**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**

**CASE NO. 20-CIV-24867-SCOLA/GOODMAN**

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GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A. and
JAN DE NUL N.V.

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMA,

Respondent/Counter-Movant.

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# SECOND EXPERT OPINION OF PROFESSOR JACK J. COE, JR.

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I, Jack J. Coe, Jr., hereby declare as follows:

## I. INTRODUCTION AND MANDATE

1. This is a supplement to my First Expert Opinion dated July 23, 2021 ("First Opinion").[1] I have been asked to respond to some of the views offered by Mr. Gary Born in his Expert Opinion of August 6, 2021.[2] As before, the scope of matters I am requested to address is limited, and I will therefore not attempt here to address every view expressed by Mr. Born in his Expert Opinion.[3]

2. My approach will be first to summarize a number of the views I expressed in my First Opinion. I will then identify several points where Mr. Born agrees with me, elaborate on my views, and describe points of difference.

3. One principal focus of these supplemental remarks is to explain why I hold that the emphasis placed by Mr. Born's Opinion on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines" or "Guidelines") is misplaced. In my view, the net effect of his analysis is to treat without adequate justification the Guidelines' color-coded schedules as a term in the parties' arbitration agreement, as if the Guidelines *in toto* constitute a binding trade usage. I explain why I find that view unfair to the parties and otherwise inappropriate.

4. Before addressing Mr. Born's misplaced emphasis on the IBA Guidelines, however, I explain the standards to which the parties expressly agreed in their contract, namely those under the Federal Arbitration Act ("FAA") and the Rules of Arbitration of the International

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1 Expert Opinion of Professor Jack J. Coe, Jr. ("First Opinion") (D.E. 55-2).

2 Expert Opinion of Gary Born ("Born Opinion") (D.E. 57-92).

3 In preparing this Opinion, I reviewed, in addition to the Born Opinion (D.E. 57-92), Movants' Consolidated Motion to Vacate (D.E. 55), the Declaration of Nicolas Bouchardie ("Bouchardie Decl.") (D.E. 55-3), and any other materials cited in this Opinion.

Chamber of Commerce ("ICC Rules"), along with seating the arbitration in Miami, Florida. Relatedly, I explain why in my view the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes[4] ("ABA-AAA Code of Ethics") described in my First Opinion, along with the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ("ICC Practice Note") ought to inform an United States court's approach to disclosure in this case.

## II. SELECTIVE SUMMARY OF MY FIRST OPINION'S MAIN POINTS

5. I summarize here the main points from my First Opinion, and note that my review of the opinion from Mr. Born does nothing to change my opinion or prior conclusions.

6. *First*, international commercial arbitration depends for its legitimacy and reliability on arbitrator disclosure. Such disclosure underpins a private system of justice that promotes voluntary compliance with awards and produces globally enforceable awards.[5]

7. *Second*, judicial safeguarding of the arbitration process is necessary in part because the institutional disclosure and institutional challenge mechanisms in place, being reliant on self-judging and self-policing participants, may break down; in particular, such institutional mechanisms are not well-equipped to process belated or post-award disclosures prompted by a

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[4] American Arbitration Association, ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes (2004) ("ABA-AAA Code of Ethics"), *available at* https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf).

[5] First Opinion ¶¶ 8, 11, 39 (D.E. 55-2); *see also* **Exhibit 7:** Marike R. P. Paulsson, *The 1958 New York Convention in Action* 14 (2016) ("Courts will reinforce and preserve trust in arbitration on the part of all disputants, private or public, by ensuring that international arbitration is the result of a willing choice, and fairly administered."); William W. Park, *International Commercial Arbitration: The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat'l L. 1241, 1262 (2003) ("[J]udicial review attempts to resolve tensions between the rival goals of award finality (necessary to make arbitration reliable) and procedural fairness (without which aberrant decisions would sap community confidence in the process).").

party's own investigations.[6] Hence, in many legal systems, awards are subject to judicial nullification when required disclosures have not been made.[7]

8. *Third*, Arbitrators serving in an ICC arbitration are subject to particularly broad disclosure obligations that emphasize the primacy of the party's potential viewpoint. In light of both the ICC Rules and various ICC policy statements, parties choosing ICC arbitration are entitled to expect that the arbitrators entrusted with their case will resolve all doubts in favor of disclosure.[8] That expectation is particularly well-justified with respect to relationships into which arbitrators have purposefully entered; informing the parties of such relationships can be accomplished easily in the ordinary course of an arbitrator's duties.[9]

9. *Fourth*, the manner and timing of disclosure also matters. In the eyes of a party (the correct standard under the express language of the ICC Rules), several cumulative instances of under-disclosure or non-disclosure by an arbitrator—or, as here, by all three arbitrators on the Tribunal—as to concurrent professional relationships can combine to engender legitimate doubts concerning an arbitrator's independence and impartiality. Moreover, complete disclosure at the time of selection, and/or as soon as a relationship or financial interest arises—whether business,

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6 First Opinion ¶¶ 8, 11, 13–14, 16, 39 (D.E. 55-2).

7 *Id*. ¶¶ 8, 39; *see also* **Exhibit 1:** Murray L. Smith, *Impartiality of the Party-appointed Arbitrator*, *in* 58 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 30, 32–36 (1992) (describing U.S., Swiss, and Canadian cases in which an award was set aside following failure to disclose); **Exhibit 5:** José Carlos Fernández-Rozas, *Clearer Ethics Guidelines and Comparative Standards for Arbitrators*, *in* Liber Amicorum Bernardo Cremades 413, 445–47 (M.A. Fernandez-Ballester & D. Arias Lozano eds., 2010) (describing U.S., French, and Finnish cases in which an award was set aside following failure to disclose).

8 First Opinion ¶¶ 8, 11, 16, 18–26, 39 (D.E. 55-2).

9 In any event, as a matter of fairness and efficiency, the burden should not be on the party to ascertain by the limited means available to it matters already known to the candidate for appointment. First Opinion ¶¶ 8, 11, 31, 39 (D.E. 55-2).

professional, or otherwise—is crucial to the integrity of the arbitral proceedings and permits the parties to object in a timely fashion.[10]

10. Applying these points to the circumstances in this arbitration, I concluded in my First Opinion that, in a situation in which (1) circumstances and facts should have been disclosed, but were not; (2) undisclosed information pertained to multiple cross-appointments of a small group of individuals; (3) there were financial considerations; as well as (4) other connections with opposing counsel, the cumulative effect will be to create a perception of bias.[11] Because in forming such an impression a party cannot be expected to disaggregate multiple episodes of partial or non-disclosure, a court is also justified in considering the combined effects of the choices a given arbitrator has made.[12]

11. In the meantime, Movants' counsel have informed me of an additional instance of non-disclosure, namely that Dr. Gaitskell failed to disclose until October 29, 2020 that he had sat on an arbitral tribunal together with a lead counsel for ACP, Mr. Loftis, in the period leading up to the commencement of the arbitration in Cofferdam or any of the later proceedings including this one[13] Under the ICC rules as explained in the ICC Practice Note, this professional relationship between opposing counsel and an arbitrator by itself should have been disclosed to Movants at the

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10 *Id*. ¶¶ 8, 11–14, 39.

11 First Opinion ¶ 38 (D.E. 55-2).

12 *Id*.

13 *See* Dr. Gaitskell's Answer to Claimants' Request to Update Disclosures dated October 29, 2020 ¶ 5 (D.E. 55-45); *see also* Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated March 24, 2015 (D.E. 55-12) (no disclosure of this fact); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated May 14, 2015 (D.E. 55-15) (same); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 dated January 25, 2017 (D.E. 55-19) (same).

time of Dr. Gaitskell's nomination to the tribunal in that arbitration in 2014, and in each separate arbitration thereafter.[14] This circumstance also reinforces the cumulative effect addressed above.

## III. THE FAA AND ICC RULES APPLY

12. Mr. Born agrees with me that—based on the parties' choice in their contract of the ICC Rules and the FAA, as well as the arbitral seat in Miami, Florida—the applicable disclosure standards for international arbitrators in this federal action are those of the ICC Rules and the FAA.[15]

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[14] *See* ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2016) ("ICC Practice Note 2016") ¶ 20 (D.E. 57-112) (an arbitrator should consider disclosing "a professional . . . relationship with counsel to one of the parties"); ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019) ("ICC Practice Note 2019") ¶ 23 (D.E. 57-113) (same); ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021) ("ICC Practice Note 2021") ¶ 27 (D.E. 57-114) (same). The ICC Secretariat is authorized, under Appendix II to the ICC Rules, to "issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings." ICC Rules, Appendix II, art. 5(2) (D.E. 55-10).

[15] Born Opinion ¶¶ 81–82, 85 (D.E. 57-92). The parties' arbitration agreement provides:

> Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by both Parties:
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> (a) ***the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules")***;
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> (b) in addition to the Rules, the arbitrators will be guided but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;
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> (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules;
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> (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language];

13. The FAA and the ICC standards are independent of each other, even if they may inform each other to some extent. That is, by agreeing to the FAA, a seat in the United States, and the ICC Rules, the parties agreed to the safeguards of *both* the FAA and the ICC Rules.

