CPR
Dispute Resolution

Guidelines for Arbitrator Disclosure

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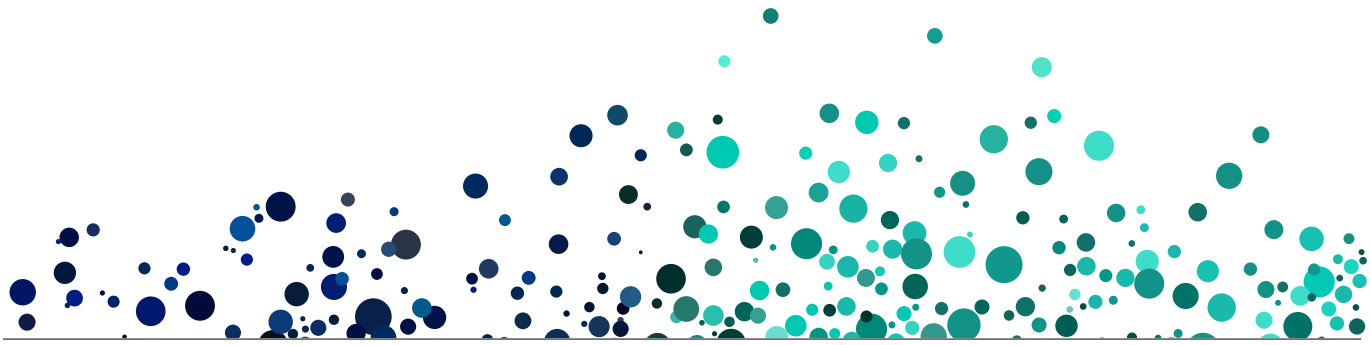

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Guidelines for Arbitrator Disclosure

These Guidelines provide arbitrators with practical guidance on preparing their disclosures in accordance with prevailing standards, such as the CPR-Georgetown Model Rule for the Lawyer as a Third-Party Neutral, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, the IBA Guidelines on Conflicts of Interest in International Arbitration, and the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution. These Guidelines are intended to apply to arbitration proceedings generally, including proceedings conducted under CPR's various rule sets.

Except in atypical circumstances not addressed by these Guidelines, arbitrators must be independent and impartial, regardless of whether they have been appointed by a party, their co-arbitrators, an administering institution, or an appointing authority. If there are any circumstances that might give rise to justifiable doubts regarding an arbitrator's independence or impartiality,[1] the arbitrator typically must disclose such circumstances. Failure to make required disclosures may result in a successful challenge to the arbitrator during the arbitral proceeding and, in certain circumstances, vacatur or refusal to enforce an award.

While the aforementioned standards set out substantive requirements as to *what* an arbitrator should disclose, there appear to be few resources providing guidance on *how* an arbitrator should prepare such disclosure. These Guidelines are intended to fill this gap by providing practical recommendations for arbitrators in identifying interests and relationships that they may need to disclose, and in drafting a written disclosure statement. Arbitrators are encouraged to implement these Guidelines in their practice as they deem appropriate and practicable, depending on their individual and specific circumstances.

These Guidelines do not set any "standards" for the conduct of arbitrators. It is *not* intended that a court or an arbitral institution will consult these Guidelines to determine whether an arbitrator violated a duty to investigate or disclose. Rather, the Guidelines seek to facilitate the disclosure process, thereby helping to ensure that applicable laws, rules or standards are met.

1. CONFIRMATION OF DISCLOSURE REQUIREMENTS

An arbitrator's disclosure should be made in accordance with applicable laws, rules or standards.[2] An arbitrator should be familiar with the disclosure requirements provided therein.

1. *See* CPR 2019 Administered Arbitration Rules (Mar. 1, 2019), Rule 7.3. Other standards may define the circumstances warranting disclosure differently. For example, the IBA Guidelines on Conflicts of Interest in International Arbitration (2024) require an arbitrator to disclose "facts or circumstances … that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence." *See* IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024), p. 7, General Standard 3(a). *See also*, ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (Mar. 1, 2004), Canon II(A); UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024), Art. 11(1).

