



**ADVANCE WAIVERS OF ARBITRATOR CONFLICTS
OF INTEREST IN INTERNATIONAL COMMERCIAL
ARBITRATIONS SEATED IN NEW YORK**

*A Report of the International Commercial Disputes Committee
of the New York City Bar Association*

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During the arbitrator appointment process, arbitrators are required to disclose potential conflicts of interest and any facts that may give rise to an appearance of partiality. During that process, some arbitrators seek to obtain from the parties an “advance waiver” by which the parties agree that if certain conflicts of interest arise in the future, the arbitrator may continue to serve.

To illustrate, in one case reported by a major arbitral institution, an arbitrator asked the parties to agree to the following conditions:

in a global law firm of about 2000 lawyers ... I cannot exclude that lawyers in this firm will act in the future for or against one of the parties or their affiliates. I will not act myself for or against any of the parties or their affiliates during the arbitration proceeding. At the same time, I will disclose any future act or circumstance that might, from the perspective of any of the parties, put my independence as an arbitrator into question.

Some waiver requests go further and ask the parties to agree expressly that the arbitrator need not make additional related disclosures. For example, in another case reported by an arbitral institution, a prospective arbitrator requested the parties to “accept that current or future member firms of [his group of firms] are free . . . to accept instructions from or against any of the parties to this arbitration . . . without any duty on [his] part to make any disclosure in connection with any such instructions.”¹

Though it is not uncommon for international arbitrators, particularly those in global law firms, to seek advance waivers of potential conflicts of interest, there is only limited available guidance concerning the use, validity, and enforceability of such waivers. With the exception of the ICC, the major international arbitration institutions have not issued rules or formal policy guidance on the subject. Further, while the October 2014 revision of the International Bar Association Guidelines on Conflicts of Interest (the “IBA Guidelines”) recognizes the “increasing use” of advance waivers, the Guidelines take no “position as to the validity and effect of advance declarations or waivers,” beyond opining that such waivers “do not discharge the arbitrator’s ongoing duty of disclosure.” Instead, the Guidelines advise, “[T]he validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.”

This Report addresses the issues that may arise when arbitrators seek an advance waiver of potential future conflicts in international commercial arbitrations seated in New York.² In doing so, the Committee neither endorses nor rejects the use of advance waivers, but rather seeks to encourage further dialogue and consideration of an existing trend.

¹ These examples were kindly provided to the Committee by the International Chamber of Commerce International Court for Arbitration (the “ICC”). Other examples provided by the ICC appear in Appendix A to this Report.

² This Report is limited to discussing advance waivers in the context of international commercial arbitration between business entities and does not address the somewhat different issues that arise in arbitration based on agreements in adhesion contracts, such as certain consumer and employment matters, or in disputes under investment treaties.

The Report contains two sections. The first section includes a discussion of the law and practices concerning advance waivers, including: (i) rationales sometimes given for and against the use of advance waivers; (ii) the standards of impartiality, independence, and disclosure in international arbitration; (iii) some comments on the applicability of lawyer ethics rules and arbitrator ethics guidelines to arbitrator advance waivers; (iv) practices of the major international arbitration institutions with respect to advance waivers; and (v) consideration of advance waivers in New York courts. The second section provides some considerations for arbitrators and counsel when drafting advance waivers or advising clients as to the advisability of consenting to such waivers.

I. Review of Law and Practices Concerning Advance Waivers

There are different types of advance waivers. Some are very narrow in scope and address specific conflicts or circumstances, while others are broad or blanket waivers that address general classes or types of conflicts. Some advance waivers seek to waive merely potential conflicts, while others go further and seek to waive the need to disclose facts that may constitute a conflict. The potential conflicts to be waived encompass a broad array of circumstances. For example, conflicts may arise from the relationship of the arbitrator (or his/her law firm or close family members) to a party and/or its related entities, to the dispute, to counsel, to the other arbitrators or even to third-party funders.

A. Rationales For and Against the Use of Advance Waivers

Arguments in favor of advance waivers of arbitrator conflicts include the following:

1. Advance waivers are consistent with the principle of party autonomy. Parties, particularly sophisticated parties in a commercial matter, should have the freedom to choose their arbitrators and to waive conflicts of interest after being duly informed of the potential risks and advantages and considering the relevant facts and circumstances.
2. Advance waivers may facilitate experienced international arbitration counsel at global law firms serving as arbitrators. Because a law firm's conflicts are commonly considered to be attributed to every lawyer in that firm at least for some purposes, an arbitrator in a global law firm may be deemed to have a myriad of conflicts or potential conflicts from law firm relationships in remote offices that neither involve the arbitrator personally nor yield a material financial interest for the arbitrator. Parties attempting in good faith to comply with disclosure requirements may, and in many cases should, disclose the potential involvement of international banks or accounting firms, which may be clients of the arbitrator's firm, even where the potential involvement is, at most, as a peripheral witness. Without an advance waiver, this web of conflicts, potential conflicts and relationships may lead some arbitrators, including prospective first-time arbitrators, to turn down appointments for fear that their firms would be unable to take on an unrelated matter.
3. Advance waivers may also avoid situations where the attribution of remote law firm conflicts to an arbitrator would otherwise result in the arbitrator's withdrawing services, and disrupting the arbitration, as, for example, where an arbitrator cannot timely disclose to the

parties, and obtain their consent to, the arbitrator's firm acting in a new, unrelated matter because the arbitrator's firm has a competing duty to the firm's client to keep the new matter confidential.

