

The Impartiality and Independence of
Arbitrators Reconsidered

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Abstract

It is important not to blame the messenger. The International Bar Association Working Group and ensuing Guidelines on Conflict of Interest in International Commercial Arbitration not only included some of the most brilliant arbitrators, they also did brilliantly at finding common ground in a minefield that, until their involvement, was marked by both rigidity in international rules governing conflicts of interest and widely disparate practice in domestic jurisdictions. Nor should the Working Group and Guidelines be held responsible for a pervasive problem that has plague modern international commercial arbitration from the outset.

This essay explores the challenge, expressed by V.V. Veeder, that the guidelines governing conflict of interest is encouraging the “malign practice” of new tactical challenges to arbitrators. It also reflects on the unprecedented decision by the LCIA Court and Board to publish abstracts of the decisions in which arbitrators are challenged. Part I frames the issues explored in the article. Part II reflects on some false truisms that have traditionally been imputed to conflicts of interest in international commercial arbitration. Part III discusses the key attributes of conflict of interest, independence and impartiality. Part IV explores the IBA Guidelines. Part V concludes with some suggestions.

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**THE IMPARTIALITY AND INDEPENDENCE OF
ARBITRATORS RECONSIDERED**

by

Leon Trakman*

IBA Guidelines on Conflict of Interest have provided a well-sprung platform for new tactical challenges to arbitrators, a malign practice that appears to be increasing everywhere. [V.V.Veeder, Essex Court Chambers, London, "The English Arbitration Act 1996: its 10th and future birthdays" at <http://www.expertguides.com/default.asp?Page=10&GuideID=150&CountryID=117>

In May [2006], the LCIA Court and Board took the landmark decision to publish the LCIA Court's decisions on challenges to arbitrators, in the form of abstracts. <http://www.lcia-arbitration.com/>

It is important not to blame the messenger. The International Bar Association Working Group and ensuing Guidelines on Conflict of Interest in International Commercial Arbitration not only included some of the most brilliant arbitrators,¹ they

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¹ The Working Group consisted of nineteen members: (1) Henri Alvarez, Canada; (2) John Beechey, England; (3) Jim Carter, United States; (4) Emmanuel Gaillard, France; (5) Emilio Gonzales de Castilla, Mexico; (6) Bernard Hanotiau, Belgium; (7) Michael Hwang, Singapore; (8) Albert Jan van den Berg, Belgium; (9) Doug Jones, Australia; (10) Gabrielle Kaufmann-Kohler, Switzerland; (11) Arthur Marriott, England; (12) Tore Wiwen-Nilsson, Sweden; (13) Hilmar Raeschke-Kessler, Germany; (14) David W Rivkin, United States; (15) Klaus Sachs, Germany; (16) Nathalie Voser, Switzerland (Rapporteur); (17) David Williams, New Zealand; (18) Des Williams, South Africa; (19)

also did brilliantly at finding common ground in a minefield that, until their involvement, was marked by both rigidity in international rules governing conflicts of interest and widely disparate practice in domestic jurisdictions. The Working Group and Guidelines should also not be blamed for different approaches towards conflict of interest in different legal systems, and some strident views about how to deal with conflicts. They cannot be faulted, too, for trying to find middle-ground in the presence of differences of opinion among them, particularly in the face of differences in arbitration law in their respective national jurisdictions.²

Nor should the Working Group and Guidelines be held responsible for a pervasive problem that has plague modern international commercial arbitration from the outset. Parties to international commercial arbitration have taken advantage of the Guidelines in part because of the vexing problem of overly litigious counsel that international commercial arbitrators have faced since long before the Guidelines came into effect. After all, counsel in arbitrations in common law jurisdictions at least tend to be lawyers who regularly engage in procedural challenges before courts of law. While they only seldom direct such procedural challenges against the impartiality or independence of courts, they are far more likely to challenge arbitrators whose jurisdiction resides primarily in party consent, not in the strict rules of evidence and procedure of national courts. Moreover, international commercial arbitrators generally, including professional arbitrator from Europe, are certain to have encountered such practices long before the IBA began this important initiative.³

It was certainly not the intention of the drafters of the IBA Guidelines to provide parties with an open-ended opportunity to challenge international commercial arbitrators.⁴ One goal was to provide greater clarity and predictability in the law of international commercial arbitration. Another goal was to assist courts, arbitrators,

Otto de Witt Wijnen, the Netherlands (Chair). The Working Group was assisted by Neomi Rao and Steven Friel.

² Even those who criticise the IBA Guidelines do so on tempered grounds. For example, Markham Ball states, at the outset, "In fact, a review of the Guidelines suggests that some of the problems that the Guidelines address may be essentially insoluble." See Markham Ball, *Probity deconstructed : how helpful, really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration* 21(3) *Arbitration International* 323, 323-341 (2005); H.L.J. Roelvink, *IBA Guidelines on Conflicts of Arbitration verdienen een ruime toepassing*, 3 *Tijdschrift voor arbitrage*, 79-86 (2005). See too See generally, Xavier Dieux, *Observations sur le régime des conflits d'intérêts au sein du conseil d'administration de la société anonyme*, in *Legal Tracks* 153-167 (Brussels, Bruylant (2003)); Xavier Dieux, *Observations complémentaires sur le régime des conflits d'intérêts au sein du conseil d'administration de la société anonyme*, in *Legal Tracks* 169-185 (Brussels, Bruylant).

³ On the development of the law governing conflicts of interest in international commercial arbitration prior to the Guidelines, see W.M. Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, (1989) 38 *ICLQ* 26; G. Eastwood, *A Real Danger of Confusion? The English Law relating to Bias in Arbitrators*, 17 *Arb. Int.* 287 (2001); A.M. Calvo, *The Challenge of ICC Arbitrator*, 15 *J Int. Arb.* 63 (1998); Gearing, *A Judge in his Own Cause?* 3 *Int. ALR* 46 (2000).

⁴ The "IBA Guidelines on Conflicts of Interest in International Arbitration" can be found at http://www.voldgiftsforeningen.dk/Files/Filer/Final_Text_of_Guidelines.pdf. See too Philip Landolt, "The IBA Guidelines on Conflicts of Interest in International Arbitration: an Overview" 22(5) *Journal of International Arbitration* 409-418 (2005). The Guidelines are incorporated into leading arbitration texts. See e.g., Tibor Varady, John J. Barcelo, Arthur T., von Mehren, *International Commercial Arbitration*, (3rd Edition) (USA, West Publ., 2005); Matti S. Kurkela, *Due Process in International Commercial Arbitration*, s. 319(18) (Oceana Publ., August 2005).

parties and others associated with arbitration in determining the principles and practice governing the impartiality and independence of arbitrators. A further goal was to build a stable platform upon which to unify disparate local, national, regional and international practice in regard to the conflict of interest of arbitrators.⁵

This essay explores the challenge, expressed by V.V. Veeder, that the guidelines governing conflict of interest is encouraging the “malign practice” of new tactical challenges to arbitrators. It also reflects on the unprecedented decision by the LCIA Court and Board to publish abstracts of the decisions in which arbitrators are challenged. Part I frames the issues explored in the article. Part II reflects on some false truisms that have traditionally been imputed to conflicts of interest in international commercial arbitration. Part III discusses the key attributes of conflict of interest, independence and impartiality. Part IV explores the IBA Guidelines. Part V concludes with some suggestions.

