

## :: ARBITRATORS' OBLIGATIONS IN INTERNATIONAL ARBITRATIONS ::

The arbitrators' obligations derive from their contractual relationship with the parties and from their role as persons in charge of resolving the dispute subject to their consideration. Among the obligations mainly acknowledged, the following are found:

### I. Obligation to resolve the controversy raised by the parties

The basic obligation of arbitrators is to resolve the parties' conflict, which is the basic purpose of the arbitration agreement and the reason whereby the parties decided to appoint an arbitrator and submit the case to him. The resolution of the case by the arbitrator/s must be performed by observing the due legal process, what implies to respect the parties' right of self-defense furnishing them an equal and fair treatment granting to said parties the proper and reasonable chance of submitting their case. This principle was adopted by several Argentine regulations [\(1\)](#) and at an international level, it is present in almost all the regulations [\(2\)](#) and in the so-called soft law [\(3\)](#).

#### I.1. Obligation of impartiality and independence

These duties include both, a personal obligation of impartiality (that requires from the arbitrator not to act subjectively with partiality, predispositions, or affinities interfering with the fair and impartial solution of the conflict raised between the parties) and an objective obligation of independence (that requires from the arbitrator not to have personal, contractual, institutional or any other type of relationships, compromising his independence). As sustained by Rivera "the arbitrator that lacks close, substantial and recent ties with the parties is independent" [\(4\)](#). These duties not only include the obligation of being impartial but also the obligation to conduct the arbitration in an impartial manner, treating both parties in an equitable and fair manner.

In order to distinguish both criteria, it may be highlighted that the term "independence" refers to an objective concept having factual ties while the term

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"impartiality" is a subjective concept and of intellectual nature [\(5\)](#). Notwithstanding this distinction, it is common practice to use both terms as synonyms. Examples thereof are the ICSID Rules [\(6\)](#) or the arbitration laws of England [\(7\)](#) and Sweden [\(8\)](#).

Essentially, the obligation to act independently and impartially constitutes an inherent and vital aspect of the adjudicative role of arbitrator, expressly set forth in almost all the national legislation [\(9\)](#) and in the institutional regimes on arbitration [\(10\)](#), in ad hoc rules [\(11\)](#), and they make-up the parte de soft law [\(12\)](#) as well.

With the purpose of ensuring the performance of the Independence obligation, arbitral institutions generally impose upon the arbitrators the execution of statements whereby they represent and warrant that they are independent [ICC [\(13\)](#), ICSID [\(14\)](#), among others [\(15\)](#)]. These representations, the act whereby arbitrators disclose to the parties all the ties that they may have with the case and/or with the parties, are not only admitted in most of the laws on arbitration [\(16\)](#) but they are supported also by a great number of authors on the issue [\(17\)](#).

Therefore, arbitrators must have and maintain the requirements of impartiality and independence set forth in the arbitration agreement, in the regulations elected by the parties to resolve their controversy and in the governing law up to the end of the arbitration proceedings (including the necessary term to issue clarifications).

## I.2. Obligation to disclose potential conflicts of interest

The main purpose of the arbitrators' obligation to provide information is to allow the parties to determine if the prospective arbitrators meet the applicable guidelines of independence and impartiality, so that said parties may exercise their rights to object to the appointment thereof or to challenge them if they consider that said guidelines are not met.

This obligation requires that, prior to the acceptance of their appointment, candidates to be proposed or appointed as arbitrators should make an analysis and a reasonable effort to be duly informed on their interests, contacts and relationships and

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that, as applicable, must be informed to the parties bearing in mind the case submitted to them.

In the event that an arbitrator's obligation to disclose is breached, the arbitrator may be challenged, removed and eventually he may potentially incur civil liability, particularly if the conflict of interest proves to be obvious.

The fact that an arbitrator informs the circumstances mentioned above does not necessarily imply the existence of a conflict of interest. The reason why an arbitrator has disclosed information to the parties is because he considers that he is independent or impartial since, otherwise he should reject or resign to the appointment, in the event of a supervening cause.

There is always a degree of tension between the right of the parties to know such facts and circumstances, that could give rise to doubts on the possible lack of independence and impartiality of arbitrators with the purpose of avoiding groundless challenges and protecting the arbitrators' freedom of choice right.

In order to define the outlines of the disclosure obligation it is very useful to consult the Rules or guidelines of the IBA on conflict of interests in international arbitration. Although said rules are not binding, unless the parties have provided it in the arbitration agreement, the aim of said rules is to try to define the cases in which it is necessary to disclose facts or circumstances, that may be important, with the purpose of protecting awards against objections based on alleged omissions of arbitrators to their duty to disclose.

The rules set a non-exhaustive list of specific situations classified in red (which in turn are divided into waivable or non-waivable), orange or green colors.

If the arbitrator considers that he must disclose certain facts or circumstances, but the professional secrecy keeps him from doing it, it is considered that the arbitrator must reject the appointment or resign.