4. Advance waivers may promote greater transparency about arbitrators' conflicts analysis and how they interpret their duty to disclose. By seeking an agreement from the parties that certain potential future conflicts will not affect the arbitrator's impartiality or independence, arbitrators may establish a shared understanding and expectations with the parties about what conflicts would give rise to reasonable doubts about the arbitrator's impartiality or independence.

5. Advance waivers may have a limiting effect on arbitrator challenges in that waivers may deter challenges, and such waivers may also be dispositive of a challenge. This may promote more efficient arbitrations.³

Arguments against advance waivers include the following:

1. A request for an advance waiver could be perceived as undermining standards of impartiality, independence, and disclosure guaranteed by leading international arbitration rules and the Federal Arbitration Act ("FAA"), and as compromising the integrity of the arbitral process from the very beginning.

2. Parties may feel pressure to grant an arbitrator's request for an advance waiver, which could create tension and mistrust of the arbitrator before the arbitration has even commenced.

3. Parties may agree to waive potential future conflicts without a clear understanding of what they are agreeing to waive, which may increase tension if and when a conflict of interest arises.

4. There is an inherent tension between an arbitrator's disavowal of any obligation to make continuing disclosures and the concept that conflict waivers must be fully informed and voluntary based on the disclosure of all relevant facts.

5. A waiver that includes a waiver of future disclosure may also conflict with institutional requirements that the arbitrator's obligation to check for conflicts and make disclosures is ongoing for the length of service as arbitrator in a matter.

6. More generally, as explored below, the effect of an advance waiver in any given arbitration is open to question. For example, in some jurisdictions, a waiver given before the conflict arises may not be given effect, and, in any case, the analysis of a waiver is likely to be highly fact specific. Therefore, any arbitrator or party hoping to rely on an advance waiver would be taking a risk that could impact enforceability of the award or the arbitrator's standing based on uncertainty regarding viability of the waiver.

³ See Anke C. Sessler, *The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration* (Skadden, Arps, Slate, Meagher & Flom LLP Jan. 6, 2015), <https://www.skadden.com/insights/the-2014-iba-guidelines-conflicts-interest-international-arbitration> ("Indeed, challenges are one of the main causes of delay in arbitration, causing it to fail in its promise to provide the parties with an effective means of dispute resolution.").

B. Standards of Impartiality, Independence and Disclosure in International Arbitration

While different arbitral institutions employ different language in their rules, the rules of all the major institutions generally impose the same requirements for arbitrator independence and impartiality.⁴ Each requires in substance that there be no circumstances that would give rise to “justifiable” or “reasonable” doubts as to the arbitrator’s impartiality and independence, and, if such circumstances do exist, that the parties be informed so that they have the opportunity to seek clarification or to object to or challenge the appointment. Additionally, each organization places upon the arbitrator an ongoing duty to continue to disclose any circumstances that arise during the course of the arbitration that could reasonably give rise to doubts about his or her impartiality, and give the parties an opportunity to challenge an arbitrator’s continuing service based on the disclosed facts. Some institutions provide for a standard of initial and ongoing disclosure that is broader than the standard of disqualification. The AAA and the ICDR’s Notice of Appointment requires, for example, that the arbitrator disclose “any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social or of any other kind.”

The UNCITRAL Arbitration Rules, initially promulgated in 1976 and revised in 2010, arguably may be said to contemplate a form of advance waiver, stating that the general duty to make ongoing disclosures does not apply where “[the parties] have already been informed by

⁴ See, e.g., Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules art. 11 (2013), available at http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf.

International Chamber of Commerce (ICC), Rules of Arbitration art. 11 (Jan. 1, 2012), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

International Centre for Dispute Resolution (ICDR or AAA International), International Arbitration Rules art. 13 (June 1, 2014), available at <https://www.icdr.org/icdr/ShowPDF?url=/cs/groups/international/documents/document/z2uy/mdi1/~edis/adrstage2025287.pdf>.

JAMS, International Arbitration Rules art. 8 (Aug. 1, 2011), available at <http://www.jamsadr.com/international-arbitration-rules/>.

London Court of International Arbitration (LCIA), Arbitration Rules art. 5 (Oct. 1, 2014), available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

Singapore International Arbitration Centre (SIAC), Arbitration Rules 10-11 (Apr. 1, 2013), available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2013>.

Stockholm Chamber of Commerce (SCC), Arbitration Rules art. 14 (Jan. 1, 2010), available at http://sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf.

United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules arts. 11-12 (2013), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

World Intellectual Property Organization (WIPO), Arbitration Rules art. 22 (June 1, 2014), available at <http://www.wipo.int/amc/en/arbitration/rules/newrules.html>.

Permanent Court of Arbitration (PCA), Arbitration Rules arts. 11-12 and Model statement of impartiality & independence (Dec. 17, 2012), available at <https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf>.

[the arbitrator] of these circumstances.”⁵ It may be argued that an arbitrator who discloses the categories of conflicts that may arise, even in general terms, has disclosed the relevant “circumstances.”⁶ Only one of the arbitral organizations, the Hong Kong International Arbitration Centre, has a rule that expressly mentions the circumstances in which an arbitrator may be relieved of the duty of disclosure. The Centre’s Rule 11.4 repeats the language of the UNCITRAL Rules.⁷

The 2014 IBA Guidelines, which are often used as guidance in international arbitrations regarding arbitrator conflicts and disclosure obligations,⁸ contain provisions regarding the impartiality and independence of an arbitrator that are similar to those of the major arbitral institutions.⁹ Specifically, the IBA Guidelines require that an arbitrator refuse an appointment “if he or she has any doubt as to his or her ability to be impartial or independent.”¹⁰ The Guidelines go on to state that “[t]he same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”¹¹ The Guidelines state that doubts are justifiable “if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”¹² Arbitrators are also required to disclose any “facts or circumstances . . . that

⁵ UNCITRAL Rules, art. 11.

