5th BVI ARBITRATION WEEK

Keynote II: Co-Arbitrator Conflicts:

PERCEPTIONS OF BIAS INTERNATIONALLY

THIS KEYNOTE WILL CONSIDER INTERNATIONAL NORMS DERIVED FROM NATIONAL LAWS, ARBITRAL INSTITUTIONS AND INTERNATIONAL ARBITRAL ORGANIZATIONS INCLUDING THE IBA, UNCITRAL AND THE COLLEGE OF COMMERCIAL ARBITRATORS.

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Co-Arbitrator Conflicts

There is not much written about co-arbitrator conflicts in the international arbitration literature. The question is whether or not co-arbitrators must disclose close relationships with colleagues on the same tribunal. Must we disclose that we are good friends with other members of the Chartered Institute of Arbitrators, that we have attended many conferences, that we have been to dinner on more than a couple of occasions? Must we disclose the fact that our regular golf partner is on the same tribunal? On the judicial front, it would be no surprise to discover two judges on a panel of three were close personal friends. No challenge for bias would be possible in that circumstance. Can the same be said for two arbitrators on the same panel who are very close friends?

As arbitrators, we are asked to disclose circumstances that might give rise to justifiable doubts as to independence or impartiality. The requirement of impartiality goes to state of mind, an absence of bias or predisposition to an issue or party. Independence goes to relationships or connections with a party, witness or counsel that might give rise to a reasonable apprehension of bias. Impartiality is a subjective matter, while independence is more of an objective inquiry.

A potential conflict involving co-arbitrators does not involve a connection to a party *per se*. It is more an inquiry into whether one arbitrator might influence the thinking of another. As such, it is difficult to fit the inquiry into the rubric of evident partiality or impermissible connection to a party. Nevertheless, in a system in which each party nominates one member of the tribunal, it may be cause for concern for one party to learn that the Chair is close friends with the other party's nominee.

Disclosure of All Connections to a Co-Arbitrator

It is not so simple as to just say that an arbitrator should make disclosure of any and all connections to a co-arbitrator. While it is always recommended that one err on the side of caution, there are a number of reasons for reluctance in making disclosures that are not legally required.

First of all, righteous appointments may be lost as a result of over-disclosure. Arbitral institutions may reject a potential appointee on a shortlist if there are numerous disclosures of potential conflicts. The parties themselves may be leery of even tenuous connections and may, out of an abundance of caution, reject a candidate who discloses a friendship with a third member of the tribunal.

Secondly, where there is disclosure of an insubstantial connection to a co-arbitrator, the challenger may say: "Why did you make the disclosure if there is no basis for concern?" This may be so even though it is generally accepted that disclosure of a possible conflict does not imply a bias. The arbitrator may feel compelled to concede a challenge where disclosure of a relatively insubstantial connection is made.

Should a relatively insubstantial connection be disclosed if the arbitrator is of the view that a court would not consider the connection to be grounds for disqualification? There is a tension between full and frank disclosure and a legal requirement to disclose tenuous connections.

The third argument for more limited disclosure is that disclosure may be a slippery slope. How detailed must the disclosure be? A listing of some but not all connections could lead to an adverse inference in respect of minor connections not disclosed. A party may complain that, while common membership in a professional organization or partnership in a law firm years earlier was disclosed, there was a failure to disclose frequent golf games or a very close friendship.

All three arbitrators are assumed to be independent and impartial, and that party-appointed arbitrators are not partial to the cause of their appointing party. It should, therefore, make no difference if two of the members of a tribunal are close personal friends. The reality, however, is that a party would be concerned to discover a close personal friendship between the nominee of the other party and the Chair. This would be so whether or not the Chair is appointed by a court, an arbitral institution, by the other two arbitrators or by the parties themselves. The concerned party may doubt just how impartial the nominee of the other party really is and worry that close friends on the tribunal may unduly influence each other's thinking.

Anecdotally, arbitrators in the United States are known to make extensive disclosures, including previous arbitrations involving the same arbitrator. It may be good form to disclose anything and everything, but is it legally necessary in an international arbitration? The root of the issue is the principle that there is always a duty to make disclosure of matters that on a common sense, objective view, ought to be brought to the attention of the parties. For present purposes, the narrow question for analysis is the extent to which two arbitrators must disclose a close friendship as a matter of law in an international arbitration.

