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Ethical Rules of Conduct in Arbitration

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ABSTRACT

Arbitration is believed to be one of the ancient mechanisms of alternative dispute resolution. In Collins v. Collins, Romilly M.R. defined arbitration as a “reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.” Arbitration as an alternative dispute resolution mechanism is considered to be neutral, confidential, cost-effective, and when compared to litigation, capable of enabling settlement between the parties.

Historically, arbitrators were guided by the principle of internal ethos. A fundamental issue with regards to the arbitral process in International Commercial Arbitration is preserving the independence and impartiality of the arbitrators. Independence and impartiality are different terms but more often, they are used interchangeably. An impartial arbitrator is not biased in favor of a party or prejudiced against a party or its case whereas an independent arbitrator does not have any financial, professional, or personal relationship with a party or its counsel. Code of conduct and ethics of arbitrators have become an important topic for public debate today. There is a range of sources that set out the ethical obligations of arbitrators. Most of the national arbitration laws provide for the ethical obligations of arbitrators. In national courts, where a challenge to awards and arbitrators are brought, the courts via several decisions have guided with regards to various standards and how they apply in practice. Various specialized codes and rules are also in force to guide and govern the conduct of arbitrators. Moreover, the guidelines enacted by the International Bar Association (IBA) are considered to be well reflective of international practice. The existence of so many sources of arbitrator’s obligations has, consequently, resulted in alteration of application of, say, an obligation of impartiality with the change in stage and context. Apart from the abovementioned obligations, arbitrators are obliged to conduct the arbitration in accordance with the arbitration agreement, they should be competent and diligent, and they are obliged to maintain confidentiality. Even though all arbitral institutions have not developed ethical codes for arbitrators, they all rely on certain rules that impose ethical obligations on arbitrators.

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I. INTRODUCTION

One Arbitration is believed to be one of the ancient mechanisms of alternative dispute resolution. In *Collins v. Collins*³, Romilly M.R. defined arbitration as a “reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.” Arbitration as an alternative dispute resolution mechanism is considered to be neutral, confidential, cost-effective, and when compared to litigation, capable of enabling settlement between the parties.

Historically, arbitrators were guided by the principle of internal ethos. A fundamental issue with regards to the arbitral process in International Commercial Arbitration is preserving the independence and impartiality of the arbitrators. Independence and impartiality are different terms but more often, they are used interchangeably. An impartial arbitrator is not biased in favor of a party or prejudiced against a party or its case whereas an independent arbitrator does not have any financial, professional, or personal relationship with a party or its counsel.⁴ Code of conduct and ethics of arbitrators have become an important topic for public debate today. There is a range of sources that set out the ethical obligations of arbitrators. Most of the national arbitration laws provide for the ethical obligations of arbitrators. In national courts, where a challenge to awards and arbitrators are brought, the courts via several decisions have guided with regards to various standards and how they apply in practice. Various specialized codes and rules are also in force to guide and govern the conduct of arbitrators. Moreover, the guidelines enacted by the International Bar Association (IBA) are considered to be well reflective of international practice. The existence of so many sources of arbitrator’s obligations has, consequently, resulted in alteration of application of, say, an obligation of impartiality with the change in stage and context. Apart from the abovementioned obligations, arbitrators are obliged to conduct the arbitration in accordance with the arbitration agreement, they should be competent and diligent, and they are obliged to maintain confidentiality. Even though all arbitral institutions have not developed ethical codes for arbitrators, they all rely on certain rules that impose ethical obligations on arbitrators.