⁶ This point is further discussed in Section II.D below.

⁷ Some rules provide a time limit for challenges after a party becomes aware of the grounds for challenge, without expressly specifying the consequences of a failure to meet the deadline. *E.g.*, UNCITRAL Rules, art. 13(1) (requiring that challenge be brought “within 15 days after the circumstances mentioned in articles 11 and 12 become known to [the challenging] party”); ICDR Arbitration Rule, art. 14(1) (“within 15 days after the circumstances giving rise to the challenge become known to that party”); JAMS International Arbitration Rules, art. 9.1 (same). The older type of trade association arbitration rules expressly mentioned that the parties could waive disqualification. In trade association arbitration, arbitrators commonly were members of the trade, often non-lawyers, who would be expected to have regular business dealings with others who might have some involvement in a dispute. The dissent in *Cook Industries, Inc. v. C. Itoh & Co. (America) Inc.*, 449 F.2d 106, 108 (2d Cir. 1971), quotes Section 8 of the then Grain Arbitration Rules of the NY Produce Exchange (which the Committee understands no longer exists), which provided:

No person shall serve as an arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, **unless the parties waive such disqualification in writing.** (emphasis added)

⁸ Many view the IBA Guidelines as a studied attempt to reflect consensus views on important issues or an appropriate balance of competing interests as to various issues. At the same time, some institutions have stated publicly that they do not view the Guidelines as reflecting the standards applicable in cases they administer.

⁹ IBA Guidelines, Part 1(2), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹⁰ *Id.* at Part 1(2)(a).

¹¹ *Id.* at Part 1(2)(b).

¹² *Id.* at Part 1(2)(c).

may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence . . . as soon as he or she learns of them."¹³

Unlike most of the arbitration organization rules, however, the IBA Guidelines do address the issue of advance waivers. The Guidelines state that "advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure."¹⁴ As noted above, however, the Guidelines "do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law."¹⁵

The IBA Guidelines do contain a "Non-Waivable Red List" of certain circumstances where doubts will always be justified such that waiver of those conflicts, including presumably advance waivers, is impermissible.¹⁶ Thus, for example, there is a requirement under the Non-Waivable Red List that an arbitrator may not serve where he or his law firm "regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."¹⁷ Given this limitation, an advance waiver would be inconsistent with the Guidelines in any case in which an arbitrator or his or her firm derives "significant financial income" from the representation of one of the parties to the arbitration.¹⁸

C. Ethical Considerations

Ethical rules governing the conduct of New York lawyers and arbitrators are of limited assistance on the subject of arbitrators' advance waivers. Service as an arbitrator in an international case does not constitute representation of any party in the case and does not involve the same ethical duties as those applicable to attorney/client relationships. This distinction can be a source of confusion when advance waivers involving arbitrators are evaluated according to attorney/client conflict waiver standards.¹⁹ The general ethical rules on conflicts of interest of lawyers, Rules 1.7 and 1.9 of the New York Rules of Professional Conduct, apply, by their terms, only when a lawyer "represent[s]" or has "represented" a "client." Rule 1.12 is the only rule that deals with arbitrator conflicts, and neither that rule itself, nor the comments to the rule, address advance waivers. Rather, the rule addresses only the extent to which an arbitrator's

¹³ *Id.* at Part 1(3)(a).

¹⁴ *Id.* at Part 1(3)(b).

¹⁵ *Id.* at Explanation to Part 1(3)(b).

¹⁶ The full "Non-Waivable Red List" is set forth in Part II of the IBA Guidelines.

¹⁷ *See id.*

¹⁸ *Id.* General Standard 4(b). The IBA Guidelines do not offer any guidance on what exactly constitutes "significant financial income." Part II of the IBA Guidelines also contains what is called the "Orange List," which contains examples of certain conflicts that are consentable if disclosed, and a "Green List" of specific situations in which, in the view of the Guidelines, no appearance of a conflict of interest exists and therefore no duty to disclose arises.

¹⁹ This Report does not seek to address, and takes no position on, any ethical issues that may arise for a law firm or other lawyers in the firm, if one of its lawyers, as an arbitrator, obtains an advance waiver.

service may prevent the arbitrator or his or her firm from representing a client that is a party in the arbitrated matter.²⁰

Further, the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes does not directly address the subject of advance waivers. It does, however, establish two potentially competing general principles that must be taken into account when considering the scope of an advance waiver: (i) the arbitrator's continuing duty to disclose relevant relationships "which may arise, or which are recalled or discovered" (Canon II, Consideration C); and (ii) "parties, with knowledge of a person's interests and relationships, nevertheless [may] desire that person to serve" (Canon II, Consideration F).²¹ The Code does not address the extent to which an advance waiver may provide the parties with sufficient "knowledge of [an arbitrator's] interests and relationships."

