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Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards

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ETHICS FOR COMMERCIAL ARBITRATORS: BASIC PRINCIPLES AND EMERGING STANDARDS

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Commercial arbitration is growing, both in the realm of small generic transactions such as credit card debt, to large complex billion dollar commercial transactions, as well as every type of commercial transaction in between. With this growth in commercial arbitration there has been a concomitant interest in the rules of ethics for commercial arbitrators. In the first part of this paper,[1] we outline the emerging basic rules of ethics that govern commercial arbitrators. In the second part of the paper, we discuss whether these emerging standards provide a positive development for the future of arbitration.

I. ARBITRATORS ARE NOT JUDGES

Because the issues that are brought to arbitration are often as complex as those issues brought to judicial resolution, the ethical decisions that arbitrators face are often as complex as the ethical issues that confront

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courts.[2] This is not to say the concerns of arbitrators run parallel to those of judges, for arbitrators are not judges in the traditional sense. Consequently, there are several important distinctions between the role of an arbitrator and that of a judge.[3]

First, the appointment of an arbitrator is fundamentally different from the appointment or election of a judge. Arbitrators are generally appointed by the parties themselves or are nominated by the governing arbitral institution.[4] Consequently, there is no universal standard of appointment other than the basic process requirements. Judges, on the other hand, are appointed or elected usually only after some level of service within the judicial or legal community. In addition, arbitrators are generally only appointed for the individual dispute,[5] and therefore do not bring the sense of procedural continuity that is implicit in the judicial process.

Second, whereas the judicial process is designed to ensure a level of impartiality and independence from the people served by the court,[6] commercial arbitration is not designed to completely separate the decision maker from the business community which she serves in the role of arbitrator.[7] In commercial arbitrations the parties generally seek a less formal process of

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2. We are addressing the ethical concerns of arbitrators, not the ethical considerations of counsel who represent parties in an arbitration.

3. In fact, in *Merit Insurance Company v. Leatherby Insurance Company*, Judge Posner stated, "The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and jurors . . . ." Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983).

4. This is almost always the case. Most if not all international commercial arbitration institutional rules allow for party arbitrator selection. *See, e.g.*, LONDON COURT OF INT'L ARBITRATION, THE LCIA RULES art. 7 (1998), *available at* http://dspace.dial.pipex.com/town/square/xvc24/arb/uk.htm#g (last visited Apr. 16, 2005); AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES art. 6 (2001), *available at* http://www.adr.org/sp.asp?id=22090 (last visited Apr. 16, 2005); and UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES arts. 6-7 (1976), *available at* http://www.jus.uio.no/lm/un.arbitration.rules.1976/6 (last visited Apr. 16, 2005).

5. This is not always the case, and there is some serious concern about "repeat players" in arbitration such that particular parties nominate the same arbitrator in successive arbitrations. This is an issue of concern to some state legislatures. For example, California has adopted arbitration rules that require disclosure of "successive" appointments by the same party. *See* CAL. ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, CALIFORNIA RULES OF COURT APPENDIX, Division VI Standard 7(b)(5)(A) (2002), *available at* http://www.harp.org/newarbrules.htm#s7 (last visited Apr. 16, 2005). *See also* Jay Folberg, *Arbitration Ethics–Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343 (2003).

6. *See, e.g.*, AM. BAR ASSOC., MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2000), *available at* http://www.abanet.org/cpr/mcjc/canon_3.html (last visited Apr. 16, 2005).

7. "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 . . . ." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 148-49 (1968), *reh'g denied*, 393 U.S. 1112 (1969).

dispute resolution, which often entails the use of arbitrators that are closely connected to the particular industry, and consequently, the parties themselves.[8] This connection with the industry is sometimes one of the most important qualities an arbitrator can have in the eyes of the appointing party.

Finally, unlike the judiciary, which has a specific governing body and a set of ethical rules, there is very little regulation of arbitrators with the exception of the oversight of a particular institution.[9] However, unlike the Judicial Code of Ethics, the limited regulation discussed does not assist in the majority of ethical determinations. Moreover, unlike the judiciary with its oversight panels and discipline boards, arbitrators are not licensed[10] nor is there an oversight board, except within certain arbitration institutions.[11]

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8. The distinction between arbitrators and judges goes hand in hand with the distinction between arbitration and the judicial process. In arbitration the parties generally give up the stringent rules of evidence and civil procedure. Most importantly, arbitration awards, in contrast to a judicial decision, are generally not subject to appeal. This concern was expressed by Justice Black in *Commonwealth Coatings* when he stated: "We [the Court] 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." *Id.* at 149.

9. There are arbitral institutions, for example the International Chamber of Commerce (ICC), that review the procedure and issuance of the award by the arbitrators. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 27 (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 16, 2005). In addition, although limited in application to the enforcement of a foreign country's arbitral award, the United Nations Commission on International Trade Law (UNCITRAL) Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides some guidance on the regulation of ethical standards for arbitrators as it provides for basic "due process" and "appointment" requirements that must exist for an arbitrator or tribunal to produce an enforceable award. UNITED NATIONS COMM'N ON INT'L TRADE LAW, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS art. V (1959), *available at* http://www.rcakl.org.my/pdf/new%20york.pdf (last visited Apr. 16, 2005).

