THE LONDON MARITIME ARBITRATORS ASSOCIATION

ADVICE ON ETHICS

This advice draws on the IBA Guidelines on Conflicts of Interest in International Arbitration published in October 2014 and Members may, where necessary, refer to the full text of those Guidelines.

The original IBA Rules of Ethics for International Arbitrations (1987) included in its introduction the advice that *"arbitrators should be impartial, independent, competent, diligent and discreet."* It is submitted that this advice remains entirely valid and it should apply at all stages of an arbitration.

1. Independence

1.1 To be independent an arbitrator must have no current connection with either of the parties, and must not have any interest in the subject matter of either the dispute or the decision on any questions which may arise in the proceedings. He or she must neither have, and equally importantly, nor be perceived to have, any interest which could influence him or her in any way.

1.2 There are obvious cases which preclude the acceptance of an appointment, if it be offered. These include an ongoing or recent commercial relationship with one of the parties, even though it may be, or may have been, on a casual basis only, and whether or not related to the dispute. In such circumstances an arbitrator should consider carefully whether, to a third party, he or she would be seen as independent. In most cases it is likely that the prudent course would be to refuse the appointment.

1.3 Where there has been a regular relationship in the past, whether with the proposed appointor or with the opponents to the dispute, the test is usually one of time. The IBA Guidelines consider a period of three years to be sufficient to allow such circumstances to appear on its Orange List (but it should be noted that the IBA regards its Orange List as reflecting situations which require disclosure by the arbitrator). For example, although past relationships may be well known in a particular market or sector, it should be remembered that parties outside that market or sector may well be unaware of any such relationship and may take a different view to that prevailing in the particular market or sector. Whilst the question of *actual* independence is very important, what is crucial is the question of how a reasonable party may *perceive* the situation. If a reasonable party may reasonably think that there is or has been an undue connection resulting in a perceived lack of independence, then whether or not that is the case, the Courts would be likely to intervene, if invited. It follows that arbitrators should not accept appointments in the first instance where there is any substantial risk of that happening.

1.4 The arbitrator should try to look at the situation as if he or she were an outsider, asking him or herself what impression acceptance of the particular appointment might reasonably convey. If there has been a particular relationship but, applying this test, the arbitrator feels he or she can accept the appointment, he or she should usually disclose the circumstances. Disclosure may remedy the situation since, if no timely objection is made after appropriate disclosure, the parties are deemed to have accepted the arbitrator.

1.5 Where there is any reasonable doubt as to how the situation may be seen, an arbitrator is likely to do a greater service to him or herself, the parties, the particular reference and London arbitration generally by declining an appointment rather than by accepting it. Similarly, if an appointment has been accepted but some challenge is then raised on the question of independence it is often better, taking a broad view, to stand down or to offer to stand down (even if it may be considered that the challenge is unjustified).

1.6 Appointments as arbitrator should never be sought. To do so may obviously put the arbitrator in a position of dependence.

1.7 It has been suggested that the frequent appointment of arbitrators on different cases by the same appointing person, party or entity may give rise to a lack of independence, or a perception of bias. However, it remains the case in maritime arbitration that the pool of arbitrators is not large and it is accepted as inevitable that such circumstances will arise. This is not considered to be a matter for disclosure, although an arbitrator should always be satisfied as to the other matters referred to in these notes.

1.8 An intended arbitrator should have no direct or indirect interest in the subject matter of the dispute or with any party or other organisation which may be involved in the dispute. Such interest, if it comes to the attention of the arbitrator at any stage of the reference, should be disclosed.

1.9 An arbitrator should also have no interest in the decision. It should not, for example, be one which could affect his or her own business interests, or any other matter in which he or she has an interest.

The fact that an arbitrator may have published legal or technical articles expressing firm views one way or the other on any matters which may come up for decision is not generally thought to be a matter for disclosure. This is a matter which is touched on further below under the subject of impartiality.

1.10 The independence of the arbitrator must be maintained throughout the arbitration. If something happens which might affect his or her independence, he or she should at once disclose it and, if appropriate, offer his or her resignation.

2. Publicity

2.1 Arbitration is an aspect of the administration of justice and arbitrators should accordingly conduct themselves with dignity and restraint. The following guidelines as to publicity are set down with that in mind:-

(a) An arbitrator may make known his or her willingness to act as such, giving contact details and particulars of his or her background and qualification, to organisations or (where there is no relevant organisation) to an individual.

(b) An arbitrator may include an entry in any relevant list or directory.

