Arbitration and mediation must be affirmatively agreed to by the parties as an alternative to litigation, with the exception that some cases are required to be arbitrated or mediated by courts or other governmental entities. Ethical conduct by all participants in these alternative dispute resolution ("ADR") proceedings is part of what gives them legitimacy, since parties simply will not voluntarily elect to opt-into them if the parties believe they are vulnerable to unethical conduct that could result in poor outcomes for themselves and their clients.

Historically, when speaking about ethics in ADR, most of the focus has been on arbitrators and mediators, the individuals serving in a neutral capacity. Such a focus was and continues to be entirely appropriate in light of the fact that those individuals are in a position of trust, and are engaged by the parties to decide the either the merits of their dispute, or to facilitate a resolution as completely independent, objective and neutral third parties. To emphasize the importance of ethical conduct by arbitrators in cases administered by the AAA, each arbitrator upon their appointment must take an oath that they will abide by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.[1] Mediators are also governed by rules and codes of ethics that govern their conduct. The AAA/ABA/ACR Model Standards of Conduct for Mediators have been recognized as proving widely accepted ethical standards applicable various types of mediations.[2] Additional protection against unethical conduct by arbitrators is provided

[1] The Code of Ethics for Arbitrators in Commercial Disputes, Effective March 1, 2004, *available at*, http://www.adr.org/aaa/ShowProperty?nodeid=/UCM/ADRSTG_003867
[2] AAA/ABA/ACR Model Standards of Conduct for Mediators, September 2005, *available at*, http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased

by the Federal Arbitration Act ("FAA"), which allows for vacatur of an arbitrator's award where, for example, a party can show that the arbitrator acted with "evident partiality."[3]

Increased Interest in Ethical Standards for Counsel in ADR

More recently, however, there has a greater focus on establishing ethical ground rules applicable to attorneys representing parties in ADR proceedings, and a number of factors have contributed to the increased attention to that issue. First, increasingly large and complex disputes are being submitted to arbitration and mediation for resolution, and along with larger claims comes harder fought and more deeply entrenched advocacy. Where the outcome of a dispute involves a large monetary impact on individuals or organizations, jobs, reputations, emotions and other important factors, greater demands are placed on counsel for success and positive outcomes.

In turn, counsel are more likely to engage in increasingly zealous representation and "leave no stone unturned" type tactics, and when that style of advocacy takes place within a commercial arbitration or mediation, many sense a disconnect since ADR proceedings have traditionally been characterized as less formal and less rigid and more accommodating to parties than litigation. Another outcome of these more recent perceptions of counsel conduct in ADR is that some have questioned whether arbitration and mediation, which are largely party driven processes, are vulnerable to creating a forum that allows improper conduct to go unchecked. While these extreme characterizations are not entirely consistent with the AAA's average interaction with counsel in AAA administered arbitrations and mediations, they do nonetheless appear to be of increased concern to parties involved in mediation and arbitration proceedings.

[3] 9 U.S.C. §l0(a) permits vacatur of an arbitration award "where there was evident partiality or corruption in the arbitrators". There is currently a split among the Federal Circuit Courts of Appeals on the applicable definition of evident partiality. The First, Second, Third, Fourth, Sixth and Seventh Circuits have held that evident partiality exists upon a showing that a reasonable person, considering all of the circumstances, would have to conclude the arbitrator was partial to one party. The Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have established a lower bar, and have held that evident partiality exists where a "reasonable impression" of arbitrator bias is present. With regard to mediation, although extremely rare in the commercial context, parties have attempted to upset mediated settlements by arguing that counsel exerted undue pressure through threats of disclosing what would be criminal conduct, purposely misrepresenting financial information directly relevant to the dispute, and unreasonably extending mediation sessions to the point where the it was perceived that a settlement was being coerced.