10. The Bar Association of a particular state may regulate the lawyers within its jurisdiction, however, there is generally no requirement to be a lawyer to serve as an arbitrator. There is also limited ability of a Bar Association to reach into foreign jurisdictions. In addition, in the enforcement proceeding of an international commercial award, the award of the tribunal may be called into question, and ultimately determined unenforceable if an arbitrator or the tribunal strays too far from the basic ethical expectations required to produce a just result. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS art. V (1959), *available at* http://www.rcakl.org.my/pdf/new%20york.pdf (last visited Apr. 16, 2005).
This provides some deterrent value. However, it is difficult to succeed in an action that challenges an award. Consequently, only the most egregious of acts call into question the award itself. Thus, the lack of enforceability of an international commercial arbitral award is an extremely limited deterrent to improper behavior of an arbitrator.

11. The International Chamber of Commerce requires all awards to be reviewed by the ICC Court before they become final. This is an oversight function. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 27 (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 16, 2005).

Consequently, arbitrators, unlike judges, are largely unregulated and unmonitored.

Moreover, unlike a judge who is given authority by the State, the role of an arbitrator is defined by the parties themselves in the arbitral agreement, which may or may not incorporate a set of institutional rules that will also govern the arbitrator's behavior. The arbitral agreement, however, as with all contracts, is interpreted by the law that governs the dispute.[12] Consequently, the domestic law at the seat of arbitration,[13] as well as some rules governing professional behavior,[14] may provide some guidance.

II. BASIC PRINCIPLES OF ETHICS FOR COMMERCIAL ARBITRATORS

Although the primary source for the obligations of an arbitrator is in the parties' agreement, in general, parties do not specify the particulars of the arbitrator's obligations but instead elect a seat of arbitration and then incorporate one of the standard sets of institutional rules.[15] Thus it is possible to examine the major arbitral institution rules, the specific ethical rules

12. Occasionally the parties select different laws to govern the arbitration agreement and the underlying dispute. However, this is not generally done in practice.

13. The "seat" of arbitration is a choice of law election by the parties. The location of the "seat" provides the appropriate state or national law that applies to the parties' agreement irrespective of the hearings actual location.

14. For example, many, if not most arbitrators will be attorneys. These arbitrators may be bound by the rules of conduct imposed by the courts and bar associations.

15. For example, the American Arbitration Association and the American Bar Association have collaborated to form The Code of Ethics for Arbitrators in Commercial Disputes. The International Bar Association has also created a code of Ethics for International Arbitrators. These two codes generally cover the same concerns. However, they differ in a few respects. The American Arbitration Association/American Bar Association code consists of black-letter canons with commentary that is similar to the American attorney code of ethics, and it is written in a "friendly" tone, while the International Bar Association code has a more statutory format written in a somewhat prohibitory tone. James H. Carter, *A Code of Ethics for International Commercial Arbitration*, 2 INT'L COMMERCIAL ARB.: RECENT DEV. 141, 143 (1988). Neither code is intended to provide additional grounds for judicial review of awards or for arbitrator liability. In addition, the American Arbitration Association/American Bar Association code is not intended to be incorporated into arbitration agreements but is meant to serve as a practical guide. Conversely, the International Bar Association code suggests in its introductory note that it is to be expressly incorporated into the parties' agreements. *See* INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS Introduction (1987). Another significant difference between the two codes is the treatment of non-neutral or party appointed arbitrators. The American Arbitration Association/American Bar Association code provides for non-neutral arbitrators who may favor the appointing party as long as disclosure is given while the International Bar Association Ethics for International Arbitrators has as a fundamental rule that all arbitrators must be free from bias. *See* AM. BAR ASS'N/AM. ARBITRATION ASS'N, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Preamble (2004), *available at* http://www.adr.org/sp.asp?id=21958 (last visited May 16, 2005); INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 1, 3 (1987).

from the arbitral institutions as well as the laws that govern arbitration,[16] and from this to synthesize the generally accepted ethical obligations of arbitrators.

A. Duty of Competency

An arbitrator has a duty not to accept an appointment beyond her competency.[17] In addition, there is a duty not to accept an appointment unless the appointee is assured of being able to commit the requisite time and resources to the arbitration. In other words, there is a duty of due care.[18]

B. Duty of Independence and Impartiality

An arbitrator has a duty of independence and impartiality in all dealings with the arbitration.[19] An impartial arbitrator is an arbitrator who is not biased in favor of, or prejudiced against, a particular party or the party's case.[20] In contrast, an independent arbitrator is an arbitrator who has no close relationship; financial, professional, or personal, with a party or the party's counsel.[21] The question of independence is determined by an objective standard. Impartiality, on the other hand, is an attitude or state of mind, and is therefore quite subjective. A lack of impartiality can be difficult to prove. In general, though, both independence and impartiality of the arbitra-

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16. Following the lead of the UNCITRAL Model Law, several nations have enacted arbitration legislation which sets out the role of arbitrators. UNCITRAL Secretariat, *Note by the Secretariat: Status of Conventions* 2-3, U.N. Doc. A/CN.9/401 (1994).