D. Practices of the Major International Arbitration Institutions

The Committee contacted a number of international arbitration organizations to determine whether they have established policies or practices concerning arbitrator advance waivers. Although only the ICC has formally given any guidance regarding the use of advance waivers, all of the institutions with which the Committee spoke described their experiences with advance waivers to date as well as their current administrative practices. The Committee's

²⁰ Rule 1.12 states, in relevant part, that "unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as . . . an arbitrator, mediator or other third-party neutral." Rule 1.12(d) states that such disqualification will be imputed to the lawyer's firm unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety. New York Rules of Professional Conduct, 22 NYCRR Part 1200, rule 1.12 (2009).

²¹ See also Canon I, Consideration C (though providing that "[a]fter accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality," stating that the "[e]xistence of any [such relationships or interests] does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following *full disclosure of the relevant facts*") (emphasis added). AAA/ABA Code of Ethics for Arbitrators, Canon I C (2004).

statements as to the practices of these institutions do not bind the institutions in any way, and those practices are subject to change at any time as the institutions deem appropriate.

1. CIETAC

The China International Economic and Trade Arbitration Commission (“CIETAC”) advised that, in its experience, arbitrators generally do not seek advance waivers in China. According to CIETAC, advance waivers are not regulated under the Arbitration Law of China,²² and arbitrators must disclose any conflict of interest arising during the proceedings in accordance with the CIETAC Arbitration Rules (2015).²³ CIETAC also follows the Rules for Evaluating the Behavior of Arbitrators, which it adopted in 2009.²⁴ Those rules have similar provisions to the CIETAC Arbitration Rules concerning an arbitrator’s continuing duty to disclose.²⁵

2. ICC

The ICC has seen a broad array of advance waivers over the last several years, coming primarily from arbitrators practicing at very large firms. When an arbitrator is to be proposed by an ICC National Committee pursuant to Article 13(3) of the ICC Rules, the ICC Court will ordinarily not appoint an arbitrator who requests an advance waiver of conflicts. When an arbitrator is nominated for confirmation by the parties or pursuant to their specific agreement (*e.g.*, nominated by the co-arbitrators), the ICC Secretariat will ask the arbitrator to complete a statement of acceptance, availability, impartiality and independence. If an arbitrator seeks to accept the appointment with an advance waiver of conflicts, the Secretariat will invite comments from the parties regarding the arbitrator’s qualified statement of impartiality and independence. In doing so, the Secretariat will seek to satisfy itself that the parties have clearly and unambiguously agreed to the waiver in the form that it is proffered, so as to ensure that the parties and the arbitrator understand the scope of the waiver in the same way. Once satisfied that

²² Article 34 of Arbitration Law of China provides:

In any of the following circumstances, an arbitrator must withdraw from the arbitration, and the parties shall have the right to apply for his withdrawal if he:

1. is a party or a close relative of a party or of a party’s representative;
2. is related in the case;
3. has some other relationship with a party to the case or with a party’s agent which could possibly affect the impartiality of the arbitration;
4. meets a party or his agent in private, accepts an invitation for dinner by a party or his representative or accepts gifts presented by any of them.

Further, Article 237 and Article 274 of the Civil Procedure Law of China provide that if the composition of the arbitration tribunal or the arbitration procedure has violated statutory procedures, the People’s Court may decline to enforce the arbitration award. Arbitration Law of the People’s Republic of China, Chapter IV, Section II, art. 134 (China), Civil Procedure Law [P.R.C.] art 237, 274 (China).

²³ CIETAC Arbitration Rules (2015), *available at* http://cn.cietac.org/rules/rule_E.pdf.

²⁴ CIETAC Rules for Evaluating the Behavior of Arbitrators, *available at* <http://www.lingspace.com/index.php?m=Page&a=index&id=112&l=en>.

²⁵ *Id.*, Article 7.

the parties understand the scope of the conflicts they are waiving, the Secretariat will not attempt to limit the scope of conflicts that informed and willing parties can waive.

Like the IBA Guidelines, however, the ICC takes the position that there can be no waiver of future disclosure obligations. The underlying premise is that “you can’t waive what you don’t know.”

Where an arbitrator accepts a proposed appointment subject to an advance waiver of conflicts, the Secretariat will advise the arbitrator and the parties that the waiver will not limit the arbitrator’s ongoing duty to make disclosure or the ICC Court’s power to examine any challenge that may come before it. Thus, while an advance waiver may be an important factor in the ICC Court’s consideration, the ICC Court does not consider itself bound by an advance waiver.

The ICC Court recently adopted a Guidance Note on conflicts disclosure by arbitrators that confirms the ICC’s view that the duty to disclose potential conflicts is an ongoing duty that is not dischargeable by an advance waiver.²⁶

3. **ICDR**

The International Centre for Dispute Resolution (“ICDR”) reports that, in its experience, advance waivers are infrequently used but their use seems to be on the rise, and most often by lawyers in large international firms. In contrast to the ICC, the ICDR prefers to forward arbitrator disclosures and waiver requests to the parties without any comment about the wording of the waiver or otherwise, in order to let the parties assess the waiver for themselves. If, however, a party raises questions or concerns to the ICDR concerning a proposed waiver, the ICDR will act as an intermediary between the parties and the arbitrator (without disclosing which party or parties objected to the waiver or otherwise expressed concern about it), which could lead to an amended form of waiver or retraction of the waiver.

