Commentary on the revised text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration

IBA Arbitration Committee Subcommittee on Rules & Guidelines[1]

Introduction

The International Bar Association ('IBA') Guidelines on Conflicts of Interest ('Guidelines') are motivated by a simple premise: having a set of common best practices regarding disclosures of conflicts of interest promotes the efficiency, the effectiveness, and the legitimacy of international arbitration as a system to resolve disputes. While domestic laws or institutional rules and practice will necessarily provide the overarching framework governing arbitrator independence and impartiality, these sources of law often only offer limited practical guidance for arbitrators and parties regarding disclosure obligations and any ensuing objections and challenges. This issue can be exacerbated because parties, counsel, and arbitrators of different legal backgrounds may have different views as to the appropriateness or necessity of disclosures of potential conflicts of interest, or even whether particular circumstances constitute a potential conflict of interest.

Accordingly, in 2004, the IBA Arbitration Committee prepared, and the IBA Council adopted, the first Guidelines to reflect an international consensus on standards that should be expected to apply to questions of impartiality and independence and disclosures of potential conflicts of interest in international arbitration. Since then, the Guidelines have been revised twice – in 2014 and, most recently, in 2024 by an IBA Review Task Force[2] – to ensure that they continue to reflect modern best practices and promote the integrity, reputation, and efficiency of international arbitration. Like the previous versions, the 2024 Guidelines explicitly confirm that the Guidelines 'do not override any applicable national law, arbitral rules, codes of conduct, or other binding instruments chosen by the parties', such as, for instance, the recently concluded UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution. This reflects the principle that, while the Guidelines provide

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[2] The 2024 Review Task Force for the Revision of the 2014 Guidelines consisted of: Erica Stein (Chair); Claudia Frutros-Peterson (Vice-Chair); Team Leaders Nicolas Angelet, Crina Baltag, Dániel Dózsa, Sarah Grimmer, Jan Heiner Nedden, Marily Paralika, Louise Reilly, Mallory Silberman, Hilde van der Baan, and Galina Zukova; Members André Abbud, Folashade Alli, Richard Apphun, Benan Arseven, Giedrė Aukštuolienė, Julie Bédard, Pierre Bienvenu, David Blackman, Lawrence Boo, Daniela Bambaci, Alfredo Bullard, Pierre Burger, Juliana Castillo, Zarina Chinoy, Daniel Heilbron Chrispim, Stephanie Cohen, Sylvie Bebohi Ebongo, Khaled Abou El Houda, Kun Fan, Lauren Friedman, Alice Fremuth-Wolf, Beata Gessel, Tom Glasgow, Sandra González, Ji Hi Jung, Frank Hormes, Sofia de Sampaio Jalles, Dyalá Jimenez, Pál Kara, Jennifer Kirby, Christian Leathley, Barton Legum, Silvia Marchili, Ricardo Dalmaso Marques, Lucy Martinez, Alexis Mourre, Christa Mueller, Harold Noh, Yoshimi Ohara, Sherina Petit, Ren Qing, Noradèle Radjai, Sami Tannous, Paul Tichauer, Jiří Urban, Mohamed S. Abdel Wahab, and Duncan Watson; and Secretaries to the Subcommittee David Blackman and Viva Dadwal.

a common set of voluntary best practices, arbitration remains a flexible and party-directed process.

As a result, the IBA Guidelines have gained wide acceptance within the international arbitration community,and are commonly referred to by arbitral institutions and national courts dealing with issues of independence and impartiality or disclosures of potential conflicts of interest.

The broad acceptance of the IBA Guidelines is consistent with their scope of application. They are intended to apply to all forms of international arbitration, including international investment arbitration and specialised areas of international commercial arbitration, such as commodities, sports, or maritime disputes. The Guidelines also apply irrespective of whether non-legal professionals serve as arbitrators, and whether the representation of the parties is carried out by lawyers or non-lawyers.

The 2024 Guidelines retain the structure – of two distinct but closely related sections – that was introduced, to great success, in their first edition. That is, the Guidelines are divided into two parts: Part I, the General Principles, and Part II, the Application Lists. The former sets forth the general principles governing issues of independence, impartiality, and conflict, and explanations of those principles, which are applicable in all circumstances. The latter sets forth a non-exhaustive list of specific examples developed from statutes and case law that illustrate the General Principles in a 'traffic light system'. The lists are designated as 'Red', 'Orange' and 'Green' – for situations in which a conflict of interest is commonly understood to *exist*, in which a conflict of interest *may exist* depending on the facts and circumstances of the case, and in which a conflict of interest is commonly understood *not to exist*, respectively.

It is essential that the two parts of the Guidelines always be read together. The General Standards provide essential principles that must be applied to all situations. The Application Lists deal with some of the varied situations that commonly arise in practice. The Application Lists are therefore necessarily illustrative and non-exhaustive. The absence of a particular situation from the Application Lists does not necessarily indicate that no disclosure must be made, much less that any conflict of interest does or does not exist.

The 2024 Guidelines also reaffirm the differing standards for the obligation to disclose circumstances regarding a potential conflict, on the one hand – and for determining whether a conflict of interest actually *exists*, on the other. While the former standard is a subjective one—whether 'in the eyes of the parties', facts or circumstances may give rise to doubts as to the arbitrator's impartiality and independence – the latter is an objective enquiry, a 'reasonable third person' test. Arbitrators should investigate and disclose circumstances that may give rise to potential conflicts in the eyes of the parties so as to promote a level playing field and protect awards against future challenges by the parties. Arbitrators may only be disqualified from acting if, 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 independence or impartiality. The simple act of disclosure therefore does not imply the actual existence of any conflict of interest, nor can it by itself result in disqualification or any presumption of disqualification. The interaction between these two

standards, subjective and objective, is critical to the structure and rationale of the General Standards,and is discussed further below in connection with the Application Lists.

The revisions made in the 2024 Guidelines were adopted after thorough internal discussion and public consultation.[3] The purpose of this commentary is to provide more context as to why certain provisions were added, revised, or maintained so as to facilitate interpretations of the 2024 Guidelines that are consistent with their intended scope and/or effect. For the avoidance of doubt, this commentary should be read as an interpretative aid that clarifies, rather than expands or restricts, the scope and/or effect of the 2024 Guidelines. This commentary does so through a section-by-section explanation of the most important changes to the Guidelines. Some overall points are highlighted here.

The 2024 Guidelines incorporate two overall linguistic changes that impact provisions found throughout the Guidelines. First, the 2024 Guidelines were altered to be gender neutral, which alters the diction of various provisions. Of course, no substantive change was intended in such cases. Second, the 2024 Guidelines made a number of changes to account for the increasing presence of non-lawyer arbitrators in international arbitration, for example, by referring more broadly to an arbitrator's potential 'employer' and not simply to a potential 'law firm'.

Finally, the 2024 Guidelines revision also considered a number of proposed changes in depth that were ultimately *not* incorporated following internal discussion and analysis, or public consultation. Two may be of particular interest.

First, a number of changes were suggested to potentially account for expert witnesses, including adding references to experts in the General Standards and adding additional examples to the Application Lists regarding possible scenarios involving expert witnesses. These changes were ultimately not adopted in order to retain the Guideline's focus on arbitrator disclosures and the impartiality and independence of arbitrators. The 2024 Guidelines Review Task Force concluded that it would be more effective and useful to address the disclosure obligations of experts in arbitration in a separate instrument.

Second, the 2024 Guidelines considered a number of changes relating to so-called 'issue conflicts' – situations in which arbitrators may face a conflict of interest relating to a position previously taken on an issue that is material to the dispute. The 2024 Guidelines ultimately made relatively few changes in this respect. It was the view of the 2024 Review Task Force that the General Principles were sufficiently robust and generally applicable so that no major overhaul was required. Also, it was determined that further illustrations in the Application List were not likely to provide further clarity or be generally applicable to all types of arbitrations because issue conflicts are necessarily situation-specific.