Standards for specific disclosure obligations are usually found in the rules of arbitral institutions such as the BVI IAC or the ICDR and in codes established by international organizations such as the International Bar Association (IBA). A typical obligation is the requirement to disclose financial connections to a party, counsel or a witness. Standards for impartiality and independence, on the other hand, are usually found in arbitration statutes and court decisions applying those statutes. The usual standard is an obligation to disclose all circumstances that might give rise to justifiable doubts as to independence or impartiality.

International Norms

The starting point for discussion of co-arbitrator conflicts is the IBA Guidelines on Conflicts of Interest in International Arbitration. The Guidelines give examples under Waivable and Non-Waivable Red Lists, an Orange List of specific situations that may give rise to doubts as to impartiality or independence and a Green List of specific situations where no appearance of bias and no actual conflict of interest exists from an objective point of view. The Red Lists cover situations involving direct professional, personal or financial connections, all would recognize as a conflict of interest. The Green List is also an easy call. It includes membership in the same professional association, previous service as arbitrator, teaching in the same faculty or having served as speakers at conferences. The Orange List is more nuanced. It requires disclosure of a close personal friendship or enmity between an arbitrator and counsel for a party or the fact that the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel or law firm. The Orange List also suggests disclosure ought to be made if the arbitrator has acted as co-counsel with another arbitrator within the previous three years. Under the IBA Guidelines, co-arbitrators must disclose they are currently members of the same law firm or barristers' chambers.

What the IBA Red Lists, Orange List and Green List do not contain is any reference to close personal friendships between arbitrators. A close friendship with counsel for one of the parties must be disclosed under the Guidelines, but there is no express reference to the disclosure of close friendships between arbitrators. Paragraph 3 of the IBA Guidelines references a disclosure requirement where co-arbitrators are in the same firm or have been partners within the previous three years, or have acted as co-counsel within the previous three years. But there is no reference to co-arbitrators who are close personal friends. This may be because the foundational principle for the IBA Guidelines is that arbitrators must be independent and impartial of the parties, not each other.

There is one notable change in the evolution of the IBA Guidelines that is relevant to the current discussion. In the 2004 Guidelines, paragraph 3.3.6 required disclosure of a close personal friendship between an arbitrator and counsel "as demonstrated by the fact that the arbitrator and counsel regularly spend considerable time together unrelated to professional work commitments". The quoted words were deleted in the 2014 revised Guidelines. Whether it was deemed to be too restrictive to define a close personal friendship so narrowly is not clear. What is clear is that we do not find in the IBA Guidelines the answer to the question of whether co-arbitrators must disclose a close personal friendship, demonstrated by the fact that the arbitrators "regularly spend considerable time together unrelated to professional work commitments". Would a judge hearing a challenge to an award based on alleged non-disclosure of a close personal friendship between co-arbitrators be influenced by the fact that the IBA Guidelines provide for disclosure of such a relationship only between an arbitrator and counsel in paragraph 3.3.6? An argument could be made on either side of that question because there is a conspicuous omission in the Guidelines to provide for disclosure of a close personal friendship between two arbitrators.

The College of Commercial Arbitrators "Guide to Best Practices in Commercial Arbitration", 4th ed., at page 25 states: "Any ongoing or recent business or professional relationship between the proposed arbitrator and a party, counsel, a known witness, or a co-arbitrator should be disclosed." The cases cited in support of that proposition deal with evident partiality of party-appointed arbitrators based on a substantial connection to the appointing party, not to co-arbitrators. One of the cases cited did anticipate connections beyond just those to the parties. In *Barcon Associates, Inc. v. Tri-County Asphalt Corp.* 430 A.2d 214 (May 28, 1981), Supreme Court of New Jersey, Pashman, J, wrote:

> In addition, we establish prospectively the requirement that every arbitrator, whether party-designated or "neutral," disclose to the parties, prior to the commencement of arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives. This disclosure should also include **any other fact** which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality. (emphasis added)

In the last sentence, the Court suggests that any connection giving rise to evident partiality, whether between arbitrators and parties or otherwise, will require disclosure.

