



# **ETHICS IN THE WORLD OF ARBITRATION**

Chartered Institute of Arbitrators

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## INTRODUCTION

- Preliminary Issue: What do we mean by ethical rules?
  - Difficult to define precisely
  - Can include purely ethical considerations (i.e. conflicts of interest, confidentiality, etc.)
  - Can also include procedural aspects of arbitration (i.e. document production obligations, witness statements, instructions to experts)

## THE NEED FOR ETHICAL RULES IN ARBITRATION

- Not an “emerging” need - existed for some time
- International arbitration situated between different legal systems
- Greater diversity has led to a diversification of potential applicable ethical rules



Not subject to any one set of ethical rules  
**No binding international code**



## TRIED SOLUTIONS

- Use of costs to police conduct of lawyers
  - Do not fully address the issues
  - Difficult to isolate the particular conduct
  - Intervene at very late stage of the proceedings
- Is there another way?

## THE NEED FOR ETHICAL RULES IN ARBITRATION

- Two main categories of ethical rules which touch international arbitration:
  - Broader rules
    - National bar association rules of ethics
    - Turin Principles of Professional Conduct for the Legal Profession (2002)
    - Code of Conduct for European Lawyers (2006)
  - Arbitration-specific rules
    - IBA International Code of Ethics (1988)
    - IBA Guidelines on Conflicts of Interest (2004, 2014)
    - Institutional rules
    - National codes and jurisprudence on arbitration

## NEW YORK RULES OF PROFESSIONAL CONDUCT

- Rule 1.12
  - b) “[...] a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as [...] an arbitrator”
  - c) “A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially [...] as an arbitrator”

## FRENCH BAR RÈGLEMENT INTÉRIEUR NATIONAL (ETHICS RULES)

- Rule 6.3.1
  - “Upon being entrusted with a mission as an arbitrator, [a lawyer] must respect the special rules which govern the arbitral procedure [...], in particular the procedural deadlines and the secrecy of deliberations, [...] the adversarial principle and of the equal treatment of all concerned parties.”
- Rule 21.4.5
  - “The rules applicable to a lawyer’s relations with a judge are also applicable to his [or her] relations with arbitrators [...].”



## PROBLEM OF DOUBLE DEONTOLOGY

- Two sets of national bar rules which apply, but which are conflicting:
  - Document production
  - Witness testimony
  - Expert instructions

## RECOURSE TO COMMON BAR ETHICS COMMITTEE

- For example a letter asking the President of the Paris Bar to decide a dispute against:
  - “[...] *two of our colleagues whom we believe are violating our professional rules regarding the principle of adversarial proceedings and more generally the duties of discretion and care which govern the relations between lawyers.*”
  - For conduct “*in the context of our arbitral proceedings*”
- Recourse to a common body outside of the arbitration to enforce ethical obligations between lawyers of the same bar for conduct within the arbitral proceedings



## INTEGRATION OF SOFT LAW INSTRUMENTS

- Adopting soft law instruments governing ethics by reference in Terms of Reference, Procedural Orders, or as a persuasive guidance for Tribunal decisions
  - IBA Rules on Conflicts of Interest in International Arbitration
  - ICCA-Queen Mary Report on Third-Party Funding in International Arbitration

## IBA INTERNATIONAL CODE OF ETHICS (1988)

- Soft law instrument (not binding unless adopted in arbitration clause)
  - *“Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias.”*
  - No gifts from any party
  - Obligation to avoid significant social/professional contacts with a party
  - No unilateral arrangement for fees or expenses
  - Obligation to keep deliberations confidential
- Elements of Bias, Duty of Disclosure (encapsulated in later IBA Rules on Conflict of Interest in International Arbitration)

## IBA GUIDELINES ON CONFLICTS OF INTEREST (2014)

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



# IBA GUIDELINES ON CONFLICTS OF INTEREST (2014)

## 1. Non-Waivable Red List

- 1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee 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 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 or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives 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 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

## 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

## 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.<sup>5</sup>



## RECOURSE TO INSTITUTIONAL RULES

- Institutional rules often encompass ethical restraints, for example with respect to arbitrator impartiality and independence:
  - ICC Rules and Practice Notes
  - SIAC Ethical Rules
  - CIETAC Ethical Rules

# ICC RULES AND PRACTICE NOTES

## ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence



CASE N° \_\_\_\_\_

### 2017 RULES ICC ARBITRATOR STATEMENT ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE

Family Name(s): \_\_\_\_\_  
Given Name(s): \_\_\_\_\_

Please tick all relevant boxes.

#### 1. ACCEPTANCE

##### Acceptance

I **accept** to serve as arbitrator under and in accordance with the 2017 ICC Rules of Arbitration ("Rules"). I confirm that I am familiar with the Rules. I accept that my fees and expenses will be fixed exclusively by the ICC Court (Article 2(4) of Appendix III to the Rules). By accepting to serve as arbitrator under the Rules, unless otherwise agreed by the parties, I accept that my name, nationality, role and the method of my appointment as well as the termination of my assignment will be published on the ICC Court's website.

