

Arbitrator's Conduct on Social Media

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ABSTRACT

This article proposes a revision to the 'Green List', sections 4.3.1 and 4.4.4 of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration 2014. It argues that the classification of social media relationships for disclosure requirements should be divided into two categories: (i) connections on professional and (ii) general social network sites, based on the functionalities of the platform's features. The article then suggests that social media mining can be used for assessing challenges based on social media relationship with quantitative analysis on close personal relationship between an arbitrator and a party or counsel that

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gives rise to justifiable doubts as to independence and impartiality by measuring the tie strength of the said online relationship. The article also explores the possibilities of social media mining for profiling arbitrators. Lastly, the article discusses the concerns related to social media mining and proposes social media mining procedure for arbitration to address them.

1. INTRODUCTION

The use of social media, specifically social network sites, by arbitrators as legal professionals may create issues regarding conflicts of interest. Arbitrators' conduct and virtual relationships with parties or counsel on social media may arouse questions about their independence and impartiality. There have been several scholarly suggestions about how an arbitrator (in performing his/her dual roles as service provider and judicial function) should approach social media. These range from total abstinence to limited and controlled use.¹

Prohibiting arbitrators from using social media is the safest way to avoid conflicts of interest or suspicion about the lack of independence and impartiality. However, such prohibition will deprive arbitrators of the professional advantages in their role as service providers, particularly networking and marketing. Given the proliferation of social media in every aspect of life, the total abstinence approach is not a suitable one for the modern world.

Even if the proponents of complete prohibition of social media use by arbitrators support their arguments by emphasizing an arbitrator's judicial function, it should be noted that many of the judicial ethics committees in the United States and the American Bar Association (ABA) do not endorse such an approach for judges. The majority consensus is that judges may participate in social media with certain caveats.² The International Bar Association (IBA) Guidelines on Conflict of Interests in International Arbitration (the 'Guidelines'), the soft law that will be the main focus of this article, and International Principles on Social Media Conduct for the Legal Profession 2014 are also strong indications of the acceptance of social media use by arbitrators within the legal professions. Therefore, a permissible but controlled approach is more suitable to current developments in legal practice.

The *permissible* approach requires further elaboration on the *limitation and control* aspects. The Guidelines simply classify any social media relationship between arbitrators and parties or counsel in the 'Green List'.³ This means the connection will never lead to disqualification under the objective test and need not be disclosed.⁴ However, it is important to take into account the debate on social media relationships during the panel discussion of 2013 IBA's Annual Meeting that gave rise to the

1 JE Kalicki and M Silberman, 'Social Media and Conflict of Interests: A Challenge for the 21st Century' (*Kluwer Arbitration Blog*, 23 April 2012) <<http://kluwerarbitrationblog.com/blog/2012/04/23/social-media-and-arbitration-conflicts-of-interest-a-challenge-for-the-21st-century/>> accessed 16 February 2015.

2 CV Harvey, MR McCoy and B Sneath, '10 Tips for Avoiding Ethical Lapses when Using Social Media' *Business Law Today* (January 2014) 11 <http://www.americanbar.org/publications/blt/2014/01/03_harvey.html> accessed 5 December 2016.

3 IBA, Guidelines on Conflict of Interests in International Arbitration 2014 Part II, Green List, ss 4.3.1 and 4.4.4.

4 *ibid*, Explanation to General Standard 3.

Guidelines (the 'Meeting'). Lawrence Schaner suggested that most cases of social media connections do not represent real and actual relationships. Hillary Heilbron QC opined that the issue of disclosure is about the nature of a particular relationship, not the source. Therefore, social media relationships in the 'Green List' must not undermine the general principle if an arbitrator finds him/herself in a circumstance that needs to be disclosed.⁵

Basically, the discussions on disclosure revolve around whether an arbitrator who has a social media connection with a party or a counsel also has a real (offline) relationship that may give rise to justifiable doubts as to the independence and impartiality of the arbitrator. The Meeting acknowledged that shunning social media would deprive arbitrators of a medium to market themselves. Moreover, exchanging contacts via social media has become just as much an acceptable business practice as the exchange of business cards, particularly for the younger generation of lawyers.⁶

It is also interesting to note that only LinkedIn, Facebook and Twitter—the most popular social media platforms—were mentioned in the discussion. Furthermore, the report on the Meeting has no record of any discussion on the definition and scope of social media.⁷ As this article elaborates in the next sections, social media can exist in various forms and hold different features that represent several functionalities. The absence of discussions on what social media is during the Meeting may be an indication of a limited understanding of social media among arbitration practitioners.

The Meeting also did not discuss any case precedent of a challenge based on social media relationships. One of the first known cases involving a challenge based on a social media relationship was *EURL Tecso v Neoelectra SAS Group*.⁸ In that case, Tecso petitioned for an award to be set aside to the French courts. One of the arguments raised was the fact that the President of the Tribunal was a Facebook 'friend' of the counsel of Neoelectra. Furthermore, the counsel of Neoelectra 'liked' the President of the Tribunal's Facebook page that was set up for his Paris Bar election campaign. The Cour d'appel de Paris accepted the challenge but based their reasoning on other grounds (ie the arbitrator was an 'of counsel' and consultant for the counsel's law firm). Unsatisfied with the challenge, Neoelectra appealed to the Cour de Cassation, which subsequently reversed the decision and remanded the case to the Cour d'appel de Lyon. The challenge was denied and the Cour d'appel de Lyon refused to set aside the award. In its reasoning, the Cour d'appel de Lyon stated that the 'like' on the President's Facebook page was irrelevant because it took place after the award was rendered. The Facebook 'friend' issue was not addressed *per se*.⁹

5 K Karadelis, 'BOSTON: IBA Round-Up' (2013) 8 GAR <<http://globalarbitrationreview.com/journal/article/32085/boston-iba-round-up>> accessed 23 March 2015.

6 *ibid*.

7 *ibid*.

8 J-D Touraille and E Borysewicz, 'Arbitrator Must Disclose Having Worked in the Same Firm as a Party's Counsel, but Being a "Facebook Friend" with Counsel Did Not Give Rise to a Reasonable Doubt as to the Arbitrator's Independence' in *Baker & McKenzie International Arbitration Yearbook 2011–2012* (JurisNet, LLC 2012) 176–177.

9 *EURL Tecso v Neoelectra SAS Group*, Cour d'appel de Paris, 10 March 2011, n° 09/28537. Cass Civ 1e, 10 October 2012, n° 11-20299. Cour d'appel de Lyon, 11 March 2014, n° 13/00447.

Since the French courts did not address the Facebook 'friend' issue, it remains unclear whether social media relationships require disclosure under French laws.¹⁰ Romain Dupeyré, a French *Avocat*, opined that the decision of the Cour d'appel de Paris suggested that a Facebook friendship between the President of the Tribunal and a party's counsel could have justified reasonable doubts as to his independence and impartiality if the relationship existed before the award was rendered or if the relationship did not arise from specific circumstances, such as professional organization election (in this case, Paris Bar election).¹¹ If the French courts, or courts of any other jurisdiction, were to take the same view as Dupeyré, then the quantitative analysis of disclosure requirements based on classification of social media relationships under the 'Green List' of the Guidelines may fail to deliver proper or at least consistent results through an arbitration institution and a national court when assessing challenges. This article critically examines the issues of arbitrator's conduct on social media by discussing the nuance of online relationships and the potential use of social media for profiling arbitrators.

First, it questions whether disclosure requirements based on the simple classification of social media relationships in the 'Green List' is the most effective or reliable approach to use in order to achieve consistent conclusions in assessing challenges based on such relationships. The article proposes a more nuanced view on classification by examining the different uses of social media based on the relevant platform's features by using the 'functional building blocks' theory adopted from social science.

Then, the article argues how social media data generated from the interactions between the arbitrator and the parties or counsel on social media, which have been processed with social media mining, can be used as a quantitative analysis tool in assessing challenges based on social media relationships.

