Swiss Arbitration Association

Conflicts of interest and disclosure - views of the ASA Community

At the first ASA Town Hall on 29 September 2023 in Bern, the ASA Community dealt with the topic of conflicts of interest and disclosure. After short keynotes by Marieke van Hooijdonk on "Conflicts of interest and disclosure – conflicting rules all over the place?" and by Xavier Favre-Bulle on the ongoing revision of the IBA Guidelines on Conflicts of Interest in International Arbitration, six roundtables discussed various aspects of the topic. The outcomes of the roundtable discussions were gathered in a plenary session and tested with a number of polling questions. This report sets out the views expressed by the ASA Community at the ASA Town Hall. The polling results give an indication of the prevailing opinions on selected questions relating to conflicts of interest and disclosure.

By Christian Oetiker, Nadja Jaisli Kull, and Prabhjot K. Singh

A. Arbitrators' disclosure – the relationships between arbitrators, between arbitrators and counsel, and between arbitrators and experts

The first roundtable discussed relationships between arbitrators, between arbitrators and counsel, and between arbitrators and experts. The question was when relationships between these actors need to be disclosed and when they create a conflict. There was also a discussion on whether the current practice of increased disclosure is moving in the right direction.

The discussion leaders Friederike Schäfer and Simon Gabriel reported that there was a lively debate at this roundtable about several different constellations. One of the results emerging from the exchange of views was that the constellation where the arbitrator sits contemporaneously with one of the counsel in an unrelated arbitration is more relevant than the situation where the arbitrator sits with one of the other arbitrators in an unrelated arbitration. As to the relationship between arbitrators and experts, the group explored the necessity of distinguishing between experts on technical issues and legal experts, as the latter more commonly act as arbitrators.

Finally, the roundtable debated both the positive and negative aspects of the current practice of increased disclosure. While some participants emphasised that more disclosure brings greater transparency for the parties involved in the arbitration and thereby strengthens their confidence in the process, others highlighted that increased disclosure would lead to arbitrators not being considered or being excluded despite being impartial and independent.

THE POLLING QUESTIONS SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:

Answer the following questions. Ticking a box means "yes".

The arbitrator is currently sitting with one of the other arbitrators in an unrelated arbitration (both as co-arbitrators). Is disclosure required?

35 %

The arbitrator is currently working with an expert, who appears as expert witness, in capacity as counsel in an unrelated matter. Is disclosure required?

81 %

The arbitrator is currently sitting with one of counsel in an unrelated arbitration. Is disclosure required?

64 %

Is a challenged arbitrator free to withdraw or is she/he required to stay as long as he/she feels impartial and independent (Yes means: "free to withdraw")?

45 %

The discussion and the result of the polling show that the majority of the ASA Community believes that disclosure is required if the arbitrator sits contemporaneously with one of the counsel in an unrelated arbitration. Moreover, the majority considers that disclosure is necessary if the arbitrator is currently working with an expert who appears as an expert witness, in the capacity as counsel in an unrelated matter. The fact that the arbitrator currently sits with one of the other arbitrators in an unrelated arbitration (both as co-arbitrators) does not need to be disclosed according to the majority of the ASA Community participating in the ASA Town Hall. Finally, the majority supports the view that a challenged arbitrator is required to stay as long as he/she feels impartial and independent and is not free to withdraw.

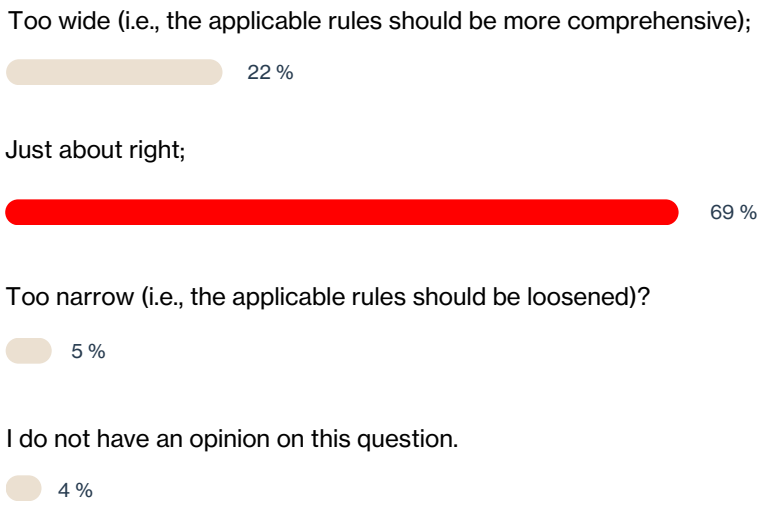
B. Arbitrators' disclosure – relationships between the arbitrator and a party

The relationships between the arbitrator (and/or partners in the arbitrator's law firm) and a party (and/or a party's affiliates) was the second topic discussed by the ASA Community at the ASA Town Hall. The discussion focused on the question of what kinds of relationships create a conflict, those which clearly do not and what are the grey areas and the proper approach on disclosure in such circumstances.