Second, there is legitimate concern about conflicting ethical obligations that can result from attorneys that may be subject to different ethics codes and expectations because they are from different countries or jurisdictions that impose different ethical standards or traditions. When each attorney acts in accordance with their respective disciplinary requirements, one or more parties may feel they are disadvantaged because differing ethical standards may apply to different sides of the dispute.

This concern is most visible in international arbitrations where both in-house and outside counsel may be from different countries with divergent requirements regarding the appropriate conduct and advocacy in ADR proceedings. In that situation, attorneys for each side of a dispute may be conducting themselves in a manner that is entirely consistent, or even mandated by, the rules of professional responsibility that each lawyer is governed by a member of their respective bars. In the eyes of their adversaries, however, their conduct may be viewed as entirely inconsistent with what they understood to have been uniformly accepted standards of conduct as counsel.

Third, some simply believe that it is critical that all participants in ADR proceedings, and not just arbitrators and mediators, must be obligated to conduct themselves in an ethical manner. The outcome of ADR proceedings frequently have a substantive impact on the parties legal rights, and we are also now at a point in time where arbitration and mediation are used to resolve not just larger and more complex disputes, but also a tremendously diverse array of dispute types. In particular, ADR has been become a relied upon means of resolving disputes in practically every field and industry, both domestically and internationally. ADR is used to resolve class actions, investment disputes between companies and countries, employment and consumer disputes, in addition to caseloads that are created by state and federal legislatures.

While the impetus for the establishment of ethical standards applicable to counsel in ADR proceedings can be attributed to these as well as other factors, it is important to also understand that there are currently an number of current and developing sources of ethical guidance that are applicable to counsel that are participating in ADR.

Existing Standards for Counsel Ethics in ADR

There are, in fact, already a number of sources of authority that govern the ethical conduct of attorneys when they participate in an arbitration and mediation, the most prominent being the code of conduct rules or rules of professional responsibility that attorneys are bound to as members of a particular bar. In addition, because commercial arbitration is a method of resolving disputes that is contractually agreed upon, the parties may also have bound themselves to certain ethical conduct through the rules provided for in their arbitration agreement. Finally, there are additional sources of ethical conduct that, while not binding on an attorney representing a party in an arbitration, may provide guidance or norms for expected attorney conduct.

Rules of Professional Conduct

State rules of professional conduct for attorneys are drafted to provide guidance regarding attorney conduct for matters that attorneys deal with in the ordinary course of their work and in representing parties. These rules of conduct are particularly important because an attorney who violates them can be subject to client complaints to state bars, censure, fines and other disciplinary actions. In that respect, the ABA's Model Rules of Professional Conduct ("Model Rules") are very influential because they have been adopted in full or in some modified form by every state except for California.[4] When representing a party in an arbitration or mediation, there should be little question that the Model Rules apply in many respects to the same extent that they would apply to counsel representing a party in court litigation.

For example, in ADR proceedings an attorney maintains the same obligations to provide competent representation, to act diligently and promptly, to maintain the confidentiality of client information, to act with candor toward a tribunal[5], to avoid conflicts of interest, to act with fairness toward an opposing party and counsel, addition to the many other Model Rules.

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[4] The ABA Model Rules of Professional Conduct, *available at*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

[5] The Model Rules specifically includes arbitrators within the definition of "Tribunal." Model Rule 1.

Attorneys should also give consideration to their obligations under the Model Rules, as to whether they have an independent obligation to discuss the advantages or disadvantages of ADR in a particular case. Specifically, Model Rule 1.4(a)(2) requires lawyers to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[6] In turn, Comment 5 to Model Rule 2.1, which addresses a lawyer's role as an advisor, states that if a case involves litigation, "it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." Accordingly, the Model Rules do suggest that lawyers have an obligation to discuss the possibility of using arbitration, mediation or other forms of dispute resolution in circumstances where litigation is being considered.[7]

Notably, some states have gone further to encourage and promote the use of ADR by more explicitly direct attorneys to advise clients about ADR. Rule 1.2 of Virginia's Rules of Professional Conduct states that "…a lawyer ***shall*** advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate…" in light of the objectives of representing the client.[8] Colorado adopted a version of Model Rule 2.1 which states that "In a matter involving or expected to involve litigation, a lawyer ***should*** advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."[9]

Accordingly, counsel should be aware that when considering the possibility of pursuing litigation, there may exist a general obligation to consider ADR as an option under the Model Rules.

