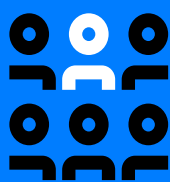




Commission on Arbitration and ADR  
Leading Dispute Resolution Worldwide



# ICC Guide on Disability Inclusion in International Arbitration and ADR



## ICC Guide on Disability Inclusion in International Arbitration and ADR

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## Introduction

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This ICC Guide on Disability Inclusion in Arbitration and ADR (the ‘Guide’) is intended to provide practical guidance on how disability inclusion can become a standard feature of arbitration and other forms of alternative dispute resolution (ADR). Until now, disability inclusion has received little attention within the arbitration and ADR community. This Guide is intended to place disability on the same plane as other characteristics protected by law, each of which is equally deserving of inclusion.

The recommendations and toolkit provided in **Section 1** of this Guide address how arbitration and ADR practitioners can – and must – improve inclusion for persons with disabilities in arbitration and ADR. The toolkit provides resources practitioners can use to pursue best practices in disability inclusion in their own practice. It intends to shift the burden from persons with disabilities ensuring that all participants take part in the conversation about how to advance disability inclusion.

**Section 2** of this Guide explains how disability is best understood in the context of arbitration and ADR. **Section 3** provides a more detailed discussion of disability inclusion in arbitration and ADR, focusing on reasonable accommodation to enable persons with disabilities to participate equally in arbitration and ADR activities, as well as the impact such accommodation might have on the arbitral and other ADR processes.

## Section 1 - Recommendations and disability inclusion toolkit

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### 1.1 Recommendations

Drawing on the discussion of disability set out in Section II below, as well as the examples in Section III of how disability inclusion could intersect with the practice of international arbitration and ADR, the Guide sets out 10 recommendations on how to improve inclusion for persons with disabilities in international arbitration and ADR.

Given the multivariate character of disability and the associated impairments, the Guide does not seek to prescribe a strict or comprehensive set of guidelines. The recommendations that follow should be considered a framework capable of adaptation to specific situations and needs, with the overall goal of removing impediments, facilitating participation, and fostering inclusion for persons with disabilities.

Although principally aimed at international arbitration, these recommendations could also be adopted for use in ADR.

#### (a) Recommendations to arbitral tribunals and other arbitration and ADR practitioners

1. Arbitral tribunals should consider making disability inclusion one of the default points on the agenda for initial case management conferences, as well as including in its first procedural order standardised provisions for the disclosure of disabilities and the requesting of accommodation by any participants in the arbitration, including members of the arbitral tribunal. Draft language for this purpose is set out in the toolkit (Section 1.2 below).
2. In considering requests for adjustments to accommodate disability, arbitral tribunals should consider applying and using the toolkit (Section 1.2 below), particularly in circumstances where an accommodation request is contested between the parties.

**(b) Recommendations to arbitral institutions**

3. Institutions should consider requesting data from arbitral appointees as to (i) whether they consider themselves to have a disability, and if so, (ii) the nature of the disability and its related impairments. Such requests must indicate that answering them is voluntary and that any information provided will be treated as strictly confidential. Institutions should consider publishing data collected through the proposed process on an anonymised basis in their annual reports.
4. Institutions should consider appointing a diversity officer (who may be an appropriately trained existing member of staff) responsible for ensuring the implementation of their diversity objectives, including those on disability inclusion.
5. Institutions should consider, and refer to, all stakeholders (the parties, outside counsel, experts, staff, arbitrators, etc.).
6. The 'mindfulness exercise' provided in the toolkit below is aimed at promoting greater awareness about disability, diversity, and inclusion in daily practice.

**(c) Recommendations related to international arbitration and ADR activities and events**

7. Institutions and organisations should consider conducting regular audits of premises used to ensure compliance with best practices for accessibility, with particular attention paid to hearing facilities.
8. Institutions and organisations should ask third-party providers for off-site venues for their operations to conduct their own audits based upon the same standards. They should also consider making disability inclusion audits mandatory for third-party venue providers.
9. Institutions and organisations should consider conducting an audit of their websites, social media channels, and other promotional materials to ensure compliance with service industry best practices for disability inclusion. Such audits could extend to their digital and telecommunication services, including but not limited to telephones, digital security kiosks, internal applications and databases, or other digital services. Audit results could be used to generate and implement policies to ensure future accessibility. Websites (and other materials) should be updated to ensure that all discussions of diversity include an appropriate reference to disability.
10. Institutions and organisations should consider adopting a policy requiring the conference organisers to strive for the representative inclusion of persons with disabilities on panels, similar to existing practices concerning gender-based inclusion. A similar policy could be adopted for other programmes organised or sponsored by institutions and organisations, including moot courts and mediation competitions. Postings concerning such conferences or other events should indicate that reasonable accommodation can be made, and registration forms should expressly provide an opportunity for such accommodation to be requested.