II. NATIONAL LAWS

Most of the national arbitration laws have specific obligations concerning the ethical conduct

³ *Collins v. Collins* (1858) 26 Beav.306, 312

⁴ Hong-Lin Yu & Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators—U.S. and English Perspectives*

of arbitrators. Some of them are as follows:

(A) United Kingdom

Arbitration proceedings in England and Wales and Northern Ireland are governed by the Arbitration Act, 1996.⁵ Section 1(a) of the Arbitration Act, 1996 states that “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”.⁶ Arbitrators are required to act fairly and impartially between the parties.⁷

In *Halliburton Company v. Chubb Bermuda Insurance Limited*⁸, the Court of Appeal observed that the test to be applied by the Courts with regards to impartiality is an objective one: would a fair-minded and informed observer, having considered all the facts, conclude that there was a real possibility that the Tribunal was biased?⁹

Even though the Arbitration Act is silent on the duty of disclosure of arbitrators, the Court of Appeal, in *Halliburton Company v. Chubb Bermuda Insurance Limited* determined the test for disclosure. This test was subsequently upheld by the Supreme Court¹⁰ and held that arbitrators have a legal duty to disclose matters which would, or might, lead to the conclusion that there is a real possibility that they are biased. The Supreme Court, however, clarified that an arbitrator’s legal duty of disclosure does not override his/her concurrent duty of privacy and confidentiality under English law and such disclosures can only be made if the parties give their express or implied consent.¹¹

Section 24: Power of 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;
- (b) that he does not possess the qualifications required by the arbitration agreement;
- (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

⁵ <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/united-kingdom>

⁶ <https://www.legislation.gov.uk/ukpga/1996/23/section/1>

⁷ Section 33(1)(a), Arbitration Act, 1996; See, <https://www.legislation.gov.uk/ukpga/1996/23/section/33>

⁸ [2018] EWCA Civ 817

⁹ [https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true)

¹⁰ *Halliburton Company v. Chubb Bermuda Insurance Limited* [2020] UKSC 48

¹¹ See, [https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default))

- (d) that he has refused or failed—
- (i) properly to conduct the proceedings, or
 - (ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

Section 29- Immunity of arbitrator.

- (1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.¹²

(B) United States

The Federal Arbitration Act is the legislative framework that provides for the enforcement of arbitral agreements and arbitral awards in the United States.

Justice Black in the case of *Commonwealth Coatings*¹³ held that it,

“is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges since the former have completely free rein to decide the law, as well as the facts and, are not subject to appellate review.”¹⁴

He further observed that the efficacy of 'the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.'¹⁵

Section 10 of the Federal Arbitration Act, United States grants Courts the power to vacate an arbitral award when:

- ➔ the award was procured by fraud, corruption, or undue means.
- ➔ there is evident partiality or corruption in the arbitrators or either of them.
- ➔ the arbitrators were guilty of misconduct or any misbehavior by which the rights of any party have been prejudiced.
- ➔ the arbitrators exceeded their powers, etc.¹⁶

One of the major ethical standards arbitrators are expected to follow is the disclosure of

¹²[https://uk.practicallaw.thomsonreuters.com/0-107-1398?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-107-1398?transitionType=Default&contextData=(sc.Default)&firstPage=true)

¹³ *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145 (1968)

¹⁴http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=203#:~:text=It%20is%20true%20that%20arbitrators,have%20completely%20free%20rein%20to

¹⁵ *Ibid*

¹⁶ <https://sccinstitute.com/media/37104/the-federal-arbitration-act-usa.pdf>

conflicts of interests such as pecuniary interest in the outcome of an arbitral proceeding or any kind of relationship with the parties, etc. The Federal Arbitration Act has been interpreted to provide certain obligations to the arbitrators with regards to such disclosures so that the “evident partiality” prohibition in the statute is not violated.¹⁷ Arbitrators should exercise their impartial and independent judgment in rendering arbitral awards. This means that they should not be influenced by any of the parties in the arbitration or even outside parties, for that matter.

(C) Australia

The International Arbitration Act, 1974 governs International Commercial Arbitrations in Australia. Section 18A of the International Arbitration Act, 1974 is a reference to Article 12 of the UNCITRAL Model Law on International Commercial Arbitration and is self-explanatory. It says:

Article 12—justifiable doubts as to the impartiality or independence of an arbitrator

(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.