17. *See, e.g.*, INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 2.2 (1987).

18. *Id.* at R. 2.3.

19. *See, e.g.*, INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R.1, 2.1 (1987); AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005); AM. ARBITRATION ASSOC., INTERNATIONAL ARBITRATION RULES art. 16 (2001), *available at* http://www.adr.org/sp.asp?id=22090 (last visited Apr. 16, 2005). This is also mandated under some national legislation, for example, in the United States. 9 U.S.C. § 10(a)(2) (2004). *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 256-63 (Kluwer Law International 2003), for further discussion.

20. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, WITH NIGEL BLACKABY AND CONSTANTINE PARTASIDES 238-39, Sec. 4-55 (Sweet & Maxwell 2004).

21. *See id.* For example, the International Chamber of Commerce requires all arbitrators to disclose facts and circumstances to the Secretary General that may affect their independence, including "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 7.2 (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/-rules/rules_arb_english.pdf (last visited May 16, 2005). For a more detailed discussion, *see* Laurence Shore, *Disclosure and Impartiality: An Arbitrator's Responsibility Vis-à-vis Legal Standards*, 57 J. DISP. RESOL. 34 (2002); Hong-Lin Yu & Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators–US and English Perspectives*, 52 INT'L & COMP. L.Q. 935 (2003).

tor are required in the institutional arbitral rules.[22] This is the case in the World Intellectual Property Organization,[23] London Court of International Arbitration,[24] American Arbitration Association[25] and UNCITRAL Arbitration Rules,[26] and most national arbitration laws.[27] The majority of arbitral institutions and judicial decisions have adopted a standard of "justifiable doubts" for the arbitrator's independence or impartiality.[28]

C. Duty to Uphold the Integrity and Fairness of the Proceeding

It is important that an arbitrator not only uphold the integrity and fairness of the arbitration process, but also that the arbitrator give the appearance of doing so. Therefore, an arbitrator should neither solicit appointment[29] nor accept an appointment if the arbitrator cannot conduct the arbitration promptly.[30] All reasonable efforts must be taken by the arbitrator to prevent delaying tactics, harassment of the parties or other participants, or any other disruption of the arbitration process. If the parties set forth the arbitrator's authority in their agreement, the arbitrator should neither exceed nor fall short of the mandated authority. The arbitrator is required to exer-

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22. The International Chamber of Commerce is the noted exception. The Rules of Arbitration of the International Chamber of Commerce Article 7(1) provides that: "Every arbitrator must be and remain independent of the parties involved in the arbitration." INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 7(1) (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 16, 2005).

23. *See* WORLD INTELLECTUAL PROP. ORG., WIPO ARBITRATION RULES art. 22 (1994).

24. *See* LONDON COURT INT'L ARBITRATION, THE LCIA RULES arts. 5.2, 5.3 (1998), *available at* http://dspace.dial.pipex.com/town/square/xvc24/arb/uk.htm#g (last visited Apr. 16, 2005).

25. *See* AM. ARBITRATION ASSOC., INTERNATIONAL ARBITRATION RULES art. 7 (2001), *available at* http://www.adr.org/sp.asp?id=22090 (last visited Apr. 16, 2005).

26. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES arts. 6.4, 9, 10 (1976), *available at* http://www.jus.uio.no/lm/un.arbitration.rules.1976/index (last visited Apr. 16, 2005).

27. For example, the UNCITRAL Model Law provides in Article 12.2 for both "impartiality" and "independence." UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 12.2 (1985), *available at* http://www.uncitral.org/english/texts/arbitration/ml-arb.htm (last visited Apr. 16, 2005).

28. Most arbitration institutions adopt this standard. *See* LONDON COURT OF INT'L ARBITRATION, THE LCIA RULES art. 10.3 (1998), *available at* http://dspace.dial.pipex.com/town/square/xvc24/arb/uk.htm#g (last visited Apr. 16, 2005); AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES art. 7.1 (2001), *available at* http://www.jurisint.org/pub/03/en/F_9904.htm (last visited Apr. 16, 2005); UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 9 (1976), *available at*, http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc (last visited Apr. 16, 2005), for examples. England uses a stricter standard and requires a "real danger of bias" to be present. *See* AT&T Corp. v. Saudi Cable Co., 2 LLOYD'S REP. 127 (2000) (discussing and establishing the standard that arbitrators—and subsequently the award—may be challenged only if a "real danger of bias" exists).

29. *See, e.g.*, INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 2.4 (1987).

30. *Id.* at R. 2.3. *See also* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 280-81 (Kluwer Law International 2003), for further discussion.

cise authority completely and to comply with all provisions of the agreement.

An arbitrator should not enter into any financial, business, professional, family or social relationship while serving as an arbitrator that would create a lack of impartiality or the appearance of a lack of impartiality.[31] This proscription should extend for a reasonable time after the resolution of the case in circumstances in which there may be an appearance that the arbitrator was influenced by the anticipation or expectation of the relationship or interest.