I. FRAMING THE ISSUES

It is not surprising that the IBA drafters received international recognition, including a prestigious award for their work.⁶ In the view of this author, and considering the thorny path they had to follow, they certainly deserved it. What they faced full square was the realization that international commercial arbitration has become increasingly more complex; it is dominated more than ever by lawyers; and just as it is substantively more complex, so too it has become inundated with procedural issues. Against such a background, it is understandable that concerns over conflicts of interest, along with arbitral neutrality, have grown, along with the need to assure users – and national legal systems – that arbitration still works, properly, efficiently and responsibly in the international community.

Nevertheless, no drafting team can hope to serve as all things to all people: and the IBA guidelines are surely no exception. In attempting to outline a plausible approach towards recognising, addressing and resolving conflicts of interest, their Guidelines unavoidably opened the door to both opportunity and opportunism. They provided an opportunity to unify a disparate body of law into a coherent whole in the interests of a viable international Law Merchant.⁷ They also served the interests of opportunistic parties who have used the guidelines to challenge arbitrators, delay and derail proceedings. The real challenge is for international commercial arbitration to ensure

⁵ For the illusive search for clarity and predictability in resolving conflicts of interest in commercial arbitration, see Wijnen Witt & L.O. de Otto, “Two Anecdotes about Robert Briner and some Thoughts on Conflicts of Interest in the Light of Transparency and Predictability”, in Global Reflections on International Law, Commerce and Dispute Resolution: Liber amicorum in Honour of Robert Briner (Ed. Gerald Aksen et al.), (International Chamber of Commerce (ICC), 2005).

⁶ At the 22nd Annual Awards Program of the CPR Institute for Dispute Resolution, the International Bar Association (IBA) was presented with the distinguished arbitration body’s 2004 Outstanding Practical Achievement Award.

⁷ On the international law merchant, see Leon E. Trakman, The Law Merchant: The Evolution of Commercial Law the Law Merchant (USA, Fred B. Rothmans, 1983).

that the opportunities the Guidelines provide to stabilize arbitration outweigh the opportunism with which the Guidelines sometimes are used to destabilize it.⁸

For these reasons, it is important that parties to arbitration and arbitrators fully understand the nature and effect of a conflict of interest. Arbitrators need to understand conflicts in deciding whether to decline to accept appointment as arbitrators and as an ongoing obligation over the course of each arbitration.⁹ They also need to understand when and what to disclose in the event of a conflict of interest and how to manage a conflict once they identify it, or alternatively, it is raised by a party. Arbitrators also need to understand conflicts as they relate to other participants in arbitrations, including but not limited to the secretary. Parties to arbitration, in turn, need to understand the nature and effect of a conflict of interest in identifying when an arbitrator is in conflict, and how to redress that conflict effectively.¹⁰

Certainly, there is scope for abuse under the Guidelines. But in considering the extent of variation in the practice of disclosure regionally and in different legal systems prior to the Working Group, the Guidelines have provided much needed clarity, even though they sometimes have reached less than ideal middle ground. If one considers the degree to which the reputation of international commercial arbitration depends upon the self-confidence of those who serve it, as arbitrators, witnesses, secretaries and parties themselves, carefully crafted guidelines in thorny areas of arbitration practice are valuable.

At the same time, it is important to recognise that, even though the Guidelines purport to be advisory and to codify international and domestic legal practice on conflicts of interest, they are subtly preemptory in key respects. For one thing, the Working Group clearly argued that its goal was to define “best practice”, and at the same time,

⁸ It should also be noted that the IBA Guidelines were developed at a time of increasing consciousness of the problems associated with conflicts of interest in commercial arbitration generally. For example, the IBA Guidelines followed by several months the Code of Ethics for Arbitrators in Commercial Disputes developed by the American Bar Association and the American Arbitration Association, which were adopted 9 February 2004. New rules governing conflicts of interest had also been enacted on 1 July 2002 in California. *See* Cal. Rules of Court, Division VI, adopted pursuant to Cat. Code of Civil Procedure, s. 1281.85. Similar developments had occurred in regard to the Uncitral Model Law. *See infra* note 8.

⁹ Arbitrators will find some assistance in model arbitral rules, such as the Uncitral Model Law on International Commercial Arbitration [hereinafter UNCITRAL Model Law] Article 12 - [Grounds for challenge] “(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.” <http://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen204.html> The trouble is that arbitrators who review these provisions will appreciate the threshold issue, that they should be able to both identify and disclose those circumstances in which “justifiable doubts [arise] as to his impartiality or independence” but fail to advise except in general terms when such “doubts” may be justified in fact, or how they should be disclosed. *See too* UNCITRAL Arbitration Rules, Article 10(1), London Court of International Arbitration, [hereinafter LCIA] RCIA Rules, article 5.3

¹⁰ For an excellent article on arbitral independence and impartiality primarily in the UK, *see* Alam, Naser, *Independence and Impartiality in International Arbitration – an assessment*, Transnational Dispute Management 1(2) (2004).

it acknowledged that national laws did not always adopt “best practice.” Similarly, it proposed guidelines that “could be accepted by different legal cultures” rather than “were” accepted by those cultures. The result is therefore more peremptory than the Guidelines formally might suggest.¹¹

II. ACCURATE AND SOME FALSE “TRUISMS”

A frequently posed view is that, if in doubt, an arbitrator should disclose the existence of a conflict of interest and be cognizant of that ongoing duty throughout the arbitration. This is a realistic response, so long as the conflict is identified, understood and adequately and properly conveyed by the arbitrator to the parties.

The second view, less popular perhaps, is that, when a party raises a conflict before or during an arbitration proceeding, the rule of thumb is for the arbitrator to step aside, even if that arbitrator does not believe the conflict is sustainable. The perceived risks in not declining the appointment or stepping down, is fear that the proceedings might be disrupted, a challenge might follow, and the reputation of the arbitrator might be impaired. The result is a very conservative approach towards conflicts of interests. As the Working Group noted in a preliminary Draft Joint Report, “arbitration practice is more and more influenced by very restrictive tendencies and that overly strict rules may limit the availability of qualified arbitrators.”¹²

There is no easy response to this conservative view; how conservative an arbitrator ought to be in fact will depend on the circumstances surrounding the case, the background and experience of the arbitrator, as well as that of the parties. What can be said is that an arbitrator should not be intimidated to resign by the allegation of a conflict, or even by the proffering of evidence of one. A decision not to accept an appointment, or to resign after appointment, should be well considered and informed; it should also be guided by fathomable standards and rules of disclosure. It is in this regard that a sound understanding of guidelines governing conflicts of interest is most useful.

A cynical third view is that, when in doubt about winning an arbitration, a party should raise a conflict of interest, whether one exists or not, in order to delay or otherwise destabilize the arbitration. It is this cynical view that perhaps lies at the core of criticism of the IBA Guidelines, not any inherent insufficiency in the Guidelines themselves. The fear that the IBA Guidelines may be used to create loopholes through which parties undermine arbitration proceeding is a concern that can be attributed to any guideline. In issue is the need to appreciate, not only when

¹¹ For example, the Working Group's Background Report stipulated that “the Guidelines are both descriptive and normative”. See Background, para. 1.3.4. The Background Report added that in most of the jurisdictions it studied, “there are no specific mandatory rules with regard to conflicts ... Even where such rules exist, or have been developed in case law, the Guidelines are not, in general, inconsistent with such rules, in the opinion of the Working Group”, *ibid.* para. 1.1. One could conclude that what the Working Group intended was merely that the Guidelines were directed at codifying the “best practice” among non-peremptory legal systems. The alternative view is that the drafters sought to fill a gap in international practice by seeking to arrive at a code of practice that would be adopted by national legal systems as *the* new norm. Insofar as the Guidelines are being considered and adopted in different jurisdictions, the result is to lend credence to this second view.