The ICDR has a strong pro-disclosure policy and shares the ICC’s view that the ongoing duty to disclose cannot be validly waived. Indeed, although the ICDR’s general practice is to let parties assess advance waiver requests for themselves without institutional comment, the ICDR intervened in a case in which the arbitrator purported to seek a waiver of his ongoing duty of disclosure and advised the arbitrator that he was bound to make ongoing disclosures. In response, the arbitrator removed the relevant language from the advance waiver request.

The ICDR utilizes a case-by-case approach to challenges that arise concerning advance waivers and will resolve those challenges based upon the parties’ submissions. If a challenge were to arise during the course of an arbitration in which an advance waiver had been made, the ICDR would not make editorial comments about the challenge in light of the advance waiver nor

²⁶ ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ¶¶ 21-22 (Feb. 22, 2016), *available at* <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/practice-notes,-forms,-checklists/> (“The duty to disclose is of an ongoing nature and it therefore applies throughout the duration of the arbitration. . . . Although an advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future may or may not in certain circumstances be taken into account by the Court, it does not discharge an arbitrator from his or her ongoing duty to disclose.”).

summarily reject the challenge based on the advance waiver. Rather, it would invite the comments of the parties and take their submissions into account in resolving the challenge.

4. LCIA

The London Court of International Arbitration (“LCIA”) reported that it has had somewhat limited experience with advance waivers, and has not formulated a formal policy, but rather has addressed them on a case-by-case basis. The LCIA states that it “is not keen on these waivers and will not accept waivers that are overly broad.” Where an arbitrator informs the LCIA that he/she would like to seek a limited advance waiver, the LCIA’s general practice is to present the proposed waiver to the parties as though it were a disclosure by the arbitrator. In addition, while the LCIA has been reluctant to tell parties that they cannot consent to an advance waiver of conflicts, its practice has been to remind the parties and the candidate arbitrator that any advance waiver would not absolve the candidate of his/her ongoing duty of disclosure and to let parties know that an agreed waiver may not be binding on the LCIA if circumstances change.

5. SCC

The Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) advised the Committee that it rarely receives requests for advance waivers from arbitrators and never has agreed to such waivers. If an arbitrator purports to rely on an advance waiver, the SCC will become aware of the waiver when the arbitrator completes a standard acceptance form that confirms the arbitrator’s terms of appointment, including with respect to the arbitrator’s independence and impartiality and any disclosure of potential conflicts. Some arbitrators have included language to the effect that the arbitrator’s appointment will not prevent one of the arbitrator’s law firm partners from accepting a matter involving a particular group of companies or client. The SCC’s general practice in these circumstances has been to call the arbitrator and to explain that the SCC does not accept such waivers, and that if such a matter were to arise, the arbitrator still would be required to make disclosure. If the arbitrator were appointed directly by the SCC rather than by a party, the arbitrator’s form would be sent to the SCC first (rather than simultaneously to the SCC and the parties), enabling the SCC to discuss the issue with the arbitrator, explain the SCC practice of not accepting such waivers, and have the form revised before sending it to the parties.

6. SIAC

Advance waivers of conflicts do arise in cases before the Singapore International Arbitration Center (“SIAC”), typically at the request of arbitrators from larger or global law firms. SIAC’s approach to a waiver generally differs depending on whether an arbitrator is being appointed directly by SIAC or whether SIAC is called upon to confirm the appointment of a party’s nominee. When acting as an appointing authority, the institution is unlikely to appoint an arbitrator who requires an advance waiver. However, when SIAC must determine whether to confirm an arbitrator who is nominated by one of the parties, its general practice is to let the parties decide whether to accept the advance waiver, without necessarily commenting on the text or scope of the waiver. If all parties agree to the advance waiver, SIAC will usually accept the nomination and confirm the appointment, on the basis that the parties should be free to decide whether to accept an arbitrator’s terms of appointment. At the same time, and although SIAC

has not previously confronted advance waivers that purported to waive the arbitrator's ongoing duty to disclose, SIAC advised the Committee that it would have to carefully consider what would be the appropriate balance between respecting party autonomy to accept an advance waiver of disclosure and potential conflict with the obligation for such disclosure to continue throughout the proceedings. The institution has not had any experience with arbitrator challenges involving advance waivers as of this time.

E. The Validity and Effect of Advance Waivers in New York Courts²⁷

The Committee is not aware of any decision by a New York court specifically considering the validity or effect of an advance waiver of potential future conflicts. This is perhaps not surprising given that arbitrator reliance on advance waivers is a nascent trend.

The United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Cas. Co.*²⁸ found that arbitrators had a duty of disclosure, but did not address the question of waiver of that duty.²⁹ In an influential concurring opinion, however, Justice White touched on the possibility of an advance disclosure of a category of conflicts, and suggested that such an advance disclosure would be effective to avoid a later challenge based on a ground within the

²⁷ The rules on the acceptability of advance waivers in other jurisdictions vary. See, e.g., Elie Kleiman & Yann Dehaut-Delville, *Challenges of Arbitrators: Clarification on Timeframe and Standard of Review*, *Lexology* (Dec. 4, 2014), available at <http://www.lexology.com/library/detail.aspx?g=7c26becb-de03-4dce-93e9-211bb1d0ab82> (French law does not permit advance waivers of conflicts); Gustav Flecke-Giammarco, *Advance Waivers: An intriguing concept . . .*, *DisputeResolution: Das Online-Magazin* (Sept. 30, 2015), available at <http://www.disputeresolution-magazin.de/advance-waivers-an-intriguing-concept/> (“From a German perspective, the admissibility of an agreement to exclude the right or limit the grounds to challenge an arbitrator beforehand in deviation from § 1036 ZPO seems doubtful . . .”); Calif. Rules of Court Ethics Standards for Neutral Arbitrators in Contractual Arbitration 12(b) (Jan. 1, 2003) (in nonconsumer arbitration, if an arbitrator discloses that he or she will entertain offers of employment or new professional relationships (other than as a lawyer, expert witness or consultant), from a party or lawyer for a party, the arbitrator need not disclose if he or she subsequently receives such an offer), available at www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf, and Calif. Code of Civ. P. § 1281.9(a)(2) (requiring arbitrators to disclose “[a]ny matters required to be disclosed” by those ethics standards).