The article also discusses the potential use of social media mining for profiling arbitrators. Parties can obtain information on an arbitrator's ideological and legal values, personal traits and policy preferences that may influence his/her decision-making, thus identifying his/her implicit bias.¹² This may allow parties to nominate an arbitrator who is more likely to be sympathetic to their cause and culture.

Social media profiling may also contribute to the creation of a level playing field for arbitrators in marketing their services as all users have equal opportunity in searchability. The searchability of arbitrators also means an enlargement of the talent pool and increase the cultural diversity in the arbitration market, which allows for better odds in establishing pluralistic tribunals. Therefore, social media can be a tool for mitigating information asymmetry and market imperfection in arbitration services

10 A-L Ménagé, 'The Disclosure Requirement Under French Law: Global Law Firms and Social Media Networks, Transnational Notes' (*NYU Law Blogs*, 15 April 2015) <http://blogs.law.nyu.edu/transnational/2015/04/the-disclosure-requirement-under-french-law-global-law-firms-and-social-media-net-work/#_ftn1> accessed 13 July 2015.

11 R Dupeyré, 'Arbitrators, Watch Your Facebook Friends!' (2012) YIAG e-Newsletter.

12 'Bias associated with the values or cognition of arbitrators', S Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 *JIDS* 553, 561.

by bridging the information gap on arbitrator profiles as well as addressing criticisms on systematic bias in international arbitration.¹³

The article acknowledges that there are concerns related to social media mining, particularly on data protection issues. Therefore, the article proposes the development of a consent-based social media mining procedure that represents data protection key principles.

2. SOCIAL MEDIA RELATIONSHIPS

A. Definition and Scope of Social Media

The IBA Guidelines do not define the term 'social media' or limitation of its scope. However, a definition of social media can be found in the IBA International Principles on Social Media Conduct for the Legal Profession: 'web-based and mobile technologies that turn text communication into active dialogue'.¹⁴ The author believes that the IBA's definition of social media is too wide and vague. It is, therefore, not helpful in enabling an understanding of what social media is.

It is difficult to design effective guidelines on social media relationships without a comprehensive understanding of what social media is. Unfortunately, so far, there is no literature exclusively devoted to social media in international arbitration that describes its characteristics, definition and scope.¹⁵ Consequently, this article makes use of interdisciplinary research to make up for this deficit in the legal scholarship covering the subject specifically.

From a social science perspective, Kaplan and Haenlin have provided a more technically accurate definition of social media: 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0 that allow the creation and exchange of User Generated Content'.¹⁶ In other words, social media rely on mobile and web-based technologies to create interactive platforms where users become part of communities and share, co-create, discuss and modify the content.¹⁷

During the panel discussion on social media relationships in the Meeting, only three platforms were mentioned, namely LinkedIn, Facebook and Twitter.¹⁸ While these three platforms are the most popular, particularly among law firms,¹⁹ the scope of the term 'social media' includes many other internet-based applications such as Wordpress, Instagram, Second Life, Flickr, Wikipedia, YouTube, World of Warcraft, Yelp and Amazon.

13 'Procedurally designed to systematically favour certain interpretations or certain groups of parties', *ibid* 560.

14 IBA, 'International Principles on Social Media Conduct for the Legal Profession', 2 <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4f410090-8de0-438d-b81e-f4a21d31501f>> accessed 5 December 2016.

15 Kalicki and Silberman (n 1) only deals with the proliferation of social media and briefly explains that 'social media certainly make certain relationships more visible'.

16 AM Kaplan and M Haenlein, 'Users of the World, Unite! The Challenges and Opportunities of Social Media' (2010) 53 *Bus Horiz* 59, 61.

17 JH Kietzmann and others, 'Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media' (2011) 54 *Bus Horiz* 241.

18 Karadelis (n 5).

19 LexisNexis Martindale-Hubbell, 'Global Social Media Check Up: A Global Audit of Law Firm Engagement in Social Media Methods' (2011) 12 <http://kevin.lexblog.com/wp-content/uploads/sites/111/2011/12/LexisNexis_Global-Social-Media-Health-Check_Summar.pdf> accessed 5 December 2016.

Kaplan and Haenlin classify social media as a set of theories in the field of media research (social presence and media richness) and social processes (self-presentation and self-disclosure). Each social media platform differs in the way in which they allow the degree of social presence, media richness, self-presentation and self-disclosure. Social presence is the degree of the acoustic, visual and physical contact between communication partners measured by the intimacy, interpersonal or mediated, such as face-to-face discussion or telephone conversations, and its immediacy, asynchronous or synchronous, such as email or live chat. Media richness is related to the amount of information that can be transmitted in a given time interval to reduce ambiguity and uncertainty when communicating. Self-presentation is related to how the user can present him or herself to create the desired impressions, usually through self-disclosure. Accordingly, social media can be divided into six categories:²⁰

1. Collaborative projects, such as wiki,²¹ which have a low degree of both social presence/media richness and self-presentation/self-disclosure, eg Wikipedia;²²
2. Web logs (blogs),²³ with a high degree of self-presentation/self-disclosure but low degree of social presence/media richness, eg Wordpress;²⁴
3. Content communities,²⁵ with a low degree of self-presentation/self-disclosure and medium degree of social presence/media richness, eg YouTube;²⁶
4. Social network sites, with a high degree of self-presentation/self-disclosure and medium degree of social presence/media richness, eg Facebook;

20 Kaplan and Haenlin (n 16) 61–62.

21 S Mitchell, 'Easy Wiki Hosting, Scott Hanselman's Blog and Snagging Screens' <http://download.microsoft.com/download/3/a/7/3a7fa450-1f33-41f7-9e6d-3aa95b5a6aea/MSDNMagazine2008_07-en-us.chm> accessed 30 June 2015: 'A wiki is a Web application whose content is collaboratively added, updated, and organized by its users. As is the case with blogs and other content management systems, a wiki's content is editable through a Web page interface.' See also MA Dennis, 'Wiki' (*Encyclopædia Britannica* 2008) <<http://www.britannica.com/topic/wiki>> accessed 30 June 2015.

22 Wikipedia, 'Introduction' (*Wikipedia*, 2014) <<https://en.wikipedia.org/wiki/Wikipedia:Introduction>> accessed 30 June 2015: 'Wikipedia is a free encyclopaedia, written collaboratively by the people who use it.'

23 MA Dennis, 'Blog, Internet' (*Encyclopædia Britannica*, 30 May 2014) <<http://www.britannica.com/topic/blog>> accessed 30 June 2015: 'online journal where an individual, group, or corporation presents a record of activities, thoughts, or beliefs'. See also Wikipedia, 'Blog' (*Wikipedia*, 2015) <https://en.wikipedia.org/wiki/Blog#cite_note-1> accessed 30 June 2015: '[A] discussion or informational site published on the World Wide Web and consisting of discrete entries ("posts") typically displayed in reverse chronological order (the most recent post appears first).'

24 Wikipedia, 'WordPress.com' (*Wikipedia*, 2015) <https://en.wikipedia.org/wiki/WordPress.com#cite_note-3> accessed 30 June 2015: '[A] blog web hosting service provider owned by Automattic, and powered by the open source WordPress software. It provides free blog hosting for registered users and is financially supported via paid upgrades, "VIP" services and advertising' (citation omitted).

25 G Washington, *Encyclopedia of Social Media and Politics* (Kerric Harvey ed, Sage 2014) 315: '[S]ites that allow users to upload and share various kinds of media'.

26 PC Magazine, 'YouTube Definition' <<http://www.pcmag.com/encyclopedia/term/57119/youtube>> accessed 24 July 2015: 'The largest video sharing site on the Web. YouTube lets anyone upload videos for private or public viewing.'