2. Such standards may include the CPR-Georgetown Model Rule for the Lawyer as a Third-Party Neutral, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, the IBA Guidelines on Conflicts of Interest in International Arbitration, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution. The laws and rules applicable at the seat of arbitration, or otherwise applicable to the arbitrator, and the agreement between the parties may include different or heightened disclosure standards. Jurisdictions that provide different or heightened disclosure requirements may include California, the District of Columbia, and certain jurisdictions outside the United States.

Prior to appointment, each prospective arbitrator should typically submit a written disclosure statement in accordance with the applicable laws, rules or standards regarding the arbitrator's impartiality and independence. The disclosed circumstances are interchangeably referred to as "potential conflicts of interest" or "potential conflicts" throughout these Guidelines. Each arbitrator should bear in mind that *potential* conflicts of interest, which warrant disclosure, are broader than *actual* conflicts of interest, which warrant declination of an appointment.[3]

Each prospective arbitrator should be provided with certain minimum information about the arbitration, including:

- the names of the parties to the dispute;
- a summary of the dispute, including the subject matter, applicable law, and seat and language of arbitration;
- the names of counsel to the parties (to the extent known at the time of appointment); and
- the names of any other persons or entities against which an ADR provider or a party has requested the arbitrator to check for potential conflicts of interest, such as a known material witness, a third-party who has a controlling influence over a party or over which a party has a controlling influence, as well as a third party who has a direct economic interest in the outcome of the arbitration, such as a third party funder.[4]

An arbitrator should perform a conflict check for each of the aforementioned entities and individuals to confirm if there are any circumstances that need to be disclosed or that warrant declination of the appointment.

2. MAINTAINING A CONFLICTS DATABASE

In performing a conflict check, an arbitrator should *not* rely only on general recollection or memory. Instead, the arbitrator should perform a conflict check by reference to a conflicts database maintained by the arbitrator.

A conflicts database is a searchable database maintained by the arbitrator that contains information necessary to conduct a conflict check for purposes of an arbitral appointment. A conflicts database may be maintained in the form of a spreadsheet or other electronic document that is readily susceptible to word searches.

3. For example, the IBA Guidelines on Conflicts of Interest in International Arbitration (2024) make clear that only objectively "justifiable" doubts warrant disqualification of an arbitrator (absent informed party consent), but that any facts or circumstances that "may, in the eyes of the parties, give rise to doubts" (whether or not "justifiable") shall be disclosed, and that any doubts concerning disclosure "should be resolved in favour of disclosure." *See* IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024), pp. 6-7, General Standards 2(b), 3(a), and 3(d).

4. For illustrative purposes, ownership of shares in a mutual fund over which the holder of shares has no control would not be considered a "direct economic interest."

A conflicts database should include key details of previous and pending arbitrations for which the arbitrator served or is serving as an arbitrator, or other cases in which the arbitrator was or is otherwise involved. For each case such details should include, as applicable:

- the parties to the arbitration;[5]
- the case caption and/or docket number;
- the administering institution, if any;
- counsel of record in the arbitration and any other counsel to the parties in the arbitration;[6]
- all arbitrators who constituted the tribunal alongside the arbitrator for the period of the arbitrator's involvement in the arbitration;
- the manner of appointment of the arbitrator (*i.e.*, by a party, the co-arbitrators, the administering institution, or the appointing authority);
- the date of appointment of the arbitrator;
- the date of conclusion of the arbitrator's role in the arbitration, including the nature of the conclusion (*i.e.*, resignation, successful challenge to the arbitrator, rendering of a final award);
- the outcome of the case, to the extent known by the arbitrator;
- to the arbitrator's knowledge, whether the existence of the arbitration and/or its outcome is public; and
- if disclosed by a party, a third-party who has a controlling influence over a party or over which a party has a controlling influence, as well as a third-party who has a direct economic interest in the outcome of the arbitration.

Arbitrators may wish to include additional information in their conflicts databases, such as the names and affiliations of expert witnesses, fact witnesses and/or corporate representatives who have appeared before them. It is acceptable not to include such information, however, and in that case the arbitrator may wish to note in a general (blanket) disclosure (*see* Section 5.B. below) such limitation on the arbitrator's conflicts database.