14. I consider the FAA and the ICC Rules in turn, noting first common ground with Mr. Born, and then where his views and mine differ.

### A. The FAA

15. As Mr. Born develops himself,[16] the FAA has no express provisions setting forth an arbitrator's disclosure obligations. However, case law has filled the gap and made plain the fundamental importance of the disclosure obligation under the FAA.[17] Specifically, the disclosure jurisprudence under the FAA has arisen almost entirely in connection with actions to vacate an

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> (e) ***the venue of the arbitration shall be Miami, Florida – United States of America; and***
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> (f) ***the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq***.

Final Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("Final Award") ¶ 78 (D.E. 55-4) (describing Sub-Clause 20.6 of the Conditions of Contract entitled "Arbitration," as modified by Variation Order No. 108 dated 1 August 2014) (emphasis in original); *see also* Born Opinion ¶ 81 (D.E. 57-92).

16 *See* Born Opinion ¶ 42 (D.E. 57-92).

17 *See* **Exhibit 1:** Murray L. Smith, *Impartiality of the Party-appointed Arbitrator*, *supra* note 7, at 32 ("The [FAA] does not specify any duty of disclosure of interest in or connection with the dispute or the parties but the courts have interpreted the duty of avoiding evident partiality as including a strict duty of disclosure."); **Exhibit 5:** José Carlos Fernández-Rozas, *Clearer Ethics Guidelines and Comparative Standards for Arbitrators*, *supra* note 7, at 445–46 ("Article 10(2) of the Federal Arbitration Act (1925) provides fertile ground for the argument that an arbitrator's failure to disclose certain information may require the award to be vacated. Jurisprudence is firm on this point, as illustrated in *Commonwealth Coatings Corp. v. Continental*. Although the objecting party had not been damaged in any way by the arbitrator's failure to inform, the court set the precedent that although arbitrators are independent and impartial, failure to comply strictly with the requirement to disclose will result in the award being vacated.").

award for "evident partiality" or efforts to resist an award's recognition or enforcement under the New York Convention.

16. Mr. Born and I also agree that proceedings in the instant Court are not governed by the California statute devoted to international arbitration, or by arbitration enactments in sister states.[18] The passage in my First Opinion that Mr. Born cites did not assert otherwise and was intended to illustrate that, in American arbitration culture, disclosure of relationships among arbitrators is neither fanciful nor unrealistic to expect.[19]

17. In my First Opinion, I referred to the disclosure rule in the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes ("ABA-AAA Code of Ethics"), which similarly to

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[18] Although not central to my attempt to identify common ground, I find confusing the apparent equivalency struck in Mr. Born's opinion between the existence of subject matter jurisdiction in a federal court, and the scope of FAA preemption in those courts. To my knowledge, federal court jurisdiction is not in question in this case, and the FAA provisions he quotes demonstrate why that is so. *See* Born Opinion ¶ 83 (D.E. 57-92); First Opinion n.42 (D.E. 55-2) (quoting International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2014) ("IBA Guidelines"), General Standard 3(a) (D.E. 57-111)).

[19] The portion of my opinion, which Mr. Born appears to misread, reported:

> Several state statutes governing international commercial arbitration similarly provide non-exclusive lists of examples of what is included in the disclosure obligation and specifically refer to relationships with other arbitrators. Thus, the California statute governing international arbitration requires a prospective or sitting arbitrator to disclose any 'close personal or professional relationship with a person who . . . is or expects to be nominated as an arbitrator in the . . . proceedings.' Texas has substantially the same rule. Section 12(a)(2) of the Revised Uniform Arbitration Act of 2000 specifically requires disclosure of '[a]n existing or past relationship with . . . another arbitrators [sic].' The Uniform Law Commission explained that Section 12 was one of several 'new provisions [that] are intended to reflect developments in arbitration law and to insure that the process is a fair one.' Florida, 18 other states, and the District of Columbia have adopted this provision.

First Opinion ¶ 27 (citations omitted) (D.E. 55-2).

the ICC disclosure rule relies on the in-the-eyes-of-the-parties test.[20] Given the parties' choice of Miami, Florida, as the arbitral seat, the ABA-AAA Code of Ethics is relevant here in that it serves to inform the FAA's evident partiality standard in regard to violation of disclosure obligations.[21] Mr. Born disagrees, asserting that the ABA-AAA Code of Ethics "was not intended for international use"[22] and suggesting that the Code applies only in AAA arbitrations,[23] and concludes that, accordingly, it is "irrelevant" to the current case.[24] As I explain below, however, the ABA-AAA Code of Ethics was in fact intended for international use, not only for AAA arbitrations, and is very much relevant to the present case. The AAA's international division, the International Centre for Dispute Resolution ("ICDR") has hundreds of cases per annum,[25] and all use the ABA-AAA Code of Ethics.[26] While not binding in this case, the ABA-AAA Code of Ethics has been greatly influential in shaping US case law on arbitrator disclosure, and, as such, remains essential to understanding US disclosure standards.

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20 First Opinion ¶ 27 (D.E. 55-2).

21 *Id*.

22 Born Opinion ¶ 90 (D.E. 57-92).

23 Mr. Born asserts: "[T]he ABA-AAA Code of Ethics was intended to provide guidance for arbitrators sitting in arbitrations under the AAA Rules and is relied upon by the AAA in making challenge decisions in arbitrations under the AAA Rules." Born Opinion ¶ 90 (D.E. 57-92). As noted, this statement is misleading.

24 Born Opinion ¶ 91 (D.E. 57-92).

25 *See* 2018 ICDR Case Data Infographic, *available at* https://www.icdr.org/sites/default/files/document_repository/2018_ICDR_Case_Data.pdf.

26 The ICDR's International Arbitration Rules expressly make the Code applicable to arbitrations and arbitrators operating thereunder. International Centre for Dispute Resolution, International Arbitration Rules (March 1, 2021) ("ICDR Rules"), art. 14(1), *available at* https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar. By mandating observance of the Code for such arbitrations the AAA understands that the Code will be applied to international arbitrations: By design, the ICDR Rules contemplate that the Code will apply to international arbitrations.

18. The ABA-AAA Code of Ethics is one of the most significant and influential professional codes of conduct for international arbitrators, in particular where the arbitration is sited, or recognition and enforcement of an award is sought, in the United States. Indeed, in a keynote address cited by Mr. Born in his opinion, Judge Charles Brower stated:

> [T]he most prominent and influential professional code of conduct, the American Bar Association/American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes ('ABA/AAA Code of Ethics'), originally adopted in 1977 and revised in 2004, 'recognizes the[] fundamental differences between arbitrators and judges.' The sponsors of the Code believe it is preferable that all arbitrators be neutral and comply with the same ethical standards (particularly in arbitrations with 'international aspects').[27]

19. This significance of the ABA-AAA Code of Ethics is confirmed by the extent to which US courts have relied on it. I find consistent with my own research the account given in Mr. Born's own reference work, based on 17 examples his research identified. He wrote:

> [T]he [ABA-AAA] Code has been relied upon in a number of decisions by U.S. courts in considering issues relating to arbitrators' independence and impartiality in the context of actions to vacate or confirm arbitral awards.[28]

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27 Charles N. Brower, *Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 Berkeley J. Int'l L. Publicist 1, 8 (2010) (D.E. 57-98) (internal citations omitted).

28 Gary Born, *International Commercial Arbitration* 1967 (3d ed. 2021) (D.E. 57-97). To be clear, Mr. Born includes in his reference work the caveats that the Code does not establish an independent basis of vacatur, does not supplant arbitration statutes, or have "force of law unless incorporated into an agreement to arbitrate." *Id.* at 1966.

20. In addition, ABA-AAA Code of Ethics was expressly designed to apply to international arbitration,[29] and indeed continues to do so.[30]

21. As I have argued in my First Report, the ABA-AAA Code of Ethics provides for broad disclosure, including disclosure of the relationships that were not disclosed here.[31]

**B. The ICC Rules**

22. Mr. Born agrees with me that the ICC Rules apply in this case and provide that an arbitrator shall disclose "any facts or circumstances which might be of such a nature as to call into

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29 The ABA-AAA Code of Ethics, Note on Neutrality, provides:

> The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. *This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects.*

(Emphasis added).

30 *See supra* note 26 and accompanying text.

31 I observed:

> A variant of the ICC disclosure instructions is found under Canon II of the ABA-AAA Code of Ethics for Arbitrators (addressing disclosure of relationships). In pertinent part, it restates its version of the in-the-eyes-of-the-parties test, which requires disclosure of '[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.' The examples given under Canon II include 'any such relationships which [an arbitrator] personally [has] with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness.'

First Opinion ¶ 27 (D.E. 55-2) (emphasis added) (citations omitted) (quoting ABA-AAA Code of Ethics, Canon II).

