Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?

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ONE OF the fundamental precepts of arbitration, be it international or domestic arbitration, is that an arbitrator should be impartial and independent. About two years ago a Working Group of the International Bar Association undertook the apparently straightforward task of giving detailed content to the principles of impartiality and independence by drafting Guidelines on arbitrator conflicts of interest. The Working Group was made up of experienced and distinguished lawyers from 14 countries. After intensive discussion within the Working Group and within the broader international arbitration community, the Guidelines were completed, approved by the Council of the IBA and published in July 2004.(1)

The genesis of this effort was the Working Group's belief that existing standards lack sufficient clarity and uniformity in their application. (2) There was too much uncertainty about when a potential arbitrator should disclose a possibly disqualifying conflict of interest, and about when such conflicts should in fact be deemed disqualifying. The goal of the Working Group was to cure such uncertainties by drafting Guidelines that were clear and detailed, and that could be applied uniformly in international arbitrations in any and all countries. A correlative goal was to eliminate what the Working Group called 'over-disclosure' of interests by potential arbitrators, in which over-rigorous application of disqualifying rules provided insufficient guidance. (3) This tendency to over-disclose, the Working Group said, could limit the availability of qualified arbitrators. (4)

I. How the Guidelines Succeed and Fail

As published, the Guidelines meet these objectives only in part. In fact, a review of the Guidelines suggests that some of the problems that the Guidelines address may be essentially insoluble. The Guidelines include a set of well considered basic rules ('General Standards') on arbitrator impartiality and independence. The Standards are supplemented by explanatory text and, most significantly, are illustrated by numerous specific examples of how the Standards are to be applied. The examples are in the form of descriptions of fact situations grouped into three lists: situations in which disqualifying conflicts of interest are present (a 'Red List'); situations in which disqualifying conflicts may be present, depending on the circumstances (an 'Orange List'); and situations in which disqualifying conflicts are not present (a 'Green List'). The General Standards, and their application to the fact situations on the Red, Orange and Green lists, 'reflect the Working Group's understanding of the best current international practice'. (5)

Although the Guidelines are drafted carefully and in great detail, they cannot (as the Working Group acknowledges) cover all fact situations that have arisen or may arise. Conflict of interest issues are fact specific and case specific. The difficult cases will always call for the application of reason and judgment. The Working Group 'trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation'. (6) In the difficult cases, the Guidelines may provide the beginning of analysis, but not the ending. The goal of achieving certainty also ran into problems from two opposing forces. Proposed rules that would have made it clear that certain conflicts need not be disclosed or are not disqualifying had to be drafted cautiously, so as to avoid violating a cardinal principle of arbitration — that in every case arbitrators should be, and should appear to be, clearly unbiased. This precept, strongly held and forcefully enunciated by the arbitral institutions that the Working Group consulted, was particularly limiting when the Working Group attempted to define circumstances in which disqualifying conflicts could be deemed never to arise. To maintain the integrity, and the perceived integrity, of the arbitral process, the definitions of situations in which no disclosure need be made, and no "224" disqualification would occur, had to be so hedged as to leave open the possibility that the particular facts of some cases might require disclosure or disqualification, even though the cases fell generally within the definition of a 'safe' category. A place on the Green List may not always be a green light.

On the other hand, efforts to state rules that would have clearly identified situations in which conflicts were disqualifying per se, and could not be waived by the parties, were limited by another core principle of international arbitration (although a principle applied with varying degrees of rigour in different countries) — the rule of party autonomy, the parties' right to design the arbitration process that they want. The Working Group concluded that some conflicts ought to be unwaivable — but the list of such conflicts as finally pronounced was both subject to interpretation and subject to exceptions. Finally, the Working Group's goal of producing Guidelines that apply uniformly in all or most countries could not be achieved only superficially at best. As the Working Group studied the laws and practices in numerous countries, it found that, on many conflict of interest issues, different countries and different arbitral institutions apply significantly different rules. If the Working Group was to produce Guidelines that were clear and unambiguous, it could do so only by choosing from among divergent national laws and institutional rules, giving effect to those that it found to reflect the 'best' practice and not giving effect to others. In some respects, the apparent uniformity of the Guidelines masks diversity in the laws and practices of nations and institutions.