¹² Draft Joint Report, para. 1.1.

and how an arbitrator should disclose a conflict, but also when and how one or both parties should be able to invoke the Guidelines, among other instruments, to make a case for a conflict, spuriously or otherwise. In issue is also how arbitrators and courts should deal with such issues responsibly and efficiently.¹³

III. INDEPENDENCE AND IMPARTIALITY

A conflict of interest in general terms constitutes a fact or circumstances in which a party who is in the position of deciding a case has a material interest which is either in actual conflict with that party making or participating in making that decision, or can be reasonably so inferred in the circumstances. That interest could arise out of a relationship in which that arbitrator or other party is involved and that goes to the arbitrator's independence; or it can arise by virtue of the behaviour or other course of conduct involving that arbitrator and that relate to that arbitrator's impartiality.¹⁴

A great deal has been written about these two key components of conflict of interest: independence and impartiality, including whether they amount to the same thing.¹⁵ The answer is that they do not. They clearly overlap, but they are distinguishable in important respects.¹⁶

i. Independence

Independence ordinarily relates to relationships, for example, whether an arbitrator is professionally or personally related to one of the parties, or has a familial or business connection to or with that party. A professional relationship could include a relationship in which the arbitrator, or partner,¹⁷ has acted or is acting as counsel, an employee,¹⁸ an advisor or as a consultant on behalf of one party.¹⁹ A business

¹³ Some rules, notably the ICC, provide succinct instructions on independence by which arbitrator are required to declare whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether it be financial, professional, social or otherwise and whether the nature of such relationship is such that disclosure is required. See Article 2.7 of ICC Rules of Arbitration International Chamber of Commerce [hereinafter ICC].

¹⁴ Whether an arbitrator is deemed to be partial depends on the nature and perceived gravity of the conduct in the issue. On the significance of allegations of partiality by an arbitrator in the past, see *Tracom SA v. Gibbs Nathaniel (Canada) LTD and another* [1985] 1 Lloyd's Rep 586.

¹⁵ Of note, prominent organizations like the ICC provide for the independence of arbitrators, but not their impartiality. See Article 11 of the ICC Rules of Arbitration. However, it is apparent that article 11, construed broadly, would encompass at least some attributes of impartiality, in providing that arbitrators act "fairly and impartially". ICC Rules, Article 15(2).

¹⁶ A. Redfern, and M. Hunter, *Law and Practice of International Commercial Arbitration* 214 (3rd ed.) (London, UK: Sweet & Maxwell, 1999). On the relationship between independence and impartiality, see also G. Eastwood, *A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators*, *supra* note 3 at page 294.

¹⁷ The fact that a fellow barrister in the same chambers is associated with one party may but need to constitute a bias in favour of that party. *Laker Airways Inc. v. FLS Aerospace LTD*. [2000] 1 WLR 113

¹⁸ Fatal employer-employee relationships sometimes arise when arbitrators have previously worked for governments and international organizations that are parties to an arbitration. The results are not always easy to predict, although one is comforted by the fact that no two arbitrations are alike. For example, the arbitration did not proceed in the *Buraimi Oasis* arbitration when that one arbitrator had previously served as a Saudi Arabian Government official and was in charge of arbitration there. In contrast, an arbitrator who had previously advised the US government on issues related to the

relationship could include a business venture in which the arbitrator or a partner holds an executive or non-executive position or is a party to a business transaction, such as a property or stock investment, with one party. 20 A familial relationship could arise when an arbitrator, partner or business associate is related to one of the parties, as a spouse, parent, aunt, or cousin. A personal relationship could include, for example, a long standing friendship between the arbitrator and a party, or a solitary incident when it is discovered that the arbitrator shared a room with the counsel for one party.²¹

Independence also depends on the degree of such relationships, such as the degree of separation between the arbitrator and a party to an arbitration. An arbitrator may be a party to a business relationship with a party to an arbitration proceeding, or a law firm partner in a different office may be such a party. The spouse of an arbitrator may work for a party to an arbitration or that person may be a distant relative. The degree of a relationship may also vary with time, space and place. For example, an arbitrator may have an investment with a party to the arbitration in which the arbitrator is in direct control, or an investment which is held by a blind trust. The arbitrator or partner may have an historical or an ongoing relationship with a party to an arbitration and so on.²²

The measure of an arbitrator's independence is sometimes conceived objectively: would a reasonable person conclude, in light of the relationship in issue, that the arbitrator is independent.²³ One can debate the nature of that objective test, including the extent to which a reasonable person is informed about the arbitration, and whether someone called upon to reach such a determination might superimpose his or her sense of reasonableness for that of the reasonable person. However, this is an age old debate that offers no new insights except to observe that the reasonable person is amorphous, not a fixed and constant being.

ii. Impartiality

Impartiality relates to a state of mind, sometimes evidenced through conduct demonstrating that state of mind. An arbitrator is partial towards one party if he displays preference for, or partiality towards one party or against another, or whether a third person reasonably apprehends such partiality. Such partiality goes to whether it is reasonable to believe that the arbitrator will favour one party over the other for reasons that are unrelated to a reasoned decision on the merits of the case. These

arbitration in question was unsuccessfully challenged. *See further* Van den Berg, A., *Justifiable Doubts as to the Arbitrator's Impartiality or Independence*, 10 LJIL 509 (1997).

¹⁹ That an arbitrator previously served as a consultant for one party is fatal unless previously and fully disclosed to the parties. *See Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968)

²⁰ An arbitrator who fails to disclose a direct and significant personal benefit ordinarily will be disqualified. *See AT&T Corporation and Lucent Technologies, Inc. v. Saudi Cable Company* 1 All ER (D)657. *But cf. Cross Properties, Inc. v. Gimbel Bros., Inc.* (1962) 15 App Div 2d 913.

²¹ On the imputed partiality that arises when the chair of a panel shares a room with claimant's counsel, *see* Murray, J., A. Rau and E. Sherman, *Process of Dispute Resolution: The Role of Lawyers* 705 (2nd ed.) (Westbury, N.Y.: Foundation Press, 1996). The fact that the arbitrator conferred in private with a party to an arbitration, in contrast, may but need not be fatal. *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* (1993) 10 F. 3d 753 (11th Cir.)

²² *See further* text *infra* Section IV, subsection iii.

²³ On the test adopted by the Guidelines, *see infra* IV. The IBA Guidelines, especially subsections. ii and iii.

unrelated factors could include a relationship, such as the influence that a professional, business, or personal relationship might give rise to the reasonable belief that the arbitrator is partial. It could also relate to the arbitrator's conduct in the absence of such a relationship, such as a statement during the course of an arbitration proceeding that persons of a particular nationality are liars, or that a member of an ethnic minority is in some way inferior.²⁴

The test applicable to impartiality is subjective in the sense that it goes to the actual state of mind and where applicable, ensuing conduct of the arbitrator. However, it is objective in the need to determine by some external measure whether a reasonable person would consider that state of mind as constituting partiality, or would have a reasonable apprehension of it being so.²⁵

Partiality is sometimes associated with bias; while the reasonable anticipation of partiality by an arbitrator is identified with the reasonable apprehension of bias.²⁶

There is clearly an overlap between arbitral independence and impartiality. For example, a great deal of debate takes place in the United States as to whether and when a party appointed arbitrator lacks independence on account of a relationship between the arbitrator and the party making the appointment, and being partial on account of that relationship.²⁷ However, the relationship associated with arbitral independence may be immaterial, while a lack of partiality may be material. For example, a party appointed arbitrator may be unrelated to the appointee, such as when the appointee chooses him because he works in the same industry but for a different company to the appointee; but the arbitrator may still display conduct that demonstrates bias or reasonable apprehension of bias in favour of the appointing party. The prevailing issue in determining partiality is to establish the extent to which the arbitrator acts as an advocate for the party appointing him, whether s/he purports to negotiate on behalf of that party,²⁸ or whether there is a reasonable apprehension that he may do so.