5. Virtual game worlds,²⁷ with a low degree of self-presentation/self-disclosure but high degree of social presence/media richness, eg World of Warcraft;²⁸
6. Virtual social worlds,²⁹ with a high degree of both social presence/media richness and self-presentation/self-disclosure, eg Second Life.³⁰

It is reasonable to understand that the term 'social media' in the Guidelines is limited to 'social network sites' category. Section 4.3.1 of the Guidelines employed the term 'social media network', the panel discussion in the Meeting focused only on LinkedIn, Facebook and Twitter.³¹ The IBA International Principles on Social Media Conduct for the Legal Profession was a response to an IBA Legal Projects Team (LPT) report titled 'the Impact of Online Social Networking on the Legal Profession and Practice' (which reported the need 'to develop guidelines regarding the use of online *social networking sites* in legal profession').³²

Social networking sites, or social network sites, are 'web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system'. The term 'social network sites' rather than 'social networking sites' is preferable since networking is not the only purpose of the sites nor does it differentiate them from other forms of computer-mediated communication.³³ An alternative definition is 'applications that enable users to connect by creating personal information profiles, inviting friends and colleagues to have access to those profiles, and sending e-mails and instant messages between each other'.³⁴

The limitation on the scope of the term social media to social network sites adequately serves the purpose of the Guidelines since there is minimal or virtually no conflict of interest element (ie close personal relationship) in other types of social

27 Virtual social worlds and virtual game worlds are forms of virtual worlds—'[a] synchronous, persistent network of people, represented as avatars, facilitated by networked computers'. Alternative definition of virtual worlds is 'platforms that replicate a three-dimensional environment in which users can appear in the form of personalized avatars and interact with each other as they would in real life'. Virtual game worlds require users to behave according to strict rules in the context of a massively multiplayer online role-playing game (MMORPG). On the other hand, virtual social worlds give users freedom to behave and live a virtual life similar to their real life. See MW Bell, "Toward a Definition of "Virtual Worlds"" (2008) 1 JVRResearch 2; and Kaplan and Haenlein (n 16) 64.

28 Wikipedia, 'World of Warcraft' (*Wikipedia*, 2015) <https://en.wikipedia.org/wiki/World_of_Warcraft#cite_ref-1> accessed 24 July 2015: 'a massively multiplayer online role-playing game (MMORPG) created in 2004 by Blizzard Entertainment'.

29 See n 27.

30 Wikipedia, 'Second Life' (*Wikipedia*, 2015) <https://en.wikipedia.org/wiki/Second_Life#cite_note-1> accessed 24 July 2015: 'an online virtual world, developed by San Francisco-based Linden Lab and launched on June 23, 2003'.

31 Twitter's main feature is 'micro-blogging' and could be categorized as 'blogs'. However, unlike conventional blogs, Twitter has medium degree of social presence/media richness since it allows almost synchronous communication using text and picture media with its 'reply' and 'direct message' features. Therefore, Twitter could also fall within the *social network sites* category.

32 IBA (n 14) 2 (emphasis added).

33 DM Boyd and NB Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 J Comput Mediat Comm 210, 211.

34 Kaplan and Haenlein (n 16) 63.

media. Close personal relationships only potentially exist when there is an intersection between personal and professional online relationships, which can only exist in social network sites.

Furthermore, establishing justifiable doubts on independence and impartiality in the context of a close personal relationship requires closeness between the individuals that is built on frequent interactions, self-disclosure and familiarity with social networks. In the context of social media relationships, such closeness can only be built on at least a medium degree of self-presentation/self-disclosure and social presence/media richness. As explained previously, these are characteristics of social network sites. Other categories of social media either have a low degree of self-presentation/self-disclosure and/or social presence/media richness. The only exception is virtual social worlds, which have a high degree of social presence/media richness and self-presentation/self-disclosure may have strong elements of conflicts of interest. Second Life users can (and even intend) to engage in emotional relationships with each other. Nevertheless, there has not been any known use of virtual social worlds in a legal professional context. Therefore, the term 'social media' hereinafter in this article shall be interchangeable with 'social network sites'—unless specifically mentioned otherwise.

B. The Nuance of Online Relationships: Personal or Professional

In a situation such as that of the *Tecso* case, the Guidelines' quantitative analysis may fail to properly assess a challenge based on social media relationships. Despite the fact that an arbitration institution or other competent authority could have come to the same conclusion as the French courts in declaring that a Facebook 'like' does not justify reasonable doubts, simply by referring to sections 4.3.1 and 4.4.4 of the Guidelines, it must be noted that the French courts considered the context (Paris Bar election) and timing (after the award was rendered) of the 'like'. Therefore, it is sensible to examine further the nuance of the relationship between the arbitrator and the counsel to ensure proper administration of justice. As Lord Steyn correctly emphasized: 'In law, context is everything.'³⁵ It is imperative to analyse factors that may influence the contextualization of challenges based on social media relationships.

The English courts, in *Hays Specialist Recruitment (Holdings) v Ions*, acknowledged that one of the factors differentiating LinkedIn from Facebook is the nuance of connection. In LinkedIn the nuance is of a professional relationship.³⁶ When signing up for a LinkedIn account, users have to agree that they will use LinkedIn services in a professional manner, only inviting real-world professional connections to their network and/or contact people they know.³⁷ LinkedIn's invitation feature also requires the user to indicate how he/she knows the invited user which must be confirmed by the recipient.³⁸ On the other hand, Facebook's mission expressly states that it is

35 *Regina v Secretary of State for Home Department, Ex Parte Daly* [2001] UKHL 26 [28] (Steyn).

36 *Hays Specialist Recruitment (Holdings) v Ions* [2008] EWHC 745 (Ch) [7].

37 LinkedIn, 'User Agreement' (*LinkedIn*) <<https://www.linkedin.com/legal/user-agreement>> accessed 18 March 2015, s 8.

38 LinkedIn, 'About Invitations & Connecting' (*LinkedIn*) <https://www.linkedin.com/static?key=popup%2Fpopup_more_iwe_invitations> accessed 20 March 2015.

designed to allow users to stay connected with friends and family.³⁹ Its Terms of Service has no 'real connection' restriction clauses such as LinkedIn's and its features allow users to add as well as contact any user with accessible privacy settings.⁴⁰ Andrew Pullen of Allen & Overy, Singapore suggested that the terminology of online connection may also indicate the nuance of the relationship: Facebook uses the term 'friend', while LinkedIn uses 'connection'.⁴¹

Based on the above, the nuance of online relationships can be divided into personal and professional. However, the case laws and discussions mentioned above only provide clues in determining the relationships nuances for two social network sites platforms: Facebook and LinkedIn. Additionally, both platforms have express indication about the nuance of the online relationships facilitated. There are other social network sites developed by different companies and each has distinctive features. Some of them may not have express indication whether the nuance of relationships facilitated are personal or professional. Given the plethora of social network sites, it is inadequate to identify the nuance of the relationships based only on currently popular or existing social media platforms (in this case Facebook and LinkedIn). After all, social media is a dynamic and competitive industry. A platform's popularity, either worldwide or jurisdictions specific, could surge and fade within short period of time.⁴²

Since there is no existing legal theory to approach to the issue, this article proposes applying the 'functional building blocks of social media' theory introduced by Kietzman and others to help identify the nuance of relationships in a social media platform when there is no express indication of such nuance. The theory proposes that social media features are directly influenced by the platform's focus on social media functionalities that determine user experience. In essence, the theory looks beyond the forms of social media and identifies the functionalities of the features, thus allowing effective engagement to social media regardless of the form.⁴³

Kietzmann and others divided the functionalities of social media features into what they referred to as the following 'functional building blocks':⁴⁴

1. 'Identity': representing the extent users can reveal their identity;
2. 'Conversations': representing the extent users can communicate with other users;
3. 'Sharing': representing the extent users can exchange, distribute and receive content;

39 Facebook, 'About' (*Facebook*) <https://www.facebook.com/facebook/info?tab=page_info> accessed 14 July 2015: 'Founded in 2004, Facebook's mission is to give people the power to share and make the world more open and connected. *People use Facebook to stay connected with friends and family*, to discover what's going on in the world, and to share and express what matters to them.' (emphasis added).

40 Facebook, 'Terms of Service' (*Facebook*) <<https://www.facebook.com/legal/terms>> accessed 20 March 2015.

41 'The Procedure of International Arbitration: How Effective are the Tools? Current Issues of Procedure in International Arbitration' (Alumni and Friends of the School of International Arbitration (AFSIA) Conference, London, 22 April 2015).