**1.2 Disability inclusion toolkit**

This toolkit is meant as a resource to guide the implementation of the recommendations set out above and includes:

- (a) language for inclusion in the agenda for the first case management conference ('CMC') and/or Procedural Order No. 1 ('PO 1') to facilitate the disclosure of disabilities and the requesting of reasonable accommodation;
- (b) guidance for arbitral tribunals asked to consider and determine requests for reasonable accommodation; and
- (c) a disability/inclusion awareness checklist ('mindfulness exercise') for use by participants in international arbitration and ADR to promote mindfulness about disability, diversity, and inclusion in daily practice.

**(a) Sample language for inclusion in the agenda for the first CMC and/or PO 1 providing a framework for the request for reasonable accommodation**

'At any point during the proceedings, but ideally as soon as practicable, either party may advise the arbitral tribunal of a person who, by reason of disability, requires reasonable accommodation to facilitate their full participation in the arbitration, including site visits and oral hearings. In considering such requests, the arbitral tribunal will take account of the privacy rights of such persons against the unnecessary disclosure of their disability.

For the purposes of this provision, disability means any physical or mental health condition that – without accommodation – would impair a person's ability to participate in work related to an arbitration.'

**(b) Guidance for arbitral tribunals asked to consider a request for reasonable accommodation**

**1.** Where possible, the party making the request for accommodation of a disability should seek to mitigate the impact of their request on the arbitration. In particular, the request for accommodation should be made as early as practicable in the circumstances.

**Comment:** Requests for accommodation of a disability should be made in such a manner as to minimise the impact of the accommodation on the arbitration. In principle, the earlier such requests are made, the more likely arrangements can be made to accord reasonable accommodation requests.

**2.** In determining whether a request for accommodation of a disability is reasonable, the arbitral tribunal may consider whether and to what extent the parties' respective interests could be prejudiced if the request is granted or refused. The arbitral tribunal may also consider any other relevant circumstances, including the duty to conduct arbitrations in an expeditious and cost-effective manner, to act fairly and impartially and ensure that each party has a reasonable opportunity to present its case, and to ensure that the award is enforceable at law.

**Comment:**

- In the case of the party requesting the accommodation, prejudice may arise where refusing to provide the accommodation would compromise the party's ability to participate in the arbitration or otherwise present its case.
- In the case of the non-requesting party, prejudice may arise where granting the accommodation would either cause a significant delay to the proceedings, impose an unduly burdensome expense on the parties, or conflict with basic tenants of procedural fairness.

**3.** In making decisions as to the costs associated with the provision of a reasonable accommodation of a disability, the arbitral tribunal may take into account such circumstances as it considers relevant.

**Comment:** This is consistent with Article 38(5) of the ICC Arbitration Rules, which provides that in making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

**4.** Where the arbitral tribunal declines a request for accommodation of a disability or where a party opposes a request for accommodation, the arbitral tribunal or party should consider indicating what accommodation(s) it would be willing to provide/accept.

**Comment:** This guidance is premised on a presumption that, in most cases, it should be possible to afford at least a measure of accommodation to address most impairments associated with disabilities. It is intended to encourage compromise between the parties on an issue that should be viewed as distinct from any tactical procedural considerations.

**5.** The arbitral tribunal should consider issuing its decision on a request for accommodation of a disability in the form of a reasoned order.

**Comment:** The arbitral tribunal should consider providing reasons for its decision to accommodate so that, through the publication of anonymised orders, in due course, a body of guidance emerges with respect to requests for accommodation of a disability.

### (c) Mindfulness exercise

Preconceptions about disability, or associated impairments, can hinder the success of even the most well-intended efforts to provide accommodation and/or to promote diversity and inclusion. Mindfulness is perhaps the best prescription available for arbitrators and practitioners seeking to avoid falling into this cognitive trap.

The five propositions and three questions below provide the basis for a short but effective mindfulness exercise. These propositions and questions should occasionally be revisited as a means of reinforcing best practices.

#### Potential pitfalls:

1. Many disabilities are not visibly manifest, especially to the untrained eye.
2. Persons with the same disability can experience or manifest their disabilities differently.
3. Not everyone who has a disability needs or wants accommodation at a given point in time.
4. It may take time for even the disabled person to identify an impairment, which could affect how suitable accommodation might be provided.
5. Social stigma still attaches to many disabilities, underlining why persons with disabilities may be reticent about disclosure.

**How to avoid them:**

1. Am I mindful of the need to respect the individual autonomy and privacy rights of persons with disabilities?
2. Am I receptive to the possibility that an unforeseen disability-related impairment could arise at any point during the arbitral proceedings?
3. Have I remained flexible enough to actively participate in creative problem-solving that simultaneously addresses the disability-based impairment at issue and safeguards values that underpin any international arbitration?

