XIII.2.2 - Arbitrator's duty to disclose

(a) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise, in the eyes of the parties, to justifiable doubts as to his impartiality or independence.

(b) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(c) An arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Therefore, disclosure does not, in and of itself, demonstrate grounds sufficient to disqualify the arbitrator.

(d) Non-disclosure by an arbitrator of certain facts or circumstances alone does not constitute a ground for challenge. Only the facts or circumstances that he did not disclose can do so.

Commentary:

1 Art. 3.2 IBA Rules of Ethics for International Arbitrators provides that 'the appearance of bias is best overcome by full disclosure'. For this reason, Art. 12 (1) UNCITRAL Model Law provides that an arbitrator shall, prior to his appointment, from the time of his appointment and throughout the arbitral proceedings, disclose without delay any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The ICC’s Statement of Independence, which every arbitrator has to sign prior to appointment by the ICC Court of Arbitration, notes that '[a]ny doubt [as to the arbitrator’s impartiality or independence] should be resolved in favor of disclosure'. The same rule is contained in General Standard 3 (c) IBA Guidelines.

2 It must be emphasized that if the arbitrator discloses certain circumstances, they should not be equated with a ground for challenge. The IBA Working Group, which drafted the IBA Guidelines on Conflicts of Interest, repeatedly emphasized that the rules contained therein are intended to 'eliminate the misunderstanding that disclosure demonstrates doubts sufficient to disqualify the arbitrator'. The reason for this misunderstanding is rooted in the fact that, in contrast to the determination of a ground for challenge, where the Working Group adopted a narrow, objective 'reasonable third person test', it adopted a wider subjective test to determine whether an arbitrator is under a duty to disclose vis-à-vis the parties. General Standard 3 (a) IBA Guidelines, in adapting the language of Art. 7 (2) ICC Rules of Arbitration, provides that the arbitrator shall disclose such facts and circumstances which, 'in the eyes of the parties' give rise to doubts as to the arbitrator's impartiality or independence. A fact or circumstance which gives rise to doubt in the eyes of a party may be considered totally appropriate from an informed third person’s point of view.