D. Duty of Disclosure

An arbitrator should fully disclose any personal interests or relationships with the parties or witnesses.[32] However, this rule should be applied

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31. *See, e.g.*, INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 3.2, 3.3 (1987).

32. *See, e.g.*, AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005); UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 9 (1976), *available at* http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc (last visited Apr. 16, 2005). UNCITRAL Arbitration Rules state:

> A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Id. See also AM. ARBITRATION ASSOC., COMMERCIAL ARBITRATION RULES R. 19 (Rev. 1996), which states:

> Any person appointed as a neutral arbitrator shall disclose to the American Arbitration Association any circumstance likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the American Arbitration Association shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of a neutral arbitrator, the American Arbitration Association shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

Id. See also INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 11.1 (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 16, 2005) ("A challenge of an arbitrator, whether for an alleged lack of 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."). *See also* INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 4.1 (1987).

realistically so that the burden of disclosure does not become so onerous that it discourages business people who are best suited to decide disputes from becoming arbitrators. The basis for disqualification due to a personal relationship with a party to the proceeding is different from disqualification for failure to disclose the relationship. Although an arbitrator's relationship with a party may not be decisive, the failure to disclose the relationship would be sufficient for disqualification.[33]

Included in the disclosure should be any interests or relationships in the past or that involve family members, employers, partners or business associates.[34] Furthermore, an arbitrator has an affirmative duty to inform herself of any possible conflicts of interest.[35] This duty of disclosure is an ongoing duty for an arbitrator that continues throughout the proceedings.[36] Unless otherwise provided in the arbitration agreement, the arbitrator should make the disclosures to all parties and to the other arbitrators if more than one arbitrator is appointed.[37]

One question that often arises is the duty of an arbitrator to investigate her law firm's prior relationship with a party as an inherent part of the duty to disclose. On this point, the American courts are in disagreement about the obligation to take reasonable efforts to inform herself about prior law firm dealings with the parties.[38]

After the disclosure, if all parties request, an arbitrator should withdraw. If less than all the parties request the withdrawal, the arbitrator should do so unless specific procedures for challenging an arbitrator are set forth in the arbitration agreement. If the agreement sets forth procedures for removing an arbitrator, the procedures should be followed strictly. Otherwise, if the arbitrator determines that the reason for the challenge is not substantial, that the arbitrator can act impartially, and that withdrawal would cause un-

33. *See* Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 16 N.Y.S.2d 435 (1939), *aff'd*, 20 N.Y.S.2d 985 (1940).

34. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II(A)(2) (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005).

35. *Id.* at Canon II(2)(B).

36. *Id.* at Canon II(2)(C).

37. *Id.* at Canon II(2)(E).

38. *Compare* Al-Harbi v. Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 981 (1996), *and* Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141 (4th Cir. 1993) (no duty to investigate), *with* Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994) (duty to investigate). *See* R. Travis Jacobs, *Arbitrator or Private Investigator: Should the Arbitrator's Duty to Disclose Include a Duty to Investigate?*, 1997 J. DISP. RESOL. 133 (1997), for a discussion of these cases.

fair delay or expense to another party or would be contrary to the ends of justice, then withdrawal would not be mandatory.[39]

If the parties' agreement does not provide for a method of challenging the appointment of the arbitrator, various sets of arbitration rules such as the UNCITRAL arbitration rules,[40] the American Arbitration Association International rules[41] and the International Chamber of Commerce rules[42] supply guidelines for challenging the appointment of an arbitrator and accordingly set forth disclosure requirements for arbitrators. Generally, the burden to prove the basis for disqualification will be on the challenging party.[43]

The leading American case on disclosure by arbitrators is *Commonwealth Coatings Corporation v. Continental Casualty Company*.[44] This case held that arbitrators are required to disclose any interests or relationships that may lead to partiality or the appearance of partiality.[45] In this case, Justice White, in a concurring opinion, suggested that an arbitrator should not be automatically disqualified for having had a business relationship with a party if both parties are informed, or, if the parties are unaware of the relationship, but the relationship is trivial.[46]

Although some American courts have supported the majority's opinion in *Commonwealth Coatings*, that there is an absolute duty to disclose, the majority of American courts have followed White's view of less than an absolute duty.[47] However, in all cases, the determination is fact-specific.[48]

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39. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II(G)(2) (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005). This position is also supported in international arbitration. For example, Lew, Mistelis, and Kroll state: "The suggested rule, when in doubt disclose, is not always appropriate." JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 268 (Kluwer Law International 2003).

40. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 9 (1976), *available at* http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc (last visited Apr. 16, 2005).

41. *See* AM. ARBITRATION ASSOC., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 8 (2003), *available at* http://www.adr.org/sp.asp?id=22090 (last visited Apr. 16, 2005).

42. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 7.2 (1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 16, 2005).

43. *See, e.g.*, 7 MEALEY'S INT'L ARB. REP. 5 (1996) (citing Kuwait Foreign Trading Contracting & Inv. v. Icori Estero SPA, 94/16731, Cour d'appel de Paris (June 13, 1996) (original in French)).

44. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968), *cert. granted*, 390 U.S. 979 (1968), *reh'g denied*, 390 U.S. 1036 (1968).