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[6] Model Rule 1.4, *available at*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html

[7] Comment to Model Rule 2.1, *available at*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html

[8] Virginia Rules of Professional Conduct, *available at*, http://www.vsb.org/docs/2009-10-pg-rpc.pdf (emphasis added).

[9] Colorado Rules of Professional Conduct, *available at*, http://www.cobar.org/index.cfrn/ID/22171 (emphasis added).

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

Perhaps the strongest indicator that additional guidance is sought on the appropriate conduct of counsel participating in international arbitrations is reflected in the recent publication of the International Bar Association's Guidelines on Party Representation in International Arbitration ("IBA Guidelines"). The guidelines were "inspired by the principle that party representatives should act with integrity and honest and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings."[10] An IBA Task Force was initially constituted in 2008 to consider issues of counsel conduct and representation in international arbitrations in light of the fact that those proceedings present counsel with diverse and potentially conflicting rules and expectations regarding their conduct. Part of the IBA Task Force's work consisted of conducting a survey to examine these issues, with the survey responses indicating support for the development of guidelines that would address party representation in international arbitrations.

The IBA Guidelines themselves provide insight into the reasons for this development. The potential for confusion and uncertainty when counsel are admitted to practice in different jurisdictions with conflicting rules and norms, and the fact that domestic litigation approaches are not suitable for international arbitral proceedings provide just some of the rationale for the creation of the IBA Guidelines.

The content and subject matter addressed in the IBA Guidelines reflect the issues most frequently cited as giving rise to ethical conflicts in international arbitration, and the primary issues dealt with in the IBA Guidelines are as follows:

Application of the Guidelines - The IBA Guidelines will apply where the parties have so agreed, or where an arbitral tribunal indicates that it wishes to rely on them after consulting with the parties and determining that the tribunal has the authority to rule on issues of party

[10] IBA Guidelines on Party Representation in International Arbitration, *available at*, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#partyrep

representation. The IBA Guidelines are not intended to displace applicable laws, professional rules, or applicable arbitration rules.

Party Representation - Party representatives should not accept representation of a party if doing so if a relationship between counsel and an arbitrator would create a conflict of interest. If appointing a particular counsel results in a conflict with an arbitrator, the arbitral tribunal may exclude that representative from participating in all or a portion of the proceedings but only seeking the input of the parties with regard to the existence of the conflict and the authority of the tribunal to actually exclude one party's counsel.

Communications with Arbitrators - Parties must not engage in *ex parte* communications with the arbitrators, except: to determine a prospective party-appointed arbitrator's suitability as an arbitrator; to communicate with a party-appointed arbitrator regarding the selection of a Presiding Arbitrator; and upon party agreement, to communicate with a prospective Presiding Arbitrator regarding his or her suitability. However, in no case should a party seek the views of a prospective arbitrator regarding the substance of the dispute.

Submissions to the Arbitral Panel - Party representatives are prohibited from presenting false submissions of fact, or false expert or witness testimony. In the event a party representative learns that they did so previously, they are directed to correct the submission.

Information Exchange and Disclosure - Party representative should inform their client of the need to preserve responsive documents and to take action to avoid the destruction of documents that might be deleted in accordance with document retention policies. Representatives should not make any request to produce documents for an improper purpose such as to harass or cause delay.

Witnesses and Experts - Party representatives are permitted to meeting with expert and other witnesses to help prepare witness statements or expert reports, and should seek to ensure that such statements and reports reflect the witnesses own account or analysis. Counsel may not invite or encourage a witness to give false testimony.

Remedies for Misconduct - The tribunal is given wide discretion to determine an appropriate response for dealing with misconduct, including admonishment, drawing adverse inferences, and apportioning costs.