## Section 2 - Understanding disability

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Understanding ‘disability’ can be difficult, starting with the term itself. ‘Disability’ connotes an indiscriminate absence of ‘ability’ which fails to reflect the nature, causes, and variety of individual impairments in context. For example, colour blindness may disqualify a person from being an airline pilot but not from becoming a musician or lawyer. ‘Disabled’ persons may also possess abilities that actually enhance their performance of certain tasks, such as a blind person’s ability to navigate a dark room or the ability of an intellectually gifted person with ADHD to think ‘outside the box’.

This Guide considers disability to be an evolving concept that requires a more dynamic understanding than a static definition permits.<sup>1</sup> This section starts with an introduction to accepted models for characterising disability, before turning to definitions of disability that may be helpful in the context of an arbitration. It ends with a discussion on the interrelated issues of inclusivity and reasonable accommodation.

### 2.1. The WHO model of disability

The World Health Organisation (WHO) International Classification of Functioning, Disability and Health (ICF) was established on 22 May 2001 and has been endorsed by all 191 WHO Members.<sup>2</sup> The ICF was designed, amongst other things, to provide a standard linguistic and conceptual basis for the definition and measurement of disability.<sup>3</sup> Its drafters sought to synthesise existing disability models into a ‘biopsychosocial model’ to offer a coherent view of biological, individual and social perspectives. As such, it reflects an attempt to integrate two major conceptual models on disability: the medical model and the social model.<sup>4</sup>

- > The **medical model** characterises disability as a condition of the person, directly caused by disease, trauma, or another health condition, for which ‘correction’ may be available with medical treatment.<sup>5</sup>
- > By contrast, the **social model** conceives of disability as a social construct rather than an individual attribute, caused by an unaccommodating physical environment shaped by features of the social environment.<sup>6</sup>

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1 See Section 5 of the Preamble to the UN CRPD, quoted below at 2.2 (a).

2 See <https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health>.

3 ‘A Practical Manual for using the International Classification of Functioning, Disability and Health, Exposure draft for comment’ (www.who.int/publications Oct. 2013) Section 1.1.

4 See ‘Towards a Common Language for Functioning, Disability and Health - ICF’ (www.who.int/publications, Jan. 2002), pp. 8-9.

5 Id. p. 8.

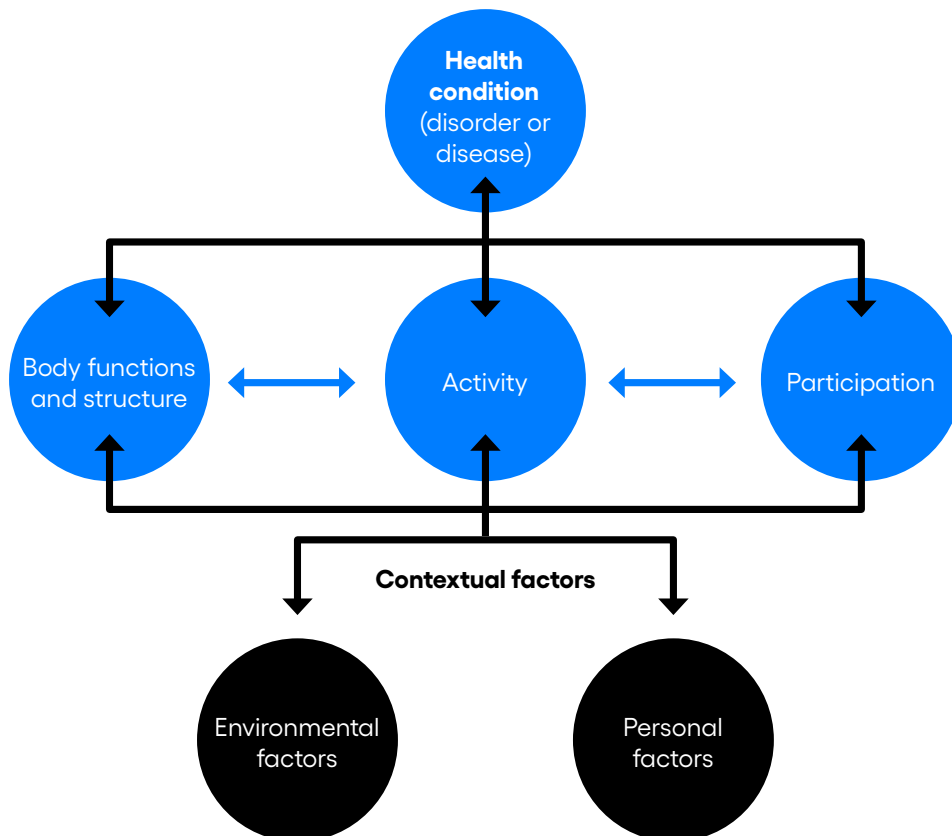
6 Id. p. 9.