At the same time, it is apparent that the extent of independence of an arbitrator, particularly in party appointed cases, may vary according to the type of arbitration in issue. For example, there is a high level of tolerance for arbitrators advising their

²⁴ For example, the statement that "Portuguese people were liars" served as grounds to remove an arbitrator in *Re The Owners of the Steamship "Catalina" and Others and The Owners of the Motor Vessel "Norma"* (1938) 61 Ll.L.Rep. 360.

²⁵ See further text *infra* Section IV, subsection iii.

²⁶ On bias, see especially Redfern, A. and M. Hunter *supra* note 16 at p.212. On "bias and prejudice" see too Eastwood, G., *A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators*, *supra* note 3 at page 294.

²⁷ On attempts to regulate party appointed arbitration, see e.g. the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, Canon VII in 10 Y.B. Comm. Arb. 131 (1985). On conflicts of interest in commercial arbitration in the United States generally, see Axel H, Baum, *Conflicts of Interests in International Commercial Arbitrations : Some Aspects of United States Practice*, in Ed. Pierre A. Karrer, *Conflicts of Interests in International Commercial Arbitration: Some Aspects of United States Practice*, (Association suisse de l'arbitrage: 2001).

²⁸ The key issue is to determine whether the arbitrator is a "negotiating advocate" attempting to get the best deal for a client. See Lord Justice Scrutton (as he was then) in *W. Naumann v. Edward Nathan & Co. LTD.* 37 Lloyd's L.L.R. 249 (1930). See further Alan S. R., *On integrity in Private Judging*, 14 *Arbitration International*, 115, at p. 123 (1998).

appointees in some trades that would be considered as being in conflict in others.²⁹ However, such differences sometimes lead to conflicts over the limits of such difference, such as in determining the extent to which a party appointed arbitrator ought to be entitled to advise his appointee as to the proceedings of the arbitration.³⁰

IV. THE IBA GUIDELINES

The International Bar Association's Guidelines on Conflicts of Interest was the product of wide consultation, intensive meetings and debate, and several drafts before being finalized. The first Draft Report dated 7 and 15 October 2002 was presented at the IBA Conference in Durban, South Africa, in October 2002. The Second Draft was discussed at an Arbitration and ADR Committee meeting at the IBA Conference in San Francisco in September 2003. The Guidelines were finalized in January 2004 as the "IBA Guidelines on Conflicts of Interest in International Arbitration."

In their two years of work leading up to the Guidelines, the Working Group consulted with leading international arbitration organisations. Members of the Group engaged in a careful scrutiny of their national legal systems, and continuous debate took place over the selection of credible, efficient and fair guidance in resolving difficult conflict issues impacting on the parties, arbitrators, international organisations, states and their courts alike.

The Guidelines were not carved in stone. As their name implies, they were intended to provide guidance to arbitrators, parties and national courts in identifying, responding to and resolving conflicts by both codifying existing arbitral practice and filling gaps in the law to arrive at the most suitable international arbitral practice. In recognising that international commercial arbitration must defer to an applicable law, they provided additional information and further assistance in regard to how to resolve issues of independence and impartiality in a range of illustrative scenarios, or "situations" contained in a published list.³¹

The commentary below identifies many of these developments, explaining and commenting on them and on occasions, raising questions about and disagreeing with them. However, in most instances of disagreement, the issue behind the disagreement arose in some manner during the course of developing the Guidelines themselves: the Working Group recognised the issues and made choices in resolving them. The fact that some might lead to disagreement is understandable in the field that is unavoidable marked with difference. That the Guidelines might encourage challenges was perhaps less clearly appreciated by the Working Group; but the jury remains out on whether

²⁹ In the commodity trade, for example, the practice appears to be more tolerant of consultation between an arbitrator and its appointee. See Murray, L. Smith, *Impartiality of the Party – Appointed Arbitrator*, 6 *Arbitration International*, 320 at p. 322 (1990). See generally Craig, Park, Paulsson, *International Chamber of Commerce Arbitration* para 2.04, pp 209-212 (2nd ed.) (Paris: Oceana & ICC Publications, 1990).

³⁰ See e.g. *Tracom SA v. Gibbs Nathaniel (Canada) LTD and another* [1985] 1 Lloyd's Rep 586. The fact that an arbitrator assisted a party in making its case is not sufficient to vacate the award if it can be shown that the arbitrator acted in good faith and with integrity and fairness. See *Sunkist Soft Drinks v. Sunkist Growers*, 10 F. 3d 753, 11th Cir. 1993.

³¹ See further text *infra*, subsection IV.

the perceived existence of a high volume of challenges is, in and of itself, evidence that the Guidelines have failed in their mission.

i. Consultative processes

It is important to recognise at the outset that the Working Group sought to promote the integrity, reputation and efficiency of international arbitration and by any measure, went a far way towards doing so. The Guidelines and the lists in particular were clearly consultative, in attempting to weigh the often competing interests of parties, counsel, arbitrators, arbitration institutions and national legal systems.³² Nor did the Working Group attempt to foist the Guidelines on the international community as the last word on the subject. Rather, it acknowledged that the Guidelines are suppletive; they do not displace mandatory rules of national law;³³ and they recognise differences in legal cultures.³⁴ At the same time, the Guideline identified the absence of mandatory rules governing conflicts of interest across multiple jurisdictions and that this factor, quite properly, reinforced its important mission.³⁵ While it perhaps overstated the assertion that national legal systems lacked variation in their mandatory rules, for the most part, its assertion is true.³⁶

³² The Working Group also consulted with different arbitration organizations, arbitrators and corporate general counsel, as well as with the ICC Germany/ DIS, ASA, the LCIA, the Arbitration Institute of the Stockholm Chamber of Commerce, ACICA, CEPINA and CPR, among others.

³³ In fact, the Guidelines make it very clear that they are not intended to supplant national law. See IBA Guidelines, Introduction, para. 6 “These Guidelines are not legal provisions and do not override any applicable national law or arbitral rule chosen by the parties.”

³⁴ See Guidelines, Introduction. See too Explanation to General Standard 3(a), on the duties of arbitrators to disclose conflicts: “In determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, *including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.*” [Emphasis added.]

³⁵ The Working Group received 13 national reports members of the Working Group, including: Australia, Belgium, Canada, England, France, Germany, Mexico, the Netherlands, New Zealand, Singapore, Sweden, Switzerland and the United States. The national reports responded to the following questions: (1) Standard of Bias: How do the jurisdictions define the standard of bias? Is Article 12 of the UNCITRAL Model Law applicable? If an ‘appearance’ test or something similar is applied, is there any rule which sets out whether this should be applied objectively (reasonable third party) or subjectively (specific party at stake)? Is the standard the same for judges and arbitrators; chairpersons and co-arbitrators? (2) Disclosure: Is there a standard of disclosure and, if so, what is it? Is there a rule that in case of doubt an arbitrator should disclose? Is there a continuing duty to disclose? (3) Members of the IBA Rules of Ethics Working Group were asked to compare the existing IBA Rules of Ethics with the standards and practice in their own jurisdictions. (4) Policy on bias: Members were asked to provide their own definition of the policy of bias and disclosure. (5) Members were requested to prepare a list of situations, in their experience, which ultimately constituted the basis for the Red, Orange and Green Lists. (6) European members were asked to include a discussion of Article 6 of the European Convention on Human Rights in their national reports. (7) Waiver of conflicts: In an Additional Report, the Working Group asked members to identify situations in which the parties could waive a conflict of interest following disclosure.