(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.¹⁸

Furthermore, Section 23D prohibits disclosure of confidential information by the arbitral tribunal except under exceptional circumstances as envisaged under the Act.¹⁹

¹⁷ 9 U.S.C. § 10

¹⁸ <https://www.legislation.gov.au/Details/C2018C00439>

¹⁹ 23D Circumstances in which confidential information may be disclosed

(1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by:

- (a) a party to the arbitral proceedings; or
- (b) an arbitral tribunal.

(2) The information may be disclosed with the consent of all of the parties to the arbitral proceedings.

(3) The information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings.

(4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party’s case and the disclosure is no more than reasonable for that purpose.

(5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.

(6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.

28 Immunity -- (1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.

Sec. 18A of this act or Art 12 of UNCITRAL Model law on International commercial Arbitration deals with the grounds for challenge.

(D) Hong Kong

Section 25 of the Hong Kong Arbitration Ordinance is the same as discussed in the Australian context, which is an adoption of Article 12 of the UNCITRAL Model Law – Grounds for Challenge. It says:

“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.”²⁰

Section 25.

Article 12 of UNCITRAL Model Law (Grounds for challenge)

Article 12 of the UNCITRAL Model Law, the text of which is set out below, has effect—

“*Article 12. Grounds for challenge*

(7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.

(8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.

(9) The information may be disclosed if the disclosure is authorised or required by another relevant law, or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to:

- (a) if the person is a party to the arbitral proceedings—the other parties to the proceedings and the arbitral tribunal; and
- (b) if the arbitral tribunal is making the disclosure—all the parties to the proceedings.

(10) In subsection (9):

another relevant law means:

- (a) a law of the Commonwealth, other than this Act; and
- (b) a law of a State or Territory; and
- (c) a law of a foreign country, or of a part of a foreign country:
 - (i) in which a party to the arbitration agreement has its principal place of business; or
 - (ii) in which a substantial part of the obligations of the commercial relationship are to be performed; or
 - (iii) to which the subject matter of the dispute is most commonly connected.

23E Arbitral tribunal may allow disclosure in certain circumstances

(1) An arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in section 23D.

(2) An order under subsection (1) may only be made at the request of one of the parties to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

²⁰ Section 25(2) of the Arbitration Ordinance, See, https://www.elegislation.gov.hk/hk/cap609?xid=ID_1438403521040_002

(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.”.

(E) Singapore

Section 14 of the Arbitration Act, 2001 deals with Grounds for Challenge. It reads:

“**14.** (1) Where any person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.

(2) An arbitrator shall, from the time of his appointment and throughout the arbitral proceedings, disclose without delay any such circumstance as is referred to in subsection (1) to the parties unless they have already been so informed by him.

(3) Subject to subsection (4), an arbitrator may be challenged only if —

a) circumstances exist that give rise to justifiable doubts as to his impartiality
or independence; or

b) he does not possess the qualifications agreed to by the parties.

(4) A party who has appointed or participated in the appointment of any arbitrator may challenge such arbitrator only if he becomes aware of any of the grounds of challenge set out in subsection (3) as may be applicable to the arbitrator after the arbitrator has been appointed.”²¹

Section 16: Failure or impossibility to act

(1) A party may request the Court to remove an arbitrator

(a) who is physically or mentally incapable of conducting the proceedings or where there are

²¹ <https://sso.agc.gov.sg/Act/AA2001#pr14->

justifiable doubts as to his capacity to do so; or

(b) who has refused or failed - (i) to properly conduct the proceedings; or (ii) to use all reasonable despatch in conducting the proceedings or making an award, and where substantial injustice has been or will be caused to that party.

(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 it is satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) While an application to the Court under this section is pending, the arbitral tribunal, including the arbitrator concerned may continue the arbitration proceedings and make an award.

(F) China

Article 34 of the Arbitration Law of the People's Republic of China reads as follows:

“Article 34 In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal:

- (1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case;
- (2) The arbitrator has a personal interest in the case;
- (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or
- (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent.”²²

Moreover, Article 58A(6) states that a party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that “the arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case”²³.

