# IBA Guidelines on Conflicts of Interest in International Arbitration

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# Introduction

1. Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.
2. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.
3. It is in the interest of everyone in the international arbitration community that international arbitration proceedings not be hindered by these growing conflicts of interest issues. The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts[1] in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality

and independence and disclosure in international arbitration. The Working Group has determined that existing standards lack sufficient clarity and uniformity in their application. It has therefore prepared these Guidelines, which set forth some General Standards and Explanatory Notes on the Standards. Moreover, the Working Group believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator. Such lists – designated Red, Orange and Green (the 'Application Lists') – appear at the end of these Guidelines.[2]

4. The Guidelines reflect the Working Group's understanding of the best current international practice firmly rooted in the principles expressed in the General Standards. The Working Group has based the General Standards and the Application Lists upon statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration. The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration. In particular, the Working Group has sought and considered the views of many leading arbitration institutions, as well as corporate counsel and other persons involved in international arbitration. The Working Group also published drafts of the Guidelines and sought comments at two annual meetings of the International Bar Association and other meetings of arbitrators. While the comments received by the Working Group varied, and included some points of criticisms, the arbitration community generally supported and encouraged these efforts to help reduce the growing problems of conflicts of interests. The Working Group has studied all the comments received and has adopted many of the proposals that it has received. The Working Group is very grateful indeed for the serious considerations given to its proposals by so many institutions and individuals all over the globe and for the comments and proposals received.



5. Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).[3]
6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation. The Working Group is also publishing a Background and History, which describes the studies made by the Working Group and may be helpful in interpreting the Guidelines.
7. The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be. Nevertheless, the Working Group is confident that the Application Lists provide better concrete guidance than the General Standards (and certainly more than existing standards). The IBA and the Working Group seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience.
8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

**Notes**

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

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

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



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

### (1) General Principle

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

**Explanation to General Standard 1:**

The Working Group is guided by the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings. The Working Group considered whether this obligation should extend even during the period that the award may be challenged but has decided against this. The Working Group takes the view that the arbitrator's duty ends when the Arbitral Tribunal has rendered the final award or the proceedings have otherwise been finally terminated (eg, because of a settlement). If, after setting aside or other proceedings, the dispute is referred back to the same arbitrator, a fresh round of disclosure may be necessary.

### (2) Conflicts of Interest

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

(b) *The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or*

*independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).*

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

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

**Explanation to General Standard 2:**

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

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

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

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

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

**(3) Disclosure by the Arbitrator**

(a) *If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.*

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

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

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

**Explanation to General Standard 3:**

(a) General Standard 2(b) above sets out an objective test for disqualification of an arbitrator. However, because of varying considerations with respect to disclosure, the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7(2) of the ICC Rules for this standard.
However, the Working Group believes that this principle should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required. Similarly, the Working Group emphasizes that the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other, and that a disclosure shall not automatically lead to disqualification, as reflected in General Standard 3(b). In determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.

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

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

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

**(4) Waiver by the Parties**

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

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

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

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

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

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



**Explanation to General Standard 4:**

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

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

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

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

**(5) Scope**

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

**Explanation to General Standard 5:**

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

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

**(6) Relationships**

(a) *When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator's law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.*

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

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



**Explanation to General Standard 6:**

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

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

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

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

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

(b) *In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall*

*perform a reasonable search of publicly available information.*

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

**Explanation to General Standard 7:**

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



# PART II: Practical Application of the General Standards

1. The Working Group believes that if the Guidelines are to have an important practical influence, they should reflect situations that are likely to occur in today's arbitration practice. The Guidelines should provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed.
   For this purpose, the members of the Working Group analyzed their respective case law and categorized situations that can occur in the following Application Lists. These lists obviously cannot contain every situation, but they provide guidance in many circumstances, and the Working Group has sought to make them as comprehensive as possible. In all cases, the General Standards should control.
2. The Red List consists of two parts: 'a non-waivable Red List' (see General Standards 2(c) and 4(b)) and 'a waivable Red List' (see General Standard 4(c)). These lists are a non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (*see* General Standard 2(b)). The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict. The waivable Red List encompasses situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).
4. It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person's point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator's impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification.
5. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.
6. The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes of the parties.'
7. Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated. An arbitrator may nevertheless wish to make disclosure if, under the General Standards, he or she believes it to be appropriate. While there has been much debate with respect to the time limits used in the Lists, the Working Group has concluded that the limits indicated are appropriate and provide guidance where none exists now. For example, the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case.
8. The borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List of instead of another. Also, the Lists contain, for various situations, open norms like 'significant'. The Working Group has extensively and repeatedly discussed both of these issues, in the light of comments received. It believes that the decisions reflected in the Lists reflect international principles to the best extent possible and that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive.
9. There has been much debate as to whether there should be a Green List at all and also, with respect to the Red List, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the Working Group has maintained its decision that the subjective test for disclosure should not be the absolute criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the Working Group was that party autonomy, in this respect, has its limits.

