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Non-Discretionary Arbitrator Disclosure Obligations in International Commercial Arbitration: A Path Forward?

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Arbitral institutions; Arbitrators; Codes of conduct; Conflict of interest; Disclosure; ICSID; International arbitration; UNCITRAL

Abstract

The system of arbitrators' disclosure relating to conflicts of interest in international commercial arbitration is in need of significant but incremental reform. The need for amelioration is evidenced by increasing calls within the system for clarity as to the scope of arbitrator disclosure at the beginning of arbitrations and confirmed by an increase in collateral challenges to final awards on the basis of improper arbitrator disclosure. The current institutional arbitral rules are not able to respond fully to this point. While some national courts are now being asked to deal with the problems, they are not fully equipped to deal with the issues of arbitrator disclosure due to their generally limited role in arbitral intervention and the often late stages at which they are called to intervene. In response to this problem, this article proposes that international commercial arbitration should now adopt the model being debated in ISDS in relation to a multi-institutional code of conduct for arbitrators. This code would set out a list of non-discretionary information which ought to be provided by arbitrators at the outset of the nomination and appointment process. Sanction or penalties for arbitrator non-compliance with such a code are advocated. It is apprehended that the provision of non-discretionary information will facilitate more reasoned consideration of "challenges" at an initial or early stage, increase transparency and thereby aid diversity and inclusion in arbitral panels.

I. Introduction

There is a tangible rise in collateral challenges to arbitral awards based on the perception that one or more arbitrators serving on the tribunal had not disclosed facts or circumstances, which may have given the parties justifiable doubts as to

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the existence of a conflict of interest. The following extract from a complaint heard by the ICC Court of International Arbitration in autumn 2020 provides a compelling example:

> "Claimants allege that each of the arbitrators improperly failed to timely make certain disclosures of professional relationships with, inter alia, one of the other arbitrators in this case, counsel in this case and/or an arbitrator in a different related arbitration. Claimants take the view that for each of the relationships they have identified upon their investigation after the Second Partial Award was rendered on 26 September 2020, or that has been disclosed by the arbitrators pursuant to Claimants' letter (in related ICC Case 22466/ASM/JPA) of 15 October 2020, a disclosure should have been made but was not made timely. In any event Claimants allege the relevant professional relationships at issue in themselves justify the challenge against each of the arbitrators. Claimants moreover are of the view that the non-disclosure of the identified professional relationships in totality raises 'issues of principle of fundamental importance for ICC Arbitration' (Cl. Letter of 14 December 2020). Claimants call into question the arbitrators' 'practices' and urge the Court to consider whether these can still be 'tolerated in the 21st century' (idem)."[1]

Recent challenges to arbitral awards have taken place in various jurisdictions including England and Wales,[2] the US[3], Continental Europe[4] and under the ICSID Convention.[5] Challenges at the latter stages of an arbitration (after a final award) can have grave consequences in terms of efficiency and confidence. Furthermore, challenges by a losing party can lead to questions of the validity of the underlying issues which are the subject of the complaint and to what extent dissatisfaction with the result (rather than the procedural process) is the true cause of the challenge. A further analysis is necessary.

An inspection of the regime, standards, sanctions and outcomes of arbitral challenges grounded in lack of disclosure suggests a random approach. An incremental overhaul of the rules on what an arbitrator should disclose together with a clearer position on the consequences for non-disclosure is now sensible and necessary. Supervisory courts acting under their domestic arbitration legislation are unable to remedy the problems. The factual matrix "causing" problems does not correlate fully or align to law or the current institutional rules. Lack of clarity on the scope of disclosure, lack of a compliance mechanism, lack of apparent sanction(s) and scope for differing arbitrator subjective views on disclosure contribute to the problem.

A fundamental question is who should and/or can deal most properly with the problem? Between arbitral institutions and national courts, it appears arbitral institutions are better placed. National legislation does not comprehensively deal

[1] *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020). Letter from the ICC to Parties in ICC Case No.20910/ASM/JPA, 29 December 2020, p.5.

[2] *Halliburton v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (27 November 2020).

[3] *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020).

[4] Decision of the Asturias Court of Appeal in Oviedo [Spain] No.00362/2020, 24 September 2020; Decision of the Swiss Federal Supreme Court No.4A_318/2020, 22 December 2020.

[5] Third ICSID Annulment Application in *TECO Guatemala Holdings v Republic of Guatemala* (ICSID Case No.ARB/10/23) filed 22 February 2021.

with the problem and changes to national legislation are time-consuming and imperfect (if capable of significant change at all). Arbitral rules dealing with the standards for arbitrator disclosure vis-à-vis arbitrator independence and impartiality need to include a non-discretionary, mandatory component and with sanctions attached. This article advocates the development and implementation of a multi-institutional Code of Conduct building on the work already completed by the UNCITRAL Working Group III and the International Center for the Settlement of Investment Disputes (ICSID).

II. Lack of clarity on disclosure/removal/challenge standards

Complaints about a lack of arbitrator disclosure are increasing. These complaints raise follow-on issues about the consequences of the lack of disclosure on awards rendered by the tribunal including whether awards rendered by those "impugned" arbitrators are open to set aside or non-recognition and whether there are any consequences on the arbitrator(s) who failed to disclose. While it may be easy to dismiss challenges against an award on the basis of undisclosed (potential) conflicts of interest as mere partisan attacks after the fact, further debate and analysis about disclosure is needed. Debate around the ability to challenge an award at the end of the proceeding for lack of arbitrator disclosure is only part of the bigger equation.

Discussion on the contours of arbitral disclosure (particularly against arbitrator duties of confidentiality) and the consequences for non-disclosure at the front end of proceedings needs to now evolve. Further and relatedly, the nature of the IBA Guidelines as "soft law" needs to be addressed. Their "soft" nature leads to additional questions, problems and challenges. One could cynically suggest that certain arbitrators *may* be exploiting the gap between the arbitral rules, mandatory legal standards and the "soft" IBA Guidelines—insulating themselves from consequences of non-disclosure for the purpose of obtaining more tribunal appointments. Other systems need to be considered.