These are the ways in which some of the national laws contribute to defining the ethical obligations of arbitrators. These specific provisions usually pertain to either challenges to arbitrators or to the review of awards. While the national courts apply these standards, they have created a rich jurisprudence with regards to the aspects of impartiality, independence,

²² <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn138en.pdf?crazycache=1>

²³ <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn138en.pdf?crazycache=1>

and the nature as well as volume of proof required so as to establish a violation. Certain national laws mandate the disclosure of information by the arbitrators such as any potential conflicts of interests.²⁴

Article 34 - In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal:

- (1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case;
- (2) The arbitrator has a personal interest in the case;
- (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or
- (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent.

Article 38: If an arbitrator is involved in the circumstances described in item (4) of Article 34 of this Law and the circumstances are serious or involved in the circumstances described in item (6) of Article 58 of this Law, he shall assume legal liability according to law and the arbitration commission shall remove his name from the register of arbitrators.

Article 58: A party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following -

- (6) The arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case.

III. INSTITUTIONAL RULES

Generally, ethical obligations and requirements set out in arbitral rules are applied exclusively by the Arbitral Institutions. If a similar allegation is subsequently brought before the National Courts, either concerning challenge to an arbitrator or regarding an arbitral award, Courts generally apply the provisions of applicable International Convention or the national legislation.²⁵ Most courts defer to the arbitral rules of the institution, that usually provide that such institution itself is the final interpreter of its own rules.²⁶ There are

²⁴ https://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-49international_arbitration.pdf

²⁵ AT&T Corporation v. Saudi Cable Co., 2 Lloyd's Rep. 201 (Ct. App. 2000).

²⁶ For example, ICC Rules of Arbitration, Art 7(4) ("The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated.").

instances where courts have looked at the ethical standards as set out in the institutional rules to evaluate the expectations of the parties with regards to impartiality.²⁷

(A) Rules of Ethics, International Bar Association

International Bar Association (IBA) introduced the “Rules of Ethics” to govern the conduct of International Arbitrators and its introductory note states as follows:

“International arbitrators should be impartial, independent, competent, diligent and discreet. The rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, the Rule of Ethics reflects internationally acceptable guidelines developed by practising lawyers from all continents. They will attain their objectives only if they are applied in good faith.”²⁸

The Rules of Ethics is comprehensive enough to accommodate relevant ethical aspects in arbitration such as bias, disclosure requirements, confidentiality, etc. The IBA rules shall not be deemed to be binding upon the arbitrators unless they are adopted by way of an agreement. These rules were not formulated to lay down grounds for setting aside an arbitral award by national courts. However, the thumb rule being, arbitrators “shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes and shall be and remain free from bias.”²⁹

Under the Rules of Ethics, an arbitrator shall accept an appointment only if:

- ➔ he is fully satisfied that he is able to discharge his duties without bias;
- ➔ he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of arbitration; and
- ➔ he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.³⁰

As per the Rules of Ethics, the aspect of bias can be prevented by full disclosure. A prospective arbitrator ““should disclose all facts or circumstances which give rise to justifiable doubts as to his impartiality or independence.”³¹ Prior to appointment,

²⁷ See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2nd Cir. Jul 09, 2007) (reasoning that “[i]t is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that will adhere to these standards.”)

²⁸ https://www.trans-lex.org/701100/_/iba-rules-of-ethics-for-international-arbitrators-1987/

²⁹ https://www.andersonkill.com/Custom/PublicationPDF/PublicationID_1609_Ethics-in-International-Arbitration.pdf

³⁰ *Ibid*

³¹ Section 4.1 A, Rules of Ethics

communication with the parties is allowed to meet the objectives of:

- ➔ ensuring that the potential arbitrator possess the requisite time to engage with the proceeding,
- ➔ avoiding conflicts, and
- ➔ for the selection of a presiding arbitrator when there are three arbitrators.³²

Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.