The Guidelines are, as the draftsmen make clear, a work in progress, to be reviewed and revised in light of future experience. They and the background materials published with them are a thoughtful and helpful elucidation of conflict of interest problems, and of the rules that apply — or should apply — to the resolution of
these problems. They are well calculated to inspire further useful analysis and debate. But if the Guidelines were ever conceived of as a panacea, they have instead shown just how elusive panaceas are in this area of arbitration practice.

II. Why Guidelines? Why Now?

The Guidelines are a response to what the Working Group calls 'the growing problems of conflicts of interest' in international arbitrations.(7) They were published only months after the American Bar Association and the American Arbitration Association, on 9 February 2004, jointly adopted a Code of Ethics for Arbitrators in Commercial Disputes. The new ABA/AAA Code revises a Code of Ethics first published by the ABA and AAA in 1977. It is generally consistent with the standards published a few months later in the IBA's Guidelines. In addition, at about the same time that the IBA, AAA and ABA were doing their work, new standards took effect to govern arbitrations in California. California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration; drafted pursuant to a directive from the California legislature, took effect on 1 July 2002.(8) The new California Standards are intended to serve the cause of arbitral integrity. Although they were in large part a response to allegations of arbitrator bias in consumer arbitration, they apply to most types of arbitration in California (not including international arbitrations as defined by California law), and are mandatory. Critics argue that the Standards are so restrictive as to jeopardise the arbitral process. A principal feature of the Standards is to expand arbitrators' duties to disclose potential conflicts of interest, and to enlarge the grounds on which arbitrators are to be disqualified.

Against this background, the work of the IBA is indeed timely. The Working Group correctly observes that conflict of interest problems frequently impede the process of international arbitration as it is practised today. As international arbitration has grown more extensive, more lawyer-driven and more like complex litigation, so too have procedural problems, including the problem of assuring arbitrator neutrality, grown more severe. The standards that govern arbitrator conduct have been stated in general terms in arbitral statutes and rules, as well as in rules of ethics published by various organisations, and there have been numerous court decisions addressing individual cases. Uncertainties persist, however, in the application of standards in particular cases.

In practice, cases in which an arbitrator is challenged and is found to have a disqualifying conflict of interest are relatively rare. When does this occur, however, the consequences can be severe – delay and complication of an arbitration, or the conflict is raised at the beginning of an arbitration; a court order vacating an award; or the conflict is discovered after an award is made. To avoid these difficulties, arbitrators and potential arbitrators are encouraged – by arbitral rules and laws, by ethical standards (including the past ethics rules of the IBA) and by informal advice from arbitral institutions – to err on the side of caution in order to avoid conflicts of interest. Arbitrators may, out of an abundance of caution, withdraw from arbitrations in the face of challenges that lack real substance, thereby unnecessarily delaying arbitrations and depriving parties of the benefits of their chosen arbitrators. When this occurs, the costs of an arbitration 'any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence',(9) a potential arbitrator, playing it safe, may disclose facts that a reasonable person would not regard as disqualifying. With increasing frequency, arbitration counsel are using motions to disqualify for tactical purposes. A potential arbitrator's unnecessary disclosure of a fact that, fairly considered, is not material would constitute a prima facie basis on which to challenge the arbitrator, and, whether or not the challenge succeeds, to complicate and delay an arbitration proceeding.

Arbitral institutions also can fail prey to the tendency to be more cautious than they need be. Typically, if an arbitral institution is asked to rule on a challenge to an arbitrator, it will be at an early stage of the arbitration proceeding. Concerned to avoid even the slightest possibility that in the end an award will be set aside by a court on conflict of interest grounds, the institutions have an incentive to decide close cases in favour of disqualification.

In its preliminary Draft Joint Report, the Working Group noted a 'concern that arbitration practice is more and more influenced by very restrictive tendencies and that overly strict rules may limit the availability of qualified arbitrators'.(10) Among the 'overly strict rules' addressed by the Working Group was the generally prevalent rule, that a conflict of interest affecting one member of a law firm automatically affects all members. In these days of multiplicity and multi-country mega firms (and of mergers of such firms), such a rule seemed to the Working Group members (a number of whom are members of large international firms) unnecessarily restrictive.