A. Arbitrator disclosure complaints

There are many ways that disclosure difficulties creep into an arbitration. Each of these areas can be a problem. However, when taken together, it is clear that changes to the system on the front end of the arbitral procedure are required. The issues include:

(a) **Disclosure requirements in Arbitral Rules which are open to "interpretation".**

Nearly all institutional arbitral rules provide the same level of guidance as to arbitrator disclosure. These rules do not provide sufficient specificity as to the scope of disclosure that is required from arbitrators at the outset of the case and as the case proceeds. Institutional Rules which do not mention specific elements of disclosure include those from the ICC, LCIA, SIAC, SCC and UNCITRAL to name a few. An example of the unspecific

institutional rules requiring disclosure is art.11 of the 2021 ICC Rules. It states:

> "2) The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
>
> 3) An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration."[6]

Similar provisions are found in the LCIA Rules;[7] the SIAC Rules;[8] and the UNCITRAL Rules.[9] However, these general provisions provide wide and subjective latitude to arbitrators in terms of facts or circumstances that the arbitrators consider need to be disclosed. For example, the ICC Court of Arbitration in December 2020 stated:

> "Claimants' view that Mr [Arbitrator] should have timely disclosed professional relationships with Prof [Arbitrator], the president of the arbitral tribunal in a different but related arbitration, *is not supported by the (non-exhaustive) list of disclosable circumstances in the ICC Note, nor is a similar situation contemplated in other sources (non-exhaustively)*

[6] 2021 ICC Rules art.11.

[7] 2020 LCIA Rules art.5: "5.4 Before appointment by the LCIA Court, each arbitrator candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present); the candidate shall also agree in writing fee rates conforming to the Schedule of Costs; the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. The candidate shall promptly furnish such agreement and declaration to the Registrar.

5.5 Each arbitrator shall assume a continuing duty, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration."

[8] 2016 SIAC Rules art.13: "13.4 A nominated arbitrator shall disclose to the parties and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before his appointment.

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

[9] 2010 UNCITRAL Rules art.11: "When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."

> *listing disclosable circumstances*. The Court holds that Mr [Arbitrator]'s relationships with Prof [Arbitrator], an arbitrator in a related but different arbitration, were not of such a nature that they 'might … call into question the arbitrator's independence in the eyes of the parties' and thus Mr [Arbitrator] had no duty to disclose such circumstances[10] (emphasis added)."

(b) **Inconsistency between disclosures.**[11]

As explained by Dr Jacomijn van Haersolte-van Hof, the Director General of the LCIA in the 2020 Freshfields' Arbitration Lecture, parties and institutions have noted a number of instances where different arbitrators have disclosed the same facts (previous or current arbitral appointments, academic appointments, authorship) differently. The differences may be innocuous. However, the fact that different situations can be described differently (or not at all) evidences the underlying problem that there are gaps in the applicable regimes which need to be addressed.

One of the reasons for the inconsistency in arbitral disclosures is the lack of clarity about what characteristics an international arbitrator should possess. If an arbitrator is not expected to possess a certain quality, then the fact that she does not possess that quality (for example a lack of current service on other arbitral tribunals with other arbitrators) would not ordinarily be a reason for disclosure. However, the definition of arbitrator duties of independence and impartiality are unclear. Professor Catherine Rogers' seminal article written more than 15 years ago pointed out the problems in the current system of comparing arbitrators to judges and the need to define arbitrator's roles differently in order to respond to the arbitral community requirements.[12]

(c) **Arbitrators are the rulers of their own domain.**

A related issue stems from the fact that there are no bodies, organisations or other individuals who can verify and check the completeness of arbitrator disclosure. In other words, the only party in the process who can attest to the completeness and accuracy of the disclosure is the arbitrator from whom disclosure is sought. While this will always be an inherent problem in the process of assessing conflicts of interest, alleviating the problem of clarifying (i) what disclosure is expected from arbitrators and (ii) what sanctions come from the fact of a lack of disclosure, should lessen the impact of that the fact that the arbitrator is the controlling factor in his disclosure.

[10] Letter from the ICC to Parties in ICC Case No.20910/ASM/JPA, 29 December 2020, p.7.

[11] Freshfields Arbitration Lecture 2020 delivered by LCIA Director General Professor Dr Jacomijn van Haersolte-van Hof on 3 December 2020.

[12] Catherine Rogers, "Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct" (2005) 41 Stan. J. Int'l L. 53.

(d) **Non-disclosure is not a self-standing basis for removal.**

Many arbitral decisions have confirmed the notion that a failure of an arbitrator to disclose facts or circumstances which may have given rise to challenges is not a basis for removing the arbitrator and/or overturning arbitral awards. In most cases, bodies charged with deciding whether or not to remove an arbitrator focus on whether there was a real or apparent bias based upon the facts or circumstances which existed (without reference to the fact of non-disclosure). The UK Supreme Court held that a failure of an arbitrator to make disclosure *is* a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias.[13] However, many other systems are reluctant to give *any* evidentiary weight to the non-disclosure. In other words, the fact that an arbitrator did not disclose facts or circumstances that could be seen as a conflict of interest is not an aggravating factor making the fact or circumstance a basis for further action against the arbitrator or its award.

By way of example, a recent ICSID decision explained the following[14]:

> "The Chair sees no basis to conclude that the non-disclosure of the arbitrators' participation in the events in question must lead to their disqualification. As the Chair has previously held, absence of disclosure cannot in and of itself make an arbitrator partial or lacking in independence; only the facts and circumstances that s/he did not disclose may call into question the qualities required by Article 14(1) of the ICSID Convention.[15] Where the undisclosed facts do not themselves support a finding of manifest lack of independence or impartiality (as the Chair has concluded in this case), failure to disclose them may not serve as a ground for disqualification."[16]

(e) **Lack of "sanction" for failing to disclose.**

To compound the issues of arbitrator discretion and lack of clarity around the circumstances of disclosure, there is also a concern that there are no (or relatively small) repercussions for an arbitrator who does not comply with the expectations of the parties in respect of disclosure of potentially relevant facts for assessing conflicts of interest. Most international arbitration rules contain a rule which gives the ability of the institution to remove the

[13] *Halliburton v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 at [155].

[14] *Landesbank Baden-Württemberg et al. v Kingdom of Spain*, ICSID Case No.ARB/15/45 Decision on the Second Proposal to Disqualify All Members of the Tribunal, 15 December 2020 at [152].

[15] See *Getma International et al. v Republic of Guinea*, ICSID Case No.ARB/11/29, Decision on Proposal to Disqualify Mr. Bernardo Cremades, 28 June 2012 (*Getma*) at [80]; IBA Guidelines on Conflict of Interest, 23 October 2014, p.18, para.5.