The American Arbitration Association *Code of Ethics for Arbitrators in Commercial Disputes*, Canon II A calls for disclosure of:

> (1) any known direct or indirect financial or personal interest in the outcome of the arbitration; (2) any known existing or past financial, business, professional or **personal relationships** which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any **co-arbitrator**, or with any individual whom they have been told will be a witness. (emphasis added)

In July 2023, UNICTRAL adopted a Draft Code of Conduct for Arbitrators in International Investment Dispute Resolution. In the Draft Code, independence is defined as the absence of a relationship with a disputing party that might influence an arbitrator's decision. Impartiality is defined as the absence of bias or predisposition of an arbitrator towards a disputing party that might influence the arbitrator's decision. Neither definition addresses a duty of disclosure of a relationship with a co-arbitrator. Article 11 of the Draft Code does, however, require disclosure by an arbitrator of any financial, business, professional or close personal relationship in the past five years with a co-arbitrator. This most recent statement of ethical obligations of arbitrators sets out the clearest duty of disclosure of possible grounds for a conflict with a co-arbitrator.

A review of standards for disclosure in international institutions shows the extent to which co-arbitrators must make disclosure of close personal friendships is a subject not fully developed. The requirements may, therefore, be better found in the applicable national law, i.e. the *lex arbitri*, the law in the place of arbitration. In considering national laws, it should be remembered that most arbitral institution rules and arbitration statutes simply require disclosure of any circumstance that might give rise to justifiable doubts as to impartiality or independence. It is only in the soft law sources of international organizations like UNCITRAL and the IBA or canons of ethics that co-arbitrators are ever mentioned.

National Law Tests for Bias

The test for arbitrator impartiality and independence is set out in the laws of the place where the arbitration takes place. The applicable test derives from the requirement for impartiality and independence found in local arbitration statutes and judicial interpretation of such statutory provisions.

Since there do not appear to be many, if any, cases in which an arbitral award has been set aside because of a failure to disclose a relationship with a co-arbitrator, it is usually necessary to extrapolate from cases where awards have been set aside because of some other form of apprehended bias, particularly situations involving undisclosed relationships between arbitrators and counsel. The Paris Court of Appeal in *Douala International Terminal v. Douala Port Authority*, (January 10, 2023 No..RG20/18330), ICC Case No. 24211/DDA decided a failure of disclosure involving a close personal relationship between an arbitrator and counsel for one of the parties. The French standard is that a mere reasonable doubt is enough to require disclosure of a connection. The French Code of Civil Procedure provides that an arbitrator is obliged to disclose any circumstance that might affect independence or impartiality.

The 2023 decision of the Paris Court of Appeal in *Douala* serves as a reminder of the need for arbitrators to make the fullest disclosure of connections to parties. The Paris Court of Appeal set aside an arbitral award because of an undisclosed connection between the lead counsel and a member of the tribunal. The connection came to light when the President of the tribunal gave a eulogy at the funeral of Emmanuel Gaillard, lead counsel for the successful party. In that eulogy, the arbitrator, Thomas Clay, described a two-decade long friendship with Gaillard, who had been a member of Clay's thesis jury. He described how they had taken trips together and how he would consult Gaillard before making important decisions. The Paris Court of Appeal set aside the arbitral award on the basis that Clay had concealed his close relationship with counsel. The Court held that the intensity of the relationship went beyond mere ordinary friendship.

Another case decided under French law is the decision of Cour de Cassation in 2016 in *Caribbean Fibre Holdings* v. AGI (16 December 2015, No. D14-26.279). That case involved a Canadian arbitrator sitting in an ICDR case subject to French law. The award was set aside because of a failure to disclose a connection between the arbitrator's law firm and a party. The Claimant was a wholly-owned subsidiary of a corporation represented by the Toronto office of the arbitrator's national law firm. The arbitrator was completely unaware of the conflict and had indeed made a conflict search that came back negative. On that conflict search, the lawyers in the Toronto office failed to disclose their representation of the parent company of the Claimant. The Court held the failure to disclose the conflict was such as to reasonably cause a doubt regarding the independence and impartiality of the arbitrator. The arbitrator's award was set aside in a dispute over a $500 million mining interest.

A similar test to the French test has been in place in the United States for many years. The possible bias test from the Supreme Court of the United States in *Commonwealth Coatings v. Continental Casualty Co.* (1968), 393 U.S. 145 and the evident partiality rule from the United States *Federal Arbitration Act,* 9 U.S.C. ch.1, have been applied over many years.