45. *Id.* at 149-50.

46. *Id.* at 151 (White, J., concurring).

47. The majority of federal circuits follow Justice White's opinion. *See* Ruth V. Glick, *Arbitrator Disclosure: Recommendation for a New UAA Standard*, 13 OHIO ST. J. ON DISP.

In addition, in the United States, there is authority that a breach of ethical standards as promulgated in arbitral rules is not a sufficient judicial basis for setting aside an arbitration award because arbitration rules and codes of ethics do not have the force of law.[49] However, under the Federal Arbitration Act, if there is "evident partiality" on the part of the arbitrator, the award may be vacated.[50] Evident partiality is more than a mere appearance of bias.[51] The party challenging the arbitration award must establish that undisclosed facts create a "reasonable impression of partiality."[52] Even

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RESOL. 89, 94-97 (1997) ("It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality.") (citing Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)). *See also* Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (holding in light of Justice White's concurring opinion, the test was whether a "reasonable person would have to conclude that an arbitrator was partial"); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983) ("[W]hether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship . . . was so intimate—personally, socially, professionally, or financially—as to cast serious doubt on . . . impartiality."); Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1201-02 (11th Cir. 1982) (White, J., concurring) (holding to vacate due to evident partiality, the challenging party must prove the undisclosed facts create a reasonable impression of partiality that is "direct, definite, and capable of demonstration rather than remote, uncertain, or speculative") (citing Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980), *cert. denied*, 449 U.S. 873 (1980)); Lozano v. Maryland Casualty, Co., 850 F.2d 1470, 1471 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) ("The type of business relationship at issue is a factor to address and where trivial, disclosure is not required.") (citing *Commonwealth Coatings*, 395 U.S. at 150).

48. *See* Glick, *supra* note 47, at 95 (citing Schmitz v. Zilveti, 20 F.3d 1043, (9th Cir. 1994) (holding the duty to investigate attaches independent of the duty to disclose. The arbitrator was charged with constructive knowledge of his firm's previous relationship with a party to the arbitration)). *See also* Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682-84 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 981 (1996) (finding no requirement of constructive knowledge. The arbitrator's former firm represented one of the parties before he became a member of the firm. The court did not impose a duty to investigate "facts marginally disclosable under the *Commonwealth Coatings* duty."); Lifecare Int'l, Inc. v. CD Medical, Inc., 68 F.3d 429, 432-34 (11th Cir. 1995), *modified*, 85 F.3d 519 (1996) (finding similar to *Al-Harbi* that there is no duty to investigate relationships concerning the arbitrator's firm which took place before he became a member of the firm).

49. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983).

50. 9 U.S.C. § 10(a)(2) (2004) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators, or either of them.").

51. *See* Int'l Produce v. A/S Rosshavet, 638 F.2d 548, 552 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981); Reeves Bros., Inc. v. Capital-Mercury Shirt Corp., 962 F. Supp. 408, 414 (S.D.N.Y. 1997) ("[W]e hold that 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.").

52. Lifecare Int'l, Inc. v. CD Medical, Inc., 68 F.3d 429, 433 (11th Cir. 1995), *modified*, 85 F.3d 519 (1996) (quoting Middlesex, 675 F.2d at 1201 (White, J., concurring)); Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994). *See also* Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196 (7th Cir. 1980), *cert. denied*, 449 U.S. 873 (1980) ("[For an award to be set aside,] the interest or bias of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.").

when a party cannot support a claim of evident partiality, the arbitrator may wish to resign. This decision generally is best left to the sound discretion of the arbitrator.[53]

E. Duty to Communicate

Unless the agreement of the parties otherwise provides, the arbitrator should not participate in *ex parte* communications with either party.[54] This rule is subject to three clearly defined and accepted exceptions. First, the arbitrator may communicate with a party concerning administrative issues, such as setting dates and times for hearings, provided that each party is informed of the communication and consulted in the determinations.[55] Second, if a party with due notice fails to attend a hearing, the arbitrator may proceed with the case with the party who is present.[56] Third, an arbitrator may discuss the case with one party if the parties request or consent to the discussion.[57] In addition, if an arbitrator communicates in writing with a party, or receives written communication from a party, the arbitrator must provide the other party with a copy of the communication.[58]

F. Duty to Act Professionally

At all times during the proceedings, an arbitrator should exhibit, and require all participants to exhibit, equality, fairness, diligence,[59] promptness, patience, and courtesy toward all parties, lawyers, witnesses and other arbi-

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53. *See* Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174 (2d Cir. 1984).

54. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II(E) (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005); INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS R. 5.3 (1987). This is a general rule that is also subject to arbitral rules that specifically provide for *ex parte* communications. Today this is quite limited. *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 606-08 (Kluwer Law International 2003).

55. AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon III(B)(6) (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005).

56. *Id.* at Canon III(B)(6). In fact, the Tribunal may decide the case without one of the parties presence provided the absent party receives sufficient notice of the hearing. *See, e.g.*, AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES art. 23.2 (2001), *available at* http://www.jurisint.org/pub/03/en/F_9904.htm (last visited Apr. 16, 2005); UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 28.2 (1976), *available at* http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc (last visited Apr. 16, 2005).

57. AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon III(B)(6) (2004), *available at* http://www.adr.org/si.asp?id=1620 (last visited Apr. 16, 2005).

58. *Id.* at Canon III(C).

59. Part of the duty to act professionally is the duty of due diligence. Arbitrators should carry out their duties in a timely manner. Whether this requirement is met is determined by the sound discretion of the arbitrator. These time constraints, however, are constrained by some arbitral rules that actually set out the time limits. *See, e.g.*, INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 24.1 (1998).

trators.[60] Also, an arbitrator should accord each party the right to appear and participate in all aspects of the proceeding and recognize the participant's right to be represented by counsel.[61]

If a party fails to appear after proper notice, the arbitrator should seek assurance that notice was provided. If notice was provided, and if authorized by the parties or by law, the arbitration may proceed without the absent party.[62] During a hearing, it is permissible for an arbitrator to ask questions, call witnesses and request documents or other evidence when the arbitrator feels that insufficient evidence has been provided to decide the case.[63]

Although an arbitrator may not exert pressure on any party to settle a case, the arbitrator may suggest that the parties discuss the possibility of settlement. However, it is generally considered outside the scope of the arbitrator's authority to participate in the settlement discussions, or to switch roles into that of a mediator, as the failure to settle the case will present difficulties for the arbitrator expecting to return to her impartial role.[64] Consequently, despite the fact that some canons allow for the arbitrator to participate in settlement discussions,[65] the arbitrator should refrain from participating in any role other than that of an impartial decision maker.

G. Duty to Render a Decision

When an arbitrator is called to preside over a dispute, the arbitrator should carefully and deliberately decide all issues involved in the dispute by relying on her independent judgment and without consideration for any outside pressures.[66] The arbitrator should not delegate the responsibility to decide the case to another person.[67] If an arbitrator is asked by the parties to

60. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV(A)-(C), (G) (2004).

61. *Id.* at Canon IV(D), (E). *See also*, UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 15 (1998); INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION arts. 14.1, 15 (1998).

62. AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV(F) (2004).

63. *Id.* at Canon IV(G).

64. This is because the arbitrator may obtain information during the "mediation" or settlement discussions that may prejudice one client. For example, and arbitrator may receive during settlement negotiations the "lowest amount acceptable for settlement" from both clients.

65. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon IV(F) (2004).

66. *Id.* at Canon V(A)-(B).

67. *Id.* at Canon V(C). This can be an issue in several circumstances because any delegation of *any* part of an arbitrator's duties can call into question the third party's involvement in the proceedings. Then, for example, there may be the question of whether the third party would be bound by the arbitration agreement or by the confidentiality provisions. The arbi-

embody a settlement agreement in the form of an award, the arbitrator may do so, but the arbitrator is not compelled to do so unless she is satisfied with the terms of the settlement.[68]

H. Duty to Act in a Fiduciary Manner

An arbitrator should keep all matters relating to the arbitration confidential and should never use confidential information for his own gain or personal advantage.[69] When an arbitrator has reached a decision, all parties should be informed of the decision before the decision is reported to anyone else. If there is more than one arbitrator deciding the case, the arbitrators deliberations are not to be shared with anyone. Following an award, the arbitrator should not assist in any post-arbitration proceedings.[70]

Confidentiality in arbitral proceedings is important. Some parties value confidentiality more than speed or economy. Arbitration allows parties to resolve their disputes privately and with assurance that the substance of the proceedings will not be disclosed.[71]

Administrative rules, as well as codes of conduct, govern confidentiality between the parties and the arbitrator and administrative body, but not between the parties themselves.[72] An arbitrator has the responsibility and the power to maintain the privacy of the hearings.[73] The arbitrator may enforce this mandate by excluding from the hearing any non-parties or persons not essential to the proceeding, including witnesses not currently testifying.[74]

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trator's paralegal, law clerk, or secretary may be considered a third party. An arbitrator should refrain from involving any third party without the expressed agreement of the parties.

68. *Id.* at Canon V(D).

69. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VI(A)-(B).

70. *Id.* at Canon VI(C). In the United States, there are instances where the subsequent involvement of an arbitrator may be required by law. The Canons recognize this. This could be the case, for example, if the arbitrator has been appointed by the court.

71. *See* Philip Rothman, *Psst, Please Keep it Confidential*, 49-SEP DISP. RESOL. J. 69 (1994).

72. *Id.*

73. *See, e.g.*, INT'L BAR ASSOC., ETHICS FOR INTERNATIONAL ARBITRATORS R. 9 (1987).