[16] See, e.g. *Getma* at [84].

arbitrator—sometimes calling them "unfit" to serve as an arbitrator. For example, art.10.2 of the LCIA Rules provide that:

> "The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry."[17]

A determination that an arbitrator was "unfit to act" alone may not deter arbitrators from improper disclosure. For example, does a finding that an arbitrator is unfit to act affect remuneration for services performed? Is the finding public? Who should bear the costs of additional proceedings that will need to be conducted with the new member of the tribunal: the removed arbitrator? The institution? The parties? There are obvious issues related to the scope for sanctioning arbitrator conduct. Some rules contain a waiver of any claims or recourse against arbitrators for their conduct in the arbitration.[18] The problem was distilled perfectly by Lord Hodge in *Halliburton v Chubb Bermuda Insurance Ltd* where he stated:

> "… Further, research carried out within the court in relation to jurisdictions which impose a legal duty of disclosure found very little evidence of personal claims against arbitrators. I respectfully question whether there is a basis in English law for a claim for damages relating to disclosure or nondisclosure, in the absence of bad faith, where the legal duty is a component of the statutory duties of fairness and impartiality which do not support such claims. In any event, section 29 of the 1996 Act will protect arbitrators against personal claims for non-disclosure in most circumstances so long as the arbitrator has not acted in bad faith. The LCIA Arbitration Rules (article 31) and the ICC Arbitration Rules (article 41) contain exclusion provisions and parties, arbitrators and institutions, who have not already done so, can adapt their contracts or rules to confer a wider immunity against personal claims in the light of this ruling."

In light of the issues discussed above, the need for reform in arbitrator disclosure should be uncontroversial. Before meaningful progress can be made on the issue of arbitrator disclosure, there must be a consensus or agreement on the parameters of what potentially constitutes disqualifying behavior making it the subject of disclosure.

[17] 2020 LCIA Rules art.10.

[18] See e.g. 2010 UNCITRAL Rules art.16 ("Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration").

B. Expansion of circumstances affecting arbitrator impartiality or independence?

One threshold issue which must be addressed by the arbitral community relates to what constitutes unacceptable facts or circumstances which give rise to the appearance of bias.[19] The inconsistency and lack of objective rules in defining what facts or circumstances are likely to lead to the appearance of bias is naturally detrimental to arbitration law. This is because arbitral processes are longer, challenges are increasing, and collateral challenges to awards are also increasing. There is agreement in the arbitral community on certain categories of conflicts of interest like providing current legal services to one of the parties on the same or a related issue; a financial interest in the outcome of the case or where close family relationships are involved.[20] However, there are now more challenges seemingly based upon conduct which was otherwise accepted and/or not clearly subject to disclosure or removal. These circumstances include:

(a) **Arbitrators' service on other tribunals.**

The fact that arbitrators have sat (or are currently sitting) together in other arbitrations between different parties was not historically cited in terms of conflicts of interest.[21] In other words, other arbitrator appointments without a connection to the parties was not a commonly accepted basis on which arbitrators were being challenged. That notion may be changing for some parties and counsel.[22] The arbitral community must decide whether this type of challenge should be able to succeed before it can require disclosure of these facts or circumstances from arbitrators.

[19] In this context it is worth noting the recent code adopted by the UK House of Lords which requires members to register work for foreign states (including various departments and agencies) or for organisations that "may be thought by a reasonable member of the public to be foreign state-owned or controlled", along with their earnings from such work. Disclosure will include work performed as counsel or arbitrator in investment and commercial arbitration and has caused certain members of the House of Lords to consider taking leave of absence due to the new increased disclosure obligations over confidential client work.

[20] IBA Guidelines on Conflicts of Interest, Non-Waivable Red List (2014).

[21] A number of recent Challenges and Decisions have related to arbitrators sitting in parallel cases where certain parties (or related parties) are litigating similar issues. Challenges in these situations have been sustained with more regularity on the basis that the arbitrator sitting in a parallel proceeding might "prejudge issues" and have access to information denied to co-panelists. See e.g. PCA Case No.AA809, *Liberty Seguros v Venezuela*, Decision on Challenge of Stephen Drysmer, 1 July 2021; ICC Case No.25542/HBH, *Anaklia Development Consortium LLC (Georgia) v Georgia*, Decision on Challenge of Klaus Sachs, 5 March 2021.

[22] See *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020). See too *A v B* [2020] EWHC 809 (TCC) where the Judge looked at issues around barristers at the same chambers:

> "Ms. Day submits that barristers are in this position—with common funding, marketing and an interest in each other's success—but they act on opposing sides in litigation as a matter of course. I do not consider that the comparison is apt for at least three reasons. Firstly, unlike the defendant companies, barristers do not share profits and therefore do not have a financial interest in the performance of their colleagues. Secondly, barristers are frequently required to represent unpopular clients or causes. They do not have the luxury of considering a case and then deciding not to accept instructions because the client or case does not fit their corporate image. Thirdly, and perhaps most importantly in the context of this case, it is common knowledge that barristers are self-employed individuals working from sets of chambers and that different barristers from a set of chambers may act on opposing sides. In this case, the defendants did not inform the claimant that they might take instructions to act both for and against the claimant in respect of the dispute. If they had done, the claimant would not have instructed the defendants. That is clear because when the defendants asked whether the claimant objected to it acting for the third party on this dispute, the claimant objected."

(b) **Issue conflicts.**

Another area of renewed attention in disclosure and challenges relates to arbitrator decisions and writings on topics which are implicated or could be implicated in the arbitration. Arbitrator decisions in disputes under the same or related contracts between differing parties also now raise questions of issue conflict in the commercial sphere. Relatedly, while many think that any form of academic writing or speeches were squarely within the IBA Guidelines' Green List and therefore not subject to disclosure, recent scholarship has challenged that thinking.[23] This is particularly true of instances where there are substantial writings over a period of years which could indicate firmly held (rather than passing) substantive views. This species is evolving.

(c) **Issue conflicts from double-hatting.**

Double-hatting represents another topic that has received increased scepticism. It relates to an arbitrator's ability to participate in some arbitrations as an advocate and others as an arbitrator. Challenges based upon double hatting became the centre of focus in 2004 with *Telecoms Malaysia*.[24] There is a perception that arbitrators should not be called upon to decide issues which are also the subject of client advocacy by the arbitrator. It is considered that the potential conflict from inconsistent positions—particularly where their decisions become public—leads the arbitrator to consider more than the merits of the case.