In *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012), the United States Court of Appeals for the Second Circuit held that co-arbitrators serving in overlapping arbitrations did not constitute a material conflict of interest. The question on appeal was whether the failure of the arbitrators to disclose their concurrent service as arbitrators in another arbitration with similar legal issues and a common witness constituted evident partiality within the meaning of the *Federal Arbitration Act* 9 U.S.C. § 10(a)(2). The United States District Court for the Southern District of New York (Shira A. Scheindlin, presiding) ordered the arbitral award vacated on the basis that the two members of the arbitral panel failed to disclose they were serving as panel members in an overlapping arbitration proceeding. The Court of Appeals for the Second Circuit reversed the decision saying the overlapping service did not suggest that the arbitrators were predisposed to rule in any particular way. Their failure of disclosure was not indicative of evident partiality.

Scandinavian Reinsurance was relied upon in *Occidental Exploration and Production Company v. Andes Petroleum Ecuador Limited*, June 15, 2023 (U.S. Court of Appeals for the Second Circuit) to uphold an ICDR arbitral award in favour of Andes for $392M. One of the Tribunal members, Robert Smit, failed to disclose that he was co-arbitrator with Laurence Shore, counsel for Andes, in a separate unrelated arbitration. The Second Circuit held that Occidental did not provide evidence that Smits was partial, and did not allege a 'material relationship' such as a family connection or ongoing business arrangement with a party or its law firm—"circumstances in which a reasonable person could reasonably infer a connection between the undisclosed outside relationship and the possibility of bias for or against a particular arbitrating party."

The *Occidental* case is currently before the Supreme Court of the United States where Occidental is seeking to have the Court review its decision in *Commonwealth Coatings* to establish a more stringent standard for disclosure of potential conflicts than would be required under the possible bias test. If successful, the United States may join the international move to a real danger test, as discussed further below.

In another 2023 decision, *Grupo Unidos Por El Canal, S.A., et al. v. Autoridad del Canal De Panama*, USCA11 Case: 21-14408, August 18, 2023, the United States Court of Appeals for the Eleventh Circuit considered a case where co-arbitrators were concurrently serving on other tribunals. The arbitral award of $285M in favour of Autoridad was upheld. Autoridad nominated Robert Gaitskell. Grupo Unidos nominated Claus von Wobeser. The parties agreed on Pierre Gunter as President of the tribunal. After the award was issued, Grupo Unidos discovered Gaitskell subsequently appointed Gunter as Chair in a concurrent arbitration. The Eleventh Circuit ruled any fear that Gaitskell purchased Gunter's concurrence was speculative and unreasonable. That case is also on appeal to the Supreme Court of the United States

In an earlier U.S. case involving co-arbitrator disclosure, *Lucent Technologies Inc. v. Tatung Co.* 379 F.3d 24 (2d Cir. 2004), a challenge was based on co-arbitrators failing to disclose co-ownership of an airplane over a sixteen-year period. The Court noted there was no precedent case where the rule in *Commonwealth Coatings* had been applied to an undisclosed relationship between co-arbitrators. The Second Circuit noted some fields of law and practice tend to breed tightly knit professional communities in which members may work together from time to time. Co-ownership of an airplane more than a decade earlier was deemed too insubstantial a connection to require disclosure. The attitude of the Court in *Lucent Technologies* may reflect that general public view that there is no reason for concern when two judges on an appeal panel are close personal friends. Why should an arbitration be different? The logical answer is the public expects judges to be friends, and given the cloistered world in which judges exist, it would be unusual if many judges were not close friends. But, such an attitude is arguably not justified in the world of arbitration because parties get to choose their arbitrators. A party may very well be concerned to learn that the other party's appointee happens to be close friends with the Chair.

In America, it thus appears to be okay if you fail to disclose an appointment of your co-arbitrator to be Chair in a concurrent proceeding, you shared an airplane with your co-arbitrator, or you served as arbitrators in a concurrent arbitration with similar legal issues and a common witness. One wonders, therefor, whether there is really any legal duty to disclose relationships with a co-arbitrator in the United States. No arbitral award has ever been set aside based on such non-disclosure except for the lower court decision in *Scandinavian Reinsurance* that was later set aside by the Second Circuit Court of Appeals.