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."[32]

23. However, I would add that the ICC Rules' disclosure provision must be read in conjunction with the ICC Practice Note, which non-exhaustively lists matters that should be considered for disclosure to include "relationships between arbitrators."[33] This aligns with the "Statement Acceptance, Availability, Impartiality, and Acceptance" form that ICC arbitrators are required to sign prior to their appointment.[34] In regard to independence and impartiality, the form requires arbitrators to disclose:

> [W]hether there exists any *past or present* relationship, *direct or indirect*, whether financial, professional *or of any other kind*, between you and any of the parties, their lawyers or other representatives, or related entities and individuals. *Any doubt must be resolved in favour of disclosure*. Any disclosure should be *complete and specific*, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.[35]

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32 ICC Rules, art. 11(2) (D.E. 55-10); *compare* First Opinion ¶ 18, n.42 (D.E. 55-2) (quoting ICC Rules, art. 11(2) (D.E. 55-10); IBA Guidelines, General Standard 3(a) (D.E. 57-111)), *with* Born Opinion ¶¶ 46, 60 (D.E. 57-92) (same).

33 ICC Practice Note 2016 ¶ 24 (D.E. 57-112); ICC Practice Note 2019 ¶ 28 (D.E. 57-113); ICC Practice Note 2021 ¶ 32 (D.E. 57-114); *see also* Born Opinion ¶¶ 48, 50 (D.E. 57-92) (referring to all three versions of the ICC Practice Note and acknowledging that they refer to "relationships between arbitrators" as circumstances arbitrators should consider disclosing). Indeed, the 2019 and 2021 versions of the ICC Practice Note provide that it "applies to all ICC arbitrations regardless of the version of the Rules pursuant to which they are conducted." ICC Practice Note 2019 ¶ 2 (D.E. 57-113); ICC Practice Note 2021 ¶ 2 (D.E. 57-114).

34 *See* ICC, ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence ("ICC Arbitrator Statement") (applying to both the 2017 and 2021 Arbitration Rules), *available at* https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/.

35 *Id.* at 2 (emphasis added).

24. The form also states expressly that arbitrators should disclose any facts that "in the eyes of the parties" may affect their independence and impartiality.[36] In any event, the form demands broad disclosure of virtually all connections. Based on my review of the record, the forms signed by the arbitrators in the instant case all contain the above-quoted language.[37]

25. It is Mr. Born's apparent disregard for the breadth of this "in-the-eyes-of-the-parties test" that underlies our fundamental disagreement about what needed to be disclosed in this case.

26. Mr. Born and I agree that there are innocuous connections that need not be disclosed. It is the diffuseness of connections on social media (among the examples he gives)[38] that renders such links among arbitrators not troubling. By contrast, the arbitral tribunal to which Dr. Gaitskell helped to appoint Mr. Gunter has only three members.[39] Thus, while overlapping in the same social media platform is nothing noteworthy, overlapping on the same tribunal is—especially, where, as here, such overlap is by design. It could easily have been disclosed.

27. I also disagree with Mr. Born's view that the arbitration in the current case can be likened to those occurring in industries that operate under idiosyncratic customs, rules and expectations, such that the pool of qualified arbitrators is limited and double-hatting and

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36 *Id.*

37 *See* Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-12); Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-13); Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-14); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-15); Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-17); Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-18); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 (D.E. 55-19).

38 *See* Born Opinion ¶ 64 (D.E. 57-92).

39 Bouchardie Decl. ¶¶ 53, 64 (D.E. 55-3).

concurrent service for arbitrators is to be taken for granted. Relatedly, the fact-intensive approach required in examining evident partiality cases and arguments requires that industry-specific elements be considered when applying decisional law. I develop these two points more fully in a subsequent section.

28. The essence of what I develop below is that: first, arbitrations occurring in maritime, reinsurance and certain other industries proceed according to distinctive customs and expectations that accommodate disclosure-related practices that are inappropriate in ICC arbitrations of the type involved in the current case; and, second, decisional law that accepts as routine the distinctive arbitral practices followed in the above specialized regimes may not be suitable for cases arising in international commercial arbitration under the ICC Rules.

29. I disagree with Mr. Born that a US court should grant deference to a decision of the ICC Court. This would amount to a commercial institution (the ICC Court) effectively overriding the protections of the FAA. There is no basis for this in US law, especially where the ICC Court does not apply or purport to apply the FAA.

30. For his part, Mr. Born reasons because Movants' attempt to remove arbitrators was rejected by the ICC Court and because he considers the vacatur standard to be "materially more demanding than the standard for removal of an arbitrator" it follows "*a fortiori* . . . that the facts relied upon by Movants cannot be grounds for vacatur."[40] This is a false correlation: neither the standard nor the law is the same. The comparison Mr. Born makes is not fully convincing because the ICC Court was not purporting to apply the FAA in general, let alone the specific evident partiality jurisprudence developed by the courts of the seat. Such challenge decisions are *sui generis*.

[40] Born Opinion ¶ 5(e) (D.E. 57-92).

31. While I have not undertaken to explore fully the statistical premises adopted by Mr. Born, I am informed that the ICC Court sustains relatively few challenges.[41] Mr. Born and I agree that a court may consider both whether the parties sought to remove an arbitrator through an agreed-upon institutional process and the results of that effort. I disagree, however, that the court must give dispositive weight to such institutional determinations; the two exercises are governed by different applicable standards and laws.

32. Additionally, as Mr. Born accepts, in determining how to respond to a request to remove an arbitrator under the ICC Rules, the ICC Court has discretion, which it exercises in accordance with its own standards for removal; the exercise of that discretion is not supervised by the courts of the seat, and those courts are not bound by the results.[42]

## IV. GENERAL CONSIDERATIONS—COMPETING INTERESTS AND POLICY CHOICES REFLECTED IN MY FIRST OPINION

33. The international commercial arbitration enterprise consists of participant groups that have interests that are sometimes concordant and sometimes competing. Administering

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41 According to statistics published in 2020 by the ICC, approximately 8% (5 of 64) of challenges were successful (when the number of challenges is adjusted downward to count as one challenge the 29 successive challenges unsuccessfully brought in one case). *See* ICC, Dispute Resolution 2020 Statistics, at 13, *available at* https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

42 In the current case, the ICC Court declined to sustain any of the three challenges initiated by Movants. ICC Court's Statement of Reasons in ICC Case No. 20910/ASM/JPA (D.E. 55-62). Mr. Born asserts that Article 14 of the ICC Rules requires "a real, serious possibility that [the arbitrator] lacks independence or impartiality," and that "[a]n unjustifiable doubt . . . does not satisfy the objective standard applicable to removal." Born Opinion ¶ 129 (D.E. 57-92). Such language does not, however, appear in Article 14, and Mr. Born cites no other basis for his reading of this standard into Article 14. Mr. Born cites only to his own book, but the passages cited do not address Article 14 of the ICC Rules, but rather discuss generally the legislation of jurisdictions that have adopted the UNCITRAL Model Law on International Commercial Arbitration. *See* Born Opinion ¶ 129, nn.124–25 (D.E. 57-92).

institutions compete for business and formulate policies designed to attract business planners. Well-informed business planners make comparisons and choose accordingly.

34. There is not any real difference among institutions concerning the independence and impartiality requirement that governs both party-appointed and presiding arbitrators. There are however important differences in the standards of disclosure to which institutions adhere; institutions such as the ICC craft, and revise, disclosure provisions with considerable deliberation. The ICC is an example of an institution that has retained an embracive disclosure standard despite the decision of other institutions not to do so.

35. However phrased, the formal standard inevitably requires arbitrators to volunteer information to match the applicable standard—both under the applicable rules (ICC Rules) and under the applicable arbitration law, here: the FAA. In an ideal setting, in making these assessments arbitrators consider the inferences to be drawn from the terms of the parties' agreement to arbitrate, including the seat that was designated (which indicates the governing law of arbitration) and institution selected.[43]

36. Anecdotal accounts nevertheless suggest that often other considerations are more influential in the process. These influences in turn may pit the preferences of the arbitrator against the expectations of the parties formed, with the help of the institution, when crafting their agreement to arbitrate. At the same time, ICC leadership has noticed that:

> [T]the users of arbitration, rightly so, have become more demanding upon arbitrators in terms of their ethical duties. After all, arbitrators are vested with immense powers: they will adjudicate claims of tens or hundreds of millions of dollars, with no appeal. It is more and more frequent to see parties, even in the absence of a disclosure,

[43] To recall, in the instant case, the parties explicitly chose the ICC Rules, the FAA, and Miami, Florida as the arbitral seat. *See supra* note 15 and accompanying text.

> asking questions or, after an initial disclosure, seeking more information from a prospective arbitrator.[44]

37. An arbitrator that adopts the err-on-the-side-of-*non*-disclosure ethic may do so in an effort to forestall challenges. Even though all agree that the problem of strategic challenges is a significant one, no authority supports an arbitrator's re-writing of the disclosure rules to include only those matters certain to lead to disqualification. Rather, as the ICC Statement of Acceptance form reminds the arbitrator,[45] the disclosure obligation of the arbitrator is to err on the side of disclosure and later, if appropriate, to respond to weak challenges by refusing to step down.