[3] From September to October 2023, the IBA Arbitration Committee invited comments on the proposed revisions from a large and diverse group of stakeholders, including from more than 200 international arbitration institutions and organisations from around the world, as well as prior Guidelines Working Groups, in addition to careful consideration of any other comments received from other parties even if not specifically solicited.

General Standard 1: General Principle

It is a fundamental principle of (international) arbitration that every arbitrator must be impartial and independent of the parties. The qualities of impartiality and independence are related, but distinct.

General Standard 1 reflects this principal tenet, which is the cornerstone upon which the framework set out in the General Standards is based. It provides that every arbitrator shall be impartial and independent of the parties at the time of accepting their appointment, and shall remain so until the final award has been rendered or the proceedings have otherwise been finally terminated. It therefore serves to establish both (i) the general standard that every arbitrator must adhere to in this respect, and (ii) the time period during which such obligation to be impartial and independent shall continue to exist.

The 2024 Guidelines maintained the text of General Standard 1 from the 2014 Guidelines, but clarified the Explanation to General Standard 1. The 2014 Guidelines noted that the question had arisen as to whether this obligation should also extend to the period of time during which the award could be challenged before any relevant courts or other bodies (such as ICSID ad hoc annulment committees, should the Guidelines apply in this context). The decision taken at the time was that the obligation did not extend in this manner, unless the final award could be referred back to the original arbitral tribunal under the relevant applicable rules. The 2024 Guidelines give a more absolute direction, providing that the obligation to remain impartial and independent does not extend to the period of time during which the award may be challenged, regardless of whether or not the final award could at some stage be referred back to the original arbitral tribunal. In consequence of this clarification, the Explanation now also provides that, if the dispute is referred back to the original arbitral tribunal after setting aside or other proceedings, a fresh round of disclosure and review of potential conflicts of interest '*will* be necessary' (as opposed to *'may* be necessary' in the 2014 Guidelines).

General Standard 2: Conflicts of Interest

Taken alone, the term 'conflict of interest' might describe any number of very different scenarios. For example, an expert could have a conflict of interest; so, too, could an advocate (or a law firm or others). Importantly, however, these particular Guidelines are not intended to give guidance on every style of conflict. Instead, as General Standard 2 reaffirms, at issue here are the *arbitrators'* possible conflicts of interest.

To assist with the assessment of whether a particular arbitrator may suffer from a conflict of interest, **General Standard 2** propounds two salient, practical questions.[4]

[4] As the Introduction to the Guidelines explains, "[t]hese Guidelines do not override any applicable national law, arbitral rules, codes of conduct, or other binding instruments chosen by the parties."

- The first, in **General Standard 2(a)**, is a personal one; it can only be answered by the arbitrators themselves, as it calls for reflection on whether they have 'any doubt' regarding their own ability to be independent and impartial.

- By contrast, the second question –in **General Standard 2(b)** – does not involve introspection. Instead, it approaches the issue objectively, by asking whether 'a reasonable third person' with 'knowledge of the relevant [details]' would have 'justifiable doubts as to the arbitrator's impartiality or independence . . .'. For their part, **General Standards 2(c) and 2(d)** offer guidance on the meaning of 'justifiable doubts'.

As indicated in General Standard 2(a), if the answer to the first above question is 'yes', the analysis would end there. The arbitrators would not need to consider the second question at all, but the arbitrators *would* need to recuse themselves.

However, if an arbitrator's response to the first question is 'no', the arbitrator's analysis should then turn to the second question above. For the sake of good order, this is now stated explicitly in Explanation 2(b). The reason for this second round of analysis is that even if, on a personal level, the arbitrator feels comfortable, there may well still be other factors that objectively should preclude the arbitrator from accepting the appointment.

In preparing the 2024 Guidelines, the Review Task Force made no substantive revisions to the General Standard.

At one point, a suggestion was made that the Guidelines be expanded to include a discussion of the circumstances that constitute a conflict of interest for experts. This suggestion was carefully considered, but rejected: in the end, the Review Task Force decided that the topic of ethical standards for experts was best left for a different soft law instrument.

Similarly, the **Explanation**, for their part, did not undergo any substantive changes; even though the Review Task Force made revisions, they were aimed at refining and improving the text to enhance comprehension and increase readability.

Thus, for instance, the Review Task Force began by shoring up the alignment between the Explanations and their counterparts – taking steps to ensure that each Explanation reflected (and respected) the contours of the General Standard it accompanies. As a part of this process, certain language that appears in General Standard 2(a) was added to Explanation 2(a), and other text that had previously been set out in Explanation 2(c) was shifted to Explanation 2(d), where it seemed better placed.

In addition, in Explanation 2(b), the Review Task Force removed some introductory filler language, after having concluded that it did not serve a purpose and could lead to confusion (as it had referenced unnamed 'standards', in the plural). In its place – though later on in the paragraph – the Review Task Force added text reaffirming that the only 'standard' at issue in General Standard 2(b) is the 'objective' assessment that an arbitrator should undertake when 'deciding whether to decline an appointment or refuse to continue to act'. This guidance is intended to further clarify the distinction between General Standard 2(b) and General Standard 3 (on 'Disclosures'). The latter contemplates a subjective test, as discussed below.

General Standard 3: Disclosure by the Arbitrator

As its title suggests, **General Standard 3** addresses arbitrator disclosures. General Standard 3(a) sets out the general principle, and the ensuing six paragraphs then provide further guidance. Specifically:

- **General Standard 3(a)** begins by describing an arbitrator's duty of disclosure, which entails that an arbitrator must disclose 'facts or circumstances' that 'may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence […]'. As General Standard 3(a) now indicates, this obligation works hand-in-hand with the duty to investigate (as described in General Standard 7(d)).

- **General Standard 3(b)** then goes on to explain that this duty exists even if there has been '[a]n advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future […]'.

- In turn, **General Standard 3(c)** recalls that an arbitrator's disclosure is simply a disclosure – and accordingly, should not be construed as an admission that the arbitrator is not independent or impartial. As Paragraph 3(c) explains, if the arbitrator had believed those qualities to be lacking, the arbitrator 'would have declined the nomination or appointment at the outset, or resigned'.

- For its part, **General Standard 3(d)** provides that '[a]ny doubt as to whether an arbitrator should [make a disclosure] should be resolved in favour of disclosure'.

- However, as **General Standard 3(e)** then clarifies, there is an exception to this tenet: if an arbitrator believes themself to be precluded from making a disclosure (for example, by the arbitrator's rules of professional conduct), the arbitrator either 'should not accept the appointment or should resign'.

- The next paragraph, **General Standard 3(f)**, explains that, when an arbitrator is assessing whether or not to make a disclosure, the arbitrator must not be influenced by the stage of the relevant arbitration. The Review Task Force determined that the comparison between the standards applied by courts and arbitral institutions that appeared in the Explanation to the similar provision in the 2014 Guidelines was outside of the focus of Guideline 3, and was therefore removed.

- Finally, **General Standard 3(g)** concludes the discussion by explaining that – even when a disclosure was warranted – the absence of a disclosure does not mean necessarily that a conflict of interest exists, or that disqualification should ensue.

Numerically, when compared to its predecessor, General Standard 3 features two ostensibly new paragraphs, namely 3(f) and 3(g). However, in terms of substance, neither paragraph is entirely new to the Guidelines.

- The first, General Standard 3(f), is a revised version of what previously had been General Standard 3(e); in the 2024 Guidelines, the text was shifted downward to

make room for another extant passage of the Guidelines to become General Standard 3(e).[5]

- Similarly, General Standard 3(g), for its part, was taken almost verbatim from Explanation 3(c) in the 2014 Guidelines.