III. The Guidelines In their Legal Setting

The Working Group was not operating in a vacuum, but in the context of national laws, arbitral rules, and developed and developing arbitral practices. Indeed, the research and reporting of Group members on the laws and practices prevailing in their several countries could be among the Working Group's most significant contributions. Some of the results of these efforts are summarised in the Working Group's 2002 Draft Joint Report (e.g., paras 1.5-2.3) and are referred to in the Guidelines themselves. Additional summary statements of the results of the Working Group members' research appear in Background Information published on behalf of the Working Group in August 2004.(11)

The National Reports prepared by members of the Working Group cover 13 of the 14 nations represented in the Group's membership.(12) The arbitration laws of most of the countries studied are, the Group found, either based on the UNCITRAL Model Law or are substantially similar to it in their treatment of arbitrator conflicts of interest. Six of the countries have adopted Article 12 of the Model Law, on arbitrator disclosure and disqualification, without change.(13) At least two other national statutes, in the Netherlands and Switzerland, include the same or similar language, and the laws of the USA and Sweden also largely reflect the influence of the Model Law.(14) The statutes and judicial decisions of each country govern (with exceptions more theoretical than real) all national and international arbitrations held in that country apart from these laws. Where the national law is unclear, however, the Guidelines are available to assist in the interpretation and application of the law and to guide courts and

legislatures in filling gaps. (15)
Rules of arbitration are another source of the standards that determine arbitrators' ethical obligations. It is probably safe to say that all national arbitration laws recognise party autonomy as a first principle, and that, applying that principle, they empower the parties to commercial contracts to make legally enforceable arbitration agreements in whatever terms they choose, subject only to limitations of public policy. The arbitration rules chosen by the parties, like the laws that give the agreements legal force, are not amended by the Guidelines, although, again, the Guidelines may be of assistance in their interpretation and application. The major arbitration rules incorporate language that is the same as, or substantially the same as, the language of article 12 of the UNCITRAL Model Law(16) that requires arbitrators to be independent and impartial, and to disclose potential conflicts of interest. See e.g., UNCITRAL Rules, articles 9 and 10, and AAA International Rules, articles 8(1) and 8(1), which track exactly the language of article 12. See also articles 7(1) and (2) of the ICC Rules, which are slightly but significantly different: 'Every arbitrator must be and remain independent of the parties ... [A] prospective arbitrator shall ... disclose 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' (emphasis added).

Into this legal framework, the IBA has introduced its new Guidelines. Where do the Guidelines fit in this framework? Strictly speaking, they have no place in the legal framework. They do not displace governing arbitration laws or rules. They are an expression of the views of the IBA and its distinguished Working Group, and as such they will likely have an influence on how parties and arbitrators operate within the legal frameworks applicable to them. But they are not legally binding on parties or arbitrators unless parties agree that they shall be binding. (17)

The 2004 Guidelines were written against the background of the Rules of Ethics for International Arbitrators published by the IBA in 1987. In its 1987 Rules, the IBA set out what it regarded as 'internationally acceptable guidelines developed by practicing lawyers from all continents'. (18) It was the IBA's hope, ... (19) however, that the Rules of Ethics would be taken into account when legally binding rules were applied. The Rules have been widely used in the years after 1987.

In its research, however, the Working Group found certain 'shortfalls' in the 1987 Rules. (19) The National Reports prepared by Group members also showed, the Working Group found, that 'the IBA Rules define the elements of bias more broadly and/or present more stringent disclosure requirements than do the relevant principles of the individual jurisdictions'. (20) Thus, it was decided that the 2004 Guidelines 'supersede the Rules of Ethics in matters treated in the Guidelines.' (21)