The discussion leaders Olena Perepelynska and Jean Marguerat reported that the group, in particular, explored the relationships between the arbitrator and a party in the context of the IBA Guidelines. The general consensus of the group was that the terms "personal interest" or "financial interest" are difficult to define, so that it would be better to leave the respective rules as they stand. With regard to repeat past appointments and the three-year period in the IBA Guidelines, the group agreed that the rule should not be applied formalistically, but one should rather take the importance of each case into consideration. The group also expressed the view that parallel cases with the same subject matter and the same factual background, in which the arbitrator had been appointed at the same time, should be considered as one case. Moreover, the group assessed whether it should count as an appointment if the case was terminated at a very early stage. The group concluded that the intention of a party to appoint an arbitrator is the relevant factor so that such an appointment must count.

THE POLLING QUESTION SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:

(Choose one option). With regard to the circumstances to disclose in relation to the parties, is the discretion currently given to the arbitrator:



The discussion and the result of the polling show that the majority of the ASA Community participating in the ASA Town Hall considers the discretion given to arbitrators with regard to the circumstances to disclose in relation to the parties neither too wide nor too narrow, but just about right. In light of this, no new and in particular no tighter regulation in this area is required in the view of the Town Hall participants.

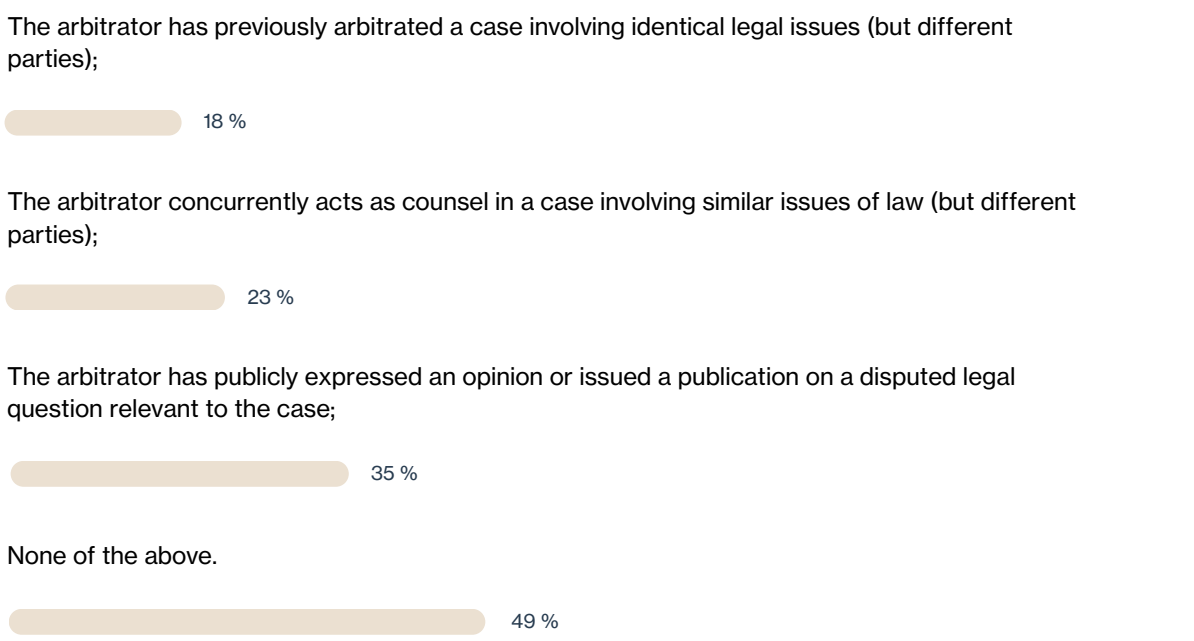
C. Issue conflicts

The third topic discussed was the potential or apparent bias of arbitrators regarding the subject matter of the dispute. The discussion focused on questions concerning when similar factual or legal issues dealt with by an arbitrator in other cases require disclosure, what the reasonable expectations of an arbitrator's "open mind" are, and whether the topic of issue conflicts is overrated or rather understated.