³⁶ The commentators for the Working Group, for example, assert that “Nevertheless, on the basis of its research in a number of important jurisdictions, the Working Group has concluded that there are no specific mandatory rules with regard to conflicts in most if not all of these jurisdictions.” See Otto L O de Witt Wijnen, Nathalie Voser and Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5(3) *Business Law International* September 433, 435 (2004). However, it is clear that courts in different jurisdictions vary over the most basic issues, such as the existence of a uniform standard to apply to chairs, non-neutral and neutral arbitrators. See *supra* note 11. While these differences may not be mandatory, they are differences all the same.

ii. The UNCITRAL Model Law

The most widely regarded standard of disclosure applicable to international commercial arbitration is embodied in the UNCITRAL Model Law. Article 12(1) states:

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

A number of jurisdictions that follow the Model Law adopt a standard of continuing disclosure.³⁷ But differences arise regarding the extent to which the standard of measurement is objective or subjective. An objective standard is the norm in Europe. Courts in the United States also adopt an objective standard in seeking to identify “an appearance of bias.”³⁸ However, French courts usually adopt a subjective standard of disclosure,³⁹ while English courts do so as well in seeking to identify whether the failure to disclose “gives rise to a real danger of bias”.⁴⁰ The problem with the subjective test is uncertainty: it can be based on the arbitrators’ or the parties’ perspective. The further problem is that, if it is based on the parties’ perspective, it may lead to delays or disruption as parties demand excessive disclosure from an arbitrator or arbitrators. Cognizant of these issues, the Guidelines adopt a subjective standard of disclosure “in the eyes of the parties.”⁴¹ However, the Guidelines provide for some situations in which disqualification will not arise under the subjective test and where no disclosure is required regardless of the parties’

³⁷ For example, Australia, Canada, Mexico, the Netherlands, New Zealand and Singapore have adopted the Model Law by statute. Germany has adopted a similar standard, but with the omission of the word “justifiable.” See Anne K. Hoffmann, *Duty of Disclosure and Challenge of Arbitrators: the Standard Applicable under the New IBA Guidelines on Conflicts of Interests and the German Approach*, 21(3) *Arbitration International*; vol. 21(3), 427-436 (2005). Switzerland also has a similar rule, but without the use of the word “impartiality”. See Swiss Private International Law Act, art. 180(1)(c); Pierre-Yves Tschanz, *Arbitrators' Conflicts of Interests : Switzerland in Conflicts of Interests in International Commercial Arbitration* (ed. by Pierre A. Karrer) (Association suisse de l'arbitrage, 2001)

³⁸ On conflicts of interest under the ICC prior to the Guidelines, see Anne Marie Whitesell, *Conflicts of Interests from the ICC Point of View in Conflicts of Interests in International Commercial Arbitration* (Ed. Pierre A. Karrer) (Association suisse de l'arbitrage, 2001).

³⁹ *Ibid.*

⁴⁰ On the approach towards conflicts of interest in arbitration from an English perspective, see Arthur Marriott, *Conflicts of Interests in Conflicts of Interests in International Commercial Arbitration* (ed: Pierre A. Karrer) (Association suisse de l'arbitrage, 2001). See too English Arbitration Act, 1996, c. 23, s. 24(1)(a).

⁴¹ See General Standard 3. The Explanation to General Standard 3(a) states: “ Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure”. In adopting a subjective test, the Working Group adopted the approach in article 7(II) of the ICC Rules of Arbitration: “Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence *in the eyes of the parties*”. [Emphasis added].

perspective.⁴² The compromise does introduce uncertainty in determining to what extent an arbitrator is to disclose information based on objective criteria, as distinct from “the eyes of the parties.” It also creates difficulty for a court to reach a determination *ex post facto* as to whether a disclosure by an arbitrator ought to have satisfied a subjective or objective test. Further uncertainty arises as to whether courts in jurisdictions in which an objective approach is adopted will comfortably shift their standard in conformity to the Guidelines. At the same time, the Working Group had to make a choice between competing approaches, none of which is ideal; and they were able to make that choice.

Requiring that arbitrators make disclosures in the case of doubt raises conflicting issues: it helps to protect arbitrators from challenges, but it also facilitates over-disclosure and can give rise to yet further challenges. The Guidelines steer a middle course. Disclosure should be made in cases of doubt, but provision is made for recognition of the need to avoid over-disclosure.⁴³ The result may be the best and the worst of all worlds: protection for arbitrators from challenges and an opportunity for parties to challenge arbitrators on account of additional disclosure. The ideal solution is for an arbitrator to have the “situation sense” to appreciate the importance of disclosure as a principle as well as in the particular context in which to make a disclosure in light of that principle.⁴⁴

The Guidelines also provide that, in evaluating whether or not a conflict of interest exists, it should not make any difference at what the stage of the arbitral proceedings the conflict arises.⁴⁵ In effect, the duty of disclosure is continuing.⁴⁶ The rationale for this logic is that the existence of the conflict, not the time it came to light, is determinative. The problem, with this reasoning is that, for practical considerations, a different view of a conflict of interest may be warranted, depending on the stage of proceeding.⁴⁷ It might have been preferable for the Guidelines to have provided for such flexibility, although, in their being only guidelines, they implicitly do so.

⁴² The Explanation to General Standard 3(a) continues: “...However, the Working Group believes that this principle [applying the subjective standard] should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties’ perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required.”

⁴³ IBA Guidelines, Explanation to General Standard 3(c)

⁴⁴ Interestingly, the International Court of Arbitration, Rules of Arbitration require that arbitrators provide a signed statement before appointment or confirmation that they are independent and provide in writing “...any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence *in the eyes of the parties.*”, See article 7.2.

⁴⁵ This is implicit in implicit in General Standard 2(a) and (b).

⁴⁶ The Guidelines do not appear to apply during any challenge to the award. However, they may subsequently apply “[i]f, after setting aside or other proceedings, the dispute is referred back to the same arbitrator.” Guidelines, General Standard 1, Explanation.

⁴⁷ Interestingly, the Second Draft provided that an arbitrator who refuses to continue to act after the arbitral procedure has commenced must carefully consider the impact that this will have on the proceedings. This was removed from the final draft because of concerns that such a provision might raise claims of liability against an arbitrator who withdraws after an arbitration has commenced. However, the Guidelines do emphasise that an arbitrator must carefully ascertain conflicts at the outset so as not to disrupt proceedings once the arbitration has commenced, even though such disruption may be unavoidable once a conflict is identified. See Otto L O de Witt Wijnen, Nathalie Voser and Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5(3) Business Law International September 433, 443 (2004).

iii. Defining a Conflict of Interest: Impartiality and Independence

The Guidelines provide a General Definition of Impartiality and Independence. Article 2.1 states: “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.”⁴⁸

It is perhaps more logical for independence to precede impartiality. The Working Group recognised this, but followed the order of the Model Law.