The conflicts database should, at a minimum, include all cases in which the arbitrator played a role within the last five years from when the arbitrator is making the written disclosure. This time period accords with CPR's requirement[7] that a disclosure statement include events occurring within that same time period.[8]

5. The database should note both the legal name and the trading name (or d/b/a name) by which the entity is known.

6. The database should endeavour to identify all counsel involved in prior proceedings even if the arbitrator did not personally interact with all of them. This list could be compiled by consulting the list of counsel in the signature blocks of the written submissions and the list of counsel identified on the record as attending oral hearings, or otherwise included as counsel of record for purpose of distribution of correspondence.

7. Other arbitral institutions may require a different time period.

8. The applicable laws, rules or standards may provide for a different time-period. *See, e.g.*, IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024), pp. 17-8 (requiring disclosure of certain Orange List items occurring within the last three years).

There may be circumstances where the conflicts database is not able to cover the applicable five-year time period for reasons beyond the arbitrator's reasonable control. For example, the arbitrator may no longer have access to information in a conflicts database maintained by a law firm or set of chambers with which the arbitrator was formerly associated. In such circumstances, the arbitrator should disclose in a written disclosure statement the time period covered by the arbitrator's own conflicts database. The arbitrator should then supplement the information contained in the conflicts database with general recollection and memory of other relevant information. Note that, if feasible and permitted by the arbitrator's former law firm, in preparation for the arbitrator's departure from the firm, the arbitrator should create an index of all cases that the arbitrator worked on while associated with the firm within the previous five years. The arbitrator should continue to consult this index when preparing future disclosure statements for a minimum period of five years from the date of departure from the firm.

An arbitrator may have the conflict check performed by an assistant. In that case, the arbitrator should provide sufficient training and supervision to ensure that the assistant properly performs the conflict check. Ultimately, the responsibility for the disclosure belongs to the arbitrator.

3. CONSIDERATIONS FOR ARBITRATORS AT LAW FIRMS

In performing a conflict check, an arbitrator at a law firm should ensure that the conflict check covers interests and relationships of other members of the law firm, which may give rise to potential conflicts of interest.

The arbitrator may rely on the law firm's conflicts database in performing a conflict check. It is advisable that the law firm maintain a comprehensive conflicts database listing the information identified in Section 2. If the law firm does not maintain such a database, the arbitrator should be familiar with the scope of the firm's conflicts database, including any limits or deficiencies.

If the arbitrator concludes that the firm's database is insufficient, the arbitrator should perform a conflict check using other available means, and/or develop an individual conflicts database to include information that is not covered by the firm's database, and perform the necessary conflict check against both the firm's and the arbitrator's database. The arbitrator should consider disclosing any limitation(s) of the firm's conflicts database in the arbitrator's written disclosure statement.

4. CONFLICT CHECKS BEYOND THE DATABASE

The prevailing disclosure standards typically list certain categories of interests and relationships that could give rise to a potential conflict of interest, but which one would not expect to be included in a conflicts database. Examples include the arbitrator's personal interests and relationships, and those involving the arbitrator's family or household members.

In performing a conflict check for these interests and relationships, it is generally acceptable for an arbitrator to rely primarily on memory and recollection and not to investigate further. However, if the arbitrator has reason to believe that there *might* be an interest or relationship that could give rise to a potential conflict of interest, the arbitrator should investigate to confirm if such potential conflict indeed exists, to the extent reasonable and practicable.

In investigating interests or relationships involving a family or household member, or a third party, the prospective arbitrator should not disclose any confidential information to such family member, household member, or third party.

5. DRAFTING A DISCLOSURE STATEMENT

A. Disclosure of Potential Conflicts

Absent a form provided by an ADR provider, an arbitrator's written disclosure statement should provide a brief summary of each of the potential conflicts that the conflict check revealed. The applicable laws, rules, or standards typically do not require disclosure of information that does not give rise to a justifiable doubt of independence and impartiality. As a general rule, however, if the arbitrator is not certain as to whether the interest or relationship requires disclosure, the arbitrator should err on the side of caution and disclose.

Unless otherwise provided under the applicable laws, rules or standards, the arbitrator must not include confidential information in the written disclosure statement. To avoid revealing such confidential information, it is generally acceptable to disclose the fact that counsel or an expert witness has appeared before the arbitrator, or the fact that the arbitrator and a co-arbitrator previously were or are members of the same arbitration panel, without disclosing any confidential information. Particular caution is necessary when disclosing the identities of the parties in a confidential arbitration. If the arbitrator considers disclosure of such information necessary but is not authorized to disclose it, the arbitrator must either decline the appointment or, if permissible under the applicable laws, rules or standards, seek the parties' consent to proceed on the basis of partial disclosures.