The discussion leaders Christopher Harris and Tilman Niedermaier reported that the group identified several issues about previously expressed views on a particular legal problem in a publication. The group weighed up whether, in order to qualify as a potential issue conflict, such a publication must concern an aspect of substantive law or whether it may also relate to procedural questions. Participants also debated whether the legal issue must be a controversial one or whether settled issues would be covered as well. From a practical perspective, the group noted that an arbitrator may not be aware of conflict issues at an early stage, especially if the request for arbitration is not detailed. Overall, the discussion leaders reported that, as a result of the issues considered, there was quite a level of skepticism in respect of disclosure duties regarding publications.

The discussion leaders also reported that the situation where the arbitrator concurrently acts as counsel in a case involving similar issues of law was considered to be somewhat trickier. However, the majority of the group took the view that an arbitrator must be presumed to be able to change his or her mind in the course of the arbitration proceedings on the basis of the parties' submissions.

THE POLLING QUESTION SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:
(Choose one or several options). Which of the following facts raises an issue conflict in a commercial arbitration:



The discussion and the result of the polling show that the majority of the ASA Community participating in the ASA Town Hall is generally skeptical about the topic of issue conflicts. Consequently, additional regulations in this area do not seem to be necessary.

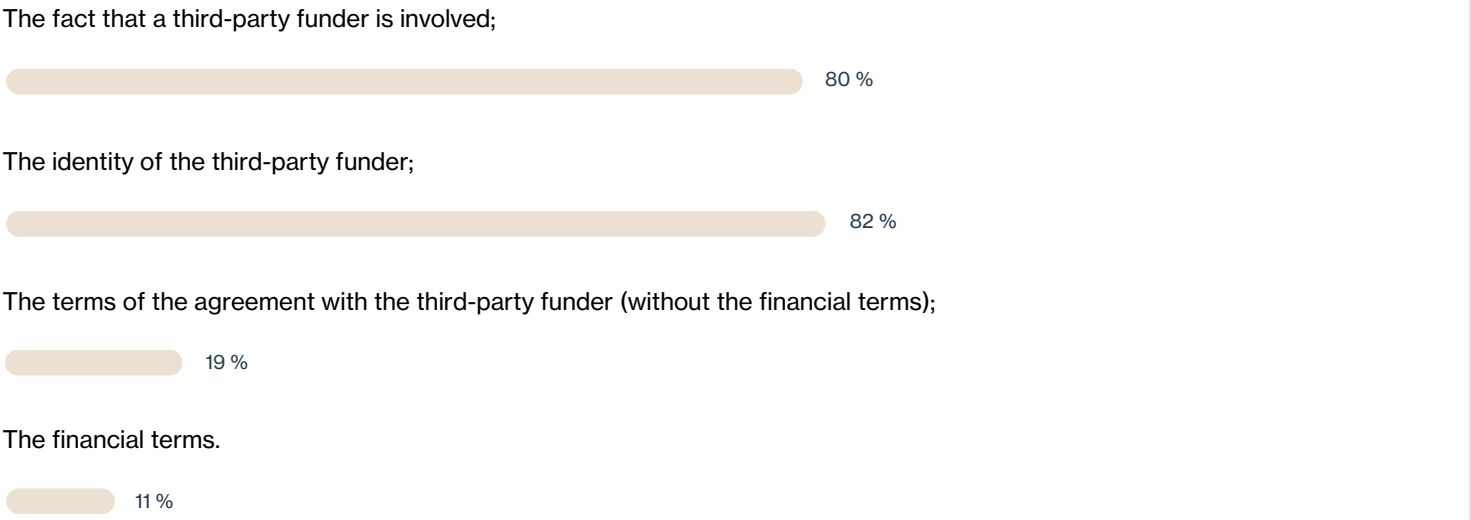
D. Third-party funding

The involvement of a third-party funder on either side of a case, which may significantly change the dynamics in relation to conflicts of interest, was the fourth topic discussed at the ASA Town Hall. The discussion included questions such as whether the involvement of a third-party funder must be disclosed; if so, what information must be disclosed and to what extent the relationship between the funder and the arbitrators is relevant.