These changes (discussed in more detail below) were the result of an iterative effort to strengthen and fine-tune the guidance on arbitrator disclosures.

During the process of preparing the 2024 Guidelines, few amendments were proposed to General Standard 3. Of these few, most suggestions were editorial in nature, but some had a substantive bent. For example, one of the suggestions put forward was to extend the scope of General Standard 3, by revising the provision to state that its contents applied also to disclosures by expert witnesses. However, as mentioned above in the commentary on General Standard 2, the Review Task Force concluded that ethical standards for experts should be covered in a separate soft law instrument.

Similarly, another proposal suggested that the Guidelines state explicitly that the 'duty of disclosure' encompasses a requirement to disclose facts and circumstances that exist or occur on social media networks. In the end, however, the Review Task Force decided that this was unnecessary, as the phrase 'facts and circumstances' was already sufficiently broad to include an arbitrator's on-line activities.

In terms of the editorial amendments proposed, one of these is noteworthy, as it resulted in several changes to the General Standard, including the addition thereto of Paragraphs 3(f) and 3(g). By way of background, at one point, it was proposed that the Review Task Force revise General Standard 3(a) to state that an arbitrator must disclose '*all* facts and circumstances' that 'may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence […]'. This proposal was met with concern, however, because there sometimes are occasions where – despite making efforts — the arbitrator cannot reasonably know *all* of the relevant facts and circumstances that could impact disclosures.

Accordingly, when implementing the proposal and revising General Standard 3(a), the Review Task Force culled language from what had previously been Explanation 3(d). Specifically, it moved to General Standard 3(a) an existing point, i.e., an arbitrator's duty of disclosure extends only to 'all facts and circumstances *known to the arbitrator*'. In parallel, the Review Task Force also added an important reminder: an arbitrator has a duty to investigate, as explained in General Standard 7(d).

Once these revisions had been made – and the duplicate text was removed from Explanation 3(d) – the contents of the Explanation no longer amounted to an 'explanation' as such. Instead, they were much more akin to the precepts set out in the General Standards. Accordingly, the remaining guidance that was once a part of Explanation 3(d) was recast as the current General Standard 3(e).

[5] As explained below, the contents of the current General Standard 3(e), in turn, were taken almost verbatim from what previously had been Explanation 3(d).

Finally, and likewise for the sake of good order, the Review Task Force emphasised that an arbitrator's omission to disclose information does not mean necessarily that a conflict of interest exists. This point, which was previously set out in Explanation 3(c), is now the subject of General Standard 3(g).

With respect to the **Explanations**: these were likewise revised for conciseness and clarity. However, no substantive implications were intended. Thus, for example, certain passages in Explanation 3(c) were deleted because they were deemed redundant with the new General Standard 3(g). Similarly, even though Explanation 3(e) has been edited to remove an observation about how an arbitral institution or a national court might handle a particular scenario, this was not intended to carry substantive consequences. Instead, the thought was simply that the point did not belong in the Guidelines, as the Guidelines do not purport to regulate the decisions on challenges by arbitral institutions or courts. As a practical matter, as Explanation 3(e) in the 2014 Guidelines had observed, when deciding a challenge, those bodies sometimes consider the stage of the arbitration. The removal of this observation from the Guidelines was not intended to suggest impropriety by institutions or courts that may follow this practice.

General Standard 4: Waiver by the Parties

General Standard 4 deals with the parties' waiver to the facts and circumstances which may constitute a potential conflict of interest of an arbitrator. Importantly, the waiver may relate not only to the disclosure made by an arbitrator (after making 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, pursuant to General Standard 7(d)), but also to undisclosed facts and circumstances which, however, could have been relatively easily ascertained by the interested party in due time.

General Standard 4(a) sets a time limit of 30 days for the parties to object to the arbitrator, with this time limit running as of (i) the receipt of any disclosure by the arbitrator, or (ii) a party otherwise learning of facts or circumstances that could constitute a potential conflict of interest for an arbitrator.

Failing an express objection from the party (e.g., an objection to the arbitrator's confirmation/appointment or a challenge against an arbitrator) within the prescribed time limit of 30 days, the party is deemed to have waived any potential conflict of interest based on such facts or circumstances and is precluded from raising any objection based on the same facts or circumstances at a later stage.

General Standard 4(a) has been updated to clarify the determination of the moment when the party is deemed to have learned of facts and circumstances which form the basis for its objection in a situation when the arbitrator did not disclose those factors *sua sponte*. The test is a 'reasonable enquiry … if conducted at the outset or during the proceedings'. A rather simple enquiry across media publications and social networks may satisfy such test.

The revised 2024 Guidelines thus make it clear that the parties should enquire into facts and circumstances that could raise potential conflicts for arbitrators. This reflects case law in some

jurisdictions, holding that parties are expected to show some level of 'curiosity' when conducting their due diligence on arbitrators.

General Standard 4(b) invalidates any waiver regarding facts and circumstances falling within the scope of the Non-Waivable Red List. This standard has remained unchanged following the revision.

General Standard 4(c) permits waivers regarding facts and circumstances falling within the scope of the Waivable Red List under the mandatory conditions of an 'express' agreement of 'all' the parties to the arbitration. For the avoidance of doubt, it is preferable that such an agreement be recorded in writing. This standard has remained unchanged following the revision.

General Standard 4(d) permits waivers to the arbitrators facilitating a settlement of the parties' dispute (for example, through conciliation and mediation) and assisting them in reaching such settlement. As with the General Standard 4(c), to preclude any possible objections later in the proceedings, there should be an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from service. This standard has remained unchanged following the revision.

The Review Task Force considered adding a provision of preliminary views (where permitted and on the premise that the preliminary views are without prejudice to the arbitrator's decisions in the arbitration) alongside conciliation and mediation, given that in some jurisdictions provision of preliminary views is considered a regular feature both in litigation and arbitration proceedings. (One may note here that some institutional arbitration rules or policy instruments specifically empower arbitrators to provide preliminary views on matters posed by the parties.) This proposal was included in the draft circulated for public consultation. However, the consultation revealed that the public was not favourable to this addition, principally because the provision of preliminary views is not used or known in many jurisdictions. The Review Task Force's proposal was not retained at the end on this basis.

General Standard 5: Scope

General Standard 5 defines the scope of the IBA Guidelines, affirming their broad applicability to all tribunal members, as well as arbitral secretaries and assistants. By doing so, it establishes a cohesive standard of behaviour and impartiality across various roles, fostering consistency and accountability in arbitration proceedings governed by the IBA Guidelines.

General Standard 5(a) mandates the IBA Guidelines' uniform application to tribunal chairs, sole arbitrators, and co-arbitrators, regardless of their method of appointment, whether by the parties, an arbitral institution, or another appointing authority. As explained by the Explanation to General Standard 5(a), the rationale behind this provision underscores the imperative for impartiality and independence across all types of arbitral tribunals. Hence, distinctions between these roles as to the obligation of impartiality and independence are not entertained within the General Standards framework.

General Standard 5(b) extends the same duty of independence and impartiality to include arbitral or administrative secretaries and/or assistants to an individual arbitrator or the

arbitral tribunal, expressly placing the onus on the arbitral tribunal or, by extension, the individual arbitrator, to ensure adherence to this duty throughout the arbitration proceedings. The explanation to General Standard 5(b) emphasises that this duty of independence and impartiality also encompasses a duty of disclosure on the part of arbitral or administrative secretaries and assistants. Further, regardless of whether the rules of the designated arbitral institution (if any) require arbitral or administrative secretaries and assistants to arbitral tribunals to sign a declaration of independence and impartiality, these individuals are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators.