## 1. Non-Waivable Red List

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

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

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

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

## 2. Waivable Red List

2.1. Relationship of the arbitrator to the dispute

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

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

- 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
- 2.2.2 A close family member[4] of the arbitrator has a significant financial interest in the outcome of the dispute.
- 2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3. Arbitrator's relationship with the parties or counsel

- 2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
- 2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
- 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
- 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate[5] 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 had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
- 2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
- 2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.
- 2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.
- 2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

## 3. Orange List

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

- 3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.
- 3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.
- 3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.[6]
- 3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of

one of the parties in an unrelated matter without the involvement of the arbitrator.

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

3.2. Current services for one of the parties

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

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

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

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

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

3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.[7]

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

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

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

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



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

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

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

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

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

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

3.5. Other circumstances

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

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

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

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

## 4. Green List

4.1. Previously expressed legal opinions

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

4.2. Previous services against one party

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

4.3. Current services for one of the parties

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

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

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

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

4.5. Contacts between the arbitrator and one of the parties

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

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

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

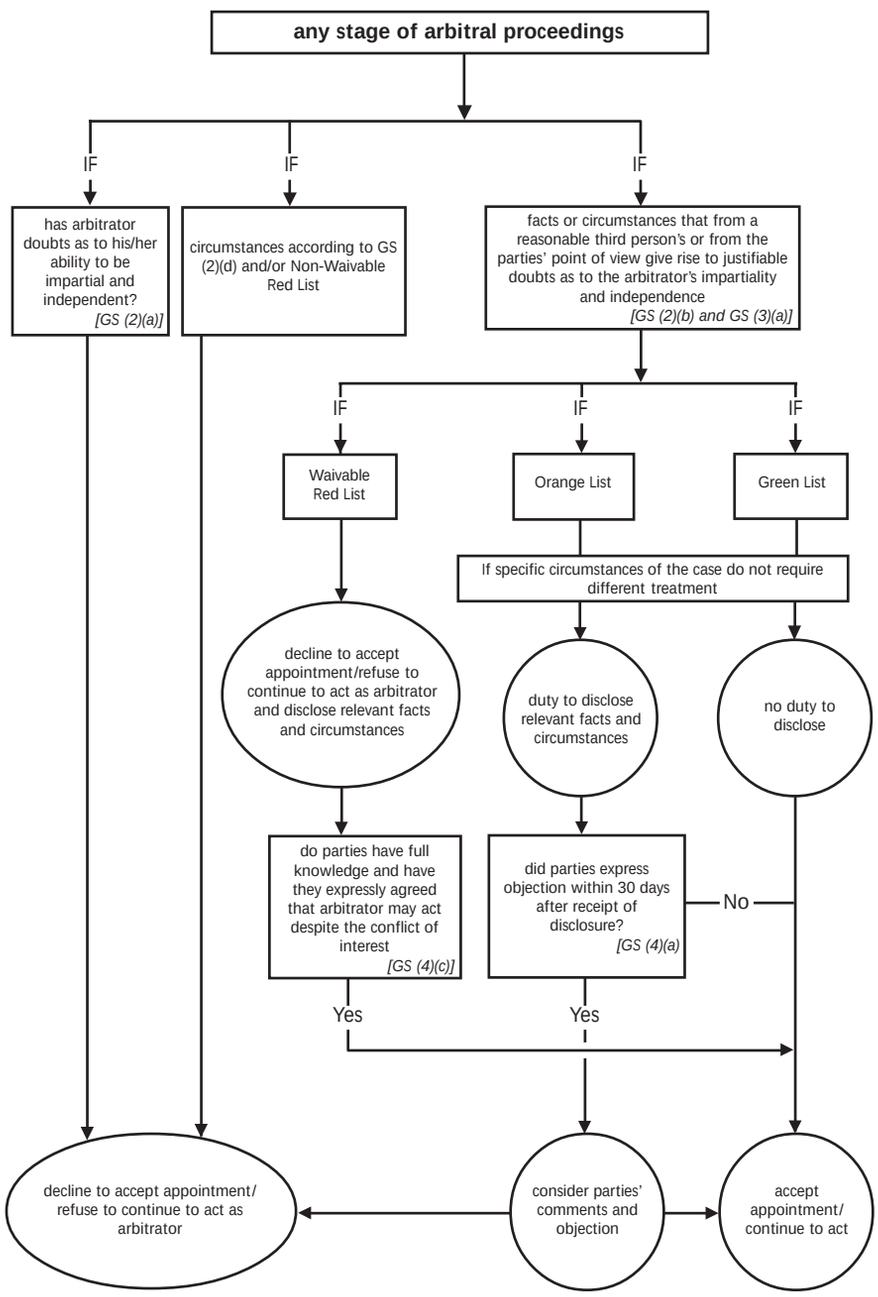
A flow chart is attached to these Guidelines for easy reference to the application of the Lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case prevail.

**Notes**

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

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

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

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

## Flow chart IBA Guidelines on Conflicts of Interest in International Arbitration