If the conflict check reveals an *actual* conflict of interest, the arbitrator should decline the appointment. In such case, the arbitrator is not required to submit a written disclosure statement.

B. General Disclosure Statements

In addition to a list of potential conflicts, the arbitrator should consider providing general (or blanket) disclosures. General disclosures include an arbitrator's interests and relationships that are not included in the disclosure statement. General disclosures may consist of the prospective arbitrator's background, the scope and limitations of the conflict check performed, and other interests and relationships that typically do not give rise to justifiable doubts of independence or impartiality (and thus will not be specifically investigated unless the arbitrator has reason to believe that a potential conflict of interest might exist). While general disclosures may invite the parties' attention to trivial interests and relationships, they promote transparency, and give the parties an opportunity to ask follow-up questions of the arbitrator or investigate potential conflicts of interest for themselves.[9]

General disclosures may include: (1) professional and business associations, (2) use of social media, (3) family members in the legal profession, (4) law firms at which the arbitrator was previously an employee or partner, including whether the arbitrator still receives a percentage portion of that firm's current revenue, and whether the arbitrator still has access to the firm's conflicts database, and (5)

9. The parties' duty to investigate is outside the scope of these Guidelines.

limitations on the arbitrator's conflicts database, including the types of information and time period(s) that the database does not cover. Except for those specific to the arbitration, an arbitrator could make general disclosures by referring to the arbitrator's website and/or disclosed CV.

6. CONTINUING OBLIGATION OF DISCLOSURE

An arbitrator's duty to disclose does not end with the submission of a pre-appointment disclosure statement. The duty to disclose is a continuing duty that requires the arbitrator to continue to disclose, as soon as practicable, any potential conflicts of interest that arise, or are recalled or discovered, during the pendency of an arbitration. Below are some common circumstances that could arise during the pendency of an arbitration that may warrant supplemental disclosures.

- If an arbitrator realizes that an initial disclosure statement failed to include information that should have been disclosed, the arbitrator must disclose such information as soon as practicable after it is recalled or discovered.

- In all cases where new participants become involved in a pending arbitration (*e.g.*, a new party is joined, a fact or expert witness is added, a new lawyer is added to a party's counsel team, or counsel for a party associates with a new law firm and continues to serve as party representative), the arbitrator should perform a new conflict check to identify any interests or relationships that may require disclosure with respect to the new participant or changed circumstance.

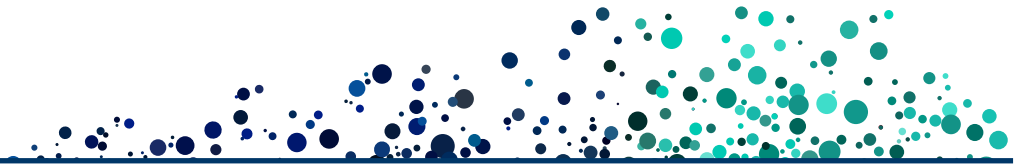
- If an arbitrator becomes aware that someone with whom the arbitrator has a relationship has been newly employed by or associated with one of the participants in the arbitration, the arbitrator should perform a conflict check to confirm if the relationship gives rise to a potential conflict of interest.

- If an arbitrator switches law firms, or the arbitrator's law firm is merged with another law firm, the arbitrator should perform a new conflict check with reference to the new or consolidated law firm's conflicts database to determine which potential conflicts of interest the arbitrator has now assumed by joining that firm or by virtue of the merger.[10]

- If possible, an arbitrator at a law firm should encourage the law firm to institute processes to investigate potential conflicts created by new hires.

- If an arbitrator at a law firm establishes an independent arbitrator practice, the arbitrator should disclose that fact to the parties, the co-arbitrators, and the administering institution.

10. The same considerations outlined in Section 3 *supra* apply with respect to this conflict check.



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CPR gratefully acknowledges the members of the Arbitrator Disclosures Task Force who contributed their expertise and time to create these Guidelines. The views expressed in this document do not reflect the views of the members' companies or firms. The titles and firms reflect the contributors' professional affiliations at the time of publication (August 2024).

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