During the revision process, General Standards 5(a) and 5(b) remained unchanged. The Review Task Force did not propose any revisions to General Standard 5, or the Explanations to General Standard 5, save for nominal clarifications regarding the arbitrator's duties. In this regard, the minor revision implemented in the text is meant to reflect General Standard 5 more accurately, insofar as it 'applies equally' to all arbitrators.

General Standard 6: Relationships

General Standard 6 provides that the existence, or otherwise, of relationships is core to the arbitrator's independence and impartiality. This includes determining who must be assimilated with an arbitrator to appreciate whether that arbitrator is or is not impartial and independent from another arbitrator, a party, counsel or expert. General Standard 6 addresses this question of assimilation, as did the previous versions of the Guidelines.

General Standard 6(a) addresses the relationship between an arbitrator and the professional structure in which the arbitrator operates. The 2014 Guidelines addressed law firms and barristers' chambers. The 2024 Guidelines include the arbitrator's 'employer'. This is meant to cover the practice of appointing individuals (including non-lawyers) who are employees in a corporation or any other type of organisation as arbitrators.

Importantly, the 2024 version clarifies that the relevance of such a relationship for purposes of determining whether a conflict of interest exists or determining whether a disclosure must be made will depend on the factual circumstances of any given case. This includes the law firm's or employer's organisational structure and mode of practice. For example, a firm might be organised as a Swiss Verein, and thereby limit the sharing of information and profits between different offices, which may be relevant to understanding whether an arbitrator or firm derives significant income or has a significant commercial relationship as a result of a representation (see, *e.g.*, Waivable Red List 2.3.1; Orange List 3.1.7). Similarly, and as the 2014 Guidelines also addressed, barristers' chambers should not be equated with law firms for the purposes of conflicts. Because arbitrators, and firms, may cooperate or share profits in different ways, the structures and modes of such cooperation should be evaluated in each case as one important aspect of the overall relevant factual circumstances.

General Standard 6(b), in the 2014 Guidelines, addressed one specific scenario, namely where one of the parties is a legal entity. It considered a number of instances in which other persons may be considered to bear the identity of that legal entity. This notably included persons having a controlling influence on or a direct economic interest in that legal entity. The 2024 Guidelines expand this situation to include all parties, regardless of whether they

are legal entities or natural persons. The standard also considers all persons who control or have a direct economic interest in a party. The draft submitted for public consultation eliminated the word 'economic' from the expression 'direct economic interest'. The term was ultimately reinserted because it appeared from the public consultation that 'direct interest' was considered too vague a notion and that non-economic interests could be addressed under the alternative criterion of 'controlling influence'.

Third-party funders and insurers may, depending on the circumstances of the case, be considered to bear the identity of a party based on either or all of the criteria mentioned in General Standard 6(b). Third-party funders have a direct economic interest in the outcome of the proceeding. Insurers either have such a direct economic interest in the outcome or 'a duty to indemnify a party for the award to be rendered in the arbitration'. Both third-party funders and insurers may also have a controlling influence on a party to the arbitration or influence over the conduct of the proceedings.

General Standard 6(c), which was added in the 2024 Guidelines, addresses the reverse relationship, where a controlled person may be considered to bear the identity of a party. It thus allows for assimilating persons who are controlled by a party, or in which a party has an interest, with that party.

General Standards 6(b) and 6(c) apply to both legal and natural persons who are a party or who control a party. It follows, for instance, that where a corporation is a party to an arbitration, its employee may be considered to bear the identity of such party. It also allows for addressing the various types of relationships that may exist between States and may, but are not necessarily covered by the criteria of 'controlling influence' or 'direct interest', depending on the circumstances of any given case.

This expansion was considered appropriate given the growing complexity of relevant relationships and because, from the viewpoint of safeguarding independence and impartiality, the relationship between superiors and subordinates is of equal relevance, irrespective of whether the superior or the subordinate is the party to the proceeding.

The criterion of 'direct economic interest' also allows for considering the relationship between a party and a third-party funder in the light of the influence the third-party funder may or may not have on the appointment of the arbitrator.

General Standard 7: Duty of the parties and the arbitrator

General Standard 7 has undergone little changes, insofar necessary to ensure that the independence and impartiality of arbitrators remain protected. A change of form concerned the placement of now General Standard 7(b), which in the 2014 Guidelines was located after the current General Standard 7(c). General Standards 7(a)-(c) continue to reinforce the fact that parties should disclose potentially relevant entities/persons, including counsel, to the arbitrator to assist the arbitrator in making disclosures.

General Standard 7(a) requires that a party informs of (i) any relationship, direct or indirect, between the arbitrator and the party; another company of the same group of companies; a person or entity having a controlling influence on the party in the arbitration; a person or

entity over which a party has a controlling influence; or any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration; and (ii) any other person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3. The party has the obligation to provide such information on its own initiative and at the earliest opportunity.

General Standard 7(a)(i) has been expanded in the 2024 Guidelines to persons and entities having a controlling influence over parties and vice versa, to reflect the changes made to General Standard 6, which now includes General Standard 6(c) providing that '[a]ny legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party'. The provision acknowledges that various factual situations may exist which can indicate the controlling economic or other influence of a legal entity or natural person over the party. General Standard 7(a)(ii), added in the 2024 Guidelines, reinforces the parties' duty to inform the arbitrator of persons or entities that they would like the arbitrator to consider for purposes of disclosures under General Standard 3. This language covers the disclosure of, for example, expert involvement, which was one of the concerns raised in the work of the Review Task Force, and now reflected in the 2024 Guidelines.

The Review Task Force did not consider necessary that disclosure go beyond the identity of the third person or entity, having controlling influence or direct economic interest, as, for example, the disclosure of the funding agreement where third-party funder is disclosed. The Review Task Force concluded that additional disclosure could be required if, on the basis of the identity of the third party, more information is needed to assess the potential conflict of interest.

Explanation to General Standard 7(a) provides that parties are required to disclose any relationship with the arbitrator and that such duty extends to relationships with a legal entity or natural person having a controlling influence on the party or 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. The Explanation to General Standard 7(a) emphasises that the 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. A new paragraph was included in the Explanation to General Standard 7(a) addressing the proposals for further guidance as to the meaning of 'reasonable enquiries' to be made by the party, as well as for taking into account jurisdiction specific approaches, such as providing multi-page lists with names, with no explanation as to their relevance for the purpose of conflict check. Therefore, the second paragraph of the Explanation to General Standard 7(a) indicates that 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.

General Standard 7(b) reinforces the parties' obligation to perform reasonable enquiries and provide all relevant information available to it to comply with General Standard 7(a). General Standard 7(b) in the 2024 Guidelines is identical to General Standard 7(c) in the 2014 Guidelines. While concern was raised in the Review Task Force with the fact that General Standard 7(b) provides no further guidance as to what conduct might satisfy the duty of the party to perform reasonable enquiries, it was not considered necessary to elaborate on this,

given the variety of situations in practice, including the different organisational models for legal professionals, the access to information etc.

General Standard 7(c) addresses the obligation of a party to 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. The obligation extends beyond the identity of the counsel and concerns any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. Similarly to General Standard 7(a), the party shall provide such information on its own initiative at the earliest opportunity, and upon any change in its counsel team. The wording of General Standard 7(c) in the 2024 Guidelines is identical to the wording contained in General Standards 7(a) and 7(b) in the 2014 Guidelines, but has been set out in its own subparagraph to eliminate the prior repetition.

Explanation to General Standard 7(c) provides that the parties must identify, at the earliest opportunity, the counsel advising on or appearing in the arbitration. The provision was amended to cover not only the counsel representing the parties in the arbitration, but also those advising on the arbitration. The amendment addresses the concern raised in the Task Force with the so-called 'shadow counsel', advising the parties, but not officially representing them in the arbitration.