The WHO considers that neither model on its own is adequate to capture what is a complex phenomenon. In the WHO's view:

'Disability is always an interaction between features of the person and features of the overall context in which the person lives, but some aspects of disability are almost entirely internal to the person, while another aspect is almost entirely external.'<sup>7</sup>

For purposes of the ICF, the WHO illustrates its model as follows:<sup>8</sup>



Central to the WHO model is the concept of 'functions' or 'functioning'. The WHO model diagram portrays the interaction and causal relationship between health conditions and contextual factors, as applied to three types of human function: physical or bodily impairments, activity limitations, and participation restrictions.<sup>9</sup>

The ICF builds on this model to produce a detailed and complex classification of various disabilities. While a comprehensive taxonomy of disabilities is beyond the scope of this Guide, certain categories, such as the five described below, may be analytically useful.

7 Id. p. 9.

8 Ibid. The ICF diagram is reproduced and adapted with permission.

9 Id. p. 10.

## 1 Inapparent disabilities

The image of a person in a wheelchair in white set against a blue background is universally recognised as a symbol for disability. In practice, however, many disabilities may not be readily apparent to others, i.e. the disability may have no self-evident, external manifestation. Examples include neurological conditions, autoimmune disorders, hearing impairments, or mental health conditions.



## 2 Apparent disabilities

An apparent disability is readily perceptible, albeit not necessarily all of the disability or how it affects each individual. Mobility impairments are typically found in this category.



## 3 Mental health conditions

Mental health conditions can be characterised by a clinically significant variation or disturbance in an individual's cognitive function, emotional regulation, or behaviour.<sup>10</sup> Such conditions can be associated with distress or other impairments in important areas of daily life.<sup>11</sup>



## 4 Neurodiversity

Neurodiversity describes the idea that people experience and interact with the world differently thanks to their individual neurological attributes. The term was established to increase acceptance and inclusion of all persons while embracing neurological differences, reflected in the viewpoint that differences need not be automatically viewed as deficits.<sup>12</sup> Examples include autism spectrum disorder (ASD), learning disabilities, and attention deficit hyperactivity disorder (ADHD).



## 5 Long-term health conditions

Long-term (or chronic) conditions are the result of injury or disease that cannot be cured but may be managed through medical intervention. Examples of long-term health conditions include arthritis, asthma, diabetes, lupus, colitis, Celiac disease, Parkinson's disease, multiple sclerosis, stroke, spinal cord injury, and epilepsy.<sup>13</sup>



<sup>10</sup> See WHO 'Mental health' Fact sheet ([www.who.int/news-room/fact-sheets](http://www.who.int/news-room/fact-sheets), June 2022).

<sup>11</sup> Ibid.

<sup>12</sup> N. Baumer, J. Frueh, 'What is Neurodiversity?' (Harvard Medical School Blog Entry, 23 Nov. 2021).

<sup>13</sup> L. Iezzoni, 'Multiple Chronic Conditions and Disabilities: Implications for Health Services Research and Data Demands', Health Serv. Res., Oct. 2010, 45(5 Pt 2): 1523-1540.

## 2.2 Defining Disability

Although there is no universally accepted definition of disability,<sup>14</sup> Article 1, paragraph 2, of the United Nations Convention on the Rights of Persons with Disabilities ('UN CRPD') provides a useful starting point. Other definitions provide additional guidance while also highlighting the difficulties inherent in seeking to establish a universal definition.

### (a) UN CRPD Article 1, paragraph 2

Article 1, paragraph 2, UN CRPD provides:

'Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'<sup>15</sup>

Although the language of this provision was not intended to define disability, *per se*,<sup>16</sup> it offers useful guidance about what disability should entail. Such guidance is also consistent with Section 5 of the UN CRPD Preamble, which recognises how:

'[D]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'<sup>17</sup>

Crucially, UN CRPD Article 1, paragraph 2, links disability to the existence of an impairment that hinders a person's full participation in societal interaction and institutions, including one's work environment. It also reflects an open-ended approach to what might constitute a disability, such that it appears to contemplate disability as encompassing impairments both of a permanent nature and those of limited duration.<sup>18</sup>

### (b) Other guidance

The **Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities** includes a definition of disability that reads as follows:

'The term "disability" means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.'<sup>19</sup>

14 For a discussion of various definitions and their evolution see the European Parliament's analysis European disability policy. From defining disability to adopting a strategy, 2017, Section 1.1.

15 <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>

16 Whereas UN CRPD Art. 1 bears the heading 'Purpose', Art. 2 bears the heading 'Definitions'. Still, the latter omits an express definition of 'disability'.

17 See <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html>

18 See the [Frequently Asked Questions](#) regarding the UN CRPD, '[Are the terms 'disability' and 'persons with disabilities' defined in the Convention?](#)'.

19 Art. I(1), Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities.

National laws can vary significantly in how disability is defined or construed.<sup>20</sup> They – and national agencies established under them – often provide additional guidance. Examples from some well-established domestic regimes are set out below.