With this much attention paid to national law and practice, one might expect the Guidelines to be a restatement of rules and practices generally prevailing in the countries studied. This is not the case, however. The Guidelines define what the drafters consider the 'best current international practice'. (22) In determining 'best practice', the Working Group took into careful account the statutes and case law of various nations, but also applied 'the judgment and experience of members of the Working Group and others involved in international commercial arbitration'. (23) The members' judgment and experience seem not always to have coincided with the statutes and case law. In several cases, as will appear below, the Working Group acknowledges that its definition of 'best' practice differs from the consensus of national laws. To the extent they define what is 'best', rather than what is, the Guidelines are prescriptive in nature, rather than purely descriptive. The Guidelines state rules that the drafters say 'could be accepted by different legal cultures', not necessarily rules that are generally accepted. (24)

IV. The Guidelines Summarised

Here, in brief, is what is contained in the 24 pages of the Guidelines. Part I of the Guidelines is a statement of seven 'General Standards Regarding Impartiality, Independence and Disclosure', with one or more paragraphs explaining each. To paraphrase and summarise some of their most important features, the General Standards include the following: ...

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1. An arbitrator shall be 'impartial' and 'independent'. (25) These two words mean different things. It might have been helpful if the Guidelines had included the definitions that were provided in the earlier IBA Rules of Ethics:

Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or someone closely connected with one of the parties. (26)

Even though the Guidelines do not restate these definitions, it is clear they use the terms 'impartial' and 'independent' to mean what the 1987 Rules say they mean. (27)

2. An arbitrator shall not serve 'if he or she has any doubts as to his or her ability to be impartial or independent'; or if the facts and circumstances, 'from a reasonable third person's point of view' would 'give rise to justifiable doubts as to the arbitrator's impartiality or independence'. (28)

3. An arbitrator or prospective arbitrator must disclose to the parties any 'facts or circumstances ... that may, in the eyes of the parties, give rise to doubts as to the arbitrator's
impartiality or independence’. In case of doubt, the arbitrator should disclose.(25) The facts are to be evaluated by different tests under Standards 2 and 3: an ‘objective test’ (the view of a hypothetical reasonable third party) for disqualification under General Standard 2, and a ‘subjective test’ (the view of the parties to a dispute) for disclosure under General Standard 3.(30)

4. A party’s failure to make a timely objection to a conflict of interest is deemed a waiver of the conflict. Most conflicts of interests may be waived by the parties. Waiver is not possible, however, if there is ‘identity between an arbitrator and a party’ (31) ‘identity’ exists, under the Standards, not only in the case of clear, obvious and literal identity, but also in the case of certain very close relationships. Most notably, ‘identity’ between a party and an arbitrator exists if the arbitrator is a “legal representative” of the party.(31)

5. The Guidelines do not apply to arbitrators who, under applicable law or rules, are not under an obligation to be impartial and independent. Thus the Guidelines do not apply to party-appointed ‘non-neutral’ arbitrators under the American Arbitration Association Rules for Commercial Arbitration.

6. Whether the activities of an arbitrator’s law firm give rise to circumstances that are disqualifying or need to be disclosed ‘should be reasonably considered in each individual case’.(32) This Standard is intended to loosen somewhat the generally prevailing rule that, even in a large law firm where partners in one city may have no involvement in the activities of partners elsewhere, the conflicts of interest affecting any partner affect all partners.

7. Each party to an arbitration has an obligation to inform arbitrators and prospective arbitrators of any relationships between the party and an arbitrator. Arbitrators themselves have a duty to make reasonable enquiries to investigate any possible conflicts of interest.(33) These rules do not appear in the IBA’s 1987 Rules of Ethics. Nor, to the author’s knowledge, do they appear explicitly in any national law or set of generally accepted arbitration rules. Probably, however, these rules are now generally observed in practice by sophisticated parties and arbitrators. The expression of the rules in General Standard 7 will advance the acceptance of these obligations of due care by parties and arbitrators.

Part II of the Guidelines, ‘Practical Application of the General Standards’, provides the detail and the guidance on the application of rules that the Working Group found lacking in pre-existing laws and rules. Part II is truly an innovation. It is a colour-coded guide to the application of the Standards to 49 fact situations, grouped into a Red, an Orange and a Green List, that the Working Group has identified as likely to occur and recur in today’s practice of international arbitration. It is through an analysis of these lists that one can best assess the successes and limitations of the Guidelines, and perhaps perceive as well the tensions between competing policies and points of view that were addressed in the making of the Guidelines.

a. The Red List(s)

The first of the three lists, the Red List, includes fact situations that ‘depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence.’(34) In fact there are two Red Lists, a Non-Waivable Red List and a Waivable Red List.