42 Boyd and Ellison (n 33) 214–218.

43 Kietzman and others (n 17) 243–248.

44 *ibid.*

4. 'Presence': representing the extent users can know if other users are accessible;
5. 'Relationships': representing the extent users can relate to other users by forming associations that leads them to converse, share objects of sociality, meet up or simply just list each other as a friend or fan;
6. 'Reputation': representing the extent users can identify the standing of others; and
7. 'Groups', representing the extent users can form communities and sub-communities.

These functional building blocks are not mutually exclusive nor must they be present in the features of a social media platform. The interface between the functional building blocks is illustrated as a honeycomb framework. None of the major social media platforms focuses solely on a single block. Most of them concentrate on three or four primary functional building blocks. For example, LinkedIn emphasizes the following priority order of the functional building blocks: 'identity' (professional profile), 'relationships' (connections) and 'reputation' (endorsement of skills and recommendations). Facebook, on the other hand, emphasizes 'relationships' (friendships), 'identity' (general profile), 'presence' (location tagging), 'reputation' (likes) and 'conversations' (comments and private messages). Twitter does not value identity and relationships as highly as Facebook and LinkedIn. Its features focus on the 'conversations' functional building block with the exchange of short messages to create general awareness of issues (140 characters tweets and direct messages).⁴⁵

In order to determine that the nuance of online relationships facilitated by a social media platform is personal, its features must promote frequent interactions between users. Online communities have similar structural characteristics to offline face-to-face networks. Research shows that the frequency of interactions between users on Facebook and Twitter indicate closeness between them. This mirrors the nature of the offline relationships in which individuals tend to interact more with people that are close to them.⁴⁶ A user can be connected on social media with many users. However, such user is unlikely to interact online with users who are not close to him/her in real world. For example, a Facebook user may have hundreds or even thousands of online 'friends' while having close relationships only with a handful of them, whom he interacts with them regularly online by private messaging or photo sharing features. This is consistent with the Dunbar's Number theory that suggests there is a cognitive limit for the human brain to maintain stable interpersonal relationships: an individual can only maintain close personal relationships with a maximum of 150 people.⁴⁷ Further research has validated that the theory is also applicable to online social structures, despite social media allow individuals to interact with more people by eliminating the constraints of time and space.⁴⁸

45 *ibid.*

46 RIM Dunbar and others, 'The Structure of Online Social Networks Mirrors Those in the Offline World' (2015) 43 *Soc Networks* 39, 46.

47 RIM Dunbar, 'Neocortex Size as a Constraint on Group Size in Primates' (1992) 22 *J Hum Evol* 469.

48 B Gonçalves, N Perra and A Vespignani, 'Modeling Users' Activity on Twitter Networks: Validation of Dunbar's Number' (2011) *PLoS One* 1 <<http://dx.doi.org/10.1371/journal.pone.0022656>> accessed 27 July 2015.

What becomes necessary at this point is revealing the criteria based on which a platform's features promotes frequent interactions. This should be measured by how easily users communicate with each other. Therefore, the focus should be on the 'conversations' functional building block. If we examine the features of the functional building blocks of LinkedIn and Facebook, both platforms have 'identity', 'relationships' and 'reputation' functional building blocks. However, the 'conversations' functional building block, representing to what extent users can communicate, is minimal in LinkedIn, which does not have an instant messaging feature because communications between users is designed to be asynchronous. Therefore, unlike Facebook, LinkedIn features do not support frequent interactions between users. As for Twitter, despite the fact that the objective of the platform is to create general awareness of an issue and the fact that emotional investment of a 'tweet' is lower than an interaction on Facebook, Twitter features focus on the 'conversations' functional building block. Additionally, frequent interactions between users on the platform also indicate closeness between them.⁴⁹

Therefore, if a social media platform's features emphasizes the 'conversations' functional building block—thus promoting frequent interactions between users—the nuance of online relationships is personal. If the features do not put much weight on, or even limit, such functional building block, then the nuance is professional.

C. Classification of Social Media Relationships for Disclosure Requirements

As explained previously, quantitative analysis tools provided by the Guidelines sections 4.3.1 and 4.4.4 could have failed to yield consistent results in the *Tecso* case if the timing and context of the social media relationship were different. Therefore, the disclosure requirements based on a simple classification of social media relationship as 'Green List', which can never lead to disqualification, may not be adequate to respond to nuanced challenges.

In developing a quantitative analysis tool that can properly set the disclosure requirement as well as evaluate challenges based on social media relationships, it is important to take into account the necessary variables to ensure consistency with qualitative analysis: the nuance of the relationship between the arbitrator and the parties or counsels. In the previous section, it has been elaborated that the nuance of online relationships could be personal or professional depending on the social media platform's features.

It seems straightforward that social media relationship disclosure requirements for the Guidelines should be revised and classified into two categories: connections on personal and professional social networks sites, as proposed by Ménagé.⁵⁰ However, sometimes there is a mix of personal and professional use of supposedly *personal* social network sites, such as Facebook, because the features allow for professional uses. Some users also use their Facebook account to network professionally, eg the arbitrator in *Tecso* case who created his Facebook page for the Paris Bar election campaign.

Consequently, the interpretation whether a platform is a personal or professional social network site may also be dependent on how the user uses the platform.

49 *ibid* 46.

50 Ménagé (n 10).

That could create another controversy when a court or other competent authority examines whether a disclosure is required or not. A hypothetical example is when an arbitrator is a Facebook friend with a counsel, but he/she apparently only uses Facebook only for professional purposes (all of his/her Facebook friends are colleagues, not personal friends). There could be arguments whether the connection is *personal* based on the platform's features that allow frequent interactions or *professional* based on the way the platform is used.

Accordingly, it is suggested that disclosure requirements for social media relationships should be divided into these two categories instead: (i) connection on *professional* social network sites; and (ii) connection on *general* social network sites. Therefore, the distinction is based on whether a social media platform is (i) exclusively used for professional networks or (ii) it can also be used for personal networks.

A two-tier test can be used in order to properly differentiate the nuance of relationships. The first-tier test is to identify whether there is any express indication that the objective of the platform is for professional use, either in the terms of use/user agreement or information about the platform. The second-tier test is whether the features of the platform focuses on the 'conversations' functional building block—therefore promote frequent interactions between users—should any express indication of professional use is unavailable. If the platform does not promote frequent interactions between users, it is a professional social network sites.

Doubts on independence and impartiality are more likely to arise if there is an online relationship on a general social network site, since it may reflect personal nuance albeit the relationship could be of professional nature. However, if the connection is on a professional social network site, the nuance is strictly professional. Therefore, the professional social network sites should be listed in the 'Green List' and the general social network sites should be in the 'Orange List.'

When applied to the most popular social media platforms among legal professionals, the fact that an arbitrator is a Facebook 'friend' of a party or a counsel must be disclosed. However, if the connection is via LinkedIn, a platform that expressly indicates that it should be used professionally, such a social media relationship does not need to be disclosed. Twitter is more delicate since it is a micro-blogging platform with social network features. A Twitter connection is based on a 'follow'. It is possible that a user follows another user without a reciprocal follower and interact only by 'replies', 'mentions' and 'retweets'. However, when two users follow each other, they can engage in private conversations via a 'direct message' feature that also represents the 'conversations' functional building block. It is also reasonable to assume that two users that do not follow each other would not have frequent interactions. Therefore, disclosure would only need to be made if an arbitrator and a party or a counsel 'follow' each other.

Connections on social network sites, even for platforms with personal nuance of online relationships should never be classified under the 'Red List'. This is because existence of online relationships on personal social network sites does not always indicate close personal relationships, as Schaner suggested.⁵¹

51 Karadelis (n 5).

3. ASSESSING CHALLENGES BASED ON SOCIAL MEDIA RELATIONSHIPS USING SOCIAL MEDIA MINING

The *Tecso* case left the question unanswered whether online relationships through social media could give rise to justifiable doubts as to an arbitrator's independence and impartiality. However, given the fact that the French courts considered the timing and context of the 'like' on Facebook page, it is possible that the French courts would apply the same test for conventional relationships when examining the independence and impartiality of an arbitrator who is a Facebook 'friend' with a party or its counsel. Moreover, since online relationships reflect the structure of offline relationships,⁵² there is a sufficient reason for social media connections to be subjected to the same standard of bias as offline relationships to determine whether the existing social media relationship gives rise to justifiable doubts about the arbitrator's independence and impartiality.