Despite increased attention on these areas, there is no clarification from the arbitral community or arbitral institutions as to their implications on arbitrator appointments and/or conflicts of interest. Clarity under arbitral rules is required to prevent further challenges. In the absence of mandatory rules from arbitral institutions, parties have resorted to national courts—sometimes, but not always at the Award enforcement stage—to challenge non-disclosures which in one party's view has affected the arbitrator's ability to decide the outcome of the proceedings.

III. National laws struggle to deal with undisclosed potential conflicts of interest

For the most part, resort to national laws to resolve issues of arbitrator challenges come into play after institutional roles have ended. This could either be because parties have challenged an arbitrator under the arbitral rules but lost or because parties are challenging an award which has been rendered by the arbitral tribunal on the basis that real or apparent bias exists as evidenced by improper disclosures. In either case, parties will not find greater clarity on the scope of arbitrator disclosure or the requirements of independence or impartiality in national legislation

[23] See ISDS Draft Code of Conduct (Version One) at art.5(2)(d); Lal, Casey and Defranchi, "Rethinking Issue Conflicts in International Commercial Arbitration" (2020) 14(1) Disp. Resol. Int'l 3.

[24] District Court of The Hague, civil law section, provisional measures judge, Challenge No.13/2004, Petition No.HA/RK 2004.667, Decision of 18 October 2004, reprinted in (2005) 23(1) ASA Bull. 186, 192.

than they will under arbitral rules. Parties will find even less straightforward answers to questions of contours of ongoing disclosure obligations. For example, national courts acting under their respective arbitration laws have limited bases for challenges to arbitral awards under the New York Convention. There is one practical point: the prospect of meaningful revisions to national legislation relating to conflicts of interest remains far in the distance. Typically, one would only expect these revisions to be included alongside a number of broader revisions based upon the UNCITRAL Model Law and/or New York Convention. These texts are currently silent on the issue of arbitrator conflicts of interest.

A. National Law Standards for Arbitrator Removal and/or Award Challenges

It is worth pausing to distinguish between the two potentially relevant aspects of national laws at play:

(a) Provisions relating to removal of arbitrators on the basis of a lack of independence or impartiality (as articulated in the national law); and

(b) Rights of parties to "challenge" arbitral awards on the basis of a (serious) irregularity in the procedure related to the arbitrator's conflicts of interest.

These different aspects of national law have sometimes been confused when discussing recourse to national courts. However, it must be borne in mind that the enforcement regime is separate and distinct from policing arbitrator disclosure and conflicts of interest.

Typically, the "pro-arbitration" policy behind the enforcement regime is limited to correcting—in guillotine fashion—for the most significant legal or procedural errors. One must recall that non-recognition of arbitral awards harms the parties more than it harms the arbitrators who rendered the award. This is because the parties must start over. Perhaps tangentially an arbitrator who rendered an award which was overturned on the basis of apparent or real bias or a conflict of interest may see an impact on her reputation. Practically speaking, however, the arbitrator likely received full remuneration and at all material times before a non-recognition event, the arbitrator was accepting additional appointments without any impact on her standing or reputation.

Statutes relating specifically to the removal of arbitrators provide a different and aspirationally smaller impact. They are the scalpel attempting to remove a malignancy in the process. These provisions of national law will only be available to parties who have seated their arbitration in the jurisdiction. The arbitrator is precluded from continuing the arbitration and from receiving fees in relation to (at least) the remainder of the arbitration. These statutes aid parties to the arbitration in at least as much as they preclude a full revision to the arbitration and remove the arbitrator (hopefully) prior to an award. The parties may still face wasted costs in as much of the procedure which needs to be repeated or other additional costs associated with an arbitrator needed to "read-in". One must also recognise that given that most national laws allow the arbitration to proceed while members of the tribunal are being challenged in the courts, it is possible that a court resolution

does not come in time to prevent an award from being rendered. In such a case, parties may be left in a situation closer to that requiring a challenge to an award rather than a challenge to the arbitrator.

A small selection of supervisory laws is sufficient to highlight the differences between the regimes. The common conclusion between the systems is that they are not suited to police non-disclosure and conflicts of interest.

1. English Arbitration Act

The English Arbitration Act contains a provision related to the removal of arbitrators and challenges to an award. Section 24 relates to the removal of arbitrators who are serving on an arbitral tribunal seated in England, Wales or Northern Ireland. The Act provides in relevant part that:

> "24. **Power of the Court to remove Arbitrator**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—
>
> (a) that circumstances exist that give rise to justifiable doubts as to his impartiality;
>
> …
>
> (2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.
>
> …
>
> (4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.
>
> (5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section."[25]

The English Arbitration Act, like other national legislation, does not contain codified lists of circumstances which could constitute justifiable doubts as to impartiality. Further, the English Arbitration Act does not provide any particular regime for the disclosure of facts which could give rise to justifiable doubts. This is unsurprising. The Act does require parties to institutional arbitration (or where parties have otherwise agreed to system for challenge and removal of arbitrations) for the party seeking removal of an arbitrator to have exhausted its remedies with the institution. The Court will only act when "satisfied" that the party has exhausted those avenues. In this way, the Court gives deference to the parties agreed arbitral institution (including any rules by which the arbitrators are required to make disclosure) before intervening in the removal process.

[25] English Arbitration Act 1996 s.24.

When it comes to issues of enforcement of arbitral awards, in addition to the grounds enumerated by the New York Convention, the Act provides under s.68 that in cases of "serious irregularity" the award may be challenged:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal)."[26]

The provisions mentioned above formed the basis for a UK Supreme Court judgment in December 2020 relating to multiple undisclosed appointments across several arbitrations.[27] Whilst there is an ability to challenge a Final Award on the basis of s.33 of the English Arbitration Act—relating to the general duty of the tribunal to act fairly and impartially[28]—the UK Supreme Court did not find a legal reason to overturn a partial final award on the basis of undisclosed multiple appointments by the chairman in parallel arbitrations involving one of the parties. The UK Supreme Court confirmed that where circumstances might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias, the arbitrator is under a free-standing or legal duty to disclose such appointments, unless the parties to the arbitration have agreed otherwise. Of material relevance to the thesis in this article, the Supreme Court also found that the legal duty of disclosure, which is a component of the arbitrator's statutory duty to act fairly and impartially, does not override the arbitrator's duty of privacy and confidentiality in English law; but, absent a contract restricting or prohibiting disclosure or binding rules which have different effect, the disclosure of information may be made without obtaining the express consent of the parties to the relevant arbitration where the needed consent is inferred.