74. *See, e.g.*, AM. ARBITRATION ASSOC., COMMERCIAL ARBITRATION RULES R. 23 (2003). Rule 23 states:

> The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

I. Compensation

An arbitrator should steadfastly avoid bargaining with the parties over the amount of fees or communicating with parties concerning fees in any way which would create an appearance of coercion or other impropriety.[75] There are certain generally accepted practices which should be applied in the absence of governing provisions in the parties' arbitration agreement or applicable law to promote integrity and fairness. First, the arbitrator's compensation should be established before she accepts the appointment. All parties should be informed of this in writing. Second, if the proceedings are being conducted by an arbitration institution, the institution should make arrangements with the parties for the arbitrator's compensation to eliminate communication directly between the arbitrator and the parties concerning compensation. Third, if it is an *ad hoc* arbitration, all discussions with the arbitrator concerning compensation should take place in the presence of all parties.[76]

J. Duty of Non-Neutral Arbitrator

Having a non-neutral arbitrator can present problems. If three arbitrators are appointed to decide a case, usually two of the three arbitrators are selected by each of the parties. Selection of the third arbitrator may be done in several ways, such as by agreement of the parties, selection by the two party appointed arbitrators or selection by the arbitral institution. The party appointed arbitrator serves an important function in that she gives confidence to the party who appointed her that she will listen carefully and sometimes sympathetically to that party's presentation and will study any supporting documents with care.[77]

Id.; UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 25.4 (1976) ("Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined."); INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 21.3 (1998) ("The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted").

75. *See, e.g.*, MILAN CHAMBER OF COMMERCE, CODE OF ETHICS FOR ARBITRATORS art.11 (2004), *available at* http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/a11 (last visited Apr. 19 2005).

76. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VI(D) (2004).

77. In an international arbitration, the party appointed arbitrator also serves as a translator of the legal and business culture between parties from different countries. For further discussion, *see* Andreas F. Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 65 (1995).

Often a party appointed arbitrator is not expected to be neutral[78] in the same way as the non-party appointed arbitrator, but instead is permitted to be "predisposed toward the party who appointed them [sic]."[79] Noting the distinction between neutral and non-neutral is one of contractual choice; the courts have consistently upheld the parties' right to select non-neutral party-appointed arbitrators.[80]

III. THE RISE OF THE CODES OF ETHICS FOR ARBITRATORS

There is a growing body of ethics rules for both domestic and international arbitrators. In fact, some states have adopted ethical rules for arbitrators[81] and many states now provide that lawyers who are acting as arbitrators are governed by the codes of professional responsibility that govern lawyers.[82] We believe this may be viewed as a trend toward the "judicialization" of arbitration. While we generally agree with the list of basic princi-

78. For example, Judicial Arbitration Mediation Services (JAMS) has separate guidelines applicable to "Non-Neutral Arbitrators" ("Section X"). The guidelines specifically provide that a non-neutral arbitrator may be predisposed towards the party who appointed the arbitrator, but in all other respects, the non-neutral arbitrator is obligated to act in good faith and serve with integrity and fairness. However, this presumption may be fading as the 2004 Revised Code of Ethics for Arbitrators in Commercial Disputes promulgated by the American Bar Association and the American Arbitration Association now specifically includes a presumption of neutrality of arbitrators, which includes party appointed arbitrators. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS APPROVED, TAKES EFFECT, *available at* http://www.adr.org/sp.asp?id=24149 (last visited April 26, 2005).

79. AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon X(A)(1) (2004).

80. *See* Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815 (8th Cir. 2001) (asserting that parties are free to contract to the desired method of arbitration, including the use of non-neutral party-appointed arbitrators who are partial).

81. For example, the North Carolina Bar Association Dispute Resolution Section and its Committee on Ethics and Professionalism promulgated the North Carolina Canons of Ethics for Arbitrators in 1998. *See* George K. Walker, *State Rules for Arbitrator Ethics*, 23 J. LEGAL PROF. 155 (1999). In 2002, California also required a person serving as a neutral arbitrator pursuant to an arbitration agreement to comply with the ethics standards for arbitrators adopted by the Judicial Council. *See* CAL. CIV. PROC. CODE § 1281.85 (West 2003). New York and Texas are also in developmental stages. *See* Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F.L. REV. 119 (2003).

82. Some commentators have suggested that participation in ADR implicates the ethical standards that govern mediators and that govern lawyers who negotiate (citing to Rules 4.1 and 4.2 of the Model Rules of Professional Conduct). This question has been debated for some time. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978). Florida has enacted a comprehensive statutory scheme that provides "credentializing" and certification standards for mediators who operate within the state's justice system, as well as formal disciplinary and regulatory bodies. *See* 5 FLA. STAT. ch. 44.106 (1990). In addition, states like Massachusetts, Virginia, and Florida have formal state offices or bureaucracies that manage dispute resolution processes. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997), for a further discussion of state management of dispute resolution processes.

ples that we have previously outlined, we are not as certain as some[83] that this rise in formalized rules and processes will result in the improvement of arbitration.

Regardless, one thing is certain. The promulgation of rules of ethics for arbitrators is a growth industry. For example, the ABA's Model Rules of Professional Conduct were formally amended in 2002 to include specific reference to third-party neutrals.[84] In addition, a joint project between the American Bar Association and the American Arbitration Association recently concluded an effort to revise the Code of Ethics for Arbitrators in Commercial Disputes as an attempt to create a unified code to apply to both domestic and international commercial arbitration within the United States.[85]

Moreover, not all of these rules provide the range of flexibility normally associated with arbitral proceedings. Thus, for example, although most of these codes are similar,[86] the International Bar Association has gone outside the normal scope of these rules, and has now developed a set of guidelines to provide governance of questions of conflicts of interests. The guidelines create three color coded lists under which conflict-of-interest disclosures would be either required, optional, or unnecessary.[87] This is a salu-

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83. *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 352 (2002) (citing Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 62 (1999) (stating in domestic American arbitrations, there is evidence that businesses are seeking more formal judicialized arbitration, instead of speedy fact-based awards entered by expert arbitrators after little prehearing process); *but see* Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, 6 No. 3 DISP. RESOL. MAG.16, 16 (2000) (arguing that "many business persons bemoan the increasing 'judicialization' of arbitration").

