

# **Arbitrator disclosures and the impact (if any) of the IBA's updated Guidelines on Conflicts of Interests in International Arbitration**

# 1. Introduction

- Wide issues, limited overview
- Pragmatic approach
- 3 recent cases in 3 different jurisdictions
- A few issues

## 2. Disclosure standard and difference with impartiality/independence

Art. 3c of the IBA Guidelines:

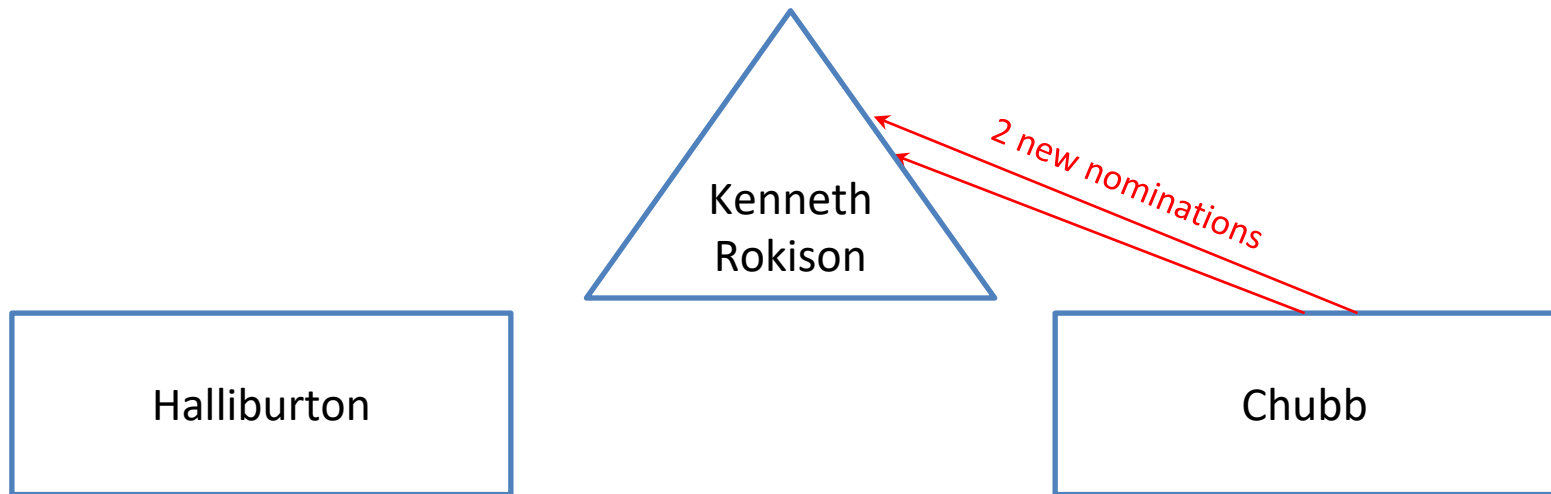
It follows from General Standards 1 and 2(a) that arbitrators who have made a disclosure consider themselves to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing their duties as arbitrator. Otherwise, the arbitrators would have declined the nomination or appointment at the outset, or resigned.

Art. 12 UNCITRAL Model Law:

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

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

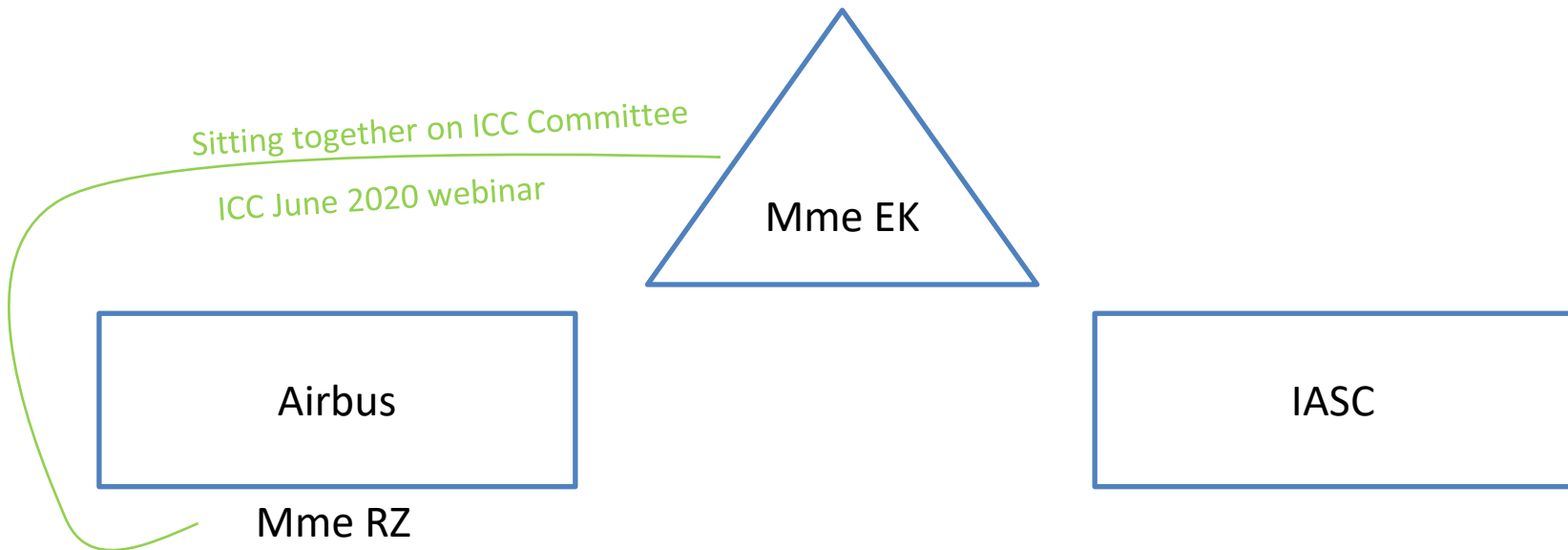
### 3. UK example Halliburton (Supreme Court, December 2020)