²⁸ 393 U.S. 145, 146 (1968).

²⁹ *Id.* at 147-49 (opinion of the Court for four justices) (stating that arbitrators “must disclose to the parties any dealings that might create an impression of possible bias”); *id.* at 151-52 (White, J., dissenting) (opining that an arbitrator “cannot be expected to provide the parties with his complete and unexpurgated business biography,” but that “where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed”). The Court was interpreting the “evident partiality” standard under the FAA, 9 U.S.C. § 10(a)(2), which is likely to apply to international arbitration awards in both federal and state courts unless the parties have expressly agreed to apply state arbitration law. See *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997) (concluding that “the FAA and the [New York] Convention have ‘overlapping coverage’ to the extent that they do not conflict,” so “the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States”). *But see* Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-11 Reporters’ Notes 153-54 (Tent. Draft No. 2, Apr. 16, 2012) (concluding that the better interpretation of the FAA is that motions to vacate nondomestic awards rendered in the United States are limited to grounds set forth in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Most challenges to international arbitration awards rendered in New York are heard in federal rather than state court, because the FAA provides federal jurisdiction for actions to confirm or vacate an award that falls under the New York Convention. 9 U.S.C. § 203.

category disclosed. He opined that arbitrators should “err on the side of disclosure” and declared that they “are not automatically disqualified by a business relationship with the parties before them *if both parties are informed of the relationship in advance*, or if they are unaware of the facts but the relationship is trivial.”³⁰

The United States Court of Appeals for the Second Circuit, sitting in New York, has likewise suggested that an advance waiver of conflicts that might arise, and of the duty to disclose those conflicts when they do, would be enforced. First, the court has accepted the general principle that a party may waive its right to object to an arbitrator’s partiality. In *Lucent Techs. Inc. v. Tatung Co.*, the Second Circuit held that where the party could have inquired of the ICDR about missing disclosure forms during the arbitration but “chose to remain ignorant,” the party had waived its right to object.³¹ Second, the court has more specifically suggested that a party may waive a duty of the arbitrator to investigate a conflict of which the arbitrator has notice. In *Applied Indus. Materials Corp. v. Ovalar*,³² the court held that “where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) *disclose his reasons for believing there might be a conflict and his intention not to investigate.*”³³ If an arbitrator may avoid the duty to investigate by disclosing an intention not to do so in the future, it could be argued that the arbitrator could likewise avoid the duty to disclose by indicating an intention not to do so. Conversely, it might be argued that a disclosure, even if coupled with a declaration of intention not to investigate, serves the purpose of putting the parties, institution, and potentially other members of the tribunal, on notice of the potential conflict and shifting the burden to them to investigate or to make further inquiry.

In this connection, we raise two caveats. First, the Second Circuit has noted, but left undecided, the question of whether a court would vacate an award because of noncompliance with an agreed-upon standard of arbitrator impartiality without a finding of “evident partiality” under the FAA.³⁴ This dictum could prove significant insofar as applicable institutional or ethical standards (as discussed above) could be interpreted to require a broader duty of disclosure (or higher standard of impartiality and independence) than the FAA. Second, there is potentially a distinction between the contractual waiver of a specific objection to an arbitrator’s impartiality or independence and a contractual waiver of one or more statutory grounds of judicial review. Following the Supreme Court’s ruling in *Hall Street* that statutory grounds for vacatur and

³⁰ *Id.* at 150-52 (emphasis added).

³¹ 379 F.3d 24, 30 (2d Cir. 2004).

³² 492 F.3d 132, 138 (2d Cir. 2007).

³³ *Id.* at 138 (emphasis added). The arbitrator learned that his company was in discussions with one of the parties regarding a potential business relationship, but instructed his business colleagues to tell him nothing about them and did not disclose the potential conflict to the parties.

³⁴ *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 77 n.22 (2d Cir. 2012). *Contra Zurich Am. Ins. Co. v. Team Tankers*, No. 13-cv-8404, 2014 WL 2945803, at *9 (S.D.N.Y. June 30, 2014) (rejecting argument that arbitration rules and ethics codes may gain the force of law because arbitration is a creature of contract, reasoning that “parties may not contractually expand a court’s authority to vacate an arbitration award beyond the grounds provided in § 10 of the FAA”) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583-88 (2008)).

modification are “exclusive” and may not be supplemented by contract,³⁵ at least some courts have held that parties may not waive statutory grounds for reviewing an award.³⁶ It is possible, notwithstanding the Second Circuit’s general acceptance of waiver of the right to object on grounds of partiality, that a court, particularly in an extreme case, might decline to accept a broad advance waiver on grounds that the “evident partiality” standard is a statutory ground for judicial review that cannot be waived.