84. Some commentators consider this the "single most important" revision. *See, e.g.*, Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 212 (2001); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 510 (2003).

85. *See* AM. ARBITRATION ASSOC., CODE OF ETHICS FOR ARBITRATORS APPROVED, TAKES EFFECT, *available at* http://www.adr.org/sp.asp?id=24149 (last visited April 26, 2005).

86. Among those codes, greater relevance should be given to the Code of Ethics for Arbitrators in Commercial Disputes; the Rules of Ethics for International Arbitrators; and the Guidelines of Good Practice for Arbitrators approved by the Chartered Institute of Arbitrators.

87. For example, the Red List *requires* disclosure in circumstances if (1) there is an identity of interests between a party and an arbitrator, (2) the arbitrator is a member of a supervisory board or director of a party, or (3) the arbitrator has a significant financial interest in one of the parties or the outcome of the dispute. The Orange List calls for disclosure in circumstances that might give rise to questions of impartiality in the eyes of the parties. The guidelines suggest these circumstances include, for example, repeat appointments of the arbitrator by a party, serving as counsel against one of the parties in an unrelated matter, and serving in another arbitration with one of the parties involving a related issue. Finally, the Green List contains a non-exhaustive list of specific situations where, in an objective determination, no appearance of or actual conflict of interest exists. In these situations the arbitrator has no duty

tary effort designed to provide a consistency of application and fewer unnecessary challenges. However, the result of the application of these rules may create limitations that go beyond what many parties and arbitrators expect from the arbitral process.

For example, the rules provide generalizations of well known principles that add little to the questions that arbitrators would ask themselves, but the rules do not provide any real appreciation for the factual determinations that are necessary to determine conflicts of interest. In addition, the rules provide concrete examples of conflicts that do not provide for arbitrators who are highly expert in a given area and may be called upon many times by a business involved in highly technical or complex products.

There is also a broader question of whether the codification of conflicts or other ethical rules inflicts both unnecessary restrictions on the parties' autonomy to choose arbitrators[88] as well as the ability of the arbitrators themselves to rely on their own professional judgment in these matters. Yet, it is the growth and popularity of arbitration as a dispute resolution institution that has brought about the judicialization of arbitration because much of the success of arbitration is based on public confidence in the system: a confidence partially created by the fact that arbitration has begun to mirror the judicial process. This confidence will continue and grow if the public believes that through arbitration justice is done in a manner consistent with the fundamental fairness that society presently expects from the judicial process.

This confidence comes at a cost, however, for much of the belief of fairness and reliability in dispute resolution systems is based on the strict adherence to procedures and guidelines. As with the judicial process itself, the arbitral process has begun to cloak itself with the mantle of detailed procedural rules, such as the ethical rules that govern arbitrators. Thus, as arbitration gains acceptance in society as a whole, it loses some of its former flexibility and informality that was one of its chief attractions.

Therein lies the dilemma. Arbitration, which was once a relatively small part of the dispute resolution system, has become a large institution in its own right. While arbitration was still the small province of the few that chose to take advantage of its benefits, there was no compelling social policy to regulate it, and its regulation was effectively within the domain of the desires of the parties. Ethical Codes and ethical standards were unnecessary

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to disclose. INT'L BAR ASSOC, GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, *available at* http://www.ibanet.org/ (last visited May 12).

88. Because arbitrators are often chosen by the parties to the arbitration, the question of conflicts of interest has traditionally been resolved by disclosure. Once the arbitrators have disclosed any potential conflicts and the risks are known to the parties, then under the theory of party autonomy and choice, the parties are free to retain the arbitrator.

as the procedures used by and behavior expected from the arbitrators were agreed upon by the parties.

With the rapid growth of arbitration as a major source of dispute resolution in modern society, society has a new-found interest in ensuring that arbitration generates fair and reliable awards. This societal interest, bolstered by the judiciary and legislatures that create a legal framework for arbitration, places a new demand on the institution of arbitration to ensure not only that there is confidence by the parties that the system works, but also that there is public confidence that the system works. This interest has generated the plethora of legislation and institutional rules that govern the behavior of arbitrators, and has moved arbitrators closer to an institutional role that is becoming indistinguishable from the judiciary. This is not an unexpected development, for as arbitration becomes a larger part of our dispute resolution system, it is natural that we would demand that it have the procedures and protections that we enjoy from our judiciary.

But at the end of the day, it was the inflexibility of judicial procedures—rules that govern conflicts of interest, rigid rules of "ethical conduct" that were no more than trade union rules, and other formalities of the judicial process—that led us to arbitration in the first place.