There are subtle differences between the possible bias test applied by the French and American courts and the approach taken in Commonwealth countries. For most of the 20th century, the test for arbitrator bias in Commonwealth jurisprudence stemmed from the famous dictum of Lord Heward in *R. v. Sussex Justices*, [1924] 1 KB 256 that justice should not only be done but should manifestly and undoubtedly be seen to be done. In accordance with that premise, courts in Commonwealth countries took a very

narrow view of arbitrator conflicts and imposed a very low bar for challenge. For example, in Canada, the Supreme Court of Canada, in the classic case of *Szilard v. Szasz*, [1955] SCR 3 stated it was sufficient for a challenge if there was a reasonable apprehension of bias.

The historical test in Commonwealth countries was thus the same as France and the United States for many years, a mere suspicion or possibility of bias was enough to disqualify an arbitrator. In England, under the *Arbitration Act 1950* and the *Arbitration Act 1979*, the courts applied a reasonable suspicion test.

The law in Commonwealth countries has, however, evolved to a stricter test for bias and more difficult grounds for challenge in recent years. England led the way with the decision in *R. v. Gough*, [1993] AC 646. The House of Lords moved away from a test based on mere suspicion and laid down a new test requiring a real danger of bias. This was a seminal moment because the bar for challenge was raised dramatically. *R. v. Gough* was decided on the test for judicial bias, but the same test was said to be applicable in arbitrations in *Laker Airways Inc. v. FLS Aerospace Limited*, [1999] 2 Lloyd's Rep. 45.

The *Gough* real danger test was then applied in an arbitration context by the English Court of Appeal in *AT&T Corporation v. Saudi Cable Company*, [2000] EWCA Civ 154. Lord Justice May made a clear statement that the test under English law for apparent bias in an arbitrator is the real danger test. That case involved a Canadian arbitrator sitting in England. The bias allegation involved misconduct in failing to disclose a directorship in Nortel, a Canadian telecommunications company that had a connection to the Respondent in the arbitration.

The real danger test was cemented in English law in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, [2000] QB 451, when the Master of the Rolls wrote that the law was settled in England by the decision of the House of Lords in *R v. Gough* establishing the real danger test.

However, in a dramatic turnaround two years later, the House of Lords in *Porter v. Magill*, [2002] AC 357, reverted to a possible bias test rather than a real danger test. The reason for the reversal was said to be the need to align the test for bias in England with that adopted by the European Court of Human Rights. The House of Lords noted the *Gough* real danger test "has not commanded universal approval" and the circumstances for challenge need only be such as would lead a fair-minded and informed observer to conclude that there was a real possibility the tribunal was biased, eschewing the language of a real danger test.

This most recent approach was applied in the UK Supreme Court decision in *Halliburton v. Chubb Insurance*, [2020] UKSC 48. In *Halliburton*, Ken Rokison, a highly respected barrister and arbitrator from London chambers failed to disclose involvement in other arbitrations in which Chubb Insurance was a party when he was sitting on a case involving Halliburton and Chubb arising out of the Deepwater Horizon catastrophe. Subsequent to his appointment in the Halliburton case, Mr. Rokison was appointed by Chubb in a different case involving Transocean Holdings LLC, the owner of the rig in the Deepwater Horizon disaster. The Court in *Halliburton* at para. 52 applied the possibility of bias test, i.e., the *Porter v. Magill* test, not the *Gough* real danger test.

Lord Hodge, for the majority, began his reasons by going back to the old adage that "justice must be seen to be done", a reference to the rule first stated by Lord Heward in *R. v. Sussex Justices*. Lord Hodge wrote at para. 145 that Mr. Rokison was under a legal duty to disclose his appointment in the Transocean case because there were potentially overlapping issues with only one common party, i.e., Chubb. However, the Supreme Court went on to find a number of subsequent circumstances that were inconsistent with an objective finding of a real possibility of bias. These circumstances included the fact that there was an apparent lack of clarity in the law governing disclosure at the time the disclosure should have been made and the fact that the Transocean case was likely to have been resolved on a preliminary ruling thus removing the danger of the arbitrator gaining knowledge in the second case that was not available to Halliburton.