##### Non-Acceptance

I **decline** to serve as arbitrator in this case. (If you tick here, simply date and sign the form without completing any other sections.)

#### 3. INDEPENDENCE and IMPARTIALITY

(Tick one box and provide details below and/or, if necessary, on a separate sheet)

In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the parties, their lawyers or other representatives, or related entities and individuals. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information. In deciding which box to tick and as the case may be in preparing your disclosure, you should also consult with care the relevant sections of the **Note** to Parties and Arbitral Tribunals on the Conduct of the Arbitration.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

# ICC RULES AND PRACTICE NOTES

## ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence

### 2. AVAILABILITY

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration throughout the entire duration of the case as diligently, efficiently and expeditiously as possible in accordance with the time limits in the Rules, subject to any extensions granted by the Court pursuant to Articles 23(2) and 31 of the Rules. I understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings when fixing my fees (Article 2(2) of Appendix III to the Rules). My current professional engagements are as below for the information of the ICC Court and the parties.

Number of currently pending cases in which I am involved (i.e. arbitrations and activities pending now, not previous experience; additional details you wish to make known to the ICC Court and to the parties in relation to these matters can be provided on a separate sheet):

	As tribunal chair / sole arbitrator	As co-arbitrator	As counsel
Arbitrations			
Court litigation	<i>Not applicable</i>	<i>Not applicable</i>	

JANUARY						
Mo	Tu	We	Th	Fr	Sa	Su
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

## SINGAPORE INTERNATIONAL ARBITRATION CENTRE

- Code of Ethics for an Arbitrator
  - Appointment: A potential arbitrator may only accept an appointment if he or she is able to:
    - i. Discharge duties without bias,
    - ii. Has an adequate knowledge of relevant language, and
    - iii. Give time and attention reasonably expected (duty to disclose with right of SIAC to refuse “should it take the view that the prospective arbitrator will not be able to discharge his duties due to such potential time constraints”)

## SINGAPORE INTERNATIONAL ARBITRATION CENTRE

- Code of Ethics for an Arbitrator
  - Disclosure & Bias
  - Communications with Parties:
    - Pre-Appointment: Only as to general nature of dispute, names of parties, expected time period required
    - Prior to Constitution: Only as permitted under arbitration rules
    - During Proceedings: No unilateral communications regarding the case
  - Fees: No unilateral arrangements for fees

## SINGAPORE INTERNATIONAL ARBITRATION CENTRE

- Code of Ethics for an Arbitrator
  - Conduct: Obligation of the arbitrator to “acquaint himself with all the facts and arguments presented and all discussions relative to the proceedings so that he may properly understand the dispute”
  - Confidentiality: No use of confidential information acquired during the proceedings
  - Disclaimer: “This Code of Ethics is not intended to provide grounds for the setting aside of any award.”



## CIETAC CODE OF CONDUCT FOR ARBITRATORS

- Communications: Cannot serve as arbitrator if discussed case with either party prior to appointment
- Cannot accept gifts
- Cannot meet either party in private to discuss matters or accept materials relating to the case
- Obligation to disclose

## CIETAC CODE OF CONDUCT FOR ARBITRATORS

- “An arbitrator shall review all documents and materials of a case carefully to find out the issues at hand.”
- “During an oral hearing, an arbitrator shall not show bias and shall [...] avoid making premature conclusions on key issues and avoid contention or confrontation with the parties.”
- Cannot disclose “his or her own opinions or the deliberations of the arbitral tribunal to the parties”.
- “An arbitrator has the right and obligation to attend seminars or events exchanging arbitration experience organized for arbitrators by CIETAC and/ or CMAC.”



## CIETAC CODE OF CONDUCT FOR ARBITRATORS

- “In the event that an arbitrator needs to attend a meeting or event on arbitration, publish an article, or make a speech, in the name of CIETAC and/or CMAC, as appropriate, he or she shall obtain the approval of such Arbitration Commission(s) in advance.”



## INTERSECTION BETWEEN ETHICS AND ANNULMENT GROUNDS

- SIAC Code of Ethics for an Arbitrator: “This Code of Ethics is not intended to provide grounds for the setting aside of any award.”
- New York Convention as translated into national law provides grounds for annulment which intersect with ethical considerations:

## INTERSECTION BETWEEN ETHICS AND ANNULMENT GROUNDS

Article V of the New York Convention

- At the request of the party against whom it is invoked
  - Incapacity of a party, arbitration agreement not valid
  - Party unable to present its case
  - Award outside scope of arbitration agreement
  - Tribunal improperly composed
  - Award set aside



## INTERSECTION BETWEEN ETHICS AND ANNULMENT GROUNDS

- Transposed into French Law through Article 1520 CPC
  - The arbitral tribunal wrongly upheld or declined jurisdiction (1°)
  - The tribunal was irregularly constituted (2°)
  - The arbitral tribunal ruled without complying with the mandate conferred upon it (3°)
  - The due process requirement was violated (4°)
  - Recognition or enforcement of the award would violate international public policy (5°)

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