The Guidelines also follow the Model Law in setting an objective standard for the disqualification of an arbitrator on grounds of partiality or lack of independence. An arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist that, from a reasonable person’s point of view having knowledge of the relevant facts, give rise to “justifiable doubts”⁴⁹ as to the arbitrator’s impartiality or independence.⁵⁰ If an arbitrator chooses to accept or to continue with an appointment once such bias has been adduced, disqualification is appropriate and a challenge to the appointment should succeed. This is a sensible standard. Nevertheless, a “justifiable doubts” standard is inevitably variable. The requirement that the doubt must be “justifiable” raises the threshold question of the dividing line between justifiable and unjustifiable doubt, including the applicable criteria; it is also not entirely clear whether a “justifiable doubt” is distinguishable from a “reasonable doubt.”⁵¹ It is also likely that, as a matter of practice, courts called upon to decide whether an arbitrator ought to have been disqualified are likely to use a hybrid objective-subjective test, determining what is reasonable but in relation to the particular parties and arbitrator in question.⁵² Whether a purely objective or a hybrid objective-subjective test is used, it is apparent that the decision-maker *will* ultimately be called upon to impute a state of mind to the arbitrator after the fact.

iv. The Lists

Perhaps the most useful, and also one of the most troubling aspects of the IBA Guidelines is its categorisation of “situations” into which arbitral impartiality and

⁴⁸ The Working Group decided to accept the wording ‘impartiality or independence’ as set out in Article 12 of the UNCITRAL Model Law to avoid confusion arising from a new rule. The author agrees with those commentators who suggested that independence logically precedes impartiality. However, the Working Group decided to follow the order of the Model Law. Of note, seven jurisdictions, Australia, Canada, Germany, Mexico, the Netherlands, New Zealand and Singapore, adopted this language in full.

⁴⁹ General Standard 2(c) provides: “Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by facts other than the merits of the case as presented by the parties in reaching his or her decision.”

⁵⁰ General Standard 2(b).

⁵¹ It would seem from the Guidelines that “justifiable” doubt is comparable to “reasonable” doubt. See General Standard 2(c) which specifies: “Doubts are justifiable if a *reasonable and informed* third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by facts other than the merits of the case as presented by the parties in reaching his or her decision.”

⁵² For the use of such an objective-subject test before a German court, *see* OLG Naumburg, Decision of 19 December 2001, 10 SchH 3/01, discussed in Anne K. Hoffman, *Duty of Disclosure and Challenge of Arbitrators* *supra* note 37 at III. German Law.

independence are divided. Based on a variety of cases in multiple jurisdictions, the Working Group broke up different factual situations giving rise to concerns about conflict of interest into three lists: Red, Orange and Green. The Red List consisted of situations which give rise to *per se* doubt as to an arbitrator's impartiality and independence. This list is again divided into situations that cannot be waived by the parties⁵³ and those that can be so waived.⁵⁴ The Orange List consists of specific situations in which the parties might reasonably have doubts about the arbitrator's impartiality or independence.⁵⁵ The arbitrator has a duty of disclosure in such cases; however, the parties can waive, or be deemed to waive, that duty.⁵⁶ The Green List consists of situations in which there is no appearance of partiality or a lack of independence and no conflict of interest.⁵⁷ It is noteworthy that the Working Group explicitly rejects the subjective "in the eyes of the parties" test in favour of an objective test in devising its Green List.⁵⁸

The benefit of the lists is that they provide a cross-section of illustrations based on past practice in which arbitrators and parties can identify situations of conflict of interest, as well as the perceived significance of that conflict, and in the case of the red list, how parties can cure conflicts through consent.⁵⁹ Whatever tests one

⁵³ The non-waivable list includes only four items. These represent the most serious types of conflict, such as when there is a relational identity between the arbitrator and a party, when the arbitrator is a manager for one party, or when the arbitrator has a "significant" interest in that party.

⁵⁴ The non-waivable list relates to situations in which an arbitrator was previously involved in a dispute, or close family friend of the arbitrator has a financial interest in the dispute, or the arbitrator has a relationship with a party or a party's counsel. See Guidelines page 16-18. In preparing the list of non-waivable conflicts, the Working Group stated that it had adopted the principle that "no one is allowed to be his or her own judge; i.e., there cannot be identity between an arbitrator and a party". See Guideline page 6. In determining those situations in which a conflict was waivable, the Working Group sought to weigh the interests of party autonomy with the need to ensure the independence of the institution of arbitration.

⁵⁵ There are 23 such situations listed in which the arbitrator has a duty of disclosure. They include, among others: serving as counsel "within the past three years" by an arbitrator or his or her law firm to a party or one of its affiliates, current service by an arbitrator's law firm to a party or affiliate when the arbitrator is not involved; several direct or indirect relationships between arbitrators or between an arbitrator and counsel in an arbitration; situations in which an arbitrator has a "material shareholding" in a party or its affiliate; and situations in which an arbitrator takes a public position on a matter that is in dispute. Guidelines at pages 18-22.

⁵⁶ The waiver need not be explicit: failure to make a timely objection can constitute waiver. However, the fact that one of these situations may exist and may not be waived "should not automatically result in the disqualification of the arbitrator" Guidelines, page 14.

⁵⁷ The Green List consists of "a non-exhaustive enumeration of specific situations... where no appearance of, and no actual, conflict of interests exists from the relevant objective point of view" and in respect of which the arbitrator "has no duty to disclose" such situations. There are eight situations mentioned in the Green List. See Guidelines, page 15. Included in the list, for example, are situations in which an arbitrator belongs to the same club or professional association as another arbitrator, owns "an insignificant amount of shares" in a party or its affiliate, or has published an article or given a talk on an issue that arises in the arbitration, so long that discussion does not include the case to be arbitrated. See Guidelines, pages 22-23.

⁵⁸ *Ibid*, page 15.

⁵⁹ The Working Group established a taskforce to evaluate how the Green and Orange Lists should be defined. The taskforce sought to weigh the need for arbitrators being considered for appointment to make full and frank disclosure and the concern that any such disclosure could result in disqualification. The taskforce decided that the Orange List should constitute a 'disclosure' list, but that any disclosure would not automatically disqualify the prospective arbitrator. This avoided the inference that disclosure gave rise to a rebuttable presumption of disqualification. The purpose of disclosure, then, was for the arbitrator to reveal information in order to begin a dialogue over the existence of a conflict and whether

applies, objective or subjective, determining whether the situation is one in which an arbitrator has a duty of disclosure depends on the judgement of that arbitrator and should it lead to a challenge, the judgement of a court or other decision-maker. The problem is that the lists also provide litigious parties with a list of circumstances in which they might ground such a challenge, spuriously or not. Such concern likely supports V.V. Veeder's concern, about the flood of recent challenges since the adoption of the Guidelines. That concern also underscores the decision of the LCIA Court and Board to publish abstract of decisions in which arbitrators are challenged. Determining whether the situation at hand is materially similar to or different from a listed situation undoubtedly can invite endless debate over differences of kind and degree. Added to this is the reality that common lawyers who are trained in the art of inductive reasoning sometimes may well draw analogies and distinctions *ad nauseam* to demonstrate that the list actually supports their argument. The fact that at least some of the lists evaluate disclosure "in the eyes of the parties" may well lend further fuel to the argument that what ought to be determinative is a party's nuanced perspective of a conflict which the arbitrator ought to have disclosed.⁶⁰

These problems are inherent in any process that relies on illustrative lists of situations. Debate among the Working Group shows that they appreciated limitations in the lists that not all listed situations fitted quite as neatly as they would have wanted, and that, as a matter of argument, the gray area in such situations could be coloured white or black. Typifying this grey area was the ultimate adoption, after lengthy debate, in the Working Group, that the non-disclosure of a conflict under the orange list would lapse after three years.⁶¹ The Group clearly recognised that this three year "rule" was arbitrary, and that individual circumstances may warrant a shorter or a longer period of time. So, the Group adopted a common sense approach. The three year "rule" was variable; and references should always be made to the General Guidelines in determining whether and when disclosure was appropriate.⁶²

v. To Whom Do the Guidelines Apply?