If the fact is contemplated in the non-waivable red list (that includes situations derived from the fact that nobody can be both, judge and jury to a case), the

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acceptance of said situation by the parties or the failure to challenge it does not avoid the conflict of interest.

The waivable red list contemplates less serious situations and the arbitration may continue if all the parties, the remaining arbitrators and the institution are in agreement, expressly waiving the right to question the arbitrator's performance.

The orange list contemplates situations that, duly disclosed, if the parties do not object to them within 30 days after the party entitled to challenge does not exercise said right, it is considered waived. Disclosure does neither imply the existence of a conflict of interest nor a disqualification per se of the arbitrator.

The situations not comprised within the orange list are not normally subject to disclosure, nevertheless, the arbitrator must analyze in each specific case the particular situation to determine if said situation, as from the parties' standpoint, could cast any doubts on his independence e impartiality.

The green list contemplates specific situations which, as from an objective standpoint, are not likely to create a conflict of interest, and that is the reason why, pursuant to the above said Rules or guidelines of the IBA, arbitrators would not be obligated to disclose the same.

The duty to disclose is widely acknowledged in the Argentine law [\(18\)](#), in the institutional regimes on arbitration [\(19\)](#) and in the so-called soft law [\(20\)](#).

As pointed out by Craig, Park and Paulsson, obviously, the performance of the duty of Independence and impartiality is not affected by the necessary presentation of the case that one party must make to the arbitrator at the time of considering its election before his appointment. The purpose of said meeting is that the arbitrator obtains certain information on the nature of the dispute. In said meeting the arbitrator should not express his opinion on the issue submitted to arbitration and the purpose thereof is to determine if the arbitrator has sufficient knowledge or experience on the subject, available time and the will to accept an appointment and, likewise, based on said personal meeting, to decide which arbitrator shall be appointed from among several

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prospective candidates [\(21\)](#).

### I.3. Diligence, expertise and integrity obligations

The obligation to conduct the arbitration proceeding and adopt a decision on the case comprises the obligation to act with the proper professional diligence, expertise and integrity. It includes:

— The arbitrators' obligation to devote to the case the necessary time and attention, dealing with the evidence and presentations produced and/or made by the parties with the necessary expertise and skill to understand them. It comprises the duty to decline appointments to act in arbitrations for which the potential arbitrator is not properly prepared or proves to be unfit, either as a result of his lack of experience, language skills, or other type of failures.

— The obligation to render an enforceable award.

— Observe the principle of consistency, deciding the issues that are submitted to his decision. Inversely, an arbitrator is obligated also not to decide on issues that have not been submitted to arbitration by the parties.

— Participate in calls and hearings held with the parties and in deliberations with the remaining members that make-up the tribunal.

— Act with professional integrity, observing the applicable rules of ethics and professional responsibility.

— Where applicable, the arbitrator is obligated to report the alleged non-performance of the other members of the tribunal's duties and the competent authorities to make appointments [\(22\)](#).

All these principles have been adopted by the Argentine law [\(23\)](#), international rules of arbitration [\(24\)](#) and the soft law [\(25\)](#).

Within the ICC Rules, upon the acceptance of his appointment, the arbitrator must address a statement to the ICC whereby he declares the following:

"based on information at present held by me, I can devote the necessary time to conduct this arbitration during the complete length of the case as diligently,

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efficiently and promptly as possible pursuant to the terms set in the Rules, subject to any extension granted by the Court pursuant to sections 23[2] and 31 of the Rules. I understand that the end of the arbitration as soon as reasonably possible is important and that the Court shall bear in mind both, the length and the management of the proceeding at the time of setting my fees (section 2<sup>o</sup> [2] of Appendix III of the Rules). My current professional commitments are detailed below for the information of the Court the ICC and the parties".

On the other hand, the rules of the Commercial Mediation and Arbitration Center (*CEMARC*) require also a professionally suitable arbitrator for the issue whereby he was appointed (section 8.1.) as required also by the Mediation and Arbitration Business Center (*Centro Empresarial de Mediación y Arbitraje (CEMA)*) [\(26\)](#).

#### I.3.a. Diligence Obligation

It consists in the general and moral duty of conducting the arbitration with diligence, efficiency and swiftly, as well as within the specific terms imposed by the applicable institutional regulations or the national law, or as per the parties' arbitration agreement.

It implies also the duty to promptly answer to the request of comments and opinions and to be available for hearings or deliberations.

Anyway, this duty must not lose sight of the obligation to give the parties the chance to submit their case and the tribunal's duty of necessary care and expertise on the basis of the complexity of the issue entrusted for its resolution.

One of elements to ensure a diligent management of the case is the arbitrator's obligation to verify that he will have time available to intervene in the arbitration.

This principle has been adopted by the Argentine law [\(27\)](#), regulations [\(28\)](#) and soft law instruments [\(29\)](#).