The discussion leaders Sarah Ganz and Benjamin Gottlieb reported that the group first discussed those situations which could lead to a potential conflict. One hypothetical scenario identified was if the third-party funders funnel counsel cases to the law firm of the arbitrator. The group concluded that the name of the third-party should be disclosed in such cases. It is then for the arbitrator to check within his or her law firm whether other partners act as counsel in cases funded by the respective funder. However, the discussion leaders also pointed out that such a disclosure would inevitably lead to the opening of a 'Pandora's box', as the other party would almost certainly start inquiring about details of the funding arrangement.

In addition, the general consensus in the group was that the existing guidelines should be applied by analogy to these types of cases involving third-party funders, i.e., the view was that there is no requirement for specific rules with regard to third-party funders.

THE POLLING QUESTION SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:
(You may choose several options). In cases involving a third-party funder, what information should the party supported by the third-party funder disclose:



The discussion and the result of the polling show that the majority of the ASA Community participating in the ASA Town Hall supports the disclosure of the involvement of a third-party funder as well as the identity of that funder. There was no majority for disclosing other aspects of third-party funding.

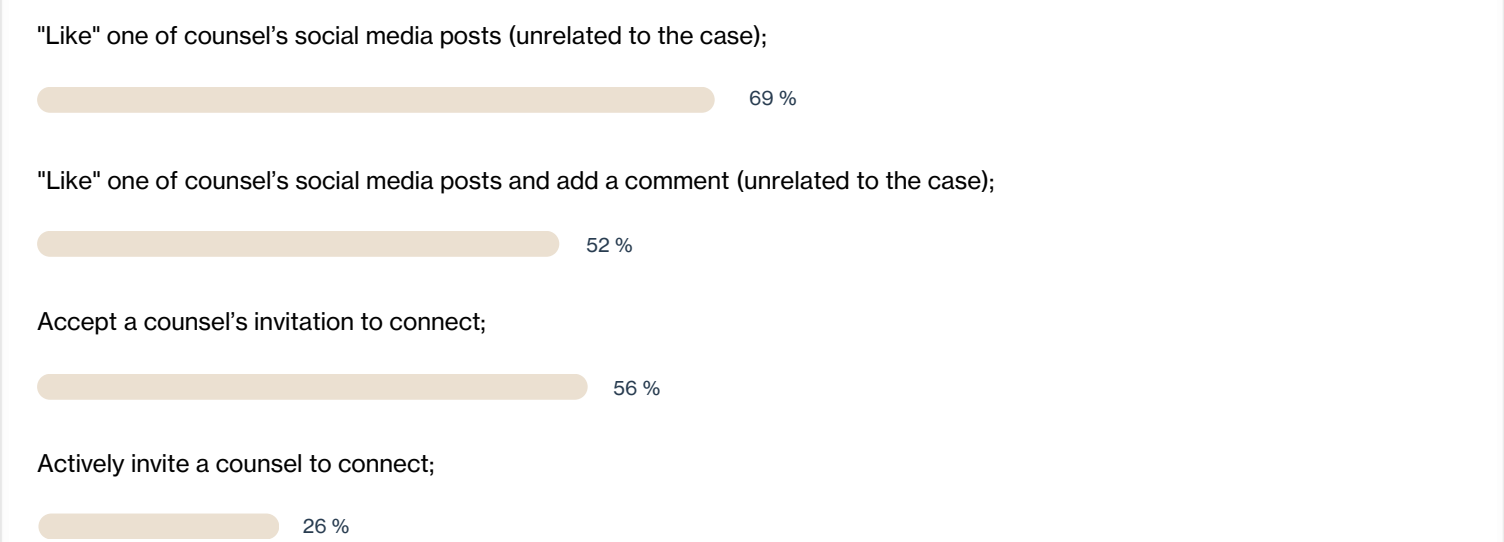
E. Social media

The fifth topic dealt with at the ASA Town Hall addressed the interplay between social media, conflicts of interest and disclosure. The discussion focused on the questions of the extent to which social media posts can create conflict issues, whether arbitrators should actively avoid using social media and to what extent parties are required to continuously monitor the arbitrators' social media activity.

Catherine Anne Kunz and Shirin Saif, the leaders of this discussion, reported that the group first identified the criteria that could allow for differentiation between problematic and unproblematic social media activity. The most important factor was considered to be timing, whereby activity during an ongoing arbitration was unsurprisingly seen to be the most problematic scenario. Intensity of the social media activity, frequency of the interactions and the type of social media platform were further relevant factors named by the participants. Overall, the key conclusion was the need to exercise self-restraint, in particular during an arbitration.