We note as well two procedural points regarding the courts’ likely treatment of advance waivers. First, it is unlikely that the courts will review an advance waiver in an international arbitration in New York prior to a final award. The Second Circuit has held that, under the FAA, a “district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award.”³⁷ Second, the courts’ treatment of the advance waiver is likely to depend significantly on the procedural context in which the assertion of evident partiality first arises. If the issue was raised in a challenge to an arbitrator that was rejected by the arbitral tribunal or arbitral institution, the New York courts are highly likely to defer to that decision. New York courts have generally deferred to institutional challenge determinations and rejected claims of evident partiality arising out of failed arbitrator challenges, reasoning that when parties agree to apply arbitration rules that provide a mechanism for determination of an arbitrator challenge, the parties should be bound by that determination.³⁸ (Moreover, such a deference decision is unlikely to reveal much about the significance of the advance waiver in the underlying decision by the arbitrators because arbitrators and institutions rarely issue reasoned decisions in resolving challenges.)

II. Considerations In Drafting and Reviewing Advance Waivers

In drafting or evaluating the validity, enforceability or advisability of an advance waiver, arbitrators and counsel may wish to consider the factors discussed below. This list of considerations is not intended to be all-inclusive.

³⁵ *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 594-95 (2008).

³⁶ *See In re Wal-Mart Wage & Hours Empl. Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013).

³⁷ *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (quoting *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980). *See also York Hannover Holding, A.G. v. AAA*, No. 92 Civ. 1643, 1993 WL 159961, at *2 (S.D.N.Y. May 11, 1993) (AAA’s decision on a challenge in a New York Convention case was not subject to pre-award judicial review).

By contrast, New York’s Court of Appeals has held that “in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered.” *Astoria Med. Group v. Health Ins. Plan of Greater NY*, 182 N.E.2d 85, 86 (N.Y. 1962). State courts generally play a less meaningful role than federal courts in international arbitrations seated in the U.S., however, because Section 205 of the FAA gives litigants a right to remove to federal court any state court case relating to an arbitration agreement or award falling under the New York Convention.

³⁸ *See, e.g., NGC Network Asia, LLC v. Pac Pacific Grp. Int’l, Inc.*, No. 09 Civ. 8684, 2012 WL 377995 (KBF) (S.D.N.Y. Feb. 3, 2012); *Reeves Brothers, Inc. v. Capital-Mercury Shirt Corp.*, 962 F. Supp. 408, 411 (S.D.N.Y. 1997).

A. *Informed Consent*

The validity and enforceability of an advance waiver could depend on whether the parties clearly and unambiguously agreed to it. Before enforcing a waiver, arbitral institutions or courts may consider whether the parties fully understood the implications of using an advance waiver and made an informed decision concerning the waiver.

A party's sophistication and reliance on independent counsel may be relevant to determining if there was informed consent. Sophisticated parties may be deemed to understand better the implications of an advance waiver; may be better able to negotiate ably, assess benefits and risks, and undertake sufficient factual investigation before agreeing to an advance waiver; and may be less likely to agree to an advance waiver by mistake. On the other hand, less sophisticated parties may be considered less able to evaluate the implications of an advance waiver, to have less familiarity with and information about waivers, and more likely to have mistaken assumptions about them. Further, whereas receiving advice from independent counsel might be viewed as evidence of informed consent to a waiver, less deference may be accorded to a decision to agree to an advance waiver if it was made without the advice of counsel.

Allowing parties to seek more information from an arbitrator (either through the arbitral institution or otherwise) may help minimize disputes over whether particular relationships would be within or outside an advance waiver and may help to prevent post-arbitration challenges.

B. *Role of Arbitrator*

Given the modern convention that both party-appointed and organization-appointed arbitrators are required to be neutral, the manner in which an arbitrator was appointed should not be particularly significant when assessing advance waivers. Nor should the standard be different if the arbitrator seeking the waiver is the chair of a tribunal or the sole arbitrator.

C. *Scope of Waiver of Conflicts*

An advance waiver should clearly delineate the scope of the waiver, including defining the parties, subject matter, type of conflicts, and goals of the waiver. When drafting an advance waiver, arbitrators and counsel should be narrow and specific, if possible. Drafting an advance waiver that identifies potential conflicts narrowly and specifically may help to minimize disputes over the scope of the waiver and increase enforceability. An advance waiver should identify the conflict that is being waived and define the subject matter of the waiver (if it applies to a specific matter or transaction), and the parties covered (if it applies to certain types of relationships or specific entities).

The advance waiver should delineate whether the waiver should be applied to the arbitrator taking on new work, or should apply more broadly to others with whom the arbitrator has some relationship, *e.g.*, law partners, relatives, etc., taking on new work. An advance waiver should identify whether it is intended to cover existing conflicts (in which case, the waiver would seek agreement of the parties that if new but substantially similar conflicts were to arise in the future, they would not be material and would not affect impartiality or independence) and/or to cover new conflicts that may subsequently arise.

When drafting an advance waiver, parties, counsel, and arbitrators are advised to consider whether certain conflicts may not be waivable as a matter of applicable law and/or ethical rules (e.g., where there would be an identity of interests between the arbitrator and a party).

D. *Separate Duty To Disclose*

The IBA Guidelines and the practice of some of the arbitral institutions draw a clear distinction between waivers of future conflicts of interest and waivers of a duty to disclose to the parties facts that may constitute a conflict of interest. As discussed above, while all of the institutions that the Committee consulted (except the SCC) were willing to consider advance waivers of conflicts, they cautioned that they would not accept, or would consider carefully, an advance waiver of an arbitrator's duty to disclose. Waiving an arbitrator's obligation to disclose has the effect of allowing the arbitrator to determine whether the new facts that give rise to a potential conflict fall within the scope of any advance waiver of conflicts. The Guidelines and those institutions apparently have decided that this determination should not be left to the sole discretion of the arbitrator.