#### I.3.b. Obligation to apply due diligence

The parties to an arbitration proceeding entrusts the arbitration tribunal with a very

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important task expecting that it will exercise its duties with due diligence. There is a clear moral obligation in such sense. However, this not always means a legal obligation, in addition to the moral one [\(30\)](#).

According to the legal system, both the civil law and the common law, each country adopts different positions as regards the arbitrators' liability for non-performance of this obligation.

In the jurisdictions that follow the civil law tradition they may be subject to account for torts [\(31\)](#). It is considered for example, in the case of Argentina, that by virtue of the executed agreement, arbitrators shall be perform their duty to decide under the warning of being held liable for the damages derived from such non-performance: "The arbitrators' acceptance shall entitle the parties to compel them to perform their duties, under the warning of being held liable for damages " [\(32\)](#). In France, the institutions are required to follow the rules applicable to arbitration and may be considered liable in view of any type of non-performance of the arbitration agreement [\(33\)](#). In these cases, the arbitrator's liability for procedural mistakes or improper decisions shall be limited to the damage caused as a consequence of the arbitrator's willful misconduct or gross negligence [\(34\)](#).

However, in the countries that follow the common law system, arbitrators are not held liable for the performance of their duties unless it may be proved that they acted in bad faith [\(35\)](#). In countries such as Australia [\(36\)](#) and New Zealand [\(37\)](#) arbitrators are not held liable for their negligent behavior. In turn, entities such as the CCI and the LCIA (London Court of International Arbitration) have included regulations that seek to release arbitrators from liability [\(38\)](#). This difference is due to the fact that in common law judges and arbitrators have a deal that ensures them certain immunity to safeguard their independence [\(39\)](#). However, this immunity may be subject to conditions when the arbitrator has acted in bad faith as evidenced by the arbitration laws of Australia and Canada that provide that arbitrators may incur liability as a result of every action committed fraudulently, in bad faith or intentionally [\(40\)](#).

An intermediate position regarding the arbitrators' liability was adopted in the IBA

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Rules of Ethics for International Arbitrators of 1987 [\(41\)](#).

#### I.3.c. Obligation to speed up

The obligation to speed up that an arbitrator must bear in mind to guarantee an efficient process is strictly related to the diligence duty. With a view to said purpose, some legal systems guarantee that the arbitration proceedings should be conducted with a reasonable speed by setting maximum terms in which the tribunal must render the award [\(42\)](#). For example, the ICC Rules of Arbitration grants a maximum term of 6 months to render the award [\(43\)](#). In the Argentine Law, the Civil and Commercial Code of Procedure of the Nation sets the late issuance of the award as one of the causes to render it null and void [\(44\)](#). The UNCITRAL Model Law provides that the duties to be performed by an arbitrator shall end "when the arbitrator fails to exercise them within a reasonable term" [\(45\)](#).

#### I.4. Obligation to apply the law

The arbitrator's duty is not merely to make use of the terms of the arbitration agreement of the parties, or inclusive the law elected by the parties (except in the case of amicable referees), but also to use the governing law, including the relevant provisions of the compulsory law, to resolve the dispute of the parties in accordance with the law [\(46\)](#).

This duty consists in hearing the presentations and evidence of the parties in fair and objective proceedings and to issue an impartial and reasoned decision finally deciding its rights based on their presentations and evidence.

Most ethics codes omit an express reference to the arbitrator's obligation to apply the law. In lieu thereof, said codes [\(47\)](#), deal with the issue implicitly, and require that the arbitrator take impartial and fair decisions, based only in law and evidence. As regards the Argentine law, this principle is implicitly present in section 1652 of the Civil and Commercial Code. [\(48\)](#).

#### I.5. Obligation not to delegate obligations

It consists in the arbitrators' obligation not to delegate their responsibilities or tasks to

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third parties.

An arbitrator cannot delegate the duty to decide a case, attend hearings or deliberations, or evaluate the presentations and evidence of the parties to others. They constitute the essence of the adjudicative duties of the arbitrator and they are personal and non-delegable duties [\(49\)](#).

However, said duty does not necessarily exclude the possibility that an arbitrator be assisted by some colleague as regards issues that do not imply to undertake the role of arbitrator, or to influence the tribunal.

This principle is found in the Argentine legislation [\(50\)](#) and in the soft law [\(51\)](#).

With respect to the reception of the obligation in international arbitration rules, the ICC has issued notes related to the appointment of secretaries that regulate the participation thereof.

"The duties of the Administrative Secretary must be strictly limited to administrative tasks. The election of said person is important. Said person must not influence at all the Arbitration Tribunal's decisions. Especially, the administrative secretary must not undertake the duties of an arbitrator, and get involved in a remarkable way in the process to adopt the decision of the tribunal or by expressing his opinions or conclusions related to the issues in dispute" (Note on the Appointment, Duties and Remuneration of Administrative Secretaries).

II. Obligation to conduct the arbitration pursuant to the Arbitration Agreement executed by the parties. General duty to conduct the arbitration proceeding in accordance with the procedure set forth in the arbitration agreement (unless it is contrary to the regulations that must be mandatorily applied).