Nondisclosure of an indirect relationship unknown to a prospective arbitrator will not be a ground for disqualification unless it could have been ascertained by making reasonable enquiries;

The Rules, however, discourage *ex parte* communications with the parties.³³ The arbitrators are also required to observe duty of diligence and are required to do their best to conduct the arbitration in a manner by which costs do not rise significantly in relation to the interests at stake.³⁴

Involvement in Settlement Proposals: Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other. Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration.

The International Bar Association takes the position that (whatever may be the case in domestic arbitration) international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations. Accordingly, the International Bar Association wishes to make it clear that it is not the intention of these rules to create opportunities for aggrieved parties to sue international arbitrators in national courts. The normal sanction for breach of an ethical duty is removal from office, with consequent loss of entitlement to remuneration. The International Bar Association also

³² Section 5.1 & Section 5.2, Rules of Ethics

³³ Section 5.3, Rules of Ethics

³⁴ INT'L BAR ASS'N, *supra* note 15, at 338, § 7

emphasises that these rules do not affect, and are intended to be consistent with, the International Code of Ethics for lawyers, adopted at Oslo on 25 July 1956, and amended by the General Meeting of the International Bar Association at Mexico City on 24 July 1964.

(B) HKIAC Code

The Preamble of Hong Kong International Arbitration Centre's Code of Ethical Conduct ("HKIAC Code") states as follows:

"In some instances, the ethics set down in HKIAC's Code of Ethical Conduct herein may be repeated in legislation governing the arbitration, case law or the rules which parties have adopted. In many instances, arbitrators will also be bound by other codes of practice or conduct imposed upon them by virtue of membership of primary professional organisations."³⁵

The Code, rather than providing stringent ethical rules, seeks to promote international norms. The key provisions in this regard are discussed below:

Rule One of the Code states that an arbitrator has an "overriding obligation to act fairly and impartially as between the parties at all stages of the proceedings."

Rule Two states that an arbitrator "shall be free from bias and shall disclose any interest or relationship likely to affect his or her impartiality or which might reasonably create an appearance of partiality or bias." It also states that "An arbitrator shall not permit outside pressure, fear of criticism or any form of self-interest to affect his or her decisions." The inclusion of "fear of criticism" is interesting but it suggests that an arbitrator must be independent and impartial. An arbitrator is barred from accepting "any gift or substantial hospitality, directly or indirectly, from any party to the arbitration, except in the presence of the other parties and/or with their consent."

Rule Three states that "an arbitrator shall only accept an appointment if he or she has suitable experience and ability for the case and available time to proceed with the arbitration." Rule Four states that "An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office." Rule Five deals with the fees of an arbitrator and it shall be "reasonable taking into account all the circumstances of the case." Rule Six bars an arbitrator from actively soliciting his/her appointment. However, he/she may "publicise their expertise and experience."³⁶

³⁵ HONG KONG INT'L ARB. CTR., CODE OF ETHICAL CONDUCT (2017), <http://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct>

³⁶ <https://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct>

(C) LCIA Rules, 2020

Article 5.3 of the LCIA Rules, 2020 provides that “All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or authorised representative of any party. No arbitrator shall give advice to any party on the parties’ dispute or the conduct or outcome of the arbitration.” Article 10 of the LCIA Rules, 2020 deals with Revocation and Challenges. Article 10.2 states that an arbitrator is unfit to act if he:

- ➔ “Acts in deliberate violation of the arbitration agreement,
- ➔ Does not act fairly or impartially as between the parties,
- ➔ Does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.”³⁷

Furthermore, Article 14 of the Rules deals with Conduct of Proceedings. Article 14.1(i) states that the Arbitral Tribunal has a duty to act fairly and impartially between all the parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s). Article 14.1(ii) states that has a duty to adopt procedures that are suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, expeditious and efficient means for the final resolution of the dispute.³⁸

(D) International Chamber of Commerce (ICC) Rules

Article 11(1) of the ICC Arbitral Rules provides that “every arbitrator must be and remain independent of the parties involved in the arbitration”.