Disclosure issues were (again) recently discussed at length in a High Court judgment handed down on 18 January 2021 in *Newcastle United Football Company Ltd*.[29] In that case, Newcastle United sought removal of the chairperson of an arbitral tribunal under s.24(1)(a) of the English Arbitration Act on the basis that the chairperson had (a) given advice to the counterparty in 2017 on related sections of the Premier League Rules; (b) the chairperson had been appointed by the counterparty's law firm on three prior occasions and served as an arbitrator where the counterparty's law firm was acting on 12 prior occasions; (c) the chairperson's failure to disclose the previous advice or the prior appointments; and (d) a series

[26] English Arbitration Act 1996 s.68.

[27] *Halliburton v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (27 November 2020).

[28] English Arbitration Act 1996 s.33(1) ("The tribunal shall—(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined").

[29] *Newcastle United Football Company Ltd v The Football Association Premier League* [2021] EWCH 349 (Comm).

of private email communications between the chairperson and the counterparty's law firm including seeking their *ex parte* views as to whether or not the chairperson should recuse himself. Ultimately the High Court held that the circumstances would not suggest to a fair-minded third-party observer that there was a real risk of bias from the chairperson's conduct when such events were considered singularly or cumulatively.[30] As such, the chairperson did not stand to be removed under s.24 of the English Arbitration Act.

2. Federal Arbitration Act (the FAA)

Unlike the English Arbitration Act, the FAA does not contain provisions on the removal of arbitrators during the pendency of arbitrations seated in the US. This is potentially explained by the well-settled position in US domestic arbitration that party-nominated arbitrators (as opposed the chairperson) do not need to be neutral and so any basis for removal would have to be tailored to account for understandings/agreements of the parties in subject-matter arbitrations to ensure the FAA did not encroach on certain arbitrations where a provision on removal could run against the will of the parties.

The FAA provides for bases to annul/refuse enforcement of arbitral awards along similar grounds to those provided for in the New York Convention. Of particular significance for the present discussion is s.10(a)(2) of the FAA which provides that:

> "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> …
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them."[31]

Like other national laws, the FAA does not define "evident partiality" and does not explain the relationship between evident partiality and disclosure obligations. The threshold term "evident partiality" would suggest that the evidentiary showings under the FAA standard are stricter than any standards that would be applied to disclosure obligations. In this way the FAA does not respond to the need for arbitrator disclosure or whether non-disclosure would lead to vacatur of the award.

Recent challenges to arbitrators and the underlying Final Award are testing the evident partiality standard.[32] The challenge in *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020) is noteworthy not simply because it attempts to link the evident partiality standard with the non-disclosure of facts potentially giving rise to justifiable doubts as to impartiality, but also because the facts allegedly giving rise to the justifiable doubts related to a number of appointments outside of the arbitration where two of the tribunal members were serving on different arbitral tribunals—some of which

[30] *Newcastle United Football Company Ltd v The Football Association Premier League* [2021] EWCH 349 (Comm) at [61]–[64].
[31] Federal Arbitration Act s.10(a).
[32] *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020).

related to the same underlying construction project but with different parties to the proceedings.

> "Movants were prompted to investigate whether the arbitrators acted with the requisite impartiality and independence. This investigation revealed that there were in fact several relationships between the arbitrators and other individuals involved in this dispute—relationships that were not but should have been disclosed. Especially considering the financial remuneration to the Tribunal president flowing from his undisclosed appointment as president of another ICC arbitration by ACP's arbitrator, there is an evident appearance of bias and lack of impartiality by the Tribunal.
>
> The Tribunal's failure to disclose multiple cross-appointments and inter-relationships among themselves and others involved in this dispute, the financial remuneration flowing from these undisclosed relationships, and the fundamentally flawed Award itself violate several provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (New York Convention or Convention) and the FAA."[33]

The arguments put forward as a basis for the challenge in the ongoing ICC proceedings were all rejected by the ICC Court of Arbitration in December 2020.[34] The ICC provided cursory reasons as to its rejection while side-stepping the issue and consequences of arbitrator non-disclosure. One sentence is representative of the position on non-disclosure:

> "Regardless of whether or not [Arbitrator] should have specifically disclosed his role as arbitrator together with [Counsel], the Court does not consider that role to be such that it calls into question [Arbitrator's] continued independence or impartiality."[35]

In summary, the ICC Court found no financial dependence or other impropriety between arbitrators sitting together on other (related and unrelated) arbitrations. The ICC found that the participation in other arbitrations did not fall to be disclosed under the relevant ICC Practice Note or under other sources.[36] The ICC Court further found a lack of disclosure where one arbitrator was sitting in a separate arbitration where one of the same members of the counsel team was acting did not warrant any consequences. The same was true where one of the arbitrations was sitting as an arbitration in an unrelated case with one of the counsel team members. As described further below, all of these circumstances would have been ripe for disclosure under a non-discretionary Code of Conduct requiring disclosure of certain circumstances. Arguably, such disclosure at the front end of the proceedings would have aided stakeholder buy-in of the process and alleviated the need for after the fact absolution of multiple failures to disclose.

[33] *Grupo Unidos por el Calan SA, et al. v Autoridad Del Canal de Panama*, Case No.1:20-cv-2487 (SD Fla. 2020), Motion to Vacate Partial Arbitral Award, 25 November 2020 at [3]–[4].

[34] Letter from the ICC to Parties in ICC Case No.20910/ASM/JPA, 29 December 2020, filed Exhibit R-38 in the Southern District of Florida litigation.

[35] Letter from the ICC to Parties in ICC Case No.20910/ASM/JPA, 29 December 2020, p.10.

[36] ICC Practice Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration entering into force 1 January 2019.