Upon the acceptance of the appointment, the arbitrator undertakes the contractual liability of exercising his powers within the terms set forth in the parties' agreement.

Unless there is a contrary previous agreement, the arbitrator's obligation is to move on with the mutually agreed upon procedure. The tribunal could refuse to make the procedures effective only when said procedures violate the mandatory applicable

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laws by requiring essentially unfair or unequal procedures, or because they are clearly illegal. [\(52\)](#).

The obligation to conduct the arbitration pursuant to the arbitration agreement executed by the parties is present both, in the Argentine law [\(53\)](#) and in soft law instruments [\(54\)](#) and international arbitration regulations [\(55\)](#).

### III. Obligation to complete their term of office

Most of the national regulations allow arbitrators to resign to their offices, either with or without the consent of the national tribunals or of the arbitral entity.

However, the acceptance of his appointment by one arbitrator involves an implicit commitment of completing said term of office, by the issuance of a final award. The resignation of an arbitrator, without cause, constitutes a breach to said commitment and would expose the arbitrator to claims for damages and other penalties [\(56\)](#).

Justifications may be material changes in personal circumstances beyond the arbitrator's control, such as sickness, disability or conflicts of interests arising after the commencement of arbitration.

This duty is related also with the obligation to resolve all the issues raised without delegating his powers.

The obligation to complete the term of office is included in the Argentine law [\(57\)](#) and in international arbitration rules [\(58\)](#).

### IV. Confidentiality obligation

The confidentiality duties are seldom expressly imposed upon arbitrators by the arbitration national legislation, but in the cases in which they exist in the law of the seat of arbitration [\(59\)](#), arbitrators shall be, in principle, committed to observe said obligation.

Likewise, the arbitration agreement of the parties may impose express obligations of confidentiality. In such event the arbitrators shall be obligated by the provisions of said arbitration agreement. The same goes for the event that the rules elected by the parties sets confidentiality obligations [\(60\)](#).

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The existence of a confidentiality obligation by the arbitrators in an international arbitration is subject to discussion, but some authors consider it as an implicit duty of the arbitration agreement [\(61\)](#).

The guidelines or instructions applicable to international arbitrations [\(62\)](#) reflect a general obligation of confidentiality. These guidelines may be considered as interpretative guidelines of the arbitration agreement defining the existence of an implicit duty of confidentiality. This principle is adopted also merely in a comprehensive manner in international arbitration rules [\(63\)](#)s.

It is a generally accepted principle that arbitrators must keep their discussions, hearings and presentations confidential, and with respect to the awards as well.

In very rare cases, the confidentiality obligation of arbitrators may come into conflict with the obligations derived from the mandatory national legislation, including the national criminal legislation or the professional liability regulations. In such cases, arbitrators are compelled to comply with the mandatory national laws properly applied to them at the time they use their best reasonable efforts to perform their contractual obligations of confidentiality with the parties [\(64\)](#).

#### ∇. Obligation to propose a settlement

In some jurisdictions the chance to suggest to the parties the advisability of reaching an agreement is considered a part of the arbitrator's duty to settle a dispute.

But, in general, the arbitrators' right to proposing the possibility of settling a dispute (what in some cases is questioned) is rarely seen as an obligation [\(65\)](#). If such possibility were accepted, it should be exercised with a high degree of caution and the arbitrator must avoid, by all means, any possibility of jeopardizing the enforcement of the award. Said principle is in turn required by the obligation of eligibility of the arbitrator, as mentioned above, it imposes upon arbitrator the obligation of rendering an enforceable award.

Said principle is adopted in soft law instruments such as the IBA Rules of Ethics for International Arbitrators [\(66\)](#) admitting such possibility when the parties have so

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requested it or have admitted a proposal in such sense made by the arbitrator and contained in the IBA Rules on conflicts of interests in Commercial Arbitration [\(67\)](#) that requires also the consent of the parties to make such proposals.

The Labor Force to control time and cost in the ICC international arbitration has suggested that an arbitration tribunal: "should consider informing the parties that they are free to settle in whole or in part the dispute at any time during the ongoing arbitration". And that: "the parties may agree also that the arbitration tribunal should adopt other steps to ease the settlement of the dispute, provided that said steps are not inconsistent with the duty of the tribunal (...) related to use their best efforts to make sure that the award may be legally enforced " [\(68\)](#).

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(1) New York Convention, approved by Act 23,619: "Section V.1) (b) The acknowledgment and enforcement of the award may be denied only, upon the petition of the party against which it is claimed, if said party proves to the competent authority of the country in which the acknowledgement and execution is applied for: (...) b) That the party against which the arbitration award is claimed, has not been duly notified on the appointment of the arbitrator or of the arbitration proceeding or was not able, for any other reason, to enforce its defense"; International Arbitration Act 27,449 "Equal Treatment of the Parties: Section 62.— The parties should be treated with equality and each of them must have the full opportunity to enforce their rights"; Civil and Commercial Code of the Nation, Section 1662.— "Arbitrators' obligations. (...) In all cases arbitrators must guarantee the equality of the parties and the adversarial debate principle, and each

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party should be given sufficient opportunity to enforce their rights ".