38. A recent example in an arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") illustrates how an arbitrator prioritized the vantage point of the parties and the integrity of the arbitral process over her personal interests in making a disclosure, and even offered to resign. In *Donatas Aleksandravicius v. Denmark*,[46] the president of the tribunal, Ms. Claudia Annacker, proposed resignation from her position after disclosing that she had accepted a role as counsel in another case, based on the intra-EU nature of both disputes and the fact that her counsel role involved claims "in the mid 8-figure range."[47] The claimant ultimately accepted Ms. Annacker's resignation, and emphasized her "integrity and high

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44 Alexis Mourre, *Conflicts Disclosures: The IBA Guidelines and Beyond*, *in* The Evolution and Future of International Arbitration 357, 363 (S.L. Brekoulakis, J.D.M. Lew et al. eds., 2016) (D.E. 57-126). Alexis Mourre was the President of the ICC Court from 2015 to 2021.

45 *See*, *e.g.*, Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466, at 3 (D.E. 55-19) ("Any doubt must be resolved in favour of disclosure." (emphasis in original)).

46 *Donatas Aleksandravicius v. Denmark*, ICSID Case No. ARB/20/30 (2020), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/30.

47 **Exhibit 8:** Damien Charlotin, *Tribunal Chair Resigns Over Role as Counsel In Another Intra-EU Case; Parties Seek Negotiated Settlement Under Termination Agreement*, IA Reporter (Aug. 24, 2021), *available at* https://www.iareporter.com/articles/tribunal-chair-resigns-over-role-as-counsel-in-another-intra-eu-case-parties-seek-negotiated-settlement-under-termination-agreement/.

professionalism in suggesting her resignation due to the objective circumstances that have developed."[48] Cases such as this underline that it is important for arbitrators to view disclosures and the arbitral process from the eyes of the parties, rather than their own.

39. While more disclosures may, or may not, generate more challenges than a reticent approach to disclosure, challenges are a remedy for which the parties bargained—a necessary mechanism that allows arbitrator conflicts questions to be resolved early in the process.[49]

40. Given the general practice in international commercial arbitration of keeping the existence of proceedings and their outcome confidential, the parties will not know all the relevant circumstances unless the arbitrators make comprehensive and timely disclosures. By providing the parties with the same information, such disclosures also have the effect of leveling the playing field between the parties.[50]

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48 *Id.*

49 There is as Mr. Born reports a need to balance the parties' rights to have information and the risk that frivolous challenges will multiply. In 2020, one party made 29 successive but unsuccessful challenges in a single case. *See supra* note 41. The problem in my view is that if the system allows arbitrators to attempt to police the problem at the disclosure stage, the center of gravity will shift away from disclosure toward concealment. Arbitrators, I among them, dislike challenges and the questions that often precede them. But, the juncture at which an arbitrator may deter an unwarranted challenge is not at the disclosure stage but rather in the post-disclosure setting when deciding how respond to any challenge that occurs. An arbitrator may deal with a tactical, ill-supported, challenge by not stepping down and again later in weighing what allocation of costs is called for.

50 *See* W.M. Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Compar. L.Q. 26, 52 (1989) (D.E. 57-130) ("The right to challenge an arbitrator is an essential part of arbitral due process. For the right to be effective there must be full and timely disclosure of any facts bearing on the question of an arbitrator's ability to serve."); **Exhibit 5:** José Carlos Fernández-Rozas, *Clearer Ethics Guidelines and Comparative Standards for Arbitrators*, *supra* note 7, at 445 ("[I]f the arbitrators ignore their duty to disclose the circumstances which have given rise to justified doubts regarding their impartiality or independence they are violating the minimum rule of due process, specifically the principle of equality[.]").

41. Additionally, when the post-appointment relationship in question involves new professional undertakings, disclosure helps the parties police an arbitrator's duty to devote sufficient time to the parties' case so as to reduce the temptation to employ short cuts of the kind alleged by Movants in the current case.[51] As I understand the facts presented to me, the tribunal here appears to have employed precisely such short cuts by extensively relying in the Partial Award on verbatim findings from the award in the related Cofferdam arbitration, where Mr. Gunter sat on the tribunal with Prof. Hanotiau.[52] If Mr. Gunter had disclosed his many separate connections to Prof. Hanotiau noted above, the parties would have been able to assess whether Mr. Gunter was an appropriate choice for Tribunal president.

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[51] The Arbitrator Statement of Acceptance executed by ICC arbitrators requires them to:

> [C]onfirm on the basis of the information presently available to [them], that [they] can devote the time necessary to conduct this arbitration throughout the entire duration of the case as diligently, efficiently and expeditiously as possible in accordance with the time limits in the Rules; [that they] understand that it is important to complete the arbitration as promptly as reasonably practicable . . . ;
>
> [On the form they must:] list current professional engagements . . . *for the information of the ICC Court and the parties* . . . [and to mark] in the annexed calendar for the next 24 months all currently scheduled hearings and other existing commitments that would prevent [them] from sitting in a hearing on this matter. I have further marked in the box below or on a separate sheet any other relevant information regarding my availability.

ICC Arbitrator Statement, *supra* note 34 (emphasis added). I understand that such statements were made by the arbitrators in the instant case. *See*, *e.g.*, Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 (D.E. 55-19).

[52] Bouchardie Decl. ¶ 27 (55-3); *see also* **Exhibit 6:** W. Michael Reisman, W. Laurence Craig, William W. Park & Jan Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* 571 (2d ed. 2015) (noting that rendering an award in one arbitration and sitting on a subsequent related arbitration, may lead an arbitrator to import preconceived notions into the latter proceedings).

42. A failure to disclose information that might be legitimately of interest to a party has undesirable knock-on effects.

43. *First*, it ensures that a greater number of awards will be resisted and attacked both at the seat and elsewhere (should enforcement be sought under the New York Convention); the resulting back-loading of corrective efforts harms finality, clogs dockets and is the opposite of the how the system is supposed to work. Moreover, vacatur as a remedy will be available only to the extent the aggrieved party discovers the non-disclosure within the relatively short statutory period during which vacatur must be sought.

44. *Second*, once discovered, the arbitrator's election not to disclose entitles the discovering party to question the motives of the arbitrator, thus undercutting the legitimacy of the arbitration process. This is especially true when disclosure could have been easily accomplished.[53]

45. A leading text on ICC Arbitration attributes to a former Chair of the ICC Arbitration Commission the view that "[i]n cases involving large amounts, the fee the arbitrator would obtain may be a corrupting influence *per se* and a desire to stay in office, no matter what, may be the

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[53] I do not agree with Mr. Born that, as to matters known to the arbitrator, a significant administrative burden is involved in performing the required post–appointment notice of a possible conflict. Any disruption that results more plausibly occurs when a challenge is launched; nevertheless, the challenge remedy is a necessary, if imperfect, part of the arbitration system and a desire to curb the disruption it causes is not a valid reason to engage what are the generally greater risks attendant under-disclosure. Alexis Mourre, then President of the ICC Court, wrote in 2016:

> [A] failure to disclose poses a risk to the award that far outweighs the difficulties that a challenge may cause for the constitution of the arbitral tribunal. . . . [T]he absence of an acceptable level of transparency poses a risk to the entire system of arbitration because, in the long run, it will provoke negative reactions from States.

Alexis Mourre, *Conflicts Disclosures*, *supra* note 44, at 363 (D.E. 57-126).

result of other than objective considerations."[54] Given the large sums in controversy and the fees to which arbitrators becomes entitled, it is not surprising that when alerted to what they regard as under-disclosure parties do not easily credit the arbitrator with the most innocent reason for the thin disclosure.[55]

## V. MY REDUCED EMPHASIS ON THE IBA GUIDELINES

46. While as Mr. Born observes the IBA Guidelines are among the IBA's more widely known and helpful efforts, they have neither a central nor an authoritative role in this case. Inasmuch as the parties have not designated them as applying to their arbitration, there is no basis for superimposing on the arbitration agreement and governing law the detailed system of safe-harbors proposed in the Guidelines. This conclusion is further underscored by the highly limited role the IBA Guidelines have played in U.S. case law (in comparison, for example to that seen with respect to ABA-AAA Code of Ethics) and several additional factors, as discussed below.

### A. Few American Cases

47. There are relatively few American cases exploring the IBA Guidelines. These cases often relied on the IBA Guidelines together with the ABA-AAA Code of Ethics to support a broad uncontroversial principle, such as that arbitrators are under a continuing duty to search for and disclose conflicts. The outcome of the one case that seems to apply the IBA Guidelines alone (at

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[54] **Exhibit 3:** W. Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 215 (3d ed. 2000) (citing Ottoarndt Glossner, *Sociological Aspects of International Commercial Arbitration*, *in* The Art of Arbitration 143, 145 (J.C. Schultsz & A.J. van den Berg, eds. 1982)).