The **Americans with Disabilities Act (ADA)** defines disability with respect to an individual as:

'[A] physical or mental impairment that substantially limits one or more major life activities of [an] individual; ... a record of such an impairment; or ... being regarded as having such an impairment.'

It goes on to state:

'[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(...)

[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>21</sup>

The ADA provides further definitions for the provision 'being regarded as having such an impairment' as well as rules of construction, which state for example that the definition of disability 'shall be construed in favour of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter'.<sup>22</sup>

The **US Centers for Disease Control and Prevention** provides the following definition:

'A disability is any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions).<sup>23</sup>

Under the **UK Equality Act 2010**, a person is deemed to have a disability if the person:

'[H]as a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on [the person's] ability to carry out normal day-to-day activities.'<sup>24</sup>

The **German Social Code** defines persons with disabilities as:

'Persons who have physical, mental, intellectual or sensory impairments that, in interaction with attitudinal or environmental barriers, are likely to prevent them from equal participation in society for longer than six months. An impairment according to the first sentence exists if the physical or health condition deviates from that typical for the age (...).<sup>25</sup>

As with the UN CRPD, impairment is a central element in the characterisation of disability. Any impairments having an adverse effect on a person's ability to conduct certain activities and/or to participate in society are thus relevant to the disability analysis.

20 For the EU Member states, see the European Parliament's analysis 'European disability policy. From defining disability to adopting a strategy' at Section 1.1 ([www.europarl.europa.eu/](http://www.europarl.europa.eu/), 2017).

21 See <https://www.ada.gov/law-and-regs/ada/> and <https://adata.org/faq/what-definition-disability-under-ada>.

22 ADA, Section 12102 'Definition of Disability'.

23 <https://www.cdc.gov/nceh/ncbddd/disabilityandhealth/disability.html>. The Centers for Disease Control and Prevention (CDC) is one of the major operating components of the US Department of Health and Human Services.

24 Section 6(1), UK Equality Act 2010.

25 § 2(1) SGB IX, unofficial translation.

### 2.3 Disability in the context of arbitration and ADR

The above sources also prescribe that disability must be understood in context. The following four propositions could provide a framework for addressing disability and inclusion within the arbitration context:

1. Disability should be construed in relation to functions related to arbitration (as opposed to 'normal daily activities' or 'major life activities'). Functions related to arbitration include all stages of an arbitration and all participants in an arbitration.
2. As the impact of any such impairment could vary depending on the individual and the nature of the specific work involved, disability should be understood in relation to the values that underpin international arbitration. Such values include party autonomy, equal treatment, and fairness.<sup>26</sup>
3. Even a relatively short-term impairment, such as those arising from a significant injury or from a medical condition such as pregnancy, may require accommodation within the context of an arbitral hearing or mediation session.
4. Recognising the possibility that unscrupulous attempts might be made to leverage a disability claim for tactical benefit, it may be necessary to weigh the significance of any claimed impairment against the potential impact of the requested accommodation on the arbitral or mediation proceedings.

Based on the above propositions, the following definition of disability can be formulated for the international arbitration context:

- > Disability is any physical or mental condition that – without reasonable accommodation – significantly impairs a person's ability to participate in work related to an arbitration.
- > Disability is an evolving concept that must be construed within the particular context of international arbitration.<sup>27</sup>

### 2.4 Reasonable accommodation

The need to provide reasonable accommodation for disability has been recognised globally through treaties and national legislation as a means of ensuring for persons with disabilities, as well as those who care for them, the enjoyment of rights, entitlements, and fundamental freedoms on equal terms with others.<sup>28</sup> Within the context of international arbitration, honouring this objective involves promoting a culture of inclusion that ensures full participation for all, including those who have some form of disability. Failure to provide reasonable accommodation may also constitute discrimination prohibited by applicable law.

Reasonable accommodation for a disability in international arbitration is to be encouraged. It includes any necessary or appropriate modification/adaptation required in a particular case to guarantee participation on equal terms so long as it does not impose a disproportionate or undue burden.<sup>29</sup>

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26 See e.g. Art. 22(4), *ICC 2021 Arbitration Rules*.

27 In this regard, there may also be instances in which the conditions that contribute to disability may also be connected to, or interrelated with, other attributes that might bear on an individual's perception of discrimination based on racial, gender, social, cultural, political, economic, ideological, or other personal characteristics protected under applicable domestic law. This is now known as intersectionality.