(2) ICC Rules Section 22 [4] "In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

(3) IBA Rules of Ethics for International Arbitrators: Cardinal Rule: "Arbitrators must act diligently and efficiently to provide to the parties a fair and effective a resolution of their disputes..." The UNCITRAL Model Law: Section 18. Equitable treatment of the parties "The parties should be treated with equality and each of them must have the full opportunity of enforcing their rights" (the translation belongs to me).

(4) RIVERA, Julio César, "International and Domestic Commercial Arbitration", page 233.

(5) CLAY, Thomas, "L'arbitre", Juris Doctor Thesis Work, of the University Panthéon-Assas (Paris II) presented and publicly supported on January 14, 2000, Printing House Dalloz, Nouvelle Bibliothèque de thèses, 2001, pages 246-247.

(6) ICSID Rules, section 14 [1] The persons appointed to appear in the Lists shall enjoy high moral character, must have recognized competence in the field of Law, trade, industry or finances and inspire full trust in their impartiality in judgment. Competence in the field of Law shall be a particularly relevant circumstance for the persons appointed in the List of Arbitrators.

(7) English arbitration Act of year 1996, section 1º: General Principles. The provisions of this Part are based on the following principle and shall be construed as (a) The purpose of arbitration is to obtain the fair resolution of controversies by an impartial tribunal without delays or unnecessary expenses.

(8) Sweden Act on arbitration dated March 4, 1999 (sections 8<sup>th</sup> and 21).

(9) International Arbitration Act (Act 27,449): "Article 26.— "[...] When appointing an arbitrator, the tribunal shall duly bear in mind the conditions required from an arbitrator by the agreement executed between the parties and shall take the necessary measures to guarantee the appointment of an independent and impartial

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arbitrator..." and Art. 28.— "An arbitrator may only be challenged if there exist circumstances that give rise to justified doubts regarding his impartiality or independence, or if he does not have the qualifications agreed upon by the parties. One party may only challenge the arbitrator appointed by it, or in whose appointment said party had participated, for causes that came to the knowledge of the party after the appointment "; Arbitration Contract in the Civil and Commercial Code of the Nation: Section 1662.— " . . . The arbitrator accepting the office executes a contract with one of the parties and undertakes to: a) disclose any circumstance previous to the acceptance or that may arise after it which may affect his independence and impartiality"; Civil and Commercial Code of Procedure of the Nation: Challenge Section 746.: "The arbitrators appointed by the tribunal may be challenged for the same causes as the judges. The parties' appointments by mutual agreement, only for reasons subsequent to the appointment..."; Civil and Commercial Code of Procedure of the Nation: Section 17.— "The following shall be legal causes for challenge: 1) Blood relatives within the fourth and second degree of kinship with any of the parties, their attorneys in fact or lawyers; 2) If the judge or his blood relatives or in-laws within the degree expressed in the preceding subsection, have any interest in the lawsuit or in a similar one, or company or community with any of the litigants, attorneys in fact or lawyers, unless it is a corporation; 3) If the judge has any pending proceeding with the challenging party; 4) If the judge is a creditor, debtor or surety of any of the parties, except for official banks;

5) To be or have been the judge that filed the report or criminal accusation against the challenging party, or reported party or accused party prior to the commencement of the lawsuit; 6) To be or have been the judge reported by the challenging party under the terms of the Act for the Prosecution of Judges, provided that the Supreme Court had decided to sustain the report; 7) To have been the defender of any of the litigants or to have issued an opinion or recommendations on the lawsuit, before or after its commencement; 8) If the judge has received important benefits from any of the parties; 9) If the judge is a friend of any of the litigants evidenced by closeness or frequent

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treatment; 10) To have against the challenging party enmity, hate or resentment evidenced by known facts. In no case challenge shall be admitted for attacks or offenses to the judge after he began hearing the case ".

(10) ICC Rules: Article 11: "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration." and section 22 [4] Conduct of the arbitration: "In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

(11) Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) Article 11: "Declarations of independence and impartiality and challenge of arbitrators: "When a person is informed on the possibility of being appointed to act as an arbitrator, said person shall disclose every circumstance that may give rise to justified doubts on his impartiality or independence. As from his appointment and throughout the whole proceeding, every arbitrator shall disclose to the parties and the other arbitrators, without delay, such circumstances, unless he has already informed them on the issues".

(12) Ethics Rules for International Arbitrators IBA; Background Note: "International arbitrators should be impartial, independent, competent, diligent and discreet". IBA Rules on Conflicts of Interest in International Arbitration 1) General Principle: "Every arbitrator shall be impartial and independent from the parties when accepting the appointment as arbitrator and shall remain so throughout the arbitration proceeding up to the rendering of the award or when the proceeding finally ends by any other means".