General Standard 7(d) provides that 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, and that failure to disclose is not excused by lack of knowledge if the arbitrator does not perform such reasonable enquiries. General Standard 7(d) is linked to General Standard 3(a), which provides that an arbitrator should take into account all facts and circumstances known to the arbitrator, including those resulted from the arbitrator's duty to investigate under General Standard 7(d). The wording of General Standard 7(d) is identical to the 2014 Guidelines, except for removing the gendered language and enhancing clarity.

The Application Lists

The Non-Waivable Red List

The Non-Waivable Red List is a non-exhaustive compilation of specific situations that inherently raise justifiable doubts regarding the arbitrator's impartiality or independence. In these circumstances, an objective conflict of interest exists, as per General Standard 2, from the perspective of a reasonable third person knowing the pertinent facts and circumstances of the case. The situations included in the Non-Waivable Red List derive from the overriding principle that no individual can be their own judge. Consequently, even explicit, knowing acceptance of such conditions cannot outweigh the conflict. Parties cannot waive such conflicts (not even in writing, knowingly, and/or after-the-fact), as an attempt to do so would be deemed invalid. Arbitrators, upon encountering such circumstances, are duty-bound to decline appointment or promptly resign.

The Non-Waivable Red List consists of four specific situations:

- There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of a person or entity that is a party in the arbitration;

- 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 interest in the award to be rendered in the arbitration;

- The arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case;

- The arbitrator currently or regularly advises a party, or an affiliate of a party, and the arbitrator or the arbitrator's firm or employer derives significant financial income therefrom.

Non-Waivable Red List, paragraph 1.1 is the explicit consequence of the fundamental principle that no party should serve as the arbiter of its own case, prohibiting the identity between a party and the arbitrator in the arbitration. The paragraph further encompasses circumstances where, although an exact identity between a party and the arbitrator may not exist, the arbitrator is the legal representative or an employee of a party.

The word 'person' was added to paragraph 1.1 to clarify that natural persons can be parties to arbitration proceedings. As such, identity between a party and an arbitrator exists when an arbitrator serves as the legal representative, or is an employee, of a party to an arbitration, irrespective of whether that party in question is a natural or a legal person.

Non-Waivable Red List, paragraph 1.2 outlines three distinct scenarios of conflicts of interest. These scenarios include instances where an arbitrator (a) serves as a manager, director, or member of the supervisory board of one of the parties, (b) exerts a controlling influence on one of the parties, or (c) exerts a controlling influence on an entity that has a direct interest in the award to be rendered in the arbitration.

The rationale behind this paragraph is derived from General Standard 6(b), which states that 'Any […] natural person having a controlling influence on a party, or a direct interest in, […] the award to be rendered in the arbitration, may be considered to bear the identity of such party'. This paragraph encompasses a wide range of scenarios, including scenarios involving third-party funders and insurers that have a direct interest in the prosecution or defence of the case in dispute, subsidiaries that might be considered to bear the identity of the parent company when the parent company has a controlling influence over it, as well 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, whenever a State or a State entity, subdivision or instrumentality is party to the arbitration, and vice-versa.

Paragraph 1.2 remains unchanged in the 2024 Guidelines.

Non-Waivable Red List, paragraph 1.3 addresses circumstances where the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case. Although the Guidelines do not explicitly define 'financial or personal interest', a factual scenario that could trigger this rule is one where an arbitrator is simultaneously serving as counsel in another dispute involving similar issues to the one they are arbitrating. In such

instances, counsel representing a party naturally harbours a significant personal and professional interest in establishing a favourable precedent for their case. Arguably, the arbitrator's duties to their client might hinder their impartiality in drafting an award that could undermine their client's position. Even if the arbitrator refrains from overtly favouring their client's stance, such as by subtly inserting favourable phrases, discrediting contradictory rulings, omitting relevant facts, or shaping liability findings, the underlying alignment of interests between the arbitrator and their client remains evident. This conflict becomes even more pronounced if the attorney/arbitrator operates on a contingency fee basis, thereby entwining their financial gain with the outcome of the dispute.

Paragraph 1.3 remains unchanged in the 2024 Guidelines.

Non-Waivable Red List, paragraph 1.4 covers instances where the arbitrator currently or regularly advises a party or an affiliate of a party, and the arbitrator or their firm or employer derives significant financial income therefrom. Under the updated version of the Guidelines, the definition of the term 'affiliate' which under the 2014 version 'encompasse[d] all companies in a group of companies, including the parent company', has been expanded so as to also extend to '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'. This addition brings the definition of affiliate in line with the terms now used in General Standards 6 and 7.

Paragraph 1.4 targets, among other situations, instances of double-hatting, thereby limiting the general permissibility of the dual arbitrator/counsel role in situations where the arbitrator 'currently or regularly' advises a party, and derives significant financial income therefrom, either directly, or through their firm or employer. The Guidelines do not offer a specific definition of 'significant financial income' in this context, thereby leaving this term open to interpretation.

Paragraph 1.4 in the 2024 Guidelines has undergone several edits compared to the previous version. By way of background, the 2004 Guidelines provided, within the Non-Waivable Red List: 'The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm or employer derives significant financial income therefrom'. Subsequently, the 2014 Guidelines expanded this to include situations where '[t]he 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'.

However, criticism, particularly from State courts, has been levied against the latter formulation over the past decade as courts raised concerns that prior requirements were treated compendiously. In response to this feedback, paragraph 1.4 of the Non-Waivable Red List in the 2024 Guidelines has been revised to resemble again the language used in the 2004 version. Specifically, two criteria must be met for this provision to apply. First, arbitrators who 'currently' advise a party or an affiliate of a party come within the scope of paragraph 1.4 in addition to those who 'regularly' advise such a party or affiliate. The language stating that this first element could be met if the arbitrator's firm regularly advises a party or affiliate has been removed. Second, a conflict arises if either the arbitrator or the arbitrator's 'firm or employer' derives significant financial income therefrom. This marks a departure from the 2014 version of the Guidelines, which did not mention the arbitrator's 'employer' as within its scope.

These revisions ensure clarity and precision in identifying situations where conflicts of interest may arise, while also distinguishing between the arbitrator and their firm or employer. Specifically, by way of the proposed revisions, situations where an arbitrator's firm or employer, rather than the arbitrator directly, advises or works for a party and derives significant income therefrom have been removed from the Non-Waivable Red List. Moreover, the addition of the word 'currently' ensures temporal consistency across lists, thereby preventing arbitrators who currently or regularly advise a party, and they or their firm or employer derives significant income therefrom, from acting altogether.

These amendments are also reflected in the Waivable Red List. Paragraph 2.3.1 of the Waivable Red List has been updated to allow an arbitrator who currently or regularly advises a party but does not derive significant income therefrom, to act if the parties agree. In addition, revised paragraph 2.3.6 allows the arbitrator to act in circumstances where the arbitrator's firm or employer (but not the arbitrator themselves) currently has a significant commercial relationship with one of the parties, provided that the parties agree.

In summary, the proposed 2024 revisions introduce a clear distinction between the arbitrator and their firm or employer. Under the 2014 Guidelines, if an arbitrator's firm, but not the arbitrator, represented a party or an affiliate, the simple fact that the firm derived significant financial income therefrom, even without the arbitrator's involvement, automatically precluded the arbitrator from acting altogether. The proposed revisions in the 2024 Guidelines specify that only the arbitrator's direct involvement with a party, paired with significant financial income, remains on the Non-Waivable Red List. If the arbitrator's firm maintains a significant financial relationship with the party without the arbitrator's involvement, that situation is now categorised under the Waivable Red List.