Since assessing challenges based on social media relationships is analogous to assessing offline relationships, the same method of objective test of bias could be applied when examining social media evidence related to the nature of the online relationship. This means the social media relationship is assessed with qualitative analysis. The focal point is whether there is an actual (offline) close personal relationship between the users by analysing the facts and circumstances. As Heilbron interestingly stated, what should be examined is the nature of the relationship—not the source.⁵³ The notion is also supported by Professor Julian D Lew QC who commented that what really matters is the substance over the form of the relationship. His example was that if a user greeted the other user and said happy birthday through social media, it is reasonable to assume that the users are personal friends.⁵⁴ In *Tecso*, the French courts considered the facts that the counsel 'liked' the arbitrator's Facebook page after the award was rendered, and the arbitrator's page was setup for the Paris Bar election campaign to analyse the substance of its relationship qualitatively.

Nevertheless, the problem with qualitative analysis is that there are no clear parameters on standards of bias.⁵⁵ The facts are open to subjective interpretation. Therefore, the author proposes that qualitative analysis regarding the nature of online relationships should be supplemented with quantitative analysis that is possible using social media mining.

Online relationships can be measured quantitatively. The use of social media generates a new form of data, referred to as social media data, which are mostly user-generated, informal, incomplete and in multi-media format, often accompanied with information about time and location. They are, therefore, a valuable resource for researchers in studying human behaviour and activities. The problem, however, is that social media data is massive and widespread so in order to be able to make sense and analyse the data, they need to be processed. The process is called 'social media

52 Dunbar and others (n 46) 46.

53 Karadelis (n 5).

54 AFSIA Conference (n 41).

55 CA Rogers, *Ethics in International Arbitration* (OUP 2014) [2.106].

mining'.⁵⁶ As Zafarani, Abbasi and Liu explain: 'Social media mining is the process of representing, analyzing, and extracting meaningful patterns from data in social media, resulting from social interactions.'⁵⁷

Social media mining involves Social Network Analysis (SNA) or structural analysis, a strategy for investigating social structures employing network and graph theories.⁵⁸ One of the aspects of SNA is the strength of interpersonal ties (tie strength), defined as 'combination of the amount of time, the emotional intensity, the intimacy (mutual confiding), and reciprocal services which characterize the tie',⁵⁹ or in simple term 'a general sense of closeness with another person'.⁶⁰ Since online interactions mirror offline face-to-face or real-world closeness between users, closeness between users can be measured by applying SNA to online behaviours and demographics data from social media mining. In other words, social media data mined can be (and has been) used to measure the degree of closeness between users.⁶¹

Major social media companies like Facebook have developed highly sophisticated algorithms for internal social media mining that can quantify the intensity of the interactions between users. Facebook even has a Data Science team which is able to 'conduct large scale, quantitative research to gain deeper insights into how people interact with each other and with their world'.⁶² For example, Facebook Data Science published some of its research explaining how Facebook can identify when two users become engaged in an emotional relationship based on the frequency and intensity of their online interactions.⁶³

Therefore, using social media data obtained from social media mining, it may be possible to establish more accurately whether there is a close personal relationship between the challenged arbitrators and a party or a counsel. This quantitative analysis tool could be a valuable supplement to qualitative analysis on the nuance of the online relationship, which is only a subjective assessment on facts, such as when the account was setup and for what purpose or when the existence of the online relationship started.

The parties can also benefit from social media by being able to make an informed decision when challenging an arbitrator and therefore reducing the risks of

56 H Liu, 'How to Mine Social Media: Big Data Derived from Online Platforms Produce Bigger Challenges' (*IEEE Roundup*, 11 September 2014) <<http://theinstitute.ieee.org/ieee-roundup/opinions/ieee-roundup/how-to-mine-social-media>> accessed 7 July 2015.

57 R Zafarani, MA Abbasi and H Liu, *Social Media Mining: An Introduction* (CUP 2014) 21.

58 E Otte, 'Social Network Analysis: A Powerful Strategy, Also for the Information Sciences' (2002) 28 *J Inf Sci* 441.

59 MS Granovetter, 'The Strength of Weak Ties' (1973) 78(6) *AJS* 1360, 1361.

60 D Du, 'Social Network Analysis Lecture 5-Strength of weak ties paradox' (*University of New Brunswick*) S <www2.unb.ca/~ddu/6634/.../Lec5_weak_tie_handout.pdf> accessed 18 July 2016.

61 JJ Jones and others, 'Inferring Tie Strength from Online Directed Behavior' (2013) 8 *PLoS One* <<http://dx.doi.org/10.1371/journal.pone.0052168>> accessed 8 July 2015. See also E Gilbert and K Karahalios, 'Predicting Tie Strength with Social Media' (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, 2009) 211–220; A Petróczy, T Nepusz, and F Bazsó, 'Measuring Tie-strength in Virtual Social Networks' (2007) 27(2) *Connections* 39–52 <https://www.insna.org/PDF/Connections/v27/2006_1-2-5.pdf> accessed 28 March 2016.

62 Facebook, 'Data Science' (*Research at Facebook*) <<https://research.facebook.com/datascience>> accessed 24 July 2015.

63 C Diuk, 'The Formation of Love' (*Facebook Data Science*) <<https://www.facebook.com/notes/facebook-data-science/the-formation-of-love/10152064609253859>> accessed 24 July 2015.

unsuccessful challenge and the effects associated with it. It is true that a failed challenge should not affect the professionalism and impartial attitude of an arbitrator. However, arbitrators are human beings and a challenge to an arbitrator is a challenge to his/her integrity that may have after effects. Therefore, an unsuccessful challenge may give rise to concerns of partiality in the proceedings to come. Furthermore, it can also create a presumption of dilatory tactics by the party.⁶⁴

Therefore, social media data mining can be a powerful tool to maintain the integrity of the international arbitration proceedings while mitigating guerrilla tactics. Supplementing qualitative analysis on facts with quantitative analysis of social media mining could be the best practice for assessing challenges based on social media relationships.

Naturally, social media companies need to be involved in the assessment of challenges to an arbitrator's independence and impartiality in his/her online conduct providing the social media data mined as evidence. The social media data required for measuring closeness between users, ie indicators of the frequency and intensity of the interactions such as exchange of messages, status or photo posts, tags, check-ins, privacy control, etc, may not be publicly available due to privacy control and they are stored and controlled by the social media company.

According to privacy laws and agreement with their users, social media companies are under obligation to keep social media data records of their users confidential. However, they may disclose such records if there is a legal request. The request is not limited to law enforcement or judicial requests, such as subpoenas, search warrants or court orders, but it may also include any request from a third party that a company believes is necessary.⁶⁵ Accordingly, the court or the arbitration institution assessing the challenge, or even the challenging party can request a social media company to disclose the social media data mined from the challenged arbitrator's account records to examine whether there is any evidence of bias or even misconduct. Data disclosure for social media mining will be discussed in detail in the next sections.

4. PROFILING ARBITRATORS WITH SOCIAL MEDIA

One of the key features of arbitration is that it allows the ultimate forum shopping because parties can choose their own judges. In practice, information gathering on prospective arbitrators is a part of the strategy in arbitration. It is perceived that an arbitrator's personal background, experience and views on policy may be relevant in the substantive outcomes of the case, particularly in investment arbitration cases.⁶⁶ Studies have shown that the decision-making process and the outcome of arbitration

64 Rogers (n 55) [2.65]–[2.66].

65 See Facebook, 'Data Policy' <<https://www.facebook.com/about/privacy/>> accessed 18 March 2015; LinkedIn, 'Privacy Policy' <<https://www.linkedin.com/legal/privacy-policy>> accessed 18 March 2015; Twitter, 'Privacy Policy' <<https://twitter.com/privacy?lang=en>> accessed 9 July 2015; and Automattic, 'Privacy Policy' (Automattic, 24 March 2006) <<http://automattic.com/privacy/>> accessed 18 March 2015.