28 See e.g. UN CRPD, Art. 2 defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

29 See e.g. UN CRPD, Art. 2, cited supra note 28.

Determinations as to what constitutes a disproportionate or undue burden must be based on an individualised assessment of the circumstances in which accommodation has been sought. The key factor informing such assessments tends to be the possibility that requested accommodation could cause either significant difficulty or expense. Evaluating this proposition involves considering the nature and/or cost of the requested accommodation, the financial resources available in the circumstances, the situation for which accommodation is requested, and the overall impact on the arbitration. For the avoidance of doubt, the right of a person with a disability to seek accommodation extends to all participants in an international arbitration, including arbitrators,<sup>30</sup> parties,<sup>31</sup> counsel,<sup>32</sup> witnesses,<sup>33</sup> and those who provide support services.<sup>34</sup>

## 2.5 Diversity and inclusion

Promoting diversity and practising inclusion are also fundamental aspects of recognising and engaging disability in the workplace. Many of the multinational corporations that rely regularly on international arbitration started embracing diversity and inclusion as core values for their corporate culture well over a decade ago.<sup>35</sup> They did so both as a means of fostering engagement with disabled clients and customers and in seeking competitive advantage over competitors who had not yet realised that problem-solving and decision-making, in general, can be enhanced by the inclusion of personnel possessing a diversity of lived experience, perspectives, and personal strengths.<sup>36</sup>

Embracing diversity and inclusion as core cultural values in international arbitration should thus not only allow practitioners to meet their users' increasing expectations in this area, but should also similarly enhance arbitral decision-making. Understanding the value of diversity for its own sake is to be much favoured over the adoption of a purely quantitative approach, involving for example the use of quotas to ensure equitable representation. While the use of quotas or targeting can improve representation, it can also breed resentment. Moreover, it risks reducing diversity promotion to little more than a performative exercise, which is unlikely to foster meaningful cultural change, thereby dramatically reducing the benefits that diversity offers for better decision-making. In other words, achieving diversity is not just about counting, it must be about culture too.

Treating diversity promotion as a performative numbers game would also likely deprive many persons with disabilities of the individual benefits of inclusion. This is because so many disabilities in the workplace are hidden or invisible. Examples run the gamut from conditions such as depression, anxiety, addiction,<sup>37</sup> learning disabilities, and ADHD, to autoimmune diseases (e.g. Lupus or Crohn's disease), to long-term conditions caused by injury or disease (e.g. fibromyalgia, chronic pain, and seizure disorders) that may be exacerbated by the stress and fatigue commonly found in the legal workplace.

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30 Including arbitral tribunal secretaries.

31 Including individuals designated as party representatives and other individuals employed by or assisting any of the parties even if they are not designated as party representatives so long as they are actively involved in the arbitration (including in its preparation).

32 As understood in accordance with Arts. 4(3)(b) and 5(1)(b), ICC 2021 Arbitration Rules ('any person(s) representing the [claimant/respondent] in the arbitration').

33 Including factual and expert witnesses.

34 For example, court reporters, interpreters, and caregivers.

35 In 2021, for example, the GCs of multiple companies issued an open 'Call to Action for General Counsel and Chief Compliance Officers to Commit to Improve Disability Inclusion in Their Law Department', see <https://elevateservices.com/a-call-to-action-for-general-counsel/>.

36 See e.g. J.M. Sempertegui, 'Dollars and Cents: The Business Value of Diversity and Inclusion', *Business Law Today* (Aug. 2016), pp. 1-3.

37 Each of these disabilities are widely considered to be prevalent in the legal workplace, at numbers significantly higher than the general population. See e.g. W.H. Grignon, 'Disability and Diversity: Changing Your Law Firm Culture', *Business Law Today*, May/June 2010, pp. 16-20.

Finally, embracing diversity and inclusion as core cultural values could additionally induce a shift of perspectives on reasonable accommodation. Instead of regarding it as a legal duty considered only when someone with a disability seeks it, organisations could instead proactively institute measures for reasonable accommodation, which could, in turn, be used as a tool to promote diversity.

### Section 3 – Disability inclusion in international arbitration and ADR

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Information is currently lacking on the number or percentage of participants in arbitration experiencing impairments from disability. It is to be noted that fear of discrimination and/or exclusion may prevent persons with disabilities from identifying as such if they can avoid it. It appears equally, if not more, difficult to quantify how many persons with disabilities have been prevented from participation altogether as a result of their disability, the impairments they experience, or discrimination against them on the basis of their disability.

The **anecdotal examples** compiled concerning the participation of persons with disabilities in the arbitration workspace are not intended to represent the entirety of the lived experience for all persons with disabilities involved in international arbitration, nor are they necessarily intended to be indicative of best practices. The object of introducing them is rather to orient the reader and, ideally, to stimulate thinking about disability and inclusion in the arbitral and ADR context, including by illustrating some of the reasonable accommodations that may be available, as well as the consequences such accommodations might have for the arbitral process.

As the examples illustrate, there will be some instances in which no reasonable accommodation is required or where a reasonable accommodation can be made with minimal impact on the arbitral process. However, the effects of a disability may be more controversial where they have the potential to impair the arbitration, and reasonable accommodation for the disability may have to be weighed against the parties' interests in an expedient and cost-effective resolution of their dispute. In this regard, the effects of a disability on an arbitration will often depend on the role of the participant and their relevance for the guarantee of the parties' procedural rights.