3. Swiss Federal Statute on Private International Law (amd. 2021)

The recently revised Swiss Statute on Private International Law (PILA) provides the most streamlined view of the ability of parties to challenge arbitrators in national courts. The PILA requires arbitrators to make disclosures "immediately" if circumstances exist which might raise justifiable doubts as to the arbitrators' independence or impartiality in art.179(6):

> "A person asked to take the office of an arbitrator must immediately disclose any circumstances that might raise reasonable doubts as to his or her independence or impartiality. This duty continues throughout the proceedings."[37]

The PILA follows the requirement for disclosure with the straightforward route for parties to seek removal in art.180(1):

> "A member of the arbitral tribunal may be challenged:
> a. if he or she does not meet the requirements agreed by the parties;
> b. if the arbitration rules agreed by the parties provide a ground for challenge; or
> c. if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality."[38]

The PILA requires any challenge to be filed to the tribunal within 30 days of becoming aware of the facts or circumstances constituting the tribunal.[39]

On its face, the PILA does not require that parties first "exhaust" their remedies for removal under the agreed rules—only that 30 days have elapsed since the tribunal was notified of the challenge.[40] This is a departure from the other national laws allowing for the national court to step in and remove arbitrators on the basis of conflicts of interest. However, and perhaps more importantly, it could appear that the PILA allows for parties to seek court removal of an arbitrator on the basis of standards or codes of conduct included in their agreed arbitral rules regardless of whether the institution deemed removal under those codes/standards to be necessary. These provisions of the PILA came into force in January 2021.

In terms of award enforcement, the new version of the PILA is worth further discussion:

> "A party may request the revocation of an award if
> a. it subsequently discovers significant facts or decisive evidence that could not have been submitted in the earlier proceedings despite due

[37] Swiss Federal Statute on Private International Law (amd. 2021) art.179(6).
[38] Swiss Federal Statute on Private International Law (amd. 2021) art.180(1).
[39] Swiss Federal Statute on Private International Law (amd. 2021) art.180a (1) ("Unless the parties have agreed otherwise and if the arbitration proceedings have not yet been concluded, the request for challenge must be submitted in writing and with reasons to the challenged member of the arbitral tribunal within 30 days since the requesting party became aware or could be aware in the exercise of reasonable diligence of the ground for challenge, and must be communicated to the other members of the arbitral tribunal within the same time limit").
[40] Swiss Federal Statute on Private International Law (amd. 2021) art.180a (2) ("The requesting party may, within 30 days of filing the request for challenge with the arbitral tribunal, submit the challenge to the state court. The decision of the state court shall be final").

diligence; facts and evidence which arose after the arbitral award was made are excluded;

b. criminal proceedings have established that the arbitral award was influenced by a crime or a misdemeanour to the detriment of the party concerned; a conviction by a criminal court is not required; if criminal proceedings are not possible, proof may be provided in another manner;

c. *a ground for challenge in accordance with Article 180 paragraph 1 letter c was, despite due diligence, only discovered after the conclusion of the arbitration proceedings and no other legal remedy is available*."[41] (emphasis added)

PILA art.190c therefore provides a direct right to "revoke" an arbitral award if circumstances existed which give rise to justifiable doubts which were only discovered after the conclusion of the arbitral proceedings. Again, this is a departure from many other national arbitration laws which do not promote conflicts of interest to an enumerated independent basis for annulling or refusing to enforce arbitral awards.

4. UNCITRAL Model Law

Like other national legislation, the UNCITRAL Model Law does not provide significant guidance as to what constitutes circumstances giving rise to justifiable doubts as to independence or impartiality.

Relevant provisions of the UNCITRAL Model Law are:

"Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

If the system agreed upon for challenges to arbitrators does not remove the arbitrator, a party is free to "appeal" the decision to the national court under art.13(3) of the Model Law on the basis of standards set out in art.12:

"If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the

[41] Swiss Federal Statute on Private International Law (amd. 2021) art.190a(1).

> decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."[42]

The appellate procedure does not specify what if any evidentiary weight should be given to the underlying decision, but a court would be expected to look at the issues of disclosure, bias and conflicts of interest fresh under the national legislation.

B. National arbitration statutes reflect the state's need to balance finality of arbitral awards and due process in terms of impartial and independent decision makers

National or supervisory courts are faced with a number of competing issues. These competing factors make national courts unsuitable as a forum for resolving challenges to arbitrators—particularly challenges based upon a lack of pre-appointment disclosure. Given that there is not a cogent view in international arbitration or national law as to what amounts to challengeable conduct and what is not, national courts are not in a position to police conflicts of interest in all but the most obvious fact patterns. National courts have historically been tasked with giving narrow review to arbitral awards in terms of factual and evidentiary issues. This is found in the deference given to the parties' choice of procedural rules, evidentiary (and in some jurisdictions) legal findings of the arbitral tribunal and the desire to enforce final arbitral awards. National courts are not typically sitting as instances of "appeal". This has led national courts away from discussions as to the proper manner in which arbitrators should make disclosures, be challenged under institutional rules and what constitutes offending conduct under those provisions.

The tensions faced by national courts are clear from their legislation. For example, under some national laws, parties are able to challenge an arbitrator concurrent with or after exhausting institutional (agreed) procedures. Other national laws permit the arbitrators to continue the arbitration while the challenge is pending.[43] A slow challenge resolution in national courts will convert the process into one of award enforcement as the arbitrators were within their rights to continue the arbitration pending the national court outcome. There are a number of procedural difficulties with late stage challenges to arbitrator removal and the effects on a final award.[44]

When discussing standards for enforcement/annulment of arbitral awards, one must remember that parties to international arbitration are not guaranteed a perfect procedural process. The prevailing jurisprudential view is that only processes or

[42] UNCITRAL Model Law art.13(3).

[43] See English Arbitration Act s.24(3); Swiss Federal Statute on Private International Law (amd. 2021) art.180a(3); UNCITRAL Model Law art.13(3).

[44] For example, there are open questions as to whether and to what extent the court will review the arbitral rules which formed the basis of the challenge. It is unclear whether a national court would be at liberty to look deeper into the issue of a violation of a mandatory code of conduct or would be required to stay at the higher level simply assessing independence or impartiality in line with the courts' other jurisprudence on those terms in the jurisdiction. Presumably, the latter approach would be the one followed by most courts, unless an argument could be made that by failing to abide by the code of conduct, the arbitration was not being conducted in accordance with the procedure agreed upon by the parties. However, this is typically a ground for challenging an Award under national legislation and not a ground for removal of the arbitrator during the pendency of the arbitration.

outcome which are (or could perceived to be) manifestly unfair and/or outside of the legal framework and norms should be opened for review. There is not a developed prevailing view as to whether a lack of arbitrator disclosure is akin to a bad procedural or evidentiary ruling (i.e. bad process but not significant enough to overturn an award) or something more serious. For the reasons explained above, requesting the supervising courts to step in to such a role appears unlikely to resolve the problems. A solution must be found elsewhere.