66 Rogers (n 55) [2.30]–[2.37]. See also, D Bishop and L Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 *Arb Intl* 395, 404–405; N Rubins and B Lauterberg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration' in C Knahr, C Koller and W Rechberger (eds), *Investment and Commercial Arbitration - Similarities and Divergences* (Eleven International 2010) 169.

in law are influenced by cognitive bias,⁶⁷ known as implicit bias in arbitration. Arbitrators have certain ideological and legal values, cultural background, personal traits and policy preferences that may influence their decision-making.⁶⁸

Other than measuring social relationships between users, social media mining can also be used for profiling users.⁶⁹ Therefore, social media makes it possible to identify an arbitrator's personal traits, cognitive behaviours and political views. In other words, social media can be a tool for identifying an arbitrator's implicit bias.

Identification of implicit bias with social media mining can help the parties in profiling prospective arbitrators in order to make an informed nomination. Parties can choose to nominate arbitrator who is more sympathetic to their cause. For example, in an investment arbitration, the investor claimant can nominate an arbitrator who is more inclined to free market ideology, while the respondent-state can nominate an arbitrator who believes in stronger government control over public law matters.

The benefit of social media profiling is not limited to the parties, but also the arbitrators in terms of providing level playing field in arbitration services market as well as the integrity and the legitimacy of arbitration system itself as a neutral and impartial dispute settlement mechanism with pluralistic, diverse and democratic decision makers. This will be discussed in further detail in the next sections.

A. Social Media Profiling for Mitigating Information Asymmetry and Market Imperfection of Arbitration Services

Catherine A Rogers has argued that there are issues of information asymmetry and market imperfection in international arbitration that hinders the development of a competitive and open market for arbitration services, due to limited availability of information on arbitrators. Currently, the most reliable information about an arbitrator is from direct participation of arbitration proceedings, which means it is only available to an elite group of arbitration insiders. Arbitration services are a closed market. It is difficult for younger arbitrators to penetrate the market. The negative consequences of market imperfection due to information asymmetry are not only suffered by the service providers but also by the users. This market imperfection increases the costs of arbitration processes. Additionally, leading arbitrators frequently turn down appointments due to their increasing workload. This may also threaten the position of arbitration as a preferred dispute resolution mechanism.⁷⁰

67 C Blattner, 'Cognitive Biases in the Law – GBS Schweiz' <<http://gbs-schweiz.org/blog/cognitive-biases-in-the-law/>> accessed 8 July 2015. See also CP Guthrie, JJ Rachlinski and AJ Wistrich, 'Inside the Judicial Mind' 86 Cornell L Rev (2001).

68 Brekoulakis (n 12) 561–563.

69 HA Schwartz and LH Ungar, 'Data-Driven Content Analysis of Social Media: A Systematic Overview of Automated Methods' (2015) 659 Ann Am Acad Polit Soc Sci 78. See also Y Bachrach and others, 'Personality and Patterns of Facebook Usage' (Proceedings of the 3rd Annual ACM Web Science Conference on - WebSci '12, 2012); D Markovikj and others, 'Mining Facebook Data for Predictive Personality Modeling' (2013) AAAI Technical Report WS-13-01 Computational Personality Recognition (Shared Task); W Youyou, M Kosinski and D Stillwell, 'Computer-Based Personality Judgments Are More Accurate than Those Made by Humans' (2015) 112 Proc Natl Acad Sci 1036.

70 Rogers (n 55) 72.

There have been efforts to make information on arbitrators more accessible with social media. Websites such as *iaiparis.com* provide searchable lists of arbitrators based on nationality, residence, language and other professional or academic attributes. A search result will show the professional CV of the arbitrators, including publications.⁷¹ While it may be possible to identify policy preference qualitatively by reading professional CV and publications as well as published awards, social media mining on a prospective arbitrator's social media account can provide deeper information on his/her personal traits, policy preferences, ideological and legal values (in other words, the arbitrator's implicit bias).

Rogers proposes to develop a project called *Arbitrator Intelligence (AI)*,⁷² which she envisions as 'an information resource about arbitrators that is equally accessible, comprehensive, substantive, and reliable', to address market imperfection issues by reducing information asymmetry. It aims to provide a platform for three categories of information: public, semi-public and feedback and would effectively reconfigure information relevant to the arbitrator selection process.⁷³ If the project materializes, AI might be a form of social media (but not limited to social network sites category), since it is developing information based on aggregated web-based information as well as past awards and Feedback Questionnaires contributed by users; therefore, it is an internet-based application and allows the creation of User Generated Content.⁷⁴

The AI can be a step forward in profiling arbitrators if the algorithms and interface are designed effectively. However, since it is still in the pilot project phase, it will take some time before the project is developed and implemented. In the meantime, existing social media platforms can be an alternative or a supplementary solution where parties can gain in-depth information about an arbitrator by social media profiling.

Therefore, social media profiling can provide better access to information on younger arbitrators, who are relatively less known compared to their seniors, thus increasing their chances of appointment. All arbitrators, junior or senior, virtually have equal opportunity to market themselves online. This can bridge the information gap and serve to correct market imperfections in arbitration services.

B. Social Media Profiling as a Tool to Address Issues of Systemic Bias

There are criticisms that there is a systemic bias in the institution of international arbitration as it favours certain class of groups of parties and arbitrators. In order to address these criticisms, Stavros Brekoulakis suggests that there is a need to 'promote institutional changes that enhance ideological pluralism and prevent homogeneity' as well as 'enlarge the pool and increase the cultural diversity of potential arbitrators'.⁷⁵ Social media profiling can be a useful tool to realize such suggestion.

71 International Arbitration Institute <http://www.iaiparis.com/drm_search.asp> accessed 9 July 2015.

72 <<http://www.arbitratorintelligence.org/>> accessed 5 December 2016.

73 Rogers (n 55) [8.95]–[8.107]. See also P Shaughnessy, 'Arbitrator Intelligence—An Interview with Its Founder and Director, Professor Catherine Rogers' (2015) 1 J Tech Int Arb 87.

74 Arbitrator Intelligence, 'Mission Statement' (*Arbitrator Intelligence*) <<http://www.arbitratorintelligence.org/>> accessed 14 September 2015.

75 Brekoulakis (n 12) 582.

The potential to identify a potential arbitrator's implicit bias will allow the parties to nominate someone who is or believed to be more sympathetic to their culture, interests, cause and/or situation. This will enhance the probability of pluralistic tribunal.

At the same time, as explained, social media profiling will improve the searchability of potential arbitrators and bridging the information gap in arbitration services market. Therefore, the talent pool is virtually enlarged by the improved accessibility to information on potential arbitrators.

5. CONCERNS ON SOCIAL MEDIA MINING

While it is possible to undertake social media mining, either for assessing a challenge based on online relationship or profiling for nomination, another important issue is the acceptance of such practice by the arbitration community, particularly the arbitrators as the data subjects. Social media mining gives rise to concerns related to data protection issues. The author identifies three major concerns which are interrelated, ie: (A) invasion of privacy; (B) unauthorized access which may provide misleading information; and (C) incomplete data set which may result in an inaccurate online profile.

A. Invasion of Privacy

Social media companies are often accused of invasion of privacy by conducting social profiling of their users. In fact, the main source of revenue for social media companies is from social profiling: the data mined is utilized or sold for targeted advertising purposes.⁷⁶ Therefore, if arbitration practice began employing social media mining, some arbitrators may perceive it as invasion of their privacy.

On the other hand, many users, particularly the younger generation, consider the benefits offered by social media outweigh the privacy concerns.⁷⁷ Therefore, younger arbitrators are less likely to feel uncomfortable about sharing their professional and personal information on social media. Many Alternative Dispute Resolution (ADR) practitioners believe social media is now an important tool to expand work opportunities.⁷⁸ Supposedly, if the trend continues, it is reasonable to predict growing acceptance to social media mining from the arbitrators.