THE POLLING QUESTION SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:

(Choose one or several options). Which of the following social media activities are in your view generally unproblematic for an arbitrator during an arbitration:



The discussion and the result of the polling show that there are diverging views on the extent to which social media posts can create conflict issues. Therefore, exercising self-restraint is considered to be key, especially during an arbitration. No additional regulations on this specific topic seem to be required.

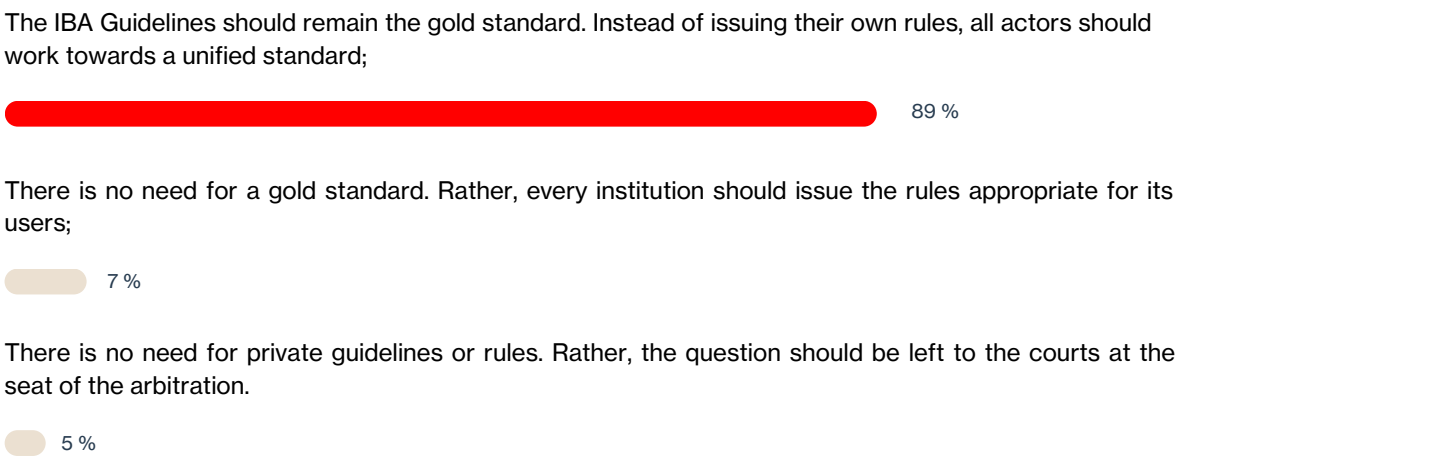
F. Regulation

Regulation was the sixth topic discussed at the ASA Town Hall. For years, the IBA Guidelines have been the gold standard when assessing the question of conflicts of interest. In recent years, arbitral institutions issued additional rules. The ASA Community discussed whether more or less regulation on the issue of conflicts of interest is the better approach and whether there is enough uniformity between the various regulations. It also dealt with the question of to what extent the regulations should require arbitrators to disclose issues that do not create a conflict for reasons of transparency.

The discussion leaders Diana Akikol and Thomas Stouten reported that the group was of the view that the arbitration community requires uniformity, which is provided by the IBA Guidelines. Additional rules and competition between different regulations should therefore be avoided. The group also found that regulation in this area is necessary for the arbitration community to show that it takes conflicts of interest seriously. Overall, the IBA Guidelines were described as balanced. The discussion leaders, nonetheless, highlighted some points regarding the IBA Guidelines that the group considered to be weak. As to Standard 6 dealing with the arbitrator's law firm and the question of whether activities of the law firm could create a conflict, it would be helpful to have more guidance on those situations which would generally be considered as unproblematic. Finally, the fact that the envisaged revision of the IBA Guidelines places more emphasis on the parties' duty to investigate conflict situations is to be welcomed according to the group as the arbitrator may not always be aware of complicated and non-transparent company structures.

THE POLLING QUESTION SUBMITTED TO THE ASA COMMUNITY AT THE ASA TOWN HALL LED TO THE FOLLOWING RESULT:

(Choose one option). The various regulations have different approaches to conflicts and disclosures. With which of the following statements do you agree most:



The discussion and the result of the polling show that the majority of the ASA Community participating in the ASA Town Hall supports the IBA Guidelines as the gold standard and believes that all actors should work towards a unified standard.