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Arbitral Institutions' Conflicts of Interest

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Conflicts of interest between parties and arbitrators are common in arbitration proceedings. However, the academic community has not yet examined whether arbitral institutions may also run into conflicts of interest. This post will deal with this question and also examine measures that can mitigate any such risks of conflicts of interest for arbitral institutions.

The management and employees of arbitral institutions perform important procedural functions in support of arbitration proceedings. This can include, for example, providing and applying procedures for the selection, appointing or deciding on challenges of arbitrators, keeping records of the proceedings, and collecting and distributing arbitration fees. However, international legal instruments and best practice guidelines do not directly regulate any conflicts of interest on the side of arbitral institutions. For example, recent free trade agreements and investment protection agreements such as the [CETA](#) (see *e.g.* Annex 29-B); the [Canada-Chile FTA](#) (Article G-24), the [EUSIPA](#) (Art. 3.11); or the [2019 Netherlands Model BIT](#) (Art. 20(6)), and rules of arbitral institutions (see *e.g.* Art. 11.4, 13.4 of the [2018 HKIAC Rules](#); and Art. 5(5) of the [2020 LCIA Rules](#)) include broad lists of addressees of rules on disclosures of conflicts of interest but do not always include arbitral institutions. Even the [IBA Guidelines on Conflicts of Interest in International Arbitration](#) (the “IBA Guidelines”) do not regulate conflicts of interest arising within arbitral institutions. Perhaps the lack of regulation comes from the generally accepted assumption of neutrality surrounding the activities of arbitral institutions.

That said, some guidance on the issue can be found in internal regulations of arbitral institutions and occasionally in national legislation. For instance, one can consider this problem based on the regulations of the [Russian Arbitration Center](#) (“RAC”) at the [Russian Institute of Modern Arbitration](#) (“RIMA”):

The RAC Administrative Office Employees

Depending on the position of the RAC Administrative Office employee, the following situations may arise in case:

- 1) The employee acts as a tribunal assistant

The IBA Guidelines General Standard 5(b) imposes a duty of independence and impartiality on tribunal assistants, similar to the one imposed on arbitrators. Tribunal assistants, therefore, may be

required to sign declarations of independence and impartiality. Accordingly, in the event of a conflict of interest, a RAC Administrative Office employee acting as a tribunal assistant must notify the parties, the tribunal and the RAC Executive Administrator of the conflict, and may even be required to terminate his/her mandate in the respective arbitration (Article 40 (3) RAC Arbitration Rules). In the latter case, the RAC Executive Administrator would appoint another employee of the RAC Administrative Office as tribunal assistant.

2) The employee is involved in case management activities

An employee may be involved in case management activities by, for example, preparing the case and other files in relation to the constitution of the arbitral tribunal. Article 3.4 of the RAC Internal Rules obliges RAC Administrative Office personnel to avoid any conflicts of interest, and if a conflict occurs, to immediately stop the performance of functions concerning the relevant arbitration proceedings¹⁾ and notify the RAC Executive Administrator. In this case, the RAC Executive Administrator should appoint another employee to perform the relevant case management functions.

3) The employee performs administrative secretary functions unrelated to a specific case

When there is no direct connection to the participants of the arbitration, no conflicts of interest arise. However, if an administrative secretary becomes aware of any circumstances that may lead to a conflict of interest, Article 7.4 of the RAC Internal Rules obliges the employee to inform the RAC Executive Administrator, who should take appropriate measures. In practice, this may involve, amongst other things, the exclusion of the employee from case-related correspondence, calls, denial of access to the case file in the [RAC Online System of Arbitration](#).

The RAC Executive Administrator (Head of the RAC Administrative Office)

The RAC Executive Administrator is responsible for managing RAC's day-to-day activities, including the activities of the RAC Administrative Office, and the administration of arbitration proceedings under the RAC Arbitration Rules.

As the RAC Executive Administrator's powers are unique, it is difficult to resolve any potential conflicts of interest arising in relation to the RAC Executive Administrator. However, if such conflict does arise, despite the lack of direct provisions, it seems that the duties of the RAC Executive Administrator can be performed by a specially appointed RAC Administrative Office's employee or a nominated deputy.

Another solution may be the delegation of the RAC Executive Administrator's powers to a member or the Chairman of the RAC Board. Obviously, any such delegation shall suspend the execution of the member's or Chairman's duties in the RAC Board.

Similar options are offered by [the VIAC](#) (Article 4.5 VIAC Arbitration Rules) and [the DIS](#) (Article 7.2 DIS Rules): if it is impossible for the Secretary General to perform his/her duties, then one of

the Board's members (VIAC) or the Deputy Secretary General or another employee (DIS) shall perform these duties.

Alternatively, [the SIAC Rules](#) (Rule 1.3) widely define the term "President" by including President, any Vice President and Registrar, thus overcoming possible conflicts of interest situations.

Members of the RAC Board

It is commonplace that members of a decision-making body such as the RAC Board shall not perform their functions of appointing arbitrators, deciding challenges and others if they run into conflicts of interest (Art. 7.6 RAC Internal Rules).

In this case, the RAC Board member shall immediately notify other Board members and the RAC Executive Administrator of a conflict and shall not participate in any decision-making with respect to that arbitration.

National laws also remain relevant. For instance, in Russia, a conflict of interest is prohibited in the performance of arbitral institution's activities ([Article 46 of the Federal Law on Arbitration](#)), if one of the parties is:

- (1) the non-profit organization, under which the institution was established;
- (2) its founder(s); and/or
- (3) the person(s) and its affiliates, who are part of the institution's governing bodies and are competent to decide questions about the appointment, challenge and termination of the arbitrator's powers.

Thus, given the importance of conflict-free arbitration proceedings, members of the appointing authority are strongly encouraged to avoid and disclose any conflicts of interest.

Conclusion

Arbitration institutions are represented by individuals, with their own ties and connections. This may result in conflicts of interest with the participants in arbitral proceedings. Taking into account the duty of neutrality that arbitral institutions should adhere to, connections of the institutions' employees and affiliates should be disclosed.

With the increase in the number of arbitral proceedings, we may see the development of principles on the topic of conflicts of interest within arbitral institutions. At the moment, the interplay between arbitral institutions and the participants of arbitral proceedings has not been sufficiently developed, but knowledge of institutional rules and domestic law on these matters may assist parties and tribunals to navigate at least some of these issues as they arise.

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References

There is a discrepancy between the English and Russian versions of the RAC Arbitration Rules: the English version states that “If a conflict of interests occurs, the personnel shall immediately cease performance of their functions with respect to the relevant *arbitrator* and notify the Executive Administrator” (emphasis added), while the Russian version provides that the performance of the respective functions shall be ceased “...with respect to the relevant *arbitration*...”. The authors believe the broader provision in the Russian-language version prevails in that case. This provision is under revision in the updated version of the RAC Arbitration Rules, which are available for [public consultation](#).

This entry was posted on Wednesday, July 28th, 2021 at 8:00 am and is filed under [Arbitration Institutions and Rules](#), [Conflicts of interest](#), [Russia](#)

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