In making these observations, it is crucial to add that thinking about disability and inclusion, in any context, should involve more than simply cataloguing impairments and adopting suitable means of accommodation for them. Satisfying the moral imperative to avoid intended or unintended discrimination is an important first step. It is equally important, however, to recognise the value of inclusion in arbitration as an institution. The diversity engendered by inclusion can both lead to better decision-making and provide a better product to arbitration users, many of whom now require diversity as a fundamental part of the services they consume.<sup>38</sup> Although the examples below chiefly concern the accommodation of impairments arising from disability, the benefits of inclusion for persons with disabilities should neither be discounted nor overlooked.

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38 J. Karton, 'Diversity in Four Dimensions', Chapter 2 in S. Ali, F. Balcerzak, G. Colombo, and J. Karton (eds.), *Diversity in International Arbitration: Why it Matters and How to Sustain It* (Edward Elgar, 2022), at pp. 17-31.

### 3.1 Disabilities self-managed by participants and not requiring any accommodation

Some impairments associated with disability will have limited or no impact on the arbitration or its participants (examples 1-3 below).

- Example 1      With the **aid of medication**, a participant successfully manages the condition at the root of their disability, such as bipolar disorder, Tourette Syndrome, Lupus, Ulcerative Colitis, or ADHD, during in-person hearings.
- Example 2      A participant in the arbitration is confronted with a temporary impairment arising from a **medical condition** during the arbitral process, such as pregnancy-related impairments, stroke, or injuries suffered in an automobile accident, which are resolved by the time in-person hearings occur.
- Example 3      A hearing-impaired person uses a **hearing aid** to participate fully during the in-person hearing.

### 3.2 Disabilities necessitating reasonable procedural accommodation<sup>39</sup>

Other impairments arising from a disability will give rise to the need for a reasonable accommodation. Examples 4 to 11 below illustrate possible reasonable accommodation within the context of the arbitral process.

- Example 4      **A quadriplegic participant** is accommodated by the adoption of a hybrid hearing format or by allowing the attendance of a caregiver with them at an in-person hearing.
- Example 5      Participation for **a blind person** is facilitated by allowing them to attend an in-person hearing with a guide dog (which is likely also required by the domestic law of the venue) and the evidentiary record is rendered machine-readable for use in text-to-speech software.
- Example 6      **Sign-language interpretation** is provided – just as it would be for any other language in an international arbitration – which facilitates the participation of someone who is hearing-impaired or deaf in an in-person hearing.
- Example 7      The timing and/or length of sessions during an in-person hearing are altered to accommodate someone experiencing **cognitive impairment** (e.g. shorter sessions extended over a longer period of time).
- Example 8      A quiet space is designated within the hearing facility and/or unscheduled breaks are granted in advance so as to accommodate a participant whose disability renders them more likely to suffer **emotional distress** during the proceedings.

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<sup>39</sup> The UN *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, Aug. 2020), at pp. 9 and 15, define procedural accommodations as ‘all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of “disproportionate or undue burden”.’ Principle 3 further classifies procedural accommodation as falling with the following three categories: (i) intermediaries and facilitators; (ii) procedural adjustments and modifications; and (iii) adjustments to the environment and communication support.



- Example 9 The hearing schedule is altered without penalty upon the request of a participant whose disability-related impairment, normally controlled by **medication**, has suddenly become acute.
- Example 10 Hearing venues and hotels at a pre-determined hearing site do not offer **physical access for the mobility-impaired or only at an exorbitant price**. Responding to the arbitral tribunal's request, the arbitral institution arranges for relocation of the hearing site to an alternative location (an act that will typically not affect the location of the legal seat of the arbitration).
- Example 11 The arbitral institution acquires a license for the use of OCR (optical character recognition) and **speech-to-text software**, which reduces or eliminates the cost of its use by participants in individual proceedings.

### 3.3 Disability and disclosure considerations

Examples 12 to 15 below are intended to demonstrate how considerations of disability disclosure may impact the administration of an arbitral proceeding.