(13) ICC Rules, article 7-2.

(14) ICSID Rules, article 6-2.

(15) UNCITRAL Rules, section 9<sup>th</sup>; International Arbitration Rules of the American Arbitration Association (1997), section 19.

(16) Civil Procedural Code of France (section 1452.2); Arbitration Law of Brazil dated September 23, 1996; Arbitration Law of Spain dated December 5,

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1988 (section 17.3).

(17) CLAY, Thomas, *op. cit.*, pages 318-320.

(18) International Arbitration Law (Act 27,449) Grounds for challenge: Section 27. — "When a person is informed on his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. As from his appointment, and throughout the arbitral acts, the arbitrator shall disclose to the parties and the other arbitrators, without delay, such circumstances, unless he has already informed them on the issues" and Section 11: "Waiver of the right to object: - The party that continues with the arbitration knowing that any provision of this Law, which the parties may deviate from, or any requirement of the arbitration agreement have not been performed and fails to object to it within the twenty [20] following days, shall be considered as having waived his right to object "; Civil and Commercial Code, Section 1662.— "Arbitrators' Obligations. The arbitrator that accepts the appointment executes and agreement with each party and undertakes to: a) disclose any circumstance preceding the acceptance or that may subsequently arise which may affect his independence and impartiality";

(19) ICC Rules: Section 11 [2] General Provisions: " 2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat 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, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them."; and Section 11 [3] "An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration." and Section 14 [2] "For a challenge to be admissible, it must be submitted by a party either within 30 days from

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receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification."

(20) Ethics Rules for International Arbitrators; Section 4th: "A candidate for arbitrator must inform all the facts and circumstance that may give rise to a justifiable doubt on his impartiality or independence. Non-performance of his obligation to disclose or inform creates an apparent bias and may constitute per se a ground for disqualification even when the non-disclosed facts or circumstances, per se, could not justify disqualification"; IBA Rules on Conflicts of Interests in International Arbitration: Section 3 (a) provides that: "If there exist facts or circumstances that under the gaze of the parties could give rise to doubts on the impartiality or independence, the arbitrator must inform such facts or circumstances to the parties, the arbitration entity or another appointing authority (if any, and if required by the applicable entities' rules) and to co-arbitrators, if any, before accepting his appointment or, if subsequently, as soon as the arbitrator is aware of the same". 3. (d) "Any doubt on whether or not an arbitrator must disclose certain events or circumstances must be resolved in favor of informing them". 4) Waiver by the parties (a) If, within 30 days following the receipt of any disclosure made by an arbitrator, or otherwise, the facts or circumstances that may constitute a potential conflict of interests for an arbitrator were known by one party, and one of the parties fails to expressly object to said arbitrator, (...), it shall be considered that the party has waived claiming the existence of any conflict of interest regarding the arbitrator on the basis of said facts of circumstances and shall not be able to question said facts of circumstances in a subsequent stage " (it does not apply to the circumstances specified in the red list).

(21) CRAIG, W. Laurence — PARK, William W. — PAULSSON, Jan, "International Chamber of Commerce Arbitration", third edition, p.213.

(22) BORN, Gary B., "International Commercial Arbitration", Wolters Kluwer,

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International Arbitral Procedures, 2<sup>nd</sup>. ed., vol. II, pages 1992-1993.

(23) Civil and Commercial Code Section 1662.— "Arbitrators' obligations. The arbitrator that accepts the office executes a contract with each party and undertakes to: d) have enough time available to duly serve the arbitration; e) personally participate in the hearings; f) discuss with the other arbitrators; g) render the award stating the reasons thereof and within the time limit".

(24) ICC Rules: Section 13 [1] Appointment and confirmation of the arbitrators: In confirming or appointing arbitrators, the Court shall consider (...) the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2)."

(25) IBA Ethics Rules for International Arbitrators; section 1 s t : "Arbitrators shall act diligently and efficiently to issue a fair and equitable resolution of their disputes".

(26) Entity that uses the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).

(27) International Arbitration Law: Impossibility or failure to exercise the duties Section 32.— "When an arbitrator is prevented, either de jure o de facto, from exercising his duties or if for other reasons he does not exercise said duties within a reasonable time, he shall no longer exercise his duties if he resigns or is removed by mutual agreement of the parties. Otherwise, if the disagreement on any of said reasons continues, pursuant to section 13 any party may require from the competent tribunal the issuance of a decision declaring the suspension of office, and said decision shall not be open to appeal"; Civil and Commercial Code: Section 1662.— Obligations of Arbitrators. "The arbitrator who accepts the office executes a contract with each party and undertakes the following: d) to have enough time available to duly serve the arbitration; g) to render the award stating the reasons thereof and within the time limit"; Civil and Commercial Code of Procedure of the Nation: Arbitrators' performance: Section 745. — "The arbitrators' acceptance shall entitle the parties to compel them to perform their duties, under the warning of

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being held liable for damages" and Section 756: Arbitrators' liability: "The arbitrators, who, without fair cause, fail to render the award within the time limit, shall not be entitled to receive fees. Likewise, they shall be held liable for damages".