[55] In the case of new work taken on, such as is involved in this case, it may simply be that the arbitrator does not want the ICC and the parties to know how cluttered her calendar had become after the original appointment was approved. *See supra* note 51 (detailing the ICC's policy which requires nominees for appointment to disclose their calendars and to certify that they have sufficient time to devote to the process).

the behest of a party) did not reach a result different from that which would obtain under the ABA-AAA Code of Ethics, and the other case that mentions the Guidelines does so only in recounting one party's argument (without itself applying the Guidelines). I follow with brief summaries of those cases.

48. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*[56] involved an ad hoc (i.e., non-administered) arbitration seated in New York; the parties had crafted their own disclosure requirements, which nevertheless did not address ongoing disclosure obligations. In vacating the eventual award, the Southern District of New York consulted both ABA-AAA Code of Ethics and the IBA Guidelines and reasoned that an arbitrator had a continuing duty to disclose emergent conflicts flowing from business relations with a party. The lower court stated, *inter alia*:

> Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality. . . .
>
> In light of the broad standards for disclosure that the parties outlined in their Submission Agreement, [the arbitrator's] continued understanding, as evidenced by his letters to the parties, that his full disclosure regarding his relationship to Aimcor/Oxbow was called for under the Submission Agreement, and the standards for arbitrators set forth by the American Arbitration Association in the Code of Ethics for Arbitrators in Commercial Disputes, as well as the IBA Guidelines on Conflicts of Interest in International Arbitration, [the arbitrator's] nondisclosure of SCF's contracts with Oxbow for over $274,770 in revenue requires that the arbitral award be vacated.[57]

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[56] *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, No. 05-cv-10540, 2006 U.S. Dist. LEXIS 44789 (S.D.N.Y. 2006).

[57] *Id.* at *27–28.

49. On appeal,[58] the Second Circuit affirmed, but relied entirely on case law. It reasoned in part:

> The mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. But, when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality.[59]

50. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*,[60] arose out of an agreement to distribute films in Japan. The arbitration in question was conducted using the services of the American Film Marketing Association ("AFMA"), now the International Film and Television Alliance, "a motion picture trade organization with its own arbitration rules and panel of arbitrators."[61] The arbitrator had changed employers during the arbitration, but had failed to investigate resulting conflicts; there were, in fact, such conflicts because his new employer had significant, ongoing, business dealings with a party.

51. In affirming the lower court's vacatur of the award, the Ninth Circuit characterized both ABA-AAA Code of Ethics and the IBA Guidelines (2004) as persuasive, but not binding. It drew from both texts, in combination with other sources, the principle that the arbitrator had an ongoing duty to search for and disclose material conflicts.[62] It followed that:

> [V]acatur by the district court for 'evident partiality' of the arbitrator was proper under the Federal Arbitration Act. . . . [T]he lack of evidence of the arbitrator's actual knowledge of the ongoing negotiation does not prevent a finding of evident partiality because, under the circumstances of this case, the arbitrator had a duty to

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58 *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007).

59 *Id.* at 138.

60 *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

61 *Id.* at 1103.

62 *See id.* at 1103–104.

> investigate possible conflicts resulting from his new employment and to disclose that employment to the parties.[63]

52. In *dictum*, the circuit court cited *Commonwealth Coatings*[64] and observed:

> While we are cognizant of the public interest in efficient and final arbitration, we believe that a rule encouraging 'arbitrators [to] err on the side of disclosure' is consistent with that interest. As Justice White explained . . . the 'arbitration process functions best' where early and full arbitrator disclosure fosters 'an amicable and trusting atmosphere' conducive to 'voluntary compliance with the decree.'[65]

**B. Other Elements Counseling Reserve in Connection with the IBA Guidelines**

53. Additional factors support my position that the IBA Guidelines ought not control the current case. While the main "standards" set forth in the Guidelines are a codification of established understandings, as discussed below the traffic light schedule is encumbered by enough doubt as to warrant a full measure of reserve.

54. First, the ICC Practice Note currently distributed to parties and arbitrators encourages them to adopt the IBA Guidelines on Party Representation (2013), but it contains no mention of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).[66]

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63 *Id.* at 1103.

64 *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 151–52 (1968).

65 *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (citing *Commonwealth Coatings*, 393 U.S. at 152). The third case is *Republic of Argentina v. AWG Group Ltd.*, 211 F. Supp. 3d 335 (D.D.C. 2016). Argentina relied on the IBA Guidelines, alleging that the arbitrator in question had an interest in the outcome and should not have served. It cited the Guidelines' "Red List." The district court relied on *New Regency* in describing the IBA Guidelines as "persuasive", but readily found Argentina's allegation to be unsupported by the facts. *AWG Group Ltd.*, 211 F. Supp. 3d at 350–56.

66 *See* ICC Practice Note 2021 ¶ 67 (D.E. 57-114) ("Parties and arbitral tribunals are encouraged, where appropriate, to adopt or otherwise be guided by the IBA Guidelines on Party Representation in International Arbitration."); *see also* ICC Practice Note 2019 ¶ 48 (D.E. 57-113) ("Parties and arbitral tribunals are encouraged to draw inspiration from and, where appropriate, to adopt the IBA Guidelines on Party Representation in International Arbitration.").

55. Second, whereas the parties designated in their arbitration clause a Miami seat, the ICC Arbitration Rules and the IBA Rules of Evidence, they *did not* designate the IBA Guidelines on Conflicts of Interest.[67] The exclusion of such reference is critical as it is a clear reflection of the choice of the Parties.

56. Third, the IBA Guidelines' drafters were not charged with making the text fully concordant with U.S. arbitral disclosure law. Mr. Born is certainly correct that Americans were included in the IBA's drafting efforts, however well placed observers have acknowledged that there were efforts to subdue U.S. approaches to arbitrator disclosure.[68]

57. The difference in legal culture is borne out in the relative permissiveness of the IBA Guidelines in comparison the ABA-AAA Code of Ethics. Despite a great deal of overlap between

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[67] Nothing would have prevented the parties from doing so. *See*, *e.g.*, **Exhibit 4:** Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* 65 (2008) (The choice of the arbitration rules represents the agreement of the parties as to how the proceedings should be conducted. . . . If parties want more specificity, they may agree to adopt or refer to other rules, such as the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration."). In connection with his view that the ABA-AAA Code is "irrelevant to the present case" because it is intended only for domestic arbitrations administered by the AAA (three conclusions with which I disagree), Mr. Born notes that the ABA-AAA Code of Ethics expressly subjects itself to "other applicable ethics rules" and that as such it should be subordinated in international practice to the IBA Guidelines as the most prominent and influential example of "other applicable ethics rules". I disagree with the scope and relevancy characterizations set forth by Mr. Born, and in a situation such as this in which the parties did not designate the Guidelines expressly, his proposal that the IBA Guidelines are governing trade usage is not convincing. More plausible is that in 2004 the Code's revisers by referring to "other applicable ethics rules" had in mind discrete sets of ethical canons applicable in arbitrations administered under any of a number of trade association regimes.

[68] *See* Alexis Mourre, *Conflicts Disclosures*, *supra* note 44, at 363 (D.E. 57-126) ("There was . . . at the time of their approval in 2004, the perception that a trend to over-disclose was coming from the United States to Europe and the Guidelines aimed at protecting arbitrators and the entire arbitral process against a perceived Anglo-Saxon push for excessive disclosures.").

the ABA-AAA Code of Ethics and IBA Guidelines texts, at the margin the IBA Guidelines are designed to excuse non-disclosure of matters that would be caught under the Code.[69]

58. Indeed, the IBA Guidelines' Green List may distract an arbitrator from heeding disclosure obligations under the law of the jurisdiction in which the arbitration is seated, which governs the arbitral procedure (in addition to the arbitral rules chosen by the parties) as well as the standard for setting aside an award (vacatur).[70]

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69 *See* **Exhibit 4:** Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* 138 (2008) ("[A] difference between the IBA Guidelines and the AAA-ABA Code of Ethics is the AAA-ABA's very broad requirement of disclosure. A number of items under the Green List of the IBA Guidelines would be required to be disclosed under the AAA-ABA Code of Ethics."); *see also* Mark R. Joelson, *A Critique of the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, 26 Am. Rev. Int'l Arb. 483, 490 (2015) ("Putting aside the question of relationships existing under tenuous social networks like Facebook or LinkedIn, the [IBA] Guidelines err . . . by making relationships which arise in professional, charitable or academic contexts matters which do not require disclosure. . . . [L]awyers engaged in the same field of endeavor, *e.g.* arbitration law, may have very frequent contact in professional association matters, to the point where they could not easily dispute the charge that they are 'friends.' Discerning who is a 'friend' and who is merely a business associate is often a thorny matter. For this reason, the existence of a possibly conflicting relationship arising from frequent personal contacts in a professional or charitable organization should be disclosed for the arbitrating parties to make a judgment.").