- Example 12 The **lead counsel** for one of the parties in an arbitration has quietly experienced periodic impairment caused by an inapparent disability. Only two weeks before their client's response to a document request is due, counsel asks the arbitral tribunal for a two-month extension, citing only 'personal reasons' in the request. The arbitral tribunal dismisses the motion and orders counsel to respond on schedule, cautioning each party that any failure to honour the schedule will attract some form of sanction. Counsel fails to meet that deadline, only responding five weeks later. On that same date, counsel also provides the arbitral tribunal with medical evidence documenting their condition, which fully explains the delay. The other party is only provided with notice that a disability is involved which justifies the delay. With this evidence in hand, the arbitral tribunal decides against assessing any penalty for the delay, being careful not to disclose any information about the disability in its reasons for the decision. After losing the arbitration, the opposing party pursues annulment on the basis that it was denied procedural fairness – having been forced to keep to a schedule from which the other party was excused without sufficient explanation. The application for annulment is dismissed on the basis that the law of the seat includes a right to privacy in relation to the disclosure of disability.
- Example 13 An **expert witness**, who is impaired by an inapparent disability that has not been disclosed to the other party, participates in an in-person hearing. At the end of the arbitration, after the additional expense for having the expert attend the in-person hearing has been included as costs, the other party objects – arguing that it had received no notice of the disability, or the costs associated with it, and that the expert could have participated remotely using standard video-telephony software. In rendering its decision on costs, the arbitral tribunal dismisses the objection on the ground that persons with disabilities ought not to be forced to participate remotely where it is possible for them to participate in person.

- Example 14      A **claimant's witness** suddenly abandons the hearing while being cross-examined under oath. Because the arbitral tribunal members have received training in how to recognise and address disability-related impairments, they reject the cross-examining party's motion for the disabled person's evidence to be stricken from the record and instead instruct counsel for the parties to agree on a process for finishing the cross-examination in a manner that facilitates the disabled person's participation.
- Example 15      Two members of a three-person **arbitral tribunal** have noticed how the third member does not appear to be paying attention to the parties' submissions at the hearing. He spends a seemingly inordinate amount of time staring off into space, playing on his phone, doodling, or otherwise fidgeting in his seat. He needs to be reminded of administrative matters already decided and is frequently late in delivering promised segments of the award. He rarely looks them in the eye during deliberations and seeks to depart as soon as dinner is over. On the other hand, his written contributions and interventions during the hearing are consistently on-point, incisive, and insightful. Neither of the two arbitrators is prone to gossip, but they cannot help themselves when speaking together or with friends and colleagues. After witnessing one too many such discussions between the two arbitrators, the arbitral tribunal secretary resolves to warn the third arbitrator about what is being said about him behind his back. Upon hearing this news, the third arbitrator decides the time has come to disclose his disability – attention deficit hyperactivity disorder (ADHD) – to his colleagues, afraid to do so from the outset due to the stigma that sometimes attaches to ADHD. Those fears are justified during their next meeting, as neither of his colleagues reacts well. While one insists that ADHD is not a 'real' diagnosis, the other begins teasing him on the basis that ADHD only affects children. Their already-strained relationship prompts the arbitral tribunal secretary (who was not privy to the disclosure) to report the arbitrators' increasingly fractured relationship to her superiors.

'ICC Guide on Disability Inclusion in International Arbitration and ADR' is a product of the ICC Commission on Arbitration and ADR ('Commission'). The Guide was prepared by the Task Force 'Disability Inclusion in International Arbitration' ('Task Force') and approved at the Commission's meeting of 18 March 2023 in Paris.

### Acknowledgements

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**Melanie van Leeuwen**, Chair, ICC Commission on Arbitration and ADR, and her predecessor, **Carita Wallgren-Lindholm**. **José Ferris**, Vice Chair of the Commission, acted as liaison to the Steering Committee. **Dr. Hélène van Lith**, Steering Committee Officer and Commission Secretary.

The Task Force was launched on 3 December 2021 with an interview of **Brooke Ellison** by **Claudia Salomon**, President of the ICC Court of International Arbitration, who chose to place disability inclusion on the top of her agenda upon assuming office.

A call for nomination was sent to all ICC National Committees and Groups. Commission members, especially those from jurisdictions not represented by a National Committee, were also invited to express their interests directly. To benefit from experts and especially individuals personally affected by the issue, a global call for candidates was also made via social media. The final membership counted 53 members from 26 jurisdictions.

**Task Force Members:** Ioannis Achillias, Ayodele Akenroye, Yury Babichev, Teddy Baldwin, Preeti Bhagnani, Johanna Büstgens, Allan Cerim, Amany Chamieh, Elizabeth Chan, Tony Cole, Jane Davies Evans, Ivo Deskovic, Alec James Emmerson, Ania Farren, Gustav Flecke-Giammarco, Juan Pablo Gómez Moreno, Martin Gusy, Poornima Hatti, Maria Hauser-Morel, David Larson, Laure Lavorel, Antonello Leogrande, Bronwyn Lincoln, Andrew Livingston, Courtney Lotfi, Rajat Malhotra, Matthew Morantz, Claire Morel de Westgaver, Samantha Nataf, Trinh Nguyen, Nikola Nikolic, Jennifer Nikoro, Andrea Orta, Arianna Rafiq, Milagros Rojas Blas, Verónica Sandler Obregón, Sebastian Seelmann-Eggebert, Rajesh Sharma, Max Stein, Louise Sura, Sylvia Tee, Dirk van Gerven, Ambrosia Varaschin, Paolo Vargiu, Fabio Vieira, Alireza Yavari and Richard Ziegler.

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