(28) ICC Rules: Section 22 [1] Conduct of the arbitration: "The arbitral

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tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."

(29) IBA Rules of Ethics for International Arbitrators; Section 1<sup>st</sup>. An essential rule "Arbitrators must act diligently and efficiently to provide to the parties a fair and effective a resolution of their disputes" and Section 7<sup>th</sup>. Duty of diligence "All the arbitrators must devote the time and attention that the parties may reasonably require bearing in mind all the circumstances of the case, and shall do everything possible to conduct the arbitration in such a way that the costs shall not be raised to an unreasonable proportion with respect to the interests at stake" (the translation is mine); The UNCITRAL Model Law on International Commercial Arbitration: Section. 14. Failure or impossibility of exercising the duties"1) Whenever an arbitrator is prevented, either de jure o de facto, from exercising his duties or if for other reasons he does not exercise said duties within a reasonable time, he shall no longer exercise his duties if he resigns or is removed by the mutual agreement of the parties".

(30) REDFERN, Alan — HUNTER, Martin, "Teoría y práctica del Arbitraje Comercial Internacional" (Theory and Practice of International Commercial Arbitration), Printing House La Ley, 4th Edition, chapter 5, page 354.

(31) Ibidem, page 359.

(32) Civil and Commercial Code of the Nation, section 745.

(33) EDFERN, Alan — HUNTER, Martin, op. cit., page 359, quotation 65. (34) Ibidem, page 356 (5-16).

(35) Arbitration Law of England of 1996, Section 29. "Immunity of

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Arbitrator. [1] An arbitrator is not responsible for anything done or omitted while exercising his duties as an arbitrator, unless it is proved that it is a bad faith act or omission. [2] Sub-section [1] it applies to an employee or agent of an arbitrator as it applies to the arbitrator himself" (the translation is mine). Along the same lines, to make sure that the arbitrators shall be responsible towards the parties for their fraudulent conduct only, the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL) Article 16 compels the parties to waive, to the fullest extent permitted under the applicable law any claim against arbitrators unless there exists the fraudulent conduct of said arbitrators: ". . . Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law any claim against arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration".

(36) International Arbitration Law of Australia of 1974, Section 28 (amended in 1992 to include the UNCITRAL Model Law).

(37) Arbitration Law of New Zealand of 1996, Section 13.

(38) EDFERN, Alan — HUNTER, Martin,  
op. cit., page 357. (39) Ibidem, ps. 356  
(5-17).

(40) Commercial Arbitration Act of Australia of 2017, Part 9 [39]:

"Immunity: [1] An arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as arbitrator. [2] An entity that appoints or fails to appoint a person as arbitrator is not liable in relation to the appointment, failure or refusal if done in good faith "(the translation is mine); Rules of Arbitration of Canada, 6.1.2: "The Tribunal and the Institute enjoy the same protections and immunity as a judge of the superior Courts of Canada" (the translation is mine).

(41) IBA Ethics Rules for International Arbitrators; Background Note: "In principle, immunity should be granted to international arbitrators against complaints pursuant

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to the national laws, except in extreme cases of willful or reckless nonperformance of his legal obligations" (the translation is mine).

(42) Italian Civil Code of Procedure, section 820 "The parties may, with the arbitration agreement or with an agreement previous to the acceptance of arbitrators, set a time limit for rendering the award. If no time limit has been set for rendering the award, the arbitrators should render it within the following two hundred and forty days following the acceptance of the appointment "; Arbitration Act of Ecuador, Section 25.— "Once the hearing to try the case is held and after declaring that the court has jurisdiction, the arbitration court shall render the award within the term of one hundred and fifty days. Said term may be extended, in strictly necessary cases, up to an equal period, either by the express agreement of the parties or by the ex-officio declaration of the court".

(43) Arbitration Rules, Section 31 [1], Term to render the final award. "The arbitration tribunal shall render its final award within the term of six months".

(44) Civil and Commercial Code of Procedure of the Nation, Section 771.— "The award rendered by amicable referees shall not be open to appeal, but if it were rendered after the legal deadline or on non-undertaken issues, the parties may file a motion to vacate the award within five [5] days following the service thereof. Once the motion is filed the judge shall serve it upon the other party for five [5] days. Upon the expiration of the term, whether or not the service of the motion has been answered, the judge shall resolve on the validity or nullity of the award, and said decision shall be final and not subject to appeal".

(45) The UNCITRAL Model Law on International Commercial Arbitration, Section 14.

(46) BORN, Gary, *op. cit.*, page 1998.

(47) IBA Rules of Ethics for International Arbitrators; Section 1<sup>st</sup>. Cardinal Rule: "Arbitrators must act diligently and efficiently to provide to the parties a fair and effective resolution of their disputes, without bias".