70 *See* John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 Univ. Miami Inter-Am. L. Rev. 1, 20–21 (2004) ("The controversial element of the 'Green List' is that it purports to enumerate circumstances that not only should not result in a challenge, but also that need not be disclosed. By doing so in a document that lacks the force of law in any jurisdiction, the IBA Guidelines risk creating a trap. For example, an arbitrator in an international case may well decide, once the IBA Guidelines gain acceptance, that he or she is not obligated to disclose a circumstance on the 'Green List.' That arbitrator would do well to check the law of the jurisdiction in which the arbitration is sited, especially if it is within the United States.") (referring to the original, 2004, IBA Guidelines); *see also* Markham Ball, *Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, *available at* 21 Arb. Int'l 323, 338–39 (2005), https://academic.oup.com/arbitration/article/21/3/323/179280?login=true (noting that arbitrators may have to disclose matters technically on the Green List if required by General Standard 3(a) or the governing arbitration law).

59. Mr. Born appears to read some passages of the IBA Guidelines to suggest that no Green List item ever needs to be disclosed.[71] However, that rigid approach is difficult to square with the drafters' decision to retain the "eyes of the parties" principle, to instruct "[i]n all cases the General Standards should control the outcome"[72]; to admonish that "any doubt should be resolved in favor of disclosure"; and to remind those using the Guidelines that "unduly formalistic" interpretations of the Guidelines should be avoided.[73] A measure of flexibility is also encouraged in the Guidelines' acknowledgement that some relationships between arbitrators and counsel (or between arbitrators) might, on a case-by-case basis, need to be disclosed although the relationships in question were otherwise thought to be exempt:

> [A]n arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure.[74]

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71 *See* Born Opinion ¶¶ 61, 64 (D.E. 57-92).

72 IBA Guidelines, Part II ¶ 1 (D.E. 57-111); *see also* Otto L.O. de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 Bus. L. Int'l 433, 449 (2004), *available at* https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/arbitrators__impartiality_and_independence/about_the_IBA_Guidelines_on_conflicts_of_interest.pdf. ("Some argued that the subjective test rendered the Green List redundant because if an arbitrator must make a disclosure based on an 'eyes of the parties' test, then it made no sense to have a list of situations beyond the disclosure requirement. Acknowledging this inconsistency, the Working Group first decided to keep the Green List as it was an important goal of the Guidelines to set forth some situations in which no conflicts of interest were deemed to arise.").

73 IBA Guidelines, Introduction ¶ 6 (D.E. 57-111).

74 IBA Guidelines, Part II ¶ 6 (D.E. 57-111).

60. It follows that the IBA Guidelines' color lists are not exhaustive, and the obligation to disclose depends also on the relevance of the case and the intensity of the relationship, as viewed with the eyes of the parties.

61. While Mr. Born examines each instance of conflict alleged by Movants separately, as I pointed out in my First Opinion, the cumulative effect of repeated failures to disclose by all three arbitrators, combined with the weakness of each of the disclosures, should be considered in totality.[75] This certainly is not envisaged in the IBA Guidelines' color lists, but would be a prime example of a situation in which a "case-by-case" approach, as contemplated in the quoted text above, would need to be applied.

## VI. MR. BORN'S "SMALL POOL" THESIS

### A. In General

62. Analysis of evident partiality allegations and related case-law is fact-dependent; factual context is paramount. Mr. Born and I agree that there are some arbitrations in which the participants can be taken to understand that the pool of qualified arbitrators is limited, and that the expectations of the participants are formulated accordingly. We disagree as to whether the current case involves that type of arbitration.

63. I hold that arbitrations occurring in maritime, reinsurance and certain other industries proceed according to distinctive customs and expectations that accommodate disclosure-related practices that are inappropriate in ICC arbitrations of the type involved in the current case. For me, it follows that decisional law that accepts as routine the distinctive arbitral practices followed in the above specialized regimes may not be suitable for cases arising in international

[75] First Opinion ¶¶ 38, 39 (D.E. 55-2); *see also* Born Opinion ¶¶ 95–124 (D.E. 57-92).

commercial arbitration under the ICC Rules. Below I explain why I do not accept Mr. Born's "small arbitrator pool" thesis[76] and why it matters.

### B. The Instant Case Does Not Typify the Small Arbitrator Pool Scenario

64. I disagree with the comparison Mr. Born draws between arbitrations in those fields and the arbitration involved in the current case in part because two of the three arbitrators involved in this case arbitrate a wide range of commercial disputes[77] and share with hundreds of other established commercial arbitrators a willingness to arbitrate big project disputes. Plainly, they were appointed for their experience as international arbitrators who have had exposure to big project arbitrations of various kinds. Only one of the three arbitrators involved in this case, an engineer, specializes in construction arbitration.

65. The several reinsurance cases cited by Mr. Born in his opinion are representative examples of the limited-pool phenomenon he describes, but they are in my view quite distinguishable from the arbitration involved in the current case. In most of those cases, the parties'

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[76] *See* Born Opinion ¶¶ 21–22 (D.E. 57-92).

[77] The law firm biography of Mr. Gunter lists complex construction projects as only one dispute type in an array of subjects with which he deals: agency, sales, distribution, joint-venture oil and gas, telecommunications and IT, intellectual property, pharmaceutical, real estate, hotel management, commodity and international trade as well as corporate/post M&A. *See* Bärr & Karrer, *Biography of Pierre-Yves Gunter* (last visited Sept. 11, 2021), https://www.baerkarrer.ch/en/lawyers/pierre-yves-gunter. The arbitrator appointed by Movants, Mr. von Wobeser, is also well known for his versatility. His bio lists commercial arbitration, public-works arbitration, foreign investment/investor-State arbitration as well as practice areas that include mergers & acquisitions, joint ventures, oil and gas/energy and natural resources. *See* The Legal 500, *Firm Profile: Von Wobeser Y Sierra, SC* (last visited Sept. 11, 2021), https://www.legal500.com/firms/51350-von-wobeser-y-sierra-sc/54013-mexico-city-mexico/lawyers/698516-claus-von-wobeser/; Von Wobeser, *Biography of Claus von Wobeser* (last visited Sept. 11, 2021), https://www.vonwobeser.com/index.php/lawyer?l=134. By contrast, Dr. Gaitskell, a lawyer and an engineer, specializes in construction disputes. *See* Keating Chambers, *Biography of Dr. Robert Gaitskell QC* (last visited Sept. 11, 2021), https://www.keatingchambers.com/people/dr-robert-gaitskell-qc/.

arbitration agreements provided that "[t]*he arbitrators shall be officials or former officials of other insurance or reinsurance companies*."[78] Most if not all of the arbitrators involved in those proceedings, in turn, were members of the AIDA Reinsurance and Insurance Arbitration Society ("ARIAS") and their disclosures were governed not by the ICC Rules, but by the ARIAS–US guidelines for arbitrator conduct.[79]

66. The special limited-arbitrator-pool nature of reinsurance arbitration is well known internationally.[80] Those proceedings are understood typically to involve multiple disputes about the same subject matter, and overlapping arbitrator appointments that are not necessarily disclosed. Additionally, in American courts insurance industry proceedings diverge from ICC arbitration cases by virtue of the apparent willingness of many of those courts to accept that the party-appointed arbitrators in reinsurance cases are partisans—that is: advocates for the parties appointing them.[81] That position is, of course, directly at odds with the ICC Rules.[82]

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78 *Transit Cas. Co. v. Trenwick Reinsurance Co., Ltd.*, 659 F. Supp. 1346, 1350 (S.D.N.Y. 1987); *see also Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 65 (2d Cir. 2012).

79 *See Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, n.26 (S.D.N.Y. 2016) ("[W]e . . . stand by the commonsense proposition . . . that an arbitration clause demanding 'active or retired officers of insurance or reinsurance companies' will substantially limit the universe of potential arbitrators."). In *IRB*, the court reported that "[an informal] search on the website of ARIAS-U.S.—the American affiliate of the AIDA Reinsurance and Insurance Arbitration Society, which maintains a list of 'ARIAS-U.S. Certified Umpires' (including [the arbitrator involved here])—based on the parameters in the parties' arbitration agreement yielded a list of 35 possible ARIAS-certified umpires." *Id*. One party questioned the court's findings, arguing that that the number should be 149, and perhaps more. *Id*.

80 *See Halliburton Co. v. Chubb Bermuda Ins. Ltd.*, [2020] UKSC 48 (UKSC), ¶¶ 43 & 128 (D.E. 57-108) (crediting a report received from the Management Committee of ARIAS (UK), the Insurance and Reinsurance Arbitration Society).

81 *See id.* ¶ 43 (attributing this view to American courts and citing *Certain Underwriting Members of Lloyds of London v. Florida Dept. of Fin. Servs.*, 892 F.3d 501 (2d Cir. 2018)).

82 *See* ICC Rules, art. 11(1) (D.E. 55-10) ("Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.").