The Non-Waivable Red List(35) describes conflicts that a party may not waive, and therefore circumstances under which an arbitrator cannot agree to serve, whether or not he or she discloses the conflict. The non-

waivable list includes only four items. Among them are some egregious conflicts – an identity between an arbitrator and a party, for example, or an arbitrator who is a manager of one “331” of the parties or who has a ‘significant financial interest in a party. In devising its list of non-waivable conflicts, the Working Group states, the Group applied 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’ (36) But the Guidelines stretch the notion of identity to an extent that is surprising and ill-defined. It includes the case of an arbitrator who is not a party, but a ‘legal representative’ of a party. (37) The Working Group considered whether this term should be further defined, but decided against it.(38)

The comments of the Working Group indicate that some members thought that the doctrine of party autonomy should be given effect here, and that the parties should be free to waive conflicts, even in extreme situations. It was the conclusion of the Working Group, however, that ‘party autonomy, in this respect, has its limits.’ (39) That is doubtless true, but just where these limits should be set is clearly open to debate. It is highly doubtful that the Guidelines’ rule that certain conflicts (those on the Non-Waivable Red List) cannot be waived holds true under the arbitration laws of all countries, or even most countries. Here the Guidelines seem clearly to go beyond current law and practice.

The National Reports by members of the Working Group showed that in ‘all jurisdictions parties that fail to object to conflicts in a timely fashion may not raise objections at a later stage.’(40) Article 4 of the UNCITRAL Model Law expressly provides that a party that fails to object timely ‘is deemed to have waived his right to

object. This surely is a recognition of the effectiveness of a waiver, apparently under any conditions. The Working Group found that two countries, Switzerland and Sweden, did not impose limits on waivers of conflicts. The Group found, however, that 'most common law countries seem to agree' there can be no waiver of 'real or possible bias', although it notes that in the USA there is case law to the contrary.(41) One would want to see the Working Group's National Reports to reach a conclusion on this issue. The doctrine of public authority is a strong one. In the USA, the 'primary purpose' of the Federal Arbitration Act (the US Supreme Court has held) is simply to ensure 'that private agreements to arbitrate are enforced according to their terms'.(42) US arbitration law and practice, notably under the AAA Commercial Rules, recognize that, if the parties agree, they may appoint arbitrators who are permitted and expected to be advocates of the views of the parties that appointed them. General Standard 5 of the Guidelines states that the General Standards do not apply to such non-neutral arbitrators. In this context, the guidelines necessarily accept the principle that parties can (332) validly agree to waive the requirements of impartiality and independence, at least with respect to some of the arbitrators in a proceeding.(43) Here not one but two fundamental principles of public arbitration and of party autonomy are in play: the principles of arbitrator neutrality and of party autonomy. Immutable as each of these principles may seem, they are not infrequently in conflict, and there is no generally accepted, invariable rule as to which should prevail in the event of conflict. With respect to conflicts that are called 'non-waivable', the Guidelines take the position that the principle of neutrality prevails. In a number of jurisdictions, however, parties or arbitrators would rely on this aspect of the Guidelines at their peril. If limits must be set on the doctrine of party autonomy, and indeed they must, under present circumstances it is the law that sets them. The limits are likely to be different in different jurisdictions.

Perhaps, however, the problem that the Guidelines may conflict on this point with a national law or a chosen set of arbitral rules is not necessarily a serious one. The Guidelines are couched in language that leaves room for exceptions. Whether a particular fact situation should be on the non-waivable list is a question depending on the facts of a given case. Whether an interest is significant and therefore disqualifying is an interesting one. Whether there is an identity between an arbitrator and a party, and in particular whether the one is the representative of the other, is entirely defined by the guidelines. Although the Non-Waivable Red List may look at first glance to be a clear prohibition applying to reasonably well defined sets of circumstances, a proper understanding and application of that list may turn out, on closer examination, to depend on a case by case analysis and the exercise of 'robust' common sense and good judgment.

