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# Vacating an Award: Lessons from the ICA v. Underwriters Decision

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# Old version of Code of Conduct – Comment 5:

**5. Relationship between comments 3 and 4.** Comment 3 sets forth circumstances in which an arbitrator must refuse to serve. If none of those circumstances applies, comment 4 sets forth circumstances an arbitrator should nevertheless consider in deciding whether to serve. In some cases, comment 3 will “almost” apply – usually because the arbitrator has a relationship described in comment 3 with an entity that is related to a party to the current arbitration, but that is not strictly within the definition of “party.” Thus, one of the circumstances set forth in comment 3 may apply (i) to an entity that is an affiliate of a party to the current arbitration, but that is not within the definition of “party,” or (ii) to an entity having the same third-party administrator or manager as a party to the current arbitration. In such a case, the arbitrator should refuse to serve, in line with the general principle that in upholding the integrity of the arbitration process an arbitrator should not get too close to the edge on issues of ethics or process fairness. If, however, it is clear that the relationship between the entity with the “comment 3” relationship to the arbitrator and the party to the current arbitration is attenuated, and that, by reason of the attenuation, the reasons for the mandatory “do not serve” rules in comment 3 are not implicated, then the arbitrator may (but need not) choose to serve.



# Tracked Changes

5. Relationship between ~~comments~~ Comments 3 and 4. Comment 3 sets forth circumstances in which an arbitrator must refuse to serve. If none of those circumstances applies, comment 4 sets forth circumstances an arbitrator should nevertheless consider in deciding whether to serve. In some cases, comment 3 will “almost” apply – usually because the arbitrator a candidate has a relationship described in comment Comment 3 with an entity that is related to a party to the current arbitration, but that is does not fall strictly within the definition of “party.” Thus, one of the circumstances set forth in comment 3 may apply (i) to an entity that is an affiliate of a party to the current arbitration, but that is not within the definition of “party,” or (ii) to an entity having the same third-party administrator or manager as a party to the current arbitration. In such a case, the arbitrator should refuse to serve, scope of Comment 3, but the relationship is sufficiently significant that the principles set out in Comment 3 are clearly implicated, then in these circumstances the candidate should refuse to serve in the current arbitration, in line with the general principle that in upholding the integrity of the arbitration process an arbitrator should not get too close to the edge on issues of ethics or process fairness. arbitrators will avoid the perception of bias. If, however, it is clear that the relationship between the entity with the “comment 3” the relationship to the arbitrator described above is remote and the party to the current arbitration is attenuated, and that, by reason of the attenuation, the reasons for the mandatory “do not serve” rules in comment 3 are not implicated, then the arbitrator may (but need not) pursuant to Comment 4, would not affect the candidate’s judgment, then the candidate may choose to serve.

## New (clean) version:

5. Relationship between Comments 3 and 4. If a candidate has a relationship described in Comment 3 with an entity that does not fall strictly within the scope of Comment 3, but the relationship is sufficiently significant that the principles set out in Comment 3 are clearly implicated, then in these circumstances the candidate should refuse to serve in the current arbitration, in line with the general principle that in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias. If, however, the relationship described above is remote and pursuant to Comment 4, would not affect the candidate's judgment, then the candidate may choose to serve.