Although the IBA Guidelines in and of themselves do not provide any binding authority with respect to the subject matter they cover, they do provide the thoughtful views of an internationally recognized organization on expected appropriate conduct by representatives in international arbitrations. It is also certainly possible that over time the concepts contained in the IBA Guidelines, or another version of them, will make their way into arbitration agreements by reference. In addition, arbitral institutions such as the AAA and the ICDR are already looking in the future to incorporate counsel ethics rules and guidelines into our various rules that apply to arbitration proceedings. Doing so would be an important step, since it would transform what are currently viewed as instructive, but non-binding guidance, into rules that could be enforced by arbitral tribunals.

Court Annexed ADR Programs

Many courts have created programs that suggest, and in some cases require, counsel to consider ADR as an alternative to litigation. Many of these ADR programs were created in response to the Alternative Dispute Resolution Act of 1998, which required federal district courts to adopt local rules regarding the use of ADR in civil actions, and to encourage and promote the use of ADR in each district.

One such notable ADR program is the one associated with the District Court or the Northern District of California. Their Civil Local Rule 16-8 state that, “The Court has created and makes available its own Alternative Dispute Resolution (ADR) programs for which it has promulgated local rules….At any time after an action has been filed, the Court on its own

initiative or at the request of one or more parties may refer the case to one of the Court's ADR programs, or to a judicially hosted settlement conference."[11]

That Court also assigns most civil actions to their ADR Multi-Option Program which is "designed to encourage litigants to use ADR and to provide parties with sophisticated assistance in identifying the ADR process that is best suited to their particular case….litigants are required to familiarize themselves with ADR…and they are presumptively required to participate in one of the non-binding ADR process offered by the court."[12] Counsel for each party are also required to execute a certification that they have read the handbook on dispute resolution procedures issued by the Court, discussed available dispute resolution options, and considered whether the case would benefit from any of the available dispute resolution options.

The Local Rules of the United States District Courts for the Southern and Eastern Districts of New York also contain Rules that address the use of ADR in a manner similar to other federal districts. Rule 83.9(d) provides that with limited exceptions that all civil cases, with some limited exceptions, are eligible for mediation, and Rule 83.9(c) states that in all cases that are eligible for mediation, the parties shall report to the Judge at the initial case management conference whether they believe mediation may facilitate the resolution of the lawsuit.[13]

Arbitration Rules

Also in an attempt to address counsel conduct in arbitrations, and to provide arbitral tribunal with greater authority to manage arbitrations in a prompt and effective manner, both the AAA's most recent amendments to the Commercial Rules and the International Rules have included new rules that address party conduct.

[11] United States District Court, Northern District of California Civil Local Rules, *available at*, http://www.cand.uscourts.gov/localrules/civil
[12] Overview of the ADR Multi-Option Program, *available at*, http://www.cand.uscourts.gov/overview
[13] Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, *available at*, http://www.nysd.uscourts.gov/rules/rules.pdf

Parties to commercial arbitrations indicated a strong desire to grant arbitrators with the authority to address objectionable or abusive conduct in the arbitration process. As a result, in addition to providing arbitrators with enhanced powers to manage arbitrations effectively and to reign in attorneys' conduct that detracts from arbitration as a fast and economical method of dispute resolution, an entirely new rule, R-58 was drafted titled "Sanctions." The rule on sanctions now grants an arbitrator the authority, if requested by a party, to order sanctions where a party fails to comply with their obligations under the rules or with an order of the arbitrator.[14]

With regard to the most recently amended ICDR International Rules, Article 16, which addresses the conduct of party representatives, now states that the conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.[15] Accordingly the rule clearly hints at the development in the near future of guidelines that would address party conduct in international arbitrations governed by the ICDR Rules.

[14] AAA Commercial Arbitration Rules, R-58. Sanctions
[15] International Centre for Dispute Resolution, International Arbitration Rules, Article 16