67. Aberrant ground rules also characterize maritime arbitration,[83] known in particular for relaxed canons of disclosure and of arbitrator independence and impartiality. The outlier status of maritime arbitration was acknowledged by the UK Supreme Court in *Halliburton v. Chubb*, in which the Court had received written submissions from, among other institutions, the London Maritime Arbitration Association (LMAA) explaining the relaxed disclosure rules obtaining in maritime arbitration.[84]

68. As demonstrated by two of the three arbitrators in this case, large project arbitrators have diverse backgrounds. And even if such projects called for construction specialists as arbitrators, the pool of potential arbitrators would be relatively deep.[85] Thus, I do not regard the

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83 An example Mr. Born gives is *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F.Supp. 352, 358 (S.D.N.Y. 1979). Born Opinion ¶ 43 (D.E. 57-92).

84 *Halliburton Co. v. Chubb Bermuda Ins. Ltd.*, [2020] UKSC 48 (UKSC), ¶¶ 44, 87 (D.E. 57-108) (restating and accepting the LMAA account that "[m]ultiple appointments are relatively common under [LMAA] procedures because they frequently arise out of the same incident . . . [and] [t]here is a relatively small pool of specialist arbitrators whom parties use repeatedly" causing the Supreme Court to conclude that "*[w]hat is appropriate for arbitration in which the parties have submitted to institutional rules, such as those of ICC and LCIA, differs from the practice in . . . LMAA arbitrations. There are practices in maritime, sports and commodities arbitrations . . . in which engagement in multiple overlapping arbitrations does not need to be disclosed*[.]" (emphasis added)).

85 Without an exhaustive search, one can readily identify about 60 ICSID arbitrators who have arbitrated disputes classified by ICSID as involving "construction". *See* **Exhibit 9:** ICSID, *Cases Database: Search Cases* (last visited Sept. 11, 2021), https://icsid.worldbank.org/cases/case-database (type of dispute: construction project). Another 89 different construction arbitrators have been inducted into the College of Commercial Arbitrators. *See* **Exhibit 10:** College of Commercial Arbitrators, Find an Arbitrator, Search Result (Term: "Construction"). In turn, one assumes many of the 1200 members of the Construction Lawyers Society of America or of the 225-plus Fellows of the American College of Construction Lawyers are available to arbitrate. *See* Am. C. Construction Laws., *History/Mission* (last visited Sept. 11, 2021), https://www.accl.org/about/historymission/. For its part, the AAA's Counsel-Rated Panel for Mega Construction Project Claims has 44 members. Some of the AAA Mega Project members are also members of the above two "Colleges" and are Society Fellows. *See* AAA, *The AAA's Counsel-Rated Panel for Mega Construction Project Claims* (last visited Sept. 11, 2021), https://apps.adr.org/constructionmegapanel/faces/FeaturedPanelists.

large project construction arbitration involved in this case to involve so few eligible participants as counsel and arbitrators that the parties who chose ICC arbitration for that project had to accept relaxed rules of disclosure.

### C. Implications of the Foregoing for *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*

69. Mr. Born relies on the 1978 Second Circuit decision in *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*,[86] and cases influenced by it in the Eleventh Circuit, for the proposition that "prior arbitration service . . . does not constitute the type of information which must be disclosed."[87] Elsewhere in his opinion Mr. Born observes:

> In *Andros v. March Rich*, which is quoted in *Boll* and *Levy* and where two arbitrators had overlapped on 19 different arbitration panels, the court found no need for disclosure and held that it "simply do[es] not regard this as the sort of information an arbitrator would reasonably regard as creating an impression of possible bias."[88]

70. In my view *Andros* is anchored in the accepted, specialized, practices of maritime arbitration in New York and in that respect may be read in conjunction with *Transmarine Seaway*,[89] a related case touched upon below. As a precedent to be used in the Eleventh Circuit,

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86 579 F.2d 691 (2d Cir. 1978).

87 *Boll v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 04-80031, 2004 WL 5589731, at *6 n.5 (S.D. Fla. June 28, 2004) (citing *Andros Compania Maritima*, 579 F.2d at 701); *see also* Born Opinion n.188 (D.E. 57-92).

88 Born Opinion ¶ 45 (D.E. 57-92) (relying on *Boll*, at *6). Born notes: "The court also noted that "prior arbitration service … does not constitute the type of information which must be disclosed." Born Opinion n.28–29 (D.E. 57-92) (citing *Andros*, 579 F.2d at 701); *Levy v. Citigroup Glob. Mkts., Inc.*, No. 06-21802, 2006 WL 8432648, at *5 (S.D. Fla. Oct. 17, 2006) (quoting *Andros Compania Maritima*, 579 F.2d at 701).

89 *Transmarine Seaways Corp.*, 480 F.Supp. at 358.

*Andros* may be well suited to NASD-type arbitrations of the type involved in *Boll*[90] and *Levy*,[91] but it ought not to govern actions arising out of an international commercial arbitration under the ICC Rules.

71. Additionally, *Andros* must also be viewed in light of its alternative rationale discussed below.

72. *Andros* arose out of a charter-party demurrage arbitration decided by three members of Society of Maritime Arbitrators: Messrs. Arnold, Moyle and Berg.[92] Marc Rich lost and, in hopes of establishing facts warranting vacatur, sought to depose Arbitrator Arnold. In question was Arnold's relationship to a fourth Member of the Society: Nelson. In addition to being a maritime arbitrator, Nelson was the President of the company that brokered the ship for Andros (owner of the ship involved in the arbitration).

73. Marc Rich alleged that Mr. Arnold "has had [an undisclosed] close personal and professional relationship with . . . Nelson".[93] The disclosure rules of the Society[94] would have

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90 *Boll*, 2004 WL 5589731, at *6 n.5 (quoting *Andros Compania Maritima*, 579 F.2d at 701). In *Boll*, the Magistrate stressed: "It bears repeating that with so many NASD arbitrations, and the reoccurrence of appearing before arbitrators, similar to lawyers appearing before judges, that does not, by itself create an appearance of bias since there is no business or professional 'relationship.'" *Boll*, 2004 WL 5589731, at *8.

91 *Levy*, 2006 WL 8432648, at *5 (quoting *Andros Compania Maritima*, 579 F.2d at 701).

92 *Andros,* 579 F.2d at 693–95.

93 *Andros*, 579 F.2d at 695.

94 Andros disputed whether the Society Rules applied, as they were not expressly designated in the arbitration clause. The question did not impact the court's reasoning. The rule required disclosure of:

> [A]ny circumstance tending to raise a presumption of bias or which he believes might disqualify him as an impartial Arbitrator including close personal ties or business relations with any one of, (a) either of the parties (b) other affiliates of the parties, (c) with counsel for either party, or, (d) with the other Arbitrators on the panel.

*Id.* n.3.

given Marc Rich the election to disqualify Arnold had such a relationship been disclosed or otherwise established.[95] The lower court would not authorize discovery and the Second Circuit affirmed. It was not contested that Arnold and Nelson had arbitrated together 19 times, but such overlap was not unusual among Society members. All four men had arbitrated together multiple times.

74. The holding relied upon by Mr. Born, and the *Boll* and *Levy* courts, was that discovery would not be allowed, because it would be unlikely to generate new information of a type that might establish bias. As to what was already before it, the court opined: "[w]e simply do not regard this as the sort of information an arbitrator would reasonably regard as creating an impression of possible bias.[96]

75. In *Andros*, there was an alternative rationale however: disclosure was simply unnecessary because the recurrent interactions between Messrs. Arnold and Nelson (both members of Society of Maritime Arbitrators) were in fact "no secret." The connection between Nelson and one of the parties, in turn, was also "clear from the documents submitted [in the] arbitration."[97] Thus, disclosure would have been unnecessary on that basis alone.

76. The Circuit Court in *Andros* did not limit its holding to maritime disputes, but that environment was an important contextual element (the Court mentioned the "intimacy of the group

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95 The rule stated: "Upon receipt of such information . . . [i]f either party declines to waive a presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules." *Andros*, 579 F.2d at 693 n.3.

96 *Andros*, 579 F.2d at 701.

97 *Id.* at 702.

from which specialized arbitrators are chosen").[98] The following year the maritime rationale was more fully stated in a related case.[99]

77. In light of the foregoing, I do not view the reasoning for which *Andros* has been cited by Mr. Born to be useful in this case. My view is unchanged by the reliance placed on *Andros* by *Boll* and *Levy*, which cases I regard as distinguishable from a case involving an ICC award.[100]

## VII. SUMMARY OF CONCLUSIONS

78. Although Mr. Born and I agree on a range of matters in connection with the current case, for all of the reasons stated above they are not on factors relevant to the outcome of the issues I have been consulted on. To start, I affirm the conclusions I reached in my First Opinion. I, however, supplement those conclusions as follows:

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98 The court observed, for example, "[t]he very intimacy of the group from which specialized arbitrators are chosen suggests that the parties can justifiably be held to know at least some kinds of basic information about an arbitrator's personal and business contacts." *Id.* at 701.

99 The case was one in which Mr. Nelson acted as arbitrator over Marc Rich's objections. As noted by Mr. Born, the district court in that case—*Transmarine Seaways*—relied on the small pool rationale. *See Transmarine Seaways Corp.*, 480 F. Supp. at 358 ("The maritime community in New York is relatively small, and closely knit[.]").