The Waivable Red List

The Waivable Red List constitutes the non-exhaustive list of examples that parties can waive in relation to potential conflicts of interest. Specifically, in accordance with the General Standard 4, parties may waive potential conflicts of interest of an arbitrator in relation to facts or circumstances exemplified in the Waivable Red List, as long as all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the potential conflict of interest, and all parties expressly agree that such a person may serve as arbitrator, despite the potential conflict of interest.

Waivable Red List, paragraph 2.1 governs the arbitrator's relationship to the dispute. The examples under paragraph 2.1 have remained unchanged following the 2024 revision.

Waivable Red List, paragraph 2.2 governs the arbitrator's direct or indirect interest in the dispute.

Waivable Red List, paragraph 2.2.1, which deals with the arbitrator's holding of shares in one of the parties or its affiliates, has remained unchanged in the 2024 Guidelines.

Waivable Red List, paragraph 2.2.2 has been updated to specify 'economic' as opposed to 'financial' interests that a close family member of the arbitrator has in relation to the outcome

of the dispute. This change broadens Waivable Red List, paragraph 2.2.2. This is because a 'significant economic interest' includes financial interests as well as any stake in the economic outcome of a dispute. The change was made through the public consultation process of the draft 2024 Guidelines. An arbitrator's close family member, although not financially benefitting from the outcome of the dispute, would still cause a potential conflict of interest of the arbitrator if such family member derived an economic benefit from the outcome of a dispute.

Waivable Red List, paragraph 2.2.3 deals with the arbitrator's or a close family member of the arbitrator's close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute. This example has remained unchanged following the 2024 revision.

Waivable Red List, paragraph 2.3 addresses the arbitrator's relationship with the parties or counsel.

Waivable Red List, paragraph 2.3.1 has been edited to apply when an arbitrator 'regularly' represents or advises a party or affiliate (in addition to 'currently' doing so), but only if the arbitrator 'does not derive significant financial income therefrom'. This change was made in conjunction with changes in the Non-Waivable and Waivable Red List as well as the Orange List to clarify and account for the variable conflict situations arising in connection with the current or regular representation of a party or affiliate by an arbitrator, the arbitrator's law firm, or the arbitrator's employer, depending on whether significant financial income is derived therefrom. The notion of regularity found in paragraph 2.3.1 in the 2024 Guidelines is not a novelty, as it was already present in paragraph 2.3.7 in the 2014 Guidelines. The 2024 Guidelines clarify that paragraph 2.3.1 applies to current and regular representation or advice. What constitutes 'regular' representation will certainly depend on the facts and circumstances of a particular case.

Paragraph 2.3.1 in the 2024 Guidelines foresee the following situations: As detailed above, the situation in which an arbitrator currently or regularly advises a party, or an affiliate of a party, and the arbitrator or the arbitrator's firm or employer derives significant financial income therefrom is a non-waivable conflict of interest (Non-Waivable Red List, paragraph 1.4).

If the arbitrator derives no significant financial income from the current or regular representation or advice to one of the parties or an affiliate, the arbitrator can act if the parties consent thereto (Waivable Red List, paragraph 2.3.1). This change has been accompanied by the deletion of the 2014 version of Waivable Red List, paragraph 2.3.7, which referred to the situation in which the arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor the arbitrator's firm derives a significant financial income therefrom. This paragraph was deleted because it was considered as partly redundant with Waivable Red List, paragraph 2.3.1 and Orange List, paragraph 3.1.7.

These situations are different from the one in which 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 (Orange List, paragraph 3.1.7).

Waivable Red List, paragraphs 2.3.2 and 2.3.3 have remained unchanged. The first example deals with the situation in which the arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties. The second example deals with the situation in which the arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

Waivable Red List, paragraph 2.3.4 used to include a definition of 'affiliate' in the paragraph's footnote. As the definition therein applied to all the Application Lists, the updated version of the Guidelines moved the footnote to the Non-Waivable Red List, which also includes a reference to affiliate. The definition now further extends to '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'. This addition brings the definition of affiliate in line with the terms now used in General Standards 6 and 7, which address the relationships of an arbitrator and the duties of the parties and the arbitrator. This new definition considers the variety of individual corporate structure arrangements and ensures that State-related parties such as organs, entities, and SOEs are included. This new definition of 'affiliate' was circulated in the draft for public consultation and was accepted without comment.

Waivable Red List, paragraphs 2.3.5 and 2.3.6 have been updated to account for the changes made in General Standards 6 and 7 regarding an arbitrator's 'employers'. This reflects the fact that non-lawyers act as arbitrators and that they should be treated the same as lawyers for the purposes of conflicts of interest. Reference is made to the commentary on General Standards 6 and 7 above.

Waivable Red List, paragraphs 2.3.7 and 2.3.8 remain unchanged in substance, although their numbering has changed compared to the 2014 Guidelines, due to the deletion of the 2014 version of paragraph 2.3.7. The first example deals with the situation in which an 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 a counsel representing a party. The second example deals with situations in which 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.

The Orange List

The Orange List is a non-exhaustive list of 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. As the 2024 Guidelines explain, the Orange List reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. If situations are not listed in the Orange List, but likely to give rise to doubts in the eyes of the parties as to the arbitrator's impartiality or independence, the arbitrator should consider disclosing them.

While several provisions of the Orange List remained unchanged between the 2014 and the 2024 Guidelines, the 2024 Review Task Force considered in each instance whether updates were necessary in light of changed circumstances or current best practice. Ultimately, however, the Review Task Force's discussions led to consensus that these unchanged provisions should be reaffirmed. For example, several situations in the Orange List refer to a three-year time period for reference; recognising that any such time period could be perceived as arbitrary, it was considered whether the three-year period referenced in one or more of those provisions should be changed. The Review Task Force considered, however, that such periods continued to generally balance the competing interests at issue and continued to reflect current best practices.

Orange List, paragraph 3.1 has been edited to reflect that this paragraph of the Orange List extends to any 'services' for one of the parties or other involvement in the case. In the 2014 Guidelines, only 'previous services' were covered by paragraph 3.1, whereas paragraph 3.2 concerned 'current services'. In the 2024 revision, these sections have been merged into what is now new paragraph 3.1 with the various sub-sections determining their own scope as to time.

Orange List, paragraph 3.1.1 addresses the situation where the arbitrator has, within the past three years, served as counsel of one of the parties or one of their affiliates, or has previously been advised or consulted by a party or one of its affiliates, in an unrelated matter and there is no ongoing relationship. The provision is identical to the previous paragraph 3.1.1 in the 2014 Guidelines.

Orange List, paragraph 3.1.2 addresses the situation where the arbitrator has, within the past three years, served as counsel against one of the parties or one of their affiliates, in an unrelated matter. The provision is identical to the previous paragraph 3.1.2 in the 2014 Guidelines.

Orange List, paragraph 3.1.3 addresses the situation where the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or one of their affiliates. The provision itself is identical to the previous paragraph 3.1.3 in the 2014 Guidelines, but the explanatory footnote 4 has undergone substantial revision. This footnote discusses certain types of arbitration, such as for example maritime, sports or commodities arbitration, where arbitrators may be drawn from a specialised pool of individuals or selected from a mandatory list. In the 2014 Guidelines, footnote 5 provided that if it was the custom and practice in such fields for parties to frequently appoint the same arbitrator in different cases, and all parties in the arbitration 'should' therefore be familiar with such custom and practice, no disclosure was required. It was considered whether this distinction for certain specific types of arbitration should be abandoned (and footnote 5 deleted). However, feedback from the arbitration community confirmed that this principle is frequently relied on. In consequence, footnote 5 has been maintained (now numbered footnote 3) but was amended to emphasise that disclosure, as opposed to non-disclosure, should be the norm, consistent with paragraph 3.1.3, while leaving room for the scope of the disclosure and the consequences of repeat appointments to differ in those circumstances from those set forth in the Guidelines.