Equally controversially, the Guidelines provide the same highest standard of impartiality and independence for judges, arbitrators, sole arbitrators, party-appointed arbitrators, tribunal chairpersons, with a qualification for secretaries.⁶³ It is clear that different standards apply in some domestic legal systems. American courts generally apply a stricter standard for neutral than non-neutral – party appointed – arbitrators.⁶⁴ A German court has also applied a stricter standard of impartiality to the Chair of an

it affected the arbitrator's ability to can act independently and impartially. Such disclosure comports with the autonomy of the parties, ensuring that they receive all material information in identifying and deciding how to deal with potential conflicts involving prospective arbitrators.

⁶⁰ For a more sanguine commentary, see Laurence Shore & Emmanuelle Cabrol, "A Comment on the IBA Guidelines on Conflicts of Interests : the Fragile Balance between Principles and Illustrations, and the Mystery of the "Subjective Test" 15 *The American Review of International Arbitration* 599-606 (2004).

⁶¹ See Orange List 3.1

⁶² See General Standard 7 in which the Guidelines describe the three year "rule" as an "appropriate general criterion subject to the specific circumstances of the case."

⁶³ Article 2.3

⁶⁴ Cited in Wijnen, Voser and Rao, *supra* note 34 at 433, 435,

arbitral tribunal than to the co-arbitrators.⁶⁵ In adopting a uniform standard of impartiality, the Guidelines avoid differentiating among national standards and in this respect, are at variance with at least some national legal systems. In addition, the guidelines purport to apply, not only to international commercial arbitration, but also to "other types of arbitration, such as investment arbitrations (insofar as these may not be considered commercial arbitrations)."⁶⁶ The rationale behind the Guidelines certainty is laudable, uniformity is a worthwhile goal in an international commercial regime that is troubled by diversity. But it remains to be seen whether, as a practical response, national courts of law will gravitate towards this uniform standard contained within the Guidelines.⁶⁷

The long-standing rule in international arbitral practice is that the interests of an arbitrator are deemed to be identical to those of his or her law firm and that all conflicts of the firm are attributed to the arbitrator. This rule is quite inadequate to deal with the large multinational law firm in which lawyers often cannot realistically keep abreast of the practice of hundreds of lawyers who practice out of different offices around the globe.⁶⁸ At the same time, it is difficult to justify carving out an exception for such firms without running into the risk of abuse by large firms, including complaints that they are subject to a lower standard of disclosure than smaller firms and single practitioners.⁶⁹ Moreover, the ease of communication today makes the case for exceptions for multinational law firms based on distance less plausible: for example, email is practically instantaneous, along with video-conferencing and podcasting. Given tension among different delegates over these issues, the Guidelines choose to identify the arbitrator "in principle" with his or her law firm, but specify further that nevertheless the activities of the arbitrator's firm should not automatically constitute a conflict of interest.⁷⁰ They adopt a subjective-objective approach in determining whether the activities of an arbitrator's law firm should give rise to circumstances that disqualify the arbitrator from serving or need to

⁶⁵ See 11 BGHZ 54, 392.12; German Civil Procedure Regulation (ZPO), art. 1036.

⁶⁶ Guidelines, para. 5 (Introduction). On an investment dispute in which an arbitrator was challenged under the Guidelines, see *Republic of Ghana v. Telekom Malaysia Berhad*, Challenge Decision No. 13/2004, October 18, 2004, District Court of The Hague, Petition No. HA/RK 2004.667.

⁶⁷ It is not apparent why secretaries ought to be held to the same standards as courts and arbitrators generally. As a result, the Guidelines provide that secretaries should not be subject to express duties in the Guidelines, but that arbitrators should assume responsibility for ensuring that the secretaries they appoint are independent and impartial. See General Standard 5.

⁶⁸ Comparable issues arise in regard to merging law firms. However, these issues pre-date the enactment of the Guidelines. See Klaus Günther, *Merging Law Firms and Coping with Conflicts of Interests* in *Conflicts of Interests in International Commercial Arbitration* (Ed. Pierre A. Karrer) (Association suisse de l'arbitrage, 2001).

⁶⁹ As an example of "social engineering" by the Working Group, in an earlier Draft Joint Report, it purported to carve a wide exception for large companies. The draft General Standard 5(a), stated that "an arbitrator's activities shall not be considered to be an equivalent to his or her firm's activities". See Draft Joint Report, para. 4. This statement was subsequently omitted in response to criticism that this draft standard would be viewed as an attempt by large international law firms "to improve their market share." Background, para. 2.5.

⁷⁰ In effect, the fact activities of the arbitrator's law firm involve one of the parties does not "automatically give rise to source of conflict or a reason for the arbitrator to make a disclosure." General Standard 6(a). Explanation to General Standard 6 (5) adds: "The relevance of such activities [of the arbitrator's law firm], such as the nature, timing and scope of the work by the law firm, should be reasonably considered in each individual case."

be disclosed, so long as that determination is “reasonably considered in each individual case”.⁷¹

Comparable issues arose in respect to disclosures by a legal entity that is a company within a group of companies. The difficulty in attributing conflicts to an individual legal entity is that it may be far removed from the others, making it doubtful to hold the individual legal entity responsible. Conversely, not holding that entity accountable for conflicts, as when each legal entity is treated as a stand-alone, raises the problem of abuse when that entity ought reasonable to know or identify conflicts relating to another legal entity in the group. The Guidelines resolved this difficulty, again by finding a middle course. It stipulates that the activities of a group of companies should be reasonably considered in each individual case.⁷²

vi. Waiving Conflicts

The issue of parties waiving and accepting conflicts is a vexing one. Waiver should not be likely assumed. Under English Law, for example, an arbitrator who has some doubt as to his ability to accept an arbitration, should decline to do so; and if he or she accepts, waiver by the parties should not be inferred.⁷³ In contrast, some jurisdictions like the United States appear to have no clear rule on the subject.⁷⁴

The Guidelines reflect a balanced position on waiver by dividing situations in the “red list” between those that can and those that cannot be waived. The result is to effectively provide that the most serious issues of impartiality and lack of independence can only be cured at the outset by the arbitrator’s decision to decline the appointment. The result is sensible, so long as one accepts the division between waivable and non-waivable situations in the “red list.”⁷⁵

Arbitrators who have heard confidential information during the course of arbitrating a dispute are sometimes appointed as facilitators or mediators in that same arbitration. The practice of requiring parties to expressly waive and accept conflicts is practical: it emphasises the importance of the decision, and express consent in writing encourages both parties to consider the issue before committing to it in writing. While the Working Group was conscious of this need, the Guidelines provided that waiver can be oral in limited circumstances, such as when the oral agreement of the parties is recorded in the minutes of an arbitration hearing.⁷⁶

⁷¹ Guidelines, page 10. The Green List also adds that an arbitrator need not disclose that his or her firm, without his involvement, has acted against one of the parties in an unrelated matter. *See* Guidelines, page 22.

⁷²

⁷³ Under General Standard 4 (a), the parties are allowed thirty days from the date of receipt of the disclosure “to raise an express objection” to the arbitrator. Otherwise, the parties are “deemed to have waived any potential conflict of interest by the arbitrator based on such facts or arbitrators apply them of their own volition.”