B. Unauthorized Access

Authentication of a social media account is a concern since the person managing the account may be another person or the account may have been hacked. Consequently, there is a risk of misleading information: the data mined from the social media account may not be accurate or deliberately misrepresented. An extreme

76 W Harris, 'Why Web 2.0 Will End Your Privacy' (*bit-tech*, 3 June 2006) <http://www.bit-tech.net/columns/2006/06/03/web_2_privacy/> accessed 25 April 2016. See also TF Claypoole, 'Privacy and Social Media' *Business Law Today* (2014) 1–4 <http://www.americanbar.org/publications/blt/2014/01/03a_claypoole.html> accessed 5 December 2016.

77 B Debatin and others, 'Facebook and Online Privacy: Attitudes, Behaviors, and Unintended Consequences' (2009) 15(1) *J Comput Mediat Commun* 103.

78 R Evans, 'The Missing Link in ADR' *The Resolver: The Quarterly Magazine of the CI Arb* [2016] 10, 10–13.

example is when Associated Press' Twitter account was hacked and then tweeted false news of bombing at the White House, causing stocks price to drop.⁷⁹ Imagine if an arbitrator's social media account is hacked and the hacker posts contents that do not represent his/her political preference or engaged in a private messages with other users. It is possible that the information will be tarnished and thus unreliable due to the risk of manipulation of user's data. This can make the social media mining result inaccurate.

Therefore, it is important to be able to authenticate the user of the social media account first. The English courts, for example, have emphasized the need to identify the person behind the social media communication.⁸⁰ Australian case law has also examined the authenticity of social media evidence by questioning the person behind the social media account.⁸¹ In many jurisdictions, unauthorized access to an internet account can even amount to a serious crime.⁸²

C. Incomplete Data Set

In order to conduct social media mining, the data to be mined must be available. However, social media companies may not be willing to respond positively to a request for social media data of an arbitrator even if the terms of use or user agreement has given them the discretion to do so.⁸³ Therefore, when profiling prospective arbitrators, a party may only be able to mine social media data that are publicly available, which may be limited if the prospective arbitrator's account privacy setting is restricted. Inaccessible social media data can create inaccurate behavioural analysis.⁸⁴

Moreover, social media participation is voluntary since they operate as user-generated platforms. In order to build credibility online, a potential arbitrator must increase his/her presence. This requires investments on time spent updating their social media account. Therefore, the availability of social media data is also dependent on the potential arbitrator's level of activity online. It is possible that an arbitrator is not nominated because they have low presence or rating on social media, whereas in real life they actually have the desired profile.⁸⁵

Additionally, given its complex nature, social media mining requires specialist expertise. Social media profiling is only as good as the algorithms developed. For example, social media platforms, especially for professional use, have algorithms to rate

79 The Economist, '#newscrashrecover' *The Economist* (27 April 2013) <<http://www.economist.com/news/finance-and-economics/21576671-hacked-tweet-briefly-unnerves-stockmarket-newscrashrecover>> accessed 27 May 2016.

80 *Applause & Firsh v Raphael* [2008] EWHC 1781; *Sheffield Wednesday Football Club & Others v Hargreaves* [2007] EWHC 2375.

81 *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268; *Condon Nixon v Rivers* [2012] FAMCA 7.

82 Penal Code (California) 502(c) PC; Computer Misuse Act 1990 (UK), s 3; Computer Misuse and Cybersecurity Act (Singapore), s 3–5; RSC 1985, c C-46 (Canada), s 342.1; Information Technology Act 2000 (India), s 66C; Electronic Information and Transaction Act No 11/2008 (Indonesia), art 30–32. See also Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, recital 46 and art 17.

83 See Facebook Data Policy, LinkedIn, Twitter and Automattic Privacy Policies (n 65).

84 FB Abdesslem, I Parris and T Henderson, Computational Social Networks: Mining and Visualization in Ajith Abraham (ed.), 'Reliable Online Social Network Data Collection' in *Computational Social Networks* (Springer 2012) 183.

85 Evans (n 78).

the user's profile strength. LinkedIn has 'profile strength' and 'skills endorsement'. In the case of AI, it is projected that the platform will have a scoring system based on, among others, Feedback Questionnaires from users. It is possible that the algorithms to measure the profile strength simply cannot produce accurate results. Take for example Klout.com, an online service that measures an individual's social media influence. One of the main algorithmic factors for higher Klout score is frequency of tweets and retweets received, which requires a user to invest a significant amount of time on social media. Klout scores are then controversial since pop stars often have higher scores compared to world leaders.⁸⁶

6. SOCIAL MEDIA MINING PROCEDURE FOR ARBITRATION

Considering the ubiquity of social media mining, the author believes it is inevitable that it will be a common practice in international arbitration in the near future—particularly for high stake cases. The absence of procedural rules or guidelines can make such practice unchecked. Therefore, it is imperative to develop a workable social media mining procedure for arbitration to ensure the legitimacy of social media mining.

The procedure must be able to address the issues associated with social media mining in order to provide a certain level of assurance that the arbitrator's individual rights are protected and on the reliability of the results. On the other hand, following the procedure can be a defence for the organizations involved in the social media mining against privacy infringement claims. Therefore, safeguarding the interests of all stakeholders.

It is proposed that the procedure must adopt the key principles in data protection recommended by the Organisation for Economic Co-operation & Development, ie:⁸⁷

1. Notice, data collection must be notified to the data subjects;
2. Stated purpose, data must only be used for the purpose stated;
3. Consent, data subject's consent is required for data disclosure;
4. Security, data collected must be secured against potential abuses;
5. Disclosure, data subjects must be informed about the data collector;
6. Access, data subjects must be allowed to access their data and make corrections on any inaccuracy;
7. Accountability, data subjects must have recourse to hold data collectors accountable for failing to comply with the above principles.

The focal point of privacy issues is consent. This can be seen in privacy laws of several jurisdictions which require consent of the data subjects for collection, storage, processing and disclosure.⁸⁸ Social network sites require users to accept the

86 E Kain, '5 Reasons You Shouldn't Care about Your Klout Score' *Forbes* (26 April 2012) <<http://www.forbes.com/sites/erikkain/2012/04/26/5-reasons-you-shouldnt-care-about-your-klout-score/#569b24b7294e>> accessed 27 June 2016. See also Seth Stevenson, 'What Your Klout Score Really Means' (*Wired Magazine*, 24 April 2012) <http://www.wired.com/2012/04/ff_klout/> accessed 29 March 2016.

87 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (2013) <<https://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf>> accessed 5 December 2016.

88 See among others Directive 95/46/EC, art 7 (a); SC 2000, c 5, s 5 (Canada); Personal Data Protection Act 2012 (Singapore) s 13; Law No 11/2008 (Indonesia), art 26 (1); Protection of Personal Information Act (Japan), art 23; Protection of Personal Information of Telecommunications and Internet Users Regulation (China), art 9; Information Technology Rules 2011 (India), s 5.

platform's terms of use or service as well as asking permission for sharing the data to third-party application, which in essence obtaining user's consent.⁸⁹ Accordingly, the primary requirement for a workable social media mining procedure is it must be consent based. Therefore, it is proposed the following procedure.

A party must submit a written request for collection of non-public data on the data subject(s) (in this case, the potential or challenged arbitrator and the counter party/counsel) to the data controllers (in this case, social media companies). In institutional arbitration, this procedure can be facilitated by the arbitration institution. For *ad-hoc* arbitration, it is proposed that the request is facilitated by national court or data protection authority such as Canada Privacy Commissioner or UK Information Commissioner's Office. The facilitation is to minimize abusive requests and provide certain level of assurance to social media companies in granting a request for disclosure due to potential privacy infringement liability. When a request is facilitated by a legitimate institution, it constitutes a legal request and gives credentials to establish a genuine need to share the social media data as well as the good faith of the request.