IV. Institutions must respond to fill the gap created between the current arbitral rules, soft law and national legislation

Institutions in international commercial arbitration are in a position to bring clarity to the process of arbitrator disclosures and to related challenges. Soft law has provided some guidance and furthered the debate, but its implementation naturally suffers drawbacks. Two main reasons stand out: (i) its broad drafting leaves it open to varying subjective interpretation; and (ii) its "non-binding" nature leaves open a myriad of explanations, excuses or other reasons why it does not apply. Soft law is "soft" and broad enough for disparate interpretations, thus bright line rules are needed if there is to be evolution in dealing with conflicts of interest.

The current trend of looking backwards at what has happened in an arbitration—and parties seeking to nullify final awards on that basis—is not a viable solution. Parties, arbitrators (and may even national courts) must be in a position before proceedings start—let alone before the final award is rendered—to know what is expected from the disclosure and challenge process so that compliance with that process can be judged. This is true in instances where challenges for removal are occurring within the institutional rule system, challenges for removal are made in national courts and also true at the enforcement stage. The more transparency that comes to the process on the front end, the less mischief and scope for error can occur on the back end.

A. A bright line example: the Draft ISDS Code of Conduct

The first movers to implement bright line rules into the arbitral system appears to be a collaboration between the UNCITRAL Working Group III and ICSID with Version Two of the Draft Code of Conduct in Investor State Dispute Settlement proceedings (the "ISDS Code of Conduct"). The ISDS Code of Conduct moves away from the soft law position and provides specificity relating to arbitrator conflicts of interest, their disclosure, and the sanctions for non-compliance with the Code. This is a significant step forward in conflicts of interest, though the notion of a Code of Conduct for Arbitrators remains hotly debated.[45] The following provisions are relevant for purposes of this Article:

(a) **Article 5—disclosure obligations.**

Article 5 requires mandatory, non-discretionary disclosure of tangible and specific circumstances. Disclosures must be made for business

[45] See e.g. Constantine Partasides QC, "Regulating Arbitrators Ethics: Goldilocks' Golden Rule" Key 33rd Annual ITA Workshop, 16 June 2021.

relationships in the past five years;[46] direct or indirect financial interests in the proceeding and any "other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity";[47] and all other ISDS cases where the candidate is involved as an arbitrator or counsel.[48] These requirements are broader and more specific than those found in current arbitral institutional rules. Importantly, the requirements also curtail the arbitrator's subjectivity or discretion to decide what could constitute a conflict of interest or bias and therefore what might or might not need to be disclosed.

(b) **Article 6—repeat appointments/double hatting.**

The Draft Article is open for revision, but currently provides: "Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity]."[49] The double hatting discussion usually occurs in the context of ISDS proceedings rather than commercial proceedings. However, current and past service for any of the parties and/or with members of the tribunal, or in respect of the same or related contracts, could be the subject of disclosure obligations in commercial proceedings.

(c) **Article 11—"enforcement".**

Given that compliance with obligations to refrain from and disclose conflicts of interest has not been fully addressed in the past, the focus on "enforcement" is noteworthy. The parameters of enforcement are yet to be determined. Article 11 provides only for removal of an arbitrator who does not comply with the code of conduct under the rules which already exist for arbitrator removal.[50] However, the Draft Code of Conduct provides for "[Other options based on means of implementation of the code]."[51] The Commentary to Version One of the Draft Code explained the other sanctions in contemplation which include:

(i) monetary/remuneration sanctions;
(ii) disciplinary measures;
(iii) reputational sanctions; and
(iv) notifications to professional associations.[52]

[46] ISDS Code of Conduct art.10(2)(a).
[47] ISDS Code of Conduct art.10(2)(b).
[48] ISDS Code of Conduct art.10(2)(c).
[49] ISDS Code of Conduct art.4.
[50] ISDS Code of Conduct arts 11(1)–(2).
[51] ISDS Code of Conduct art.11(3).
[52] Examples of monetary sanctions include fines and/or reimbursement of remuneration; disciplinary measures might require a separate administrative body to provide for such measures; which reputational sanctions could include the creation of a public list containing the names of arbitrators who are found to have violated the provisions of the code has been suggested. The sanctions have largely remained unchanged in Version Two. See Comments to ISDS Code of Conduct, paras 55–58.

The mandatory, non-discretionary disclosure obligations and consequences attached to non-disclosure are important developments. Commentaries have noted that participants in ISDS proceedings have been on the front line of many conflict of interest debates including issue conflicts and double hatting.[53] It appears that the ISDS actors have again been the first movers to push forward the necessary for required disclosures of potential sources of conflicts of interest. International commercial arbitration is lagging significantly.

B. The road forward for institutional commercial arbitration

International commercial arbitration institutions now need to address the specific area of disclosure of conflicts of interest to clarify the front end requirements. There is no quantitative analysis of the number of challenges to arbitral awards on the basis of conflicts of interest or lack of disclosure. Anecdotally, however, instances of challenges to awards on the basis of undisclosed conflicts of interest are increasing.

The only cogent way to prevent the backwards looking analysis becoming more prevalent in commercial arbitral proceedings is to set the requirements of disclosure clearly at the outset of proceedings. While certain institutions have begun the process of suggesting what disclosures should take place through Guidelines and Practice Notes, the introduction of mandatory codes of conduct or other similar mechanisms appear best placed to reset the footing on conflicts of interest.

The work done by the collaboration between the UNCITRAL Working Group III and ICSID should serve as a basis for inspiration to the commercial arbitral community. This inspiration has many levels. First, the Draft Code of Conduct shows the importance of tackling the issue of conflicts of interest is greater than any singular institution. The arbitral community must work together to enact change. Second, the substantial thinking behind the Articles enumerated in the Draft Code of Conduct should not be lost, but adapted to deal with commercial arbitration. Requiring each institution to build a code of conduct from scratch is not feasible.