⁷⁴ It would be an over-statement to claim that there is no rule on the subject, only that I am unable to discern a clear one.

⁷⁵ See *infra* section 4.2, “The Red List”.

⁷⁶ In Explanation to General Standard 4 (d), the Guidelines advise: “...In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful.”

vii. Flexibility

The flexibility of the Guidelines is readily apparent when they are compared to the 1987 IBA Rules of Ethics for International Arbitrators. The nine IBA rules represent a prior attempt to provide international guidelines governing the impartiality and independence of arbitrators; but they are significantly stricter than the Guidelines. Their very use of the word “rules” and the language by which they extol those “rules” demonstrate their peremptory character. For one thing, they define bias more expansively than most domestic legal conceptions of bias. For another, the now defunct Rule 3.3 sets out strict rules of disclosure in regard to a range of direct and indirect business relationships between an arbitrator and a party, among others.⁷⁷ Rule 3.5 stipulates further that “failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.”⁷⁸

In proposing that the Rules of Ethics be construed restrictively insofar as they conflict with the Guidelines, the Guidelines follow a common sense approach.⁷⁹ For international commercial arbitration to take the high road, and impose more stringent standards of compliance than domestic legal systems generally, is to rigidify international practice. It is also to invite schisms between domestic and international organizations in determining the nature and effect of conflicts of interest.

V. CONCLUSION

The Guidelines are innovative in finding new solutions to old problems. At the same time, they are not without controversy.

Among the more controversial, the Guidelines impose a shared obligation on the arbitrators and parties to make reasonable enquiries to uncover any potential conflicts of interest at the outset of the arbitration.⁸⁰ Imposing such an obligation on a party

⁷⁷ Rule 3.3 provided: “Any current direct or indirect business relationship between an arbitrator and a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator’s impartiality or independence. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed.” “Examples of indirect relationships are where a member of the prospective arbitrator’s family, his firm, or any business partner has a business relationship with one of the parties.” These relationships are yet further extended in Rule 4 to a range of present and past, direct and indirect relationship, including “substantial social relationships with any party or any person known to be likely to be an important witness in the arbitration...”

⁷⁸ Emphasis added.

⁷⁹ Interestingly, the IBA Working Group began with the assumption that the IBA Rules, already quite influential at that time, would serve as a backdrop against which the IBA Guidelines would function. However, that attitude shifted as the Group became more conscious of the stringent character of the Rules, leading the Working Group ultimately to propose that the Rules be construed restrictively. See Draft Joint Report, para. 5.1.

⁸⁰ General Standard 7(c). The Explanation for General Standard 7 (c) adds: “In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying the general standard, might affect the arbitrator’s impartiality and independence.”

was not included in the pre-existing IBA Rules of Ethics. Nor to the knowledge of the author, did it exist in any major legal system prior to the enactment of the Guidelines. Arguably, the change is an example of the attempt by the Working Group to dictate “best practice” in conflict of interest cases. However, the development may also be commendable. Shifting part of the burden to uncover material conflicts may well be realistic insofar as parties often are in a better position to identify conflicts than the arbitrators. This “rule” may also illustrate the development of norms of good faith that ought to be imposed on arbitrators and parties alike in international commercial arbitration.⁸¹ However, it remains uncertain as to how such norms would apply in practice. For one thing, most parties choose arbitration with limited understanding that they are subject to such good faith duties and might well be less inclined to opt for arbitration were they so constrained. For another thing, imposing a burden on a party could create its own conflicts as arbitrators and parties engage in a battle over who is responsible, or indeed more responsible for the lack of independence or imputed partiality of the arbitrator(s) and/or parties.

Other innovations appear unduly rigid to those who regard themselves as being most detrimentally affected by them. For example, the Guidelines impose duties on English barristers to disclose conflicts in relation to other barristers in the same chambers. While English barristers, unlike solicitors, practice alone, they practice in chambers where they share certain facilities and expenses, while also maintaining their separate confidential files, fax and related equipment and resources.⁸² In strict principle, barristers are legally independent from one another. In practice, they may well enjoy a functional relationship, including consulting one another on difficult case files. It makes sense, albeit not without controversy, to expect a barrister to disclose a conflict of interest in respect of a fellow barrister. It makes equal sense not to impose such a requirement *stricto sensu*. Again, the Working Group took a common sense approach. They considered it desirable for there to be full disclosure to the parties of the involvement of more than one barrister in the same chambers as soon as that arbitrator-barrister becomes aware that another barrister in the same chambers is so involved.⁸³

This rule holding barristers accountable for conflicts with other barristers in the same chambers is perhaps one that worries some English barristers most. A litigious party to an arbitration proceeding may well attempt to exploit such a “conflict”. It is certainly realistic to expect that parties may raise tenuous conflicts to delay or disrupt proceedings. English barrister-arbitrators are also justified to be concerned about the economic cost of a challenge, disruption of their practices and about a potential loss of reputation. At the same time, it is fair to comment that the nature of a barrister’s relationship with another barrister in the same chambers is a question of fact, and that in assessing what a barrister-arbitrator should disclose ought to depend upon the nature of that relationship in a particular case. If the Working Group did no more than determine that a barrister-arbitrator may be accountable because of such a de facto relationship, there is an offsetting benefit to the reputation of international

⁸¹ This development could be inferred from General Standard 7.

⁸² English arbitrators, in particular, are often “door tenants” in chambers, such as Essex Chambers, in which they pay a rent usually proportionate to the time they occupy those premises.

⁸³ The Working Group also included in the orange list the requirement that an arbitrator-barrister disclose a situation in which another arbitrator or the counsel for one party is a member of the same chambers. *See* Orange List, 3.3.2

commercial arbitration that a barrister-arbitrator may be justifiably held accountable for such a relationship. While this reputation benefit is speculative, the Working Group ultimately chose to raise an issue that others would prefer it to have avoided; it is incumbent on us in the arbitration community to make the best of it.

Yet further controversy swirls around specific illustrations mentioned in the Guideline's lists. For example, Rule 3.3 sets out specific situations in which disclosure may be required under the "orange list" as a result of a "relationship between an arbitrator and another arbitrator or counsel". One sub-rule is 3.3.7 identifies a situation in which "[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." One may well question the rule. After all, why should it be three years and three appointments? Is there any magic in the number three? And what relevance should be accorded to the circumstances surrounding such appointments, the nature of the firm, the nature of the disputes, the relationship between the parties, and so on? The point is that all these comments are justified, with one important qualification. The list was never intended to serve as a substitute for scrutiny of the facts in issue. Indeed, the final comment in the Guidelines makes the point well when it refers to a flow chart of the list. "...it should be stressed that this [list] is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case [should] prevail."⁸⁴

No one ought to suggest that reform is without cost, and that solutions will always lead to positive outcomes for all groups. It will be some time before we can confidently answer the question whether international commercial arbitration is better or worse off with the IBA Guidelines on Conflicts of Interest. Given what existed before them, not least of all the IBA Rules of Ethics, this author believes that the Guidelines represent meaningful progress, even if their effects are sometimes subject to abuse. It may be that, at an appropriate juncture, the Guidelines might be reviewed with regard to redressing concerns arising from their adoption and use. As the Guidelines state, at the outset: "The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process."⁸⁵

⁸⁴ Word added. *But cf.* Stephan Wilske & Michael Stock, "Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration: the Enlargement of the Usual Shortlist", 23 ASA bulletin 45-52 (2005).

⁸⁵ IBA Guidelines, Comment 4.