(48) Civil and Commercial Code section 1652.— "Classes of arbitration. The issues that may be subject to the arbitrators' judgment may be submitted to the decision of

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arbitrators or amicable referees. If nothing is provided for in the arbitration agreement on whether the arbitration is de jure or of amicable referees, or if arbitrators are not expressly authorized to decide on the controversy pursuant to equity, it must be understood that it is de jure".

(49) BORN, Gary, *op. cit.*, chap. 13, 13.04 [A]. page 1994.

(50) Civil and Commercial Code: Section 1662.— Arbitrators' Obligations. "The arbitrator that accepts the appointment executes and agreement with each party and undertakes to: e) personally participate in the hearings".

(51) IBA Rules of Ethics for International Arbitrators, Section 4.3: "A potential arbitrator must accept his office only if he can devote to the case the necessary time and attention that the parties are reasonably entitled to expect"; Code of Conduct of USA. Arias - Canon VIII 3. "Arbitrators must not delegate the duty to decide to any other person. However, arbitrators may use an employee or assistant to conduct a legal research to help to review the registry" (the translation is mine).

(52) BORN, Gary, *op. cit.*, chap. 13, 13.04 [A] page 1995.

(53) International Arbitration Act: Determination of the procedure, Section 63.— "Subject to the provisions of this Act, the parties shall be free to agree with the procedure to which the arbitration tribunal shall stick to".

(54) Ethics Code AAA / ABA, Canon I (E): "When an arbitrator's authority derives from the agreement of the parties, an arbitrator must neither surpass said authority nor do less than necessary to completely exercise it. When the agreement of the parties provides the procedures that shall be followed to conduct the arbitration or is referred to the rules that must be followed, the arbitrator is obligated to comply with said procedures or rules. An arbitrator has no ethical obligation to perform any illegal agreement, procedure or rules or that, at the arbitrator's discretion, are inconsistent with this Code" (the translation is mine).

(55) ICC Rules, Section 19: "Rules Governing the Proceedings The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any

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rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." and Section 22 [2] Conduct of the Arbitration: "In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties ".

(56) BORN, Gary, *op. cit.*, chap. 13, 13.04 [E], page 1999.

(57) International Arbitration Act, Section 32.— "When an arbitrator is prevented, either de jure o de facto, from exercising his duties or if for other reasons he does not exercise said duties within a reasonable time, he shall no longer exercise his duties if he resigns or is removed by mutual agreement of the parties. Civil and Commercial Code of the Nation: Section 1662.— Obligations of arbitrators. "The arbitrator accepting the office executes a contract with each party and undertakes to: b) stay in the arbitration tribunal up to the end of the arbitration, unless he justifies the existence of an impediment or a legitimate cause for resignation".

(58) ICC Rules: Article 11 [5] General Provisions: "By accepting to serve, arbitrators undertake to carry out their responsibilities up to the end in accordance with the Rules".

(59) Civil and Commercial Code of the Nation: Section 1662.— "Obligations of arbitrators. The arbitrator accepting the office executes a contract with each party and undertakes to: c) respect the confidentiality of the procedure".

(60) BORN, Gary, *op. cit.*, chap. 13, 13.04 [C] page 1997.

(61) *Ibidem*, page 1997.

(62) IBA Rules of Ethics for International Arbitrators: The background note sets forth that "[T]he international arbitrators must be impartial, independent, competent, diligent and discreet" "9. Confidentiality of deliberations: "The Arbitration Tribunal deliberations and the content the award are kept confidential in perpetuity unless the parties release the arbitrators from said obligation"; Ethics Code of the American Arbitration Association/American Bar

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Association Canon VI (B) "Unless otherwise agreed upon by the parties, or if required by the applicable regulations, an arbitrator should keep the arbitration proceeding and the decision confidential".

(63) ICC Rules, Hearings: Section 26 [3] "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."; and Section 22 [3]: Conduct of the Arbitration "Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."

(64) BORN, Gary, *op. cit.*, chap. 13, 13.04 [C] page 1999.

(65) *Ibidem*, page 2001.

(66) IBA Rules of Ethics for International Arbitrators: Section 8th: "When the parties have requested or consented to a suggestion to such end made by the arbitral tribunal, the tribunal as a whole (or the president of the tribunal if appropriate) may make settlement proposals to both parties simultaneously and preferably in the presence of the other party" (the translation is mine).

(67) IBA Rules on Conflicts of Interest in Commercial Arbitration: "In any stage of the proceeding the arbitrator may assist the parties to reach a settlement, mediation or in any other manner to resolve the controversy. However, before it the arbitrator shall obtain the express consent of the parties specifying that acting in that way shall not disqualify him to continue developing the duties of an arbitrator inconsistent with the duty to use every effort to ensure that the award shall be enforceable" (the translation is mine).

(68) Techniques to Control Time and Costs in the ICC Arbitration (See section 42).

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