(c) Any notification under (a) should be given once only and any such notification and any entry under (b) should give no more particulars of the arbitrator than are found in the LMAA's List of Members, and it should not seek to draw comparisons with any other individual or group whether as to background, experience, qualifications, availability or otherwise; nor should it imply any shortcoming on the part of any other individual or group.

(d) An arbitrator should not procure, and wherever possible should endeavour to avoid, the publication of any material that might infringe the above guidelines.

2.2 The crest of the LMAA may only be used on notepaper or other media by Full Members of the LMAA.

3. Competence

3.1 To be competent an arbitrator should have:

(a) sufficient knowledge and experience of the matters in dispute to enable him or her to understand them without requiring unduly long explanations, and

(b) sufficient knowledge of the relevant law, and of arbitration law and procedure, to enable him or her to conduct the proceedings efficiently and to write a clear and enforceable Award.

3.2 In the absence of special circumstances an arbitrator should write his or her Award so that it is valid and enforceable under English law. If prior to the making of the Award he or she is asked to make some addition to or variation from the normal form, he or she should hear the parties before deciding whether to accede to the request.

4. Impartiality

4.1 To be impartial an arbitrator must throughout the arbitration act fairly, judicially and without actual or apparent bias.

4.2 An Arbitrator should be careful to ensure that all written communications addressed to or received from one of the parties to a reference are copied to all of the parties.

4.3 There is no harm in speaking either personally or by telephone to one party in the absence of the other, provided that the conversation is limited to routine matters of procedure. In the event of any such conversation, an Arbitrator should consider carefully whether it should be reported to the other party, even in the simplest terms: in most cases it should be, to avoid any perception of bias or partiality. An arbitrator should rigorously refuse to discuss any matter relating to the merits of the case or any matter of procedure which is likely to be disputed. A party attempting to do so should be told to make its application in writing, with a copy to the other side. Attention should be drawn to the LMAA Terms.

4.4 If the circumstances justify it, an arbitrator should not be afraid to take firm action. Provided it complies with the principles of natural justice, such action will almost certainly be supported by the Courts. However, before doing so, a warning should be given to the offending party so that it is not taken by surprise. This can often be done by a peremptory order, with an explanation of what is likely to happen in the event of non-compliance.

4.5 If an arbitrator has specialised knowledge, it should be declared, especially if such knowledge or any opinion which an Arbitrator may hold, or may have formed on the evidence before him or her, differs from that of the expert evidence before him or her.

4.6 There is no objection to the arbitrator lunching with the parties at the hearing, provided that representatives of both parties are present and there is no conversation which could be relevant to the dispute.

5. Diligence

5.1 To be diligent an arbitrator must ensure that at all times he or she has the time and the resources to enable him or her to handle correspondence, interlocutories, the hearing and the writing of the Award with reasonable despatch.

5.2 If by reason of other commitments, illness or other unavoidable circumstances, an Arbitrator is unable to act with reasonable despatch, the procedure outlined in the LMAA Terms should be followed.

5.3 Where a hearing is held urgently at short notice, an arbitrator should make sure not only that he or she has time for the hearing, but that he or she has time to produce the Award promptly.

6. Discretion

6.1 To be discreet at all times an arbitrator must act in a temperate and judicial manner. Patience must be shown, but at the same time an Arbitrator should not allow unnecessary repetition or unrestrained or abusive language. An Arbitrator must set the example and should, if necessary, not be afraid to take firm action.

6.2 If an arbitrator feels he or she needs time to make a decision, an adjournment should be ordered for such time as is considered appropriate.

6.3 There is no objection to the arbitrator indicating to the parties the way in which his or her mind is working. Indeed it is sometimes helpful as this may lead to an amicable settlement. However, an Arbitrator should avoid being drawn into the position of a mediator or conciliator. In particular he or she should be careful not to indicate what he or she thinks might be appropriate terms of any settlement. To do so might prejudice his or her position as an arbitrator.

6.4 An arbitrator by reason of his or her position has a wide degree of discretion, but the exercise of that discretion must be made with proper reasons which, in appropriate cases, should be disclosed to the parties.

6.5 An arbitrator should always remember that he or she is the servant of the parties and should endeavour to accommodate their requests, particularly if they are joint requests.

6.6 An arbitrator should remember that he or she is in a position of confidence. The proceedings, the evidence given and the Award which is made are confidential. Except with the consent of the parties, an Arbitrator may not disclose any document or other evidence or any submission which comes before him or her in the course of the reference and may not disclose the Award or any part of it.