100 *Boll* was set forth in a magistrate judge's report issued in relation to an award under the NASD Rules of compensatory and punitive damages (together totaling less than US$ 2 million) awarded to account for the brokerage's gross negligence. The award was unanimous, and carried reasons that were "well-crafted and detailed." *Boll*, 2004 WL 5589731, at *9. The single undisclosed contact alleged was that two arbitrators had served together on one other NASD panel and that tribunal had produced an award contemporaneous to the pending arbitration. In recommending against vacatur, the magistrate quoted *Andros*. *See Boll,* 2004 WL 5589731, at *6 n.5 (quoting *Andros Compania Maritima*, 579 F.2d at 701).

*Levy* involved an customer's attack on an award that was so frivolous as to warrant sanctions. *Levy*, 2006 WL 8432648, at *9. His claim of "bias" was almost entirely based on the tribunal's procedural rulings. *Levy*, 2006 WL 8432648 *2–4. The one non-disclosure argument he advanced was that the tribunal's chairman was an arbitrator in other cases defended by Citigroup's counsel. But as in *Andros*, the question of disclosure was beside the point because petitioner's attorney had acted in those other cases; petitioner thus had notice of the contacts that he alleged were not disclosed. *Levy*, 2006 WL 8432648, at *5.

79. For the reason I stated above, I agree with Craig, Park & Paulsson who write: "The first obligation of an arbitrator to the parties and to the ICC . . . is the obligation of disclosure."[101] That expectation attracts users to ICC Arbitration, and they may be taken to have relied upon it.

80. That the ICC Rules envision very broad arbitrator disclosure is not controversial. Many commentaries examining the ICC Rules confirm this.[102] Even the ICC Court of Arbitration in this proceeding found that the arbitrators should have disclosed certain relationships.[103] It is for this Court to apply the FAA evident partiality standard to the arbitrators' lack of disclosure and cumulative undisclosed conflicts.

81. Arbitration is an attractive alternative to courts for international disputes in part because of the broad autonomy accorded the parties. Disclosure is an important facet of party autonomy; meaningful exercise of the parties' right to choose their arbitrators depends on arbitrators erring on the side of disclosure, as urged by leading administering institutions and soft-law texts. In this same spirit, the 11th Circuit opined in *University Commons–Urbana v. Universal Constructors Inc.*:[104]

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101 W. Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, *supra* note 54, at 215.

102 The Fouchard, Gaillard, Goldman treatise, for example, confirms that ICC arbitrators are "expected to decide what they should disclose by putting themselves in the position of the parties," and they are called upon to disclose "all circumstances," even those that in they view as "inconsequential." **Exhibit 2:** *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶ 1060 (Emmanuel Gaillard & John Savage eds., 1999). As that treatise further notes, an arbitrator may additionally specify, on the arbitrator statement of independence form, that, in his or her opinion, such circumstances do not raise doubts as to his or her independence. *Id*.

103 ICC Court's Statement of Reasons in ICC Case No. 20910/ASM/JPA, at 9 (D.E. 55-62) (finding that Mr. Gaitskell should have disclosed that he was sitting as president of an arbitral tribunal in a case where Mr. McMullan, counsel for ACP, was acting for one of the parties); *id*. at 10 (finding that Mr. von Wobeser should have disclosed his "recent role as an arbitrator sitting in an ICSID case together with Mr Jana").

104 304 F.3d 1331 (11th Cir. 2002).

> Section 10 of the Federal Arbitration Act provides that a federal district court may vacate an arbitration award '[w]here there was evident partiality or corruption in the arbitrators[.]' This rule is meant to be applied stringently. As the Supreme Court emphasized in the seminal case of *Commonwealth Coatings Corp. v. Continental Cas. Co.*,[105] courts '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.'[106]

82. The IBA Guidelines are not a singular guide with respect to the disclosure obligations of the arbitrators involved in this case. The pattern of limited observance of the Guidelines among parties designating American seats of arbitration, and the Guidelines' incipient role in US arbitral jurisprudence suggests that they do not supply an implied term in an arbitration clause designating the ICC Rules, Miami as a seat, and other IBA texts but not the Guidelines. They lack the elements necessary for them to qualify as a trade usage.

83. The IBA Guideline, nevertheless, ought to be considered helpful to the extent they codify principles also set forth in the ABA-AAA Code of Ethics, the ICC Rules and Practice Notes and authoritative commentaries about the ICC Rules. Those principles include that arbitrators must err on the side of disclosure, and in identifying those matters which ought to be disclosed arbitrators must try to place themselves in the shoes of the parties.

84. The large project construction arbitration involved in this case does not involve standard arbitrator qualification restrictions (such as those that govern much reinsurance arbitration) or other small-pool attributes. Nor does Mr. Born present any basis to support the use of partisan arbitrators in ICC construction arbitration. It cannot therefore be compared, for example, to reinsurance or maritime arbitration in which multiple cross-appointments are routine

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105 393 U.S. 145 (1968).

106 *University Commons*, 304 F.3d at 1336 (quoting *Commonwealth Coatings*, 393 U.S. at 149).

and fully to be expected by the parties. For similar reasons, cases involving broker-customer securities disputes and securities industry employment disputes provide limited guidance.

85. It is not idiosyncratic or fanciful to expect that international arbitrators will disclose concurrent service with fellow appointees on other tribunals and similar shared duties with counsel for a party. Robust arbitral disclosure is practiced even in specialized industries in which the pool of arbitrators is small because of, for example, agreed upon minimum arbitrator qualifications. In reinsurance arbitration, for instance, such liberal disclosure extends to detailed information about an arbitrator's past, existing and future appointments and is promoted by disclosure rules that overlap significantly with those of the ICC.[107]

86. An arbitrator's disclosure of significant new concurrent appointments allows parties to both protect the integrity of their arbitration and police the tribunal members' promise to devote adequate time to the parties' proceeding.

87. Arbitrators are well paid for their services. The privilege to perform those services comes with obligations: making cooperative, broad disclosure; answering the parties' conflicts-related questions; and, if necessary, dealing professionally with any resulting challenges.

88. In evaluating the sufficiency of an arbitrator's disclosure in relation to omitted items, courts consider a range of factors including: the scope of disclosure described in the parties' arbitration agreement, chosen procedural rules, governing ethical codes and law of the seat; the

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[107] This is confirmed in cases upon which Mr. Born relies. For example, in *Scandinavian Reinsurance Company Ltd. v. St. Paul Fire & Marine Insurance Co.*, 668 F.3d 60, 66 (2d Cir. 2012) the arbitrators were bound by the ARIAS–US Guidelines for Arbitrator Conduct. Those Guidelines required them to disclose, on a continuing basis, inter alia: "any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment[.]" ARIAS-US, *Code of Conduct – Canon IV* (last visited Sept. 11, 2021), https://www.arias-us.org/arias-us-dispute-resolution-process/code-of-conduct/code-of-conduct-canon-iv/.

concurrency or coinciding character of the undisclosed activity; the ease of disclosure; the other disclosures made by the arbitrator; the timing of any disclosures made; and, any interest expressed by the parties in having the information in question.

89. As a policy matter, courts that excuse non-disclosure to avoid vacatur are making a choice. By attempting to avoid waste in the specific case (by choosing finality over transparency), they reduce the power of the parties to set high disclosure standards, permit the enforcement of awards potentially infected by conflicts and, at the margin, they encourage under-disclosure by attaching no deterrent to it.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this September 13, 2021, in Camarillo, CA., U.S.A.

Jack J. Coe, Jr.

**INDEX OF EXHIBITS**
**TO SECOND EXPERT OPINION OF PROFESSSOR JACK J. COE, JR.**

| NO. | DESCRIPTION | DATE |
|---|---|---|
| 1. | Murray L. Smith, *Impartiality of the Party-appointed Arbitrator*, *in* 58 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 30 (1992) | 1992 |
| 2. | *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds., 1999) | 1999 |
| 3. | W. Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (3d ed. 2000) | 2000 |
| 4. | Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2008) | 2008 |
| 5. | José Carlos Fernández-Rozas, *Clearer Ethics Guidelines and Comparative Standards for Arbitrators*, *in* Liber Amicorum Bernardo Cremades 413 (M.A. Fernandez-Ballester & D. Arias Lozano eds., 2010) | 2010 |
| 6. | W. Michael Reisman, W. Laurence Craig, William W. Park & Jan Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* 571 (2d ed. 2015) | 2015 |
| 7. | Marike R. P. Paulsson, *The 1958 New York Convention in Action* (2016) | 2016 |
| 8. | Damien Charlotin, *Tribunal Chair Resigns Over Role as Counsel In Another Intra-EU Case; Parties Seek Negotiated Settlement Under Termination Agreement*, IA Reporter (Aug. 24, 2021) | August 24, 2021 |
| 9. | ICSID, *Cases Database: Search Cases* (Term: "Construction Project") | |
| 10. | College of Commercial Arbitrators, Find an Arbitrator, Search Result (Term: "Construction") | |