At the same time, it might be argued that an initial reasonably specific disclosure of categories of conflicts that exist or may arise during the life of the arbitration is sufficient to satisfy the arbitrator's disclosure obligation or to support a valid waiver of further disclosure. If a dispute involves a significant financial institution, for example, the arbitrator might disclose that his or her firm represents another specified institution with respect to a specified type of matter. As another example, an arbitrator might disclose that the firm commonly represents or is adverse to financial institutions in the same market as the party and may do so with respect to the party during the life of the arbitration.

These forms of disclosure raise practical as well as policy considerations. First, even if a waiver of future disclosure is deemed to be invalid, an arbitrator who failed to disclose a conflict in reliance on the invalid waiver might nonetheless withstand a challenge, because the standard for disclosure is generally broader than the standard for disqualification in institutional arbitrations. Second, there may be potential implications for the arbitrator if he or she is deemed out of compliance with arbitral institution disclosure requirements.³⁹ Third, as noted above,⁴⁰ the validity of an advance waiver of disclosure appears to be an open question as a matter of law in various jurisdictions and may differ among the various arbitral institutions. The Committee neither endorses nor rejects advance waivers of disclosure. Rather, the Committee encourages further dialogue with respect to the scope of continuing disclosure requirements after an arbitrator has made an initial disclosure of relevant facts and circumstances and cautions that an arbitrator would still need to disclose any different conflict that arose during the arbitration.

³⁹ For example, the Arbitrator's Oath used by the AAA and ICDR states, in part, "I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter and that failing to make appropriate and timely disclosures may result in my removal as arbitrator from the case and/or, where applicable, my removal from the AAA's Roster of Neutrals."

⁴⁰ See Section I.E and n.29 above.

E. *Additional Provisions To Consider Including In a Waiver*

There are a number of provisions that could be added to a waiver to increase the probability that a waiver would be accepted by the parties and/or enforced by a court or arbitral institution. For example, the waiver could include provisions:

1. Stating that if a conflict arises with the arbitrator's firm (in a matter in which the arbitrator is not involved) the arbitrator will ensure that the firm institutes the necessary protective measures to ensure that the arbitrator is screened from the new matter.
2. Addressing limitations that the arbitrator may have concerning his/her ability to check for conflicts, such as an arbitrator's inability to have access to records of a former firm or employer; an arbitrator's inability to check the records of a spouse's law firm and similar situations; or if the arbitrator is a retired partner at a firm or has office space in a firm, that he/she does not have any interest in the firm or access to the firm's database.
3. Incorporating the IBA's concept of providing a threshold for conflicts based upon whether the conflicting representation represents "significant financial income" to the arbitrator's firm.

F. *Potential Impact of Waivers*

We conclude with words of caution. First, while the existence of a waiver could be relevant to resolving an arbitrator challenge before an arbitral institution, the administrative practices of arbitral institutions with respect to advance waivers are evolving and institutions are unlikely to consider themselves bound to enforce an advance waiver. Second, though the general considerations raised in this Report may apply beyond international commercial arbitrations seated in New York, arbitrators and counsel should be mindful of the validity of advance waivers in the relevant courts and the potential impact on the enforceability of an award or on an arbitrator, as discussed above. Care should be taken to assess the validity and effect of the waiver on enforcement and set aside proceedings as well as interlocutory challenges where permitted by law. This analysis should be applied to both the law of the seat of the arbitration and the law of other jurisdictions where enforcement may reasonably be anticipated.

International Commercial Disputes Committee
Joseph E. Neuhaus, Chair

March 2016

APPENDIX A

Examples of Advance Waivers from ICC Cases

A

“in a global law firm of about 2000 lawyers ... I cannot exclude that lawyers of this firm will act in the future for or against one of the parties or their affiliates. I will not act myself for or against any of the parties or their affiliates during the arbitration proceedings. At the same time, I will disclose any future act or circumstance that might, from the perspective of any of the parties, put my independence as an arbitrator into question.”

B

The prospective co-arbitrator, who was in transition between two law firms, accepted the appointment on condition that the parties *“accept that both [his present law firm] and [the future law firm] may act (or continue to act) for any of the parties in matters unrelated to the present proceedings.”*

C

The prospective arbitrator disclosed that his *“acting of arbitrator [will] not prevent any member firm of [his group of firms] from acting for clients in matters adverse to the parties of the ... arbitration or to the law firms representing these parties in matters not directly related to this appointment.”*

D

“The parties are requested to accept that current or future member firms of [the prospective arbitrator’s group of firms] are free ... to accept instructions from or against any of the parties to this arbitration ... without any duty on my part to make any disclosure in connection with any such instructions.”

E

The prospective Chairman disclosed that he may only act as Chairman, if the parties agreed that other lawyers of his law firm could accept instructions for or against either party or a related entity.

F

The prospective president, jointly nominated by the co-arbitrators, disclosed that other lawyers of his firm have worked on cases where Companies affiliated to Claimant were adverse parties and that he could not hinder his colleagues *“from acting for or against any of the parties and therefore accept an appointment as President in this arbitration only if both parties agree to this condition.”*

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