Unless there is an agreement to the contrary, there is generally a presumption that a sole arbitrator cannot be of the same nationality as any of the parties. This can be seen in Article 13(5) of the ICC Arbitration Rules, which provides that a sole arbitrator appointed by the ICC “shall be of a nationality other than those of the parties.” The rules, however, provide for an exception “in suitable circumstances” and when neither party objects. The ICC Courts in Article 13(1) consider nationality as well as “residence and other relationships with the countries of which the parties or the other arbitrators are nationals”³⁹. Article 22(3) of the Rules states that the Tribunal “may make orders concerning the confidentiality of the arbitration proceedings” and “may take measures for protecting trade secrets and confidential information.” Article 22(4) states that the Tribunal “shall act fairly and

³⁷ https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%206

³⁸ Ibid

³⁹ ICC Rules, Article 9(1)

impartially and ensure that each party has a reasonable opportunity to present its case.”

Article 14 of ICC Rules of Arbitration, 2021: Challenge of Arbitrators

1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Article 15: Replacement of Arbitrators

1) An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator’s resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

2) An arbitrator shall also be replaced on the Court’s own initiative when it decides that the arbitrator is prevented de jure or de facto from fulfilling the arbitrator’s functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.

3) When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

(E) Code of Ethics, Singapore International Arbitration Centre

Principles of Ethical Behaviour for SIAC Arbitrators-- The principles for ethical behaviour of arbitrators have been defined relatively comprehensively by the Singapore International Arbitration Centre (SIAC), which issued in 2015 the Code of Ethics for an Arbitrator (CEA).

Article 1.3 of the CEA contains a mechanism for sanctions against the arbitrators, whose remuneration may be decreased by the registrar due to any failure to comply with the obligation regarding the fair, economical and final resolution of the dispute. This motivates the arbitrators to abide by CEA.

(F) Commercial Arbitration Rules, American Arbitration Association

The American Arbitration Association (AAA) has revised its commercial arbitration rules to change the default stance of party-appointed arbitrators from partisan to neutral. The AAA, the American Bar Association and the CPR Institute for Dispute Resolution have been working on revisions to the code of ethics, which has been renamed the Code of Ethics for Arbitrators in Domestic and International Commercial Disputes. This major change is meant to bring practice in the US more in line with international practice. The revised AAA rules now require that:

A party-appointed arbitrator must be impartial and independent and conduct duties with diligence and good faith. A party-appointed arbitrator is subject to disqualification for partiality or lack of independence, an inability to perform his duties in good faith, or other grounds for disqualification provided by the law.

(G) Code of Professional and Ethical Conduct of Members, Chartered Institute of Arbitrators (CI Arb)

CI Arb has jurisdiction to consider any allegation of misconduct made against any member of CI Arb, whether acting as an arbitrator, adjudicator, mediator or in any other capacity. Misconduct is defined in section 15.2 of the Bye-laws of CI Arb and shall mean one or more of the following:

- (1) Conduct which is injurious to the good name of CI Arb, renders a person unfit to be a member of CI Arb or is likely to bring CI Arb into disrepute.
- (2) A significant breach of professional or ethical conduct which shall include a breach of the Code of Professional and Ethical Conduct or other similar document published from time to time by CI Arb;
- (3) Falling significantly below the standards expected of a competent Practitioner or a competent professional person acting in the field of private dispute resolution;
- (4) A failure without reasonable excuse, to comply with a direction and/or a recommendation of a Peer Review Panel constituted under Bye-law 15.1;
- (5) A significant breach of any of the Articles of CI Arb or of these Bye-laws (or any Regulation or rule published thereunder from time to time).

What sanctions can be imposed by the Disciplinary Tribunal if the Tribunal finds that the charge is proved?

The Disciplinary Tribunal may impose one of the following sanctions:

- (1) reprimand or warn the member as to their future conduct;
- (2) suspend the member from membership of CIArb for a period not exceeding twelve months;
- (3) in the case of a member having chartered status, to withdraw that status without limit of time or for a specific period;
- (4) expel the member from CIArb;
- (5) make an appropriate order for costs (the order will be made in accordance with paragraph 8.6 of CIArb's Schedule to the Bye-laws).