Orange List, paragraph 3.1.4 addresses the situation where 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 one of their affiliates in unrelated matters. This paragraph is new in the 2024 Guidelines and was included because, even though assisting in mock-trials or hearing preparations is not formally the same as an appointment to serve as arbitrator or counsel, arbitrators are more frequently being engaged for such services and this may denote a similar level of commercial dependency on, or familiarity to, a party (compared to an appointment to serve as counsel or arbitrator) that consequently equally warrants disclosure. This new provision was circulated in the draft for public consultation and was generally accepted, subject to only minor comments as to the meaning and scope of the terms 'mock-trials' and 'hearing preparations' that were ultimately not integrated into the 2024 Guidelines.

Orange List, paragraph 3.1.5 addresses the situation where 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 one of their affiliates. The provision is largely identical to previous paragraph 3.1.5 in the 2014 Guidelines, albeit with the additions that (i) it applies equally to serving as arbitrator or serving as counsel in such matters, and (ii) it clarifies that it concerns arbitrations on both related issues and related matters.

Orange List, paragraph 3.1.6 addresses the situation where the arbitrator has, within the past three years, acted as an expert for one of the parties or one of their affiliates in an unrelated matter. This paragraph is new in the 2024 Guidelines and was included for the same reason as paragraph 3.1.4, i.e., because such appointments have arisen in practice since the 2014 Guidelines and may denote a similar level of commercial dependency or familiarity to a party (compared to an appointment to serve as counsel) that consequently equally warrants disclosure. This new provision was circulated in the draft for public consultation and was accepted without comment.

Orange List, paragraph 3.1.7 addresses the situation where the arbitrator's law firm or employer is currently rendering or regularly renders services to one of the parties or one of their affiliates, without creating a significant commercial relationship and without the involvement of the arbitrator, and such services do not concern the dispute in the arbitration. This provision (former paragraph 3.2.1 in the 2014 Guidelines) has been edited to include a significant commercial relation for the arbitrator's 'employer' within its ambit, as opposed to only the arbitrator's 'law firm'. This is reflective of the changes to General Standards 6 and 7, and accounts for the fact that an arbitrator may be a partner at a law firm but may equally be employed by a company or another kind of organisation. The paragraph has also been modified to include services 'regularly rendered', whereas the language previously only referred to services that the law firm was 'currently rendering'. This reflects the commercial reality that a standing relationship where services are being rendered on a regular basis (but not specifically at the time of the appointment or arbitration) may be equally relevant for disclosure purposes. Finally, new language has been added to specify that this provision applies only if the relevant services being rendered 'do not concern the current dispute' – services concerning the current dispute are captured (in various manners) by the Red List.

Orange List, paragraph 3.1.8 addresses the situation where 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 one of their affiliates. The provision is largely identical to the previous paragraph 3.2.2 in the 2014 Guidelines, albeit with the addition that it applies equally to the arbitrator's 'law firm' or 'employer'. This addition was made for the same reason that 'employer' was added to paragraph 3.1.7 discussed above.

Orange List, paragraph 3.2 addresses relationships between an arbitrator and another arbitrator or counsel to the parties in the arbitration, and contains a few substantial changes (discussed below), as well as four new provisions (paragraphs 3.2.9, 3.2.10, 3.2.12 and 3.2.13).

Orange List, paragraph 3.2.1 addresses the situation in which the arbitrator and another arbitrator are lawyers in the same law firm or have the same employer. The provision in the 2024 Guidelines has added the reference to the 'same employer', acknowledging that arbitrators may be non-lawyers, or may be in-house counsel or otherwise employed.

Orange List, paragraph 3.2.2 addresses the situation in which the arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers. The provision is identical to the previous paragraph 3.3.2 in the 2014 Guidelines.

Orange List, paragraph 3.2.3 addresses the situation in which 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. The provision is identical to the previous paragraph 3.3.3 in the 2014 Guidelines.

Orange List, paragraph 3.2.4 addresses the situation in which 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. This provision is identical to the old paragraph 3.3.4 in the 2014 Guidelines, save the qualifying language 'on a related issue or matter'. The change ensures consistency with the other provisions in the Orange List, in particular paragraph 3.1.5.

Orange List, paragraph 3.2.5 addresses the situation in which 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. The provision is identical to the previous paragraph 3.3.5 in the 2014 Guidelines. The Review Task Force considered the need to address the reference to 'close family ties', and whether a definition or guidelines should be inserted to clarify the 'closeness' element in the provision. In keeping the provision unaltered, the Review Task Force took into account the multitude of situations likely to arise in practice, including in light of cultural variations.

Orange List, paragraph 3.2.6 addresses the situation in which a close personal friendship exists between an arbitrator and counsel of a party. The provision is identical to the previous paragraph 3.3.6 in the 2014 Guidelines. A similar concern as with paragraph 3.2.5 was raised here. The Task Force reached the same conclusion that a definition or guidance for what 'close personal friendship' may be is largely to be assessed on a case-by-case basis.

Orange List, paragraph 3.2.7 addresses the situation in which enmity exists between an arbitrator and counsel appearing in the arbitration. The provision is identical to the previous paragraph 3.3.7 in the 2014 Guidelines. As with sections/paragraphs 3.2.5 and 3.2.6, what constitutes 'enmity' is to be assessed on a case-by-case basis.

Orange List, paragraph 3.2.8 addresses the situation in which 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. The provision remains largely unchanged compared to the previous paragraph 3.3.8 in the 2014 Guidelines, except for the addition of the terms 'as arbitrator', particularising the appointment circumstances. Other appointments of the arbitrator, for example, as expert or as mock arbitrator are addressed elsewhere in the List. The Review Task Force has considered further particularisation of the provision, specifically concerning the type of appointment, for example, where this is a joint appointment by counsels on both sides for sole and presiding arbitrator appointments, but has deemed that the wording of the provision is clear enough to address only appointments made by the counsel/law firm. The Review Task Force has also discussed whether the number of appointments should vary depending on the size/type of law firm, but such distinction was not retained in the final draft. Along the same lines, the Review Task Force considered whether to change the reference to 'on more than three occasions' to 'on two or more occasions', but, it was decided that the first still reflected the arbitral practice, namely, that there would be a lower threshold in the eyes of the parties regarding arbitrators' independence and impartiality when they receive multiple appointments from a party involved in a dispute, as opposed to counsel.

Orange List, paragraph 3.2.9 is a new paragraph addressing the situation in which 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. The Review Task Force has observed that it is common for arbitrators to act also as legal experts, but that the 2014 Guidelines did not deal with this issue. The provision is also in line with the general approach of the 2024 Guidelines to address the role of experts in the context of arbitrator disclosure and independence and impartiality. Furthermore, the Task Force considered appropriate to align the provision with the similar ones in the Orange List and to refer to the 'past three years' as the relevant standard. This new provision was circulated in the draft for public consultation and was accepted without comment.

Orange List, paragraph 3.2.10 is a new paragraph addressing the situation in which 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. The paragraph reflects the increasing use of mock-trials or hearing preparations by counsel, as it is further reflected in the amended paragraph 3.1.4 which addresses the assistance of the arbitrator in mock-trials or hearing preparations on more than three occasions by one of the parties, or an affiliate of one of the parties in unrelated matters. This new provision was circulated in the draft for public consultation and was generally accepted, subject to only minor comments as to the meaning and scope of the terms 'mock-trials' and 'hearing preparations' that were ultimately not integrated into the 2024 Guidelines.