The former English view, i.e., the Gough real danger test, has been adopted in Australia and in Canada. The government of British Columbia recently amended both the domestic *Arbitration Act,* S.B.C. 2020, c.2 and the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 to impose a statutory real danger test. The Attorney-General of B.C., when introducing the amendment, stated that the intention was to raise the standard needed for a party to challenge an arbitrator's independence or impartiality. The Attorney-General said there was an international trend toward a higher standard because of a concern that challenges with little merit were being employed as a strategic tool to disrupt arbitrations (Hon. Eby, D. (2018 April 12). "Bill 11, International Commercial Arbitration Amendment Act." British Columbia, Legislative Assembly. 41st Parliament, 3rd Session. 3819).

Consequences to the Arbitrator for Failure to Disclose

International arbitrators should note the comments made by Lord Hodge and by Lady Arden in the *Halliburton* case regarding potential sanctions for breach of the legal duty of disclosure. Lord Hodge at paragraph 111, said the offending arbitrator could be held liable for his own costs or for the costs of the unsuccessful challenger. Lady Arden at para. 169 said that a breach of a legal duty of disclosure would be a breach of the terms of appointment and, thus, a breach of contract.

The reference by Lady Arden in *Halliburton* to a potential breach of contract opens the door to potential liability in other countries as well. There is generally immunity for anything done in the performance of the duties of an arbitrator. Another way of putting this is to say that an arbitrator has the right to be wrong. But does an arbitrator have a right to be negligent in exercising due diligence in the performance of those duties? Would an arbitrator be immune from liability for costs thrown away by the parties where the arbitrator has double booked, and one of the cases could not go ahead? Likewise, a failure to conduct a reasonable conflict search and make disclosure of potential conflicts could be actionable as a breach of contract.

The United States offers an example of a challenge for bias with commentary on liability for non-disclosure. In *La Serena Properties v. Weisback,* [2010] San Francisco City and County Super. Ct. 484081, the award of arbitrator Weisbach, was set aside because he failed to disclose that he was dating the sister of the lawyer for the Claimant. In a civil claim against Mr. Weisbach based on that intentional non-disclosure, the California Court of Appeal held that the arbitrator was protected by common law arbitral immunity because the requirement for disclosure of a conflict of interest was part of the arbitration process. The Court of Appeal followed a Texas Court of Appeals decision to the same effect. Even if immunity is available in the U.S, it is nevertheless a very embarrassing thing for an arbitrator to have an award set aside for bias. The laws in other countries relating to civil liability for non-disclosure may not be so generous to arbitrators as those in the United States.

The laws of British Columbia provide for immunity from liability for anything done in the performance of arbitrator duties, but there remains a question as to whether a failure to disclose a conflict would fall within statutory immunity. Under the *International Commercial Arbitration Act* of British Columbia section 36.02: "An arbitrator is not liable for anything done or omitted in connection with an arbitration unless the act or omission is in bad faith or the arbitrator has engaged in intentional wrongdoing."

Conclusion

International arbitrators must be aware of the different approaches to bias taken by national courts. In Commonwealth countries (other than England), there is a general trend to require a higher burden of proof to establish a real danger of bias. In Europe and the United States, the bar is generally a bit lower and requires only a suspicion of bias to either disqualify an arbitrator or set aside an arbitral award. The reason for vigilance is that there may be an increased danger of liability for the costs of arbitration proceedings rendered useless because of a finding of an undisclosed arbitrator conflict. In the United States, there is a strong case for immunity for even intentional wrongdoing. Courts in other countries may not be as forgiving as American courts. In Canada, the jury is still out as to liability in a case of inadvertent non-disclosure of a conflict.

The duty of co-arbitrators to disclose connections is a grey area. International norms do recognize permissible connections between co-arbitrators. The IBA Green list allows for arbitrators to be members of the same professional association, to have previously served together as arbitrators, to have taught in the same faculty or to have served as speakers at conferences. Courts in the United States have excused undisclosed close relationships, including co-ownership of a significant asset and concurrent service on other tribunals. But on a common-sense view, a party has a right to know whether the other party's nominee and the Chair are close personal friends. The difference between a mere ordinary friendship and a close personal friendship will be a fact-specific inquiry. The extent to which close friendships must be disclosed remains to be decided by the courts. The extent of personal liability of arbitrators who fail to disclose a close connection to a co-arbitrator remains uncertain.

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