The request should contain a brief description of the case, the purpose and the scope of data collection and the firm employed to perform the data mining as well as written declaration that warrants that the data will be kept secure and will not be shared to any other third party and/or used for any other purpose. The request should not ask for indiscriminate full disclosure of social media data and only limited to data that is relevant to specific profiling or relationships attributes. This is to protect the privacy of the data subjects and to prevent the data being abused to harass and oppress the challenged arbitrator or the counter party/counsel. Therefore, there has to be a limit on the extent to which the data controller has a duty to disclose their records of social media mining. This could be the equivalent of the limitation set by the English courts for determining which interrogatories and requests for specific discovery as well as further and better particulars are proper in a claim for a breach of duty by Facebook. In *HL v Facebook*, the said social media company was only obliged to provide data within the period of three years and the request could not be too vague, or insufficiently relevant or clear.⁹⁰ This is to observe the principles of 'purpose', 'security' and 'accountability'.

The data controller will then notify the data subject and seek his/her approval. If they approve, the consent serves as authorization to collect the data. This step is to ensure compliance to the 'notice', 'consent' and 'disclosure' principles. If the purpose of the data mining is for profiling and the arbitrator refuses to give consent, the party should not proceed. However, if the purpose is for challenging an arbitrator, the party will need to obtain a court order to proceed.

The data controller, by virtue of its privacy policy and terms of use, will then assess and decide whether or not to provide the party with the data pursuant to the request. Social media company can even proactively pursue legal action if it believes

89 Facebook Data Policy, LinkedIn, Twitter and Automattic Privacy Policies (n 65).

90 *HL (A Minor) v Facebook Inc* [2014] NIQB 101 [25]–[26], [28], [33]–[34].

the request is an unjustifiable attempt on its user's privacy and security.⁹¹ This should disincentive abusive requests.

If the data controller decided to disclose the data requested, the data subject must be given the opportunity to review them. This is pursuant to the 'access' principle.

After the data mining has been conducted and no longer needed, the data should be deleted. This is to ensure the 'security' principle. Furthermore, given the confidential nature of arbitration, the social media data mined can be kept confidential. Therefore, minimizing the risk of personal data leakage.

7. CONCLUSION

The IBA addresses the issues of social media relationships in its Guidelines on Conflicts of Interest in International Arbitration 2014 owing to demands from arbitration practitioners. The Guidelines' disclosure requirements simply classify social media relationship under the 'Green List' thus declaring it as neither leading to disqualification nor the need for disclosure. However, this could have failed to deliver consistent results in a situation such as in the *Tecso* case where the President of the Tribunal is challenged because he is a Facebook 'friend' of a party's counsel and his page was 'liked'. Even though the French courts subsequently denied the challenge and declared the Facebook argument as irrelevant, they considered the facts that the arbitrator's Facebook page was 'liked' after the award was rendered and the account was setup for his Paris Bar election campaign. It is, therefore, possible that the social media relationship between the arbitrator and a party's counsel could have justified reasonable doubts as to his independence and impartiality given different context and timing. Therefore, the current generalist approach of sections 4.3.1 and 4.4.4 of the Guidelines that disregards the nuance of social media relationships should be revised.

This article proposes that the new guidelines on social media relationships should take into account the nuance of the online relationships. The first step is to identify whether a platform is designed for personal or professional networking. If there is an express indication in the user agreement such as in LinkedIn, then determining the platform as having a professional network purpose is easy. Nevertheless, it is possible that a platform may not show an express indication on such a matter. Twitter and Facebook are examples of this, in which case we need to look further into the functionalities of the features. If a social media platform has features with strong 'conversations' functionality, then it is designed for personal networking purposes since it allows or even promotes frequent interactions between users.

However, classifying social media into professional and personal networks for disclosure requirements in the revised guidelines may not be a workable solution. Sometimes there is a mix of personal and professional use of a supposedly *personal* social network site such as Facebook because the platform allows, or even promotes, professional use. Consequently, classification of professional and personal social network sites may fail to address conflicts of interest issues for platforms that allow both

91 MT Brian, 'Facebook may Take Legal Action Over Employer Password Requests' (*The Next Web*, 23 March 2012) <<http://thenextweb.com/socialmedia/2012/03/23/facebook-says-it-may-launch-legal-action-against-employers-who-ask-for-user-passwords/>> accessed 23 March 2016.

personal and professional uses since a court or other competent authority may interpret the disclosure requirement is more dependent to the way the platform is used to network rather than the nuance of its features. Accordingly, social media relationships should be divided into these two categories instead: (i) connection on *professional* social network sites; and (ii) connection on *general* social network sites. Therefore, the distinction is based on whether a social media platform is exclusively used for professional networks or can also be used for personal networks, thus the term 'general' is more suitable. The professional social network sites should be listed in the 'Green List' since the risk of justifiable doubts on independence and impartiality is too remote. On the other hand, the general social network sites should be listed in the 'Orange List' considering there is a risk of close personal relationship.

The article has also approached social media as a quantitative analysis tool in assessing a challenge based on social media relationships. Online relationships are one form of relationships. What really matters is the substance of relationship, ie whether the relationship between the users could have justified reasonable doubts as to independence and impartiality. In other words, the question is the existence of close personal relationships between users. Since social media relationships reflect the structure of offline relationships, whereas an individual tend to interact more with people who are close to them, it is reasonable to apply the same standards of bias in conventional relationships by using the objective test.

However, unlike offline relationships, social media relationships can be measured quantitatively. The use of social media, including the frequency and intimacy of interactions between users, generates data that can be processed with social media mining. The closeness between users can be measured quantitatively using SNA algorithms. Therefore, the competent authority can establish more accurately whether there is a close personal relationship between the challenged arbitrators and a party or a counsel. This quantitative analysis tool could be a valuable supplement to qualitative analysis of the conventional objective test when evaluating a challenge based on social media relationships.

Other than measuring social relationships (closeness or tie strength) between users, social media mining can also be used for profiling users identifying aspects such as personal traits, cognitive behaviours and political views. Therefore, social media can be a tool for identifying an arbitrator's implicit bias.

An arbitrator's personal background, experience and views on policy may be relevant in the substantive outcomes of a case, particularly in investment arbitration cases. Since arbitration allows parties to choose their own judges, profiling arbitrators is one of the most important elements of arbitration strategy. Based on the information gathered from the profiling of a prospective arbitrator, particularly about the arbitrator's implicit bias, the parties can make better informed nominations of arbitrator who may be more inclined to be sympathetic to their cause.

Social media profiling can be beneficial not just to the parties, but also to the arbitrators and the arbitration system as a whole. Younger or lesser known arbitrators have virtually equal opportunity to market themselves online with their senior or prominent peers. Social media searchability has an equalizing effect on the arbitration playing field. Therefore, social media can bridge the information gap and serve as market correction in arbitration services.

By providing a marketing level playing field and searchability to arbitrators, social media profiling may also enlarge the talent pool and increase cultural diversity of potential arbitrators to be nominated. Therefore, enhancing the probability of pluralistic tribunals. This makes social media profiling as a tool to address the criticisms of systemic bias in international arbitration.

However, despite its potential, social media mining gives rise to concerns related to data protection issues, particularly to the arbitrators as the data subject. The three main concerns identified are (i) invasion of privacy; (ii) unauthorized access which risk misleading information to be mined; and (iii) incomplete data set which may result on inaccurate behaviour analysis. Therefore, the author proposes the development of a consent-based social media mining procedure for arbitration that adheres to the seven key principles of data protection. The proposed procedure involves all stakeholders in social media mining: the party, the potential arbitrator as the data subject, the social media companies as the data controllers, and the arbitration institution or data protection authority. The party must submit a written request to the social media company, facilitated by arbitration institution or data protection agency. The request should contain a brief description of the case, the purpose and the scope of data collection and the firm employed to perform the data mining as well as written declaration that warrants that the data will be kept secure and will not be shared to any other third party and/or used for any other purpose.

The author believes that a critical examination of an arbitrator's conduct on social media requires a comprehensive understanding of social media by arbitration practitioners. This article has sought to provide a deeper understanding about social media and its interface with arbitration from a jurist's perspective through the application of social science theory.

Arbitrator conduct on social media is an emerging subject in arbitration. It requires an *across-the-board* analysis by a range of interested stakeholders and experts. This article is also a call for further interdisciplinary studies by arbitration practitioners and social media experts regarding the issues associated with the subject.