Orange List, paragraph 3.2.11 addresses an arbitrator's current and past service as co-counsel with another arbitrator or counsel for one of the parties. The past services cover the period of the three years preceding the disclosure. This provision remained unchanged compared to paragraph 3.3.9 in the 2014 Guidelines. The Review Task Force considered whether the period of three years should be increased, not least in view of the application of the longer time limits by some leading arbitration institutions and the increasing requests by the parties for

disclosures beyond the traditional three-year period, yet the overall consensus was that such a modification was not warranted.

Orange List, paragraphs 3.2.12 and 3.2.13 are new and address the current service of an arbitrator on an arbitral tribunal in another arbitration together with a counsel for one of the parties or arbitrator(s) in the arbitration. These additions had not been included in the draft circulated for public consultation, but were included in response to the public's unanimous comments that such disclosures are required by parties and arbitration institutions, and because of attempts to challenge awards before state courts for the failure to disclose such information by the arbitrators in due course. While there was agreement from the public that international arbitral practice requires the disclosure of current services, there was no such agreement with respect to past services. Past services were thus not included in the 2024 updates. Accordingly, while the 2024 Guidelines clarify that current services should always be disclosed, disclosure of past services should be considered on a case-by-case basis.

Orange List, paragraph 3.3 has been slightly edited to apply to relationships between arbitrator and party 'and/or' others involved in the arbitration whereas the previous language (Orange List, paragraph 3.4 in the 2014 Guidelines) stated that it applied between arbitrator and party 'and' others involved in the arbitration.

Orange List, paragraph 3.3.1 requires disclosure when the arbitrator's law firm is currently acting adversely to one of the parties or an affiliate of one of the parties. This paragraph is identical to the previous paragraph 3.4.1 in the 2014 Guidelines.

Orange List, paragraph 3.3.2 addresses the arbitrator's past association with an expert, a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner. Compared to the previous paragraph 3.4.2 in the 2014 Guidelines, the new paragraph has been edited by adding an expert to this list, consistent with the general approach in the 2024 Guidelines to address arbitrators' affiliations with experts. As before, there is no temporal limit to which this disclosure applies.

Orange List, paragraph 3.3.3 addresses the arbitrator's close personal friendship with the management and/or a person having a controlling influence in the party or an entity that has a direct economic interest in the award. This paragraph is identical to the previous paragraph 3.4.3 in the 2014 Guidelines.

Orange List, paragraph 3.3.4 addresses situations where enmity exists between an arbitrator and individuals who may hold the positions of manager or director or a member of the supervisory board of a party, or between the arbitrator and an entity that has a direct economic interest in the award of a person having a controlling influence on one of the parties or one of their affiliates or on a witness or expert. This provision remained largely unchanged compared to the previous version in the 2014 Guidelines. The only change in the 2024 Guidelines refers to 'a person having a controlling influence *on* one of the parties' rather than '*in* one of the parties' in the previous version.

Orange List, paragraph 3.3.5 refers to arbitrators who are former judges and had heard a significant case involving one of the parties or one of their affiliates. The only change

introduced in this paragraph is the removal of the reference to gendered language, which has been removed throughout the 2024 Guidelines.

Orange List, paragraph 3.3.6 is a new provision which addresses situations where an arbitrator has concurrently instructed an expert in another matter, where the arbitrator acts as counsel, and such expert also appears in the arbitration proceedings. The relationship between arbitrators and expert witnesses was not addressed in the 2014 Guidelines. This new paragraph was included in the 2024 Guidelines to address circumstances that have arisen in practice since the 2014 Guidelines. This new provision was circulated in the draft for public consultation and was accepted without comment.

Orange List, paragraph 3.4 addresses the relationship between arbitrator and party and/or others involved in the arbitration.

Orange List, paragraph 3.4.1 addresses situations where the arbitrator holds shares in one of the parties or an affiliate of one of the parties and has remained unchanged following the revision. The provision is identical to the previous paragraph 3.5.1 in the 2014 Guidelines.

Orange List, paragraph 3.4.2 addresses situations where the arbitrator has publicly advocated a position on the case. The previous version in the 2014 Guidelines provided that the arbitrator's position would be either expressed during a speech or published in academic or other papers. The updated paragraph 3.4.2 has kept reference to speeches and published papers, but has expanded the reference to the media where such positions may be published, with the addition of a reference to social media and to on-line professional networking platforms. This addition takes into account the proliferation and increased use of social media networks and platforms that are used for the distribution of published papers, but also as independent media for publishing opinions and positions.

Orange List, paragraph 3.4.3 addresses situations where the arbitrator holds an executive or other decision-making position with the administering institution or appointing authority with respect to the dispute and specifies that in this position, the arbitrator has participated in decisions with respect to the arbitration. On the one hand, the scope of the new provision has been expanded to refer not only to 'appointing authority' but also to 'administering institutions'. This expansion aims at ensuring that the provision captures both *ad hoc* and institutional arbitrations and is not only confined to the role of appointing authorities to appoint arbitrators, but takes into account any other administrative decision that administering arbitral institutions may take. On the other hand, the new provision narrows down the scope of application of the former paragraph 3.5.3 in the 2014 Guidelines in two ways: the first is that it no longer refers to 'a position' that the arbitrator holds with the appointing authority with respect to the dispute, but limits its application to cases where the arbitrator holds 'an executive or other decision-making position'. The second amendment relates to the new requirement that the arbitrator would have, in this (executive or decision-making) position, participated in decisions with respect to the arbitration prior to the arbitrator's appointment. Both amendments in the 2024 Guidelines aim at limiting the application of the provision to cases in which the arbitrator, through a decision-making position, has had concrete involvement in a decision concerning the case. The amendments address the need for a disclosure in case decision-makers on administering institution's

bodies are nominated by parties/co-arbitrators subsequent to their participation in a decision on a case.

Orange List, paragraph 3.4.4 addresses situations where 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 and has remained unchanged following the revision. The provision is identical to the previous paragraph 3.5.4 in the 2014 Guidelines.

The Green List

The Green List provides a list of situations in which no doubts as to the independence and impartiality of the arbitrator can arise in the eyes of the parties, because no appearance of or actual conflict of interest exists from an objective point of view. An arbitrator is not required to disclose the circumstances listed in the Green List. Consequently, the examples provided in the Green List cannot lead to the disqualification of an arbitrator.

Green List, paragraph 4.1 addresses an arbitrator's previously expressed legal opinion concerning an issue that also arises in the arbitration, but is not focused on the case. While the Revision Task Force considered whether this example should be modified or deleted, it has ultimately remained unchanged.

Green List, paragraph 4.2.1 addresses current services in an unrelated matter for one of the parties by the arbitrator's law firm or employer, where the arbitrator does not share significant fees or other revenues with the arbitrator's law firm or employer. This example has been edited to specify that the arbitrator's 'employer' is within scope, addressing situations outside of the traditional law firm context. This change mirrors the changes made in General Standard 6(a) to consider the possibility that non-lawyers who are employees of companies act as arbitrators.

Green List, paragraph 4.3 addresses contacts with another arbitrator or with counsel for one of the parties. Only Green List, paragraph 4.3.4 was slightly amended with additional punctuation. The examples have otherwise remained unchanged.

Green List, paragraphs 4.5 and 4.5.1 are new and address contacts between the arbitrator and one of the experts. The addition was made to clarify that an arbitrator hearing testimony from an expert appearing in current proceedings and who has already heard testimony from this expert in another matter does not constitute a conflict of interest. In the 2014 Guidelines, there were only two references to expert witnesses in the Orange List dealing with close personal friendship or enmity between an arbitrator and an expert. The Review Task Force considered it necessary to implement further examples in the Red, Orange, and Green List, as there were more situations in which relationships between arbitrators and experts could arise other than just close personal friendship or enmity. This led to the creation of this specific example in Green List, paragraph 4.5.1, which is a common scenario.