The Court said that the IBA Guidelines “assist the court in identifying what is an unacceptable conflict of interest and what matters may require disclosure” while emphasising that they are non-binding.

**Duty to disclose**  
**No real possibility of bias.**

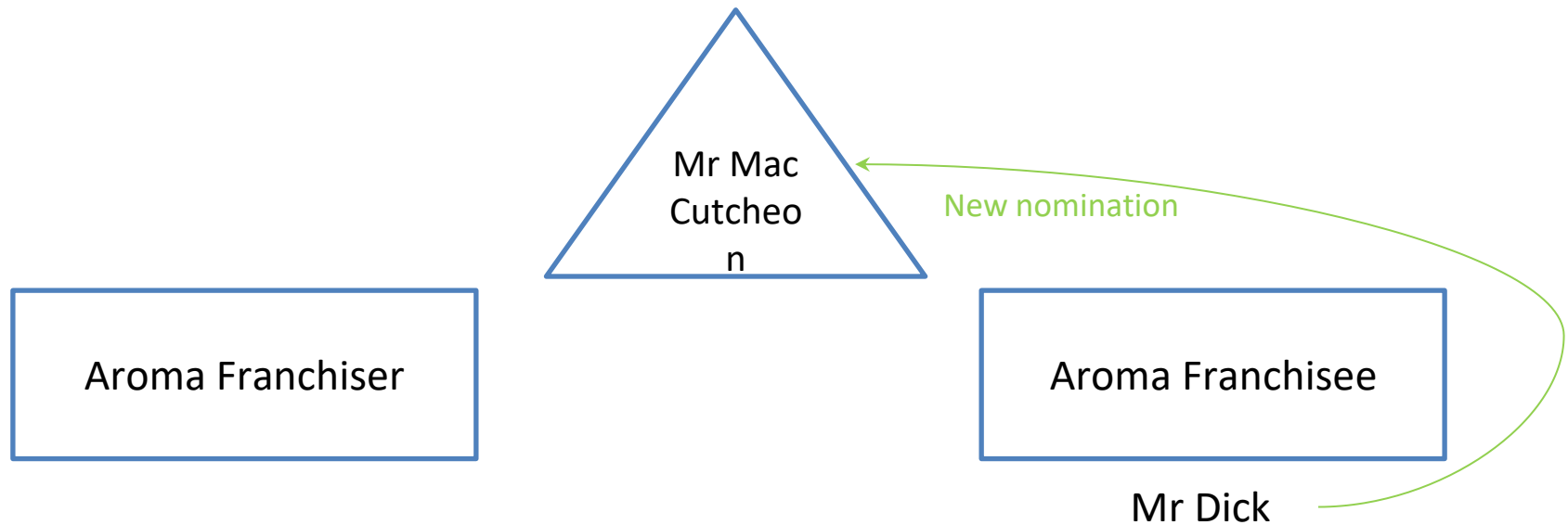
## 4. French example Airbus (Cour d'appel de Paris, December 2023)



### **No duty to disclose**

- ICC Committee: public knowledge
- Webinar: green list, also applicable to party representatives

## 5. Canada example Aroma (Court of Appeal for Ontario, November 2024)



**Objective test** (arbitrator unaware of parties' specific expectations)  
**No duty to disclose.**

## 6. Objective/subjective test

### **IBA Guidelines**

General Standards in Part I “were developed to be the primary source for evaluating the existence of conflicts of interest (adopting an objective, ‘reasonable third person test’) and the obligation to disclose (adopting a subjective, ‘in the eyes of the parties’ test)”.

# 7. Scope of disclosure

## **a. Individual vs law firm : Art. 6 IBA Guidelines**

(a) The arbitrator is in principle considered to bear the identity of the arbitrator's law firm or employer, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm or employer, if any, the law firm's or employer's organisational structure and mode of practice, and the relationship of the arbitrator with the law firm or employer, should be considered in each individual case. The fact that the activities of the arbitrator's law firm or employer involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's law firm or employer has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) Any legal entity or natural person having a controlling influence on a party, or a direct economic interest in, or a duty to indemnify a party for the award to be rendered in the arbitration, may be considered to bear the identity of such party.

(c) Any legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party.

## **b. Duty to investigate: art. 7b IBA Guidelines**

An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to the arbitrator's impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge if the arbitrator does not perform such reasonable enquiries.

## **c. Party vs counsel**



## 8. Consequences of failure to disclose

### **Art. 3(g) IBA Guidelines**

An arbitrator's failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

## 9. Take-aways

- Wider duty of disclosure
- Reasonable limits to the duty to disclose
- Failure to disclose does not automatically imply bias
- As an arbitrator, ask yourself what the parties would expect
- As a party representative, let the arbitrators know about your expectations