The authors advocate a multi-institutional code of conduct be introduced by arbitral institutions. By implementing a mandatory code of conduct as part of institutional arbitral rules, institutions are filling the delta between the current institutional rules, soft law and the national court processes. The code of conduct implements a mandatory, non-discretionary disclosure regime which replaces or supplements the current system of soft law and guidelines. In this way, the code of conduct provides greater clarity for stakeholders at the front end of disputes and should remove perceived impropriety and issues of challenges to arbitrators and/or awards at late stages of the arbitration. Further, the mandatory and non-discretionary nature of arbitrator disclosures under the code of conduct should clarify what disclosures are expected of arbitrators.

A code of conduct is not expected to increase ad hoc requests from parties for more or continued disclosure. Rather, the fact that to a large extent arbitrator discretion or subjective assessment has been removed from facts or circumstances

[53] See e.g. K. Fach Gómez, "Drafting a Twenty-First Century Code of Conduct for International Investment Adjudicators", in J. Chaisse, L. Choukroune and S. Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, 2021).

disclosed ought to make the process more transparent and useful (compared to a continued volleying of disclosure requests and responses between parties and arbitrators). Finally, any legal duties of disclosure to which arbitrators are subject (e.g. in England and Wales) will not be displaced by disclosure obligations under the code of conduct. To the extent the disclosure obligations are not coterminous, an arbitrator will need, of course, to ensure it is complying with both duties placed upon it.

Collaboration between institutions and within the commercial arbitral community more broadly on the code of conduct has multiple benefits:

(a) it provides for standards across many commercial institutions which clarifies party and arbitrator understandings of what is expected;

(b) the process of debating—cross-institution—what should and should not be included in the code of conduct, the sanctions for failing to follow the code and the methods for administering the code will flesh-out points of similarity and difference. The obvious need for revisions to codes of conduct in the future should not preclude progress now;

(c) implementation of the code of conduct and the accompanying additional arbitrator disclosure should foster diversity and inclusion in arbitral panels. The so-called "closed club" of arbitrators benefits from a lack of transparency and repeat/cross-appointments. By mandating disclosure of non-discretionary information, parties should be able to recognise signs of the closed nature of the arbitrator club and to add diversity to arbitral panels;

(d) collaboration between institutions should lead to formation of an administering body which can administer the code of conduct across institutions. Disparate administration is not ideal. The costs and administrative load for a separate administrative body for each institution are disproportionate. Pooling resources would alleviate many of those issues. Further, a common administering body promotes the necessary information sharing for enforcement mechanisms against offending arbitrators and harmonisation of sanctions.

There *may* be some in the arbitral community who point to differences between ISDS and commercial arbitration as a point against importing a code of conduct into commercial arbitration. However, to a meaningful extent, the arbitral community has not accepted that different standards of impartiality or independence to arbitrators should apply to arbitrators sitting in ISDS relative to international commercial proceedings. Commentators have noted that in terms of the IBA Guidelines on Conflicts of Interest, the drafting committee discussed, but was not persuaded, to provide for distinctions between the applications or standards of arbitrator independence or impartiality.[54] To the extent modifications do need to be made for international commercial arbitration compared to ISDS, it appears the

[54] See Nathalie Voser and Angelina M. Petti, "The Revised IBA Guidelines on Conflicts of Interest in International Arbitration" (2015) 33(1) *ASA Bulletin* 12; Paula Hodges, "Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?", in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Vol.19 (Kluwer 2017), pp. 606–607.

draft code of conduct could readily accommodate such modifications without need for substantial debate.

One issue worth further consideration relates to arbitrator duties of confidentiality to parties in respect of other proceedings whether historic or concurrent. A close inspection of the non-discretionary disclosure sought under the code of conduct[55] suggests that most categories of information do not create greater confidentiality concerns than an arbitrator will already face when using the IBA Guidelines. This is because arbitrators are arguably already required to disclose other appointments they have received from the parties or their related companies in other arbitrations and the code of conduct is unlikely to require further disclosure in respect of the parties. To the extent there are additional appointments across related contracts, arbitrators could be required to disclose appointments on matters of related contracts without divulging the names of the parties to those disputes. Confidentiality may now become the new "battleground" with arbitrators seeking to use confidentiality as a basis not to share information. Lady Arden in *Halliburton v Chubb Bermuda Insurance Ltd*[56] (persuaded by the seminal work *A Guide to the ICC Rules of Arbitration*, by Derains and Schwartz, 2nd edn (2005)) made clear that an arbitrator may need to decline an appointment if one of the parties in the overall "disclosure matrix" does not consent:

> "… if more information is required (or, I would add, at least if it is reasonably required), it cannot be disclosed without the relevant parties' consent. If consent is not forthcoming, the arbitrator will have to decline the proposed appointment …"

While there may be certain instances where arbitrators feel they must retain confidentiality rather than disclose, the arbitrators, parties and institutions have the ability to assess whether or not the invocation of confidentiality should be allowed or whether its invocation amounts to circumstances which might arise to the level of justifiable doubts as to independence or impartiality. Where arbitral rules do not currently allow arbitrators to disclose information related to their other appointments for the purposes of assessing conflicts of interest in order to comply with the code of conduct, arbitral rules could be amended to allow for such (limited) disclosures. While confidentiality may be impacted in certain cases, confidentiality obligations should flex to the extent necessary to allow the assessment of conflicts of interest under the code of conduct. The issue of confidentiality should be an academic question because it is in all stakeholders' interests to allow the code of conduct to function properly.

V. Conclusion

Tangible concerns surrounding arbitrator conflicts of interest and disclosure obligations need to be fixed. In the face of continued challenges, the arbitral community must not fall into the trap of letting the pursuit of a perfect solution "be the enemy of the good". All stakeholders should view the implementation of a code of conduct which moves arbitrator disclosure from its current state to

[55] ISDS Code of Conduct art.10.
[56] *Halliburton v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 at [187] and [188].

mandatory, non-discretionary information with certain sanctions for non-disclosure as an essential but incremental step forward. Revisions to the code, including its expansion or contraction, may be inevitable. However, the current system of late stage and collateral challenges to arbitrators and arbitral awards must concern users of arbitration. Ensuring impartiality is a key principle of arbitration law. Greater transparency and non-subjective provision of information on the front end in terms of arbitrator disclosure appears to be the rational and proportionate solution.