The Waivable Red List consists of 14 paragraphs, each describing a different set of circumstances under which an arbitrator must be disqualified unless the parties expressly waive the conflict. Waiver through a simple failure to object is not possible with respect to the items on this list. The circumstances described in the Waivable Red List — generally, an arbitrator's previous involvement in the dispute, the financial interest in the dispute of an arbitrator or a close family member, or an arbitrator's relationship with a party or a party's counsel — all appear to be circumstances that a conscientious arbitrator would disclose in individual cases, that parties might or might not waive, depending on the circumstances, and that would be regarded in most jurisdictions as disqualifying unless waived (expressly or by failure to object). The Guidelines here are a helpful (333) advance over the old Rules of Ethics, in that they describe many more fact situations than are expressly touched on in the 1987 Rules. Careful country-by-country research would probably show that here the Guidelines are generally consistent with prevailing legal standards throughout the world on what conflicts are disqualifying unless waived. It is likely, however, that country-by-country research would show that, under the laws of most countries, where waivers are permitted, a waiver will be found either when it is expressly made or when a party fails to make a timely objection. It will be interesting to see, when and if the Working Group releases its National Reports, what the Reports will show.

Here again, however, the Guidelines do not provide bright-line rules, to be applied without exception. In some cases the descriptions of situations covered by the Waivable Red List contain what the Guidelines call 'open norms'(44) — hedge-words that clearly call for the exercise of common sense and judgment. For a financial interest to be disqualifying, for example, it must be a 'significant' interest. And even when the circumstances described without obvious hedge-words (for example, a case in which the arbitrator's law firm had a previous but terminated involvement in the case),(45) it is unlikely that the Guidelines can always be literally applied. For example (to take a hypothetical case that is not far-fetched), a brief, never to be repeated consultation between a party and the partner of an arbitrator resident in another country, occurring several years previously, for which no file was opened and no bill sent, and of which the arbitrator had no knowledge, should not be enough to disqualify an arbitrator, even if one of the parties objects. As a practical matter, the conflict between a lawyer and an arbitrator's taking a public position on a matter in dispute. The arbitrator has a duty to disclose such situations.(47)

In Orange List cases, any conflicts of interest that are disclosed may be waived by the parties. The waiver need not be explicit: failure to make timely objection will suffice.(45) However, the fact that one of these situations should not automatically result in the dismissal of the arbitrator's law firm or the arbitrator's law firm or the arbitrator's taking a public position on a matter in dispute. The arbitrator has a duty to disclose such situations.(47)

The list of situations on the Orange List is a useful one. It includes many that doubtless arise frequently. They
are situations in which few conscientious arbitrators would fail to make disclosure. Here again, however, in certain respects the Guidelines seem rather clearly to reflect the Working Group's view of what ought to be, rather than the rules that now exist under national laws and international practice.

In the first place, the insistence that failure to disclose is not in itself grounds for disqualification seems to be a distinctly departure from existing law and practice. Under the 1987 Rules of Ethics (article 4.1) failure to make a required disclosure creates an appearance of bias, and may of itself be a ground of disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification - a statement, or at least the strongest of suggestions, that failure to disclose facts that are not insignificant is automatically disqualifying. The Working Group itself at first took the view that failure to make a required disclosure would be grounds for a successful challenge. (51) In the Guidelines as adopted, however, the IBA stakes out a different position.

In the USA, arbitrators are generally considered to be disqualified if they fail to disclose a potentially disqualifying relationship or interest that is more than 'trivial'. (52) Further research would be required to assess what the law and practice are in other nations. Practitioners at the Iran-United States Claims Tribunal will recall a noteworthy case at that Tribunal in which an arbitrator withdrew from a case in the face of a challenge based on his failure to disclose that he was a director of an affiliate of a company that was a key witness to one of the parties in the case. This, perhaps, is only anecdotal evidence, but it is nevertheless an indication that 'best practice' regards the failure to disclose a non-trivial relationship as in itself grounds for disqualification. Regrettably, there is no mention of research into national laws by Group members on this point in the Guidelines, the Draft Joint Report or the Background.

Secondly, to make the standard of when disclosure must be made a 'subjective' standard, i.e., 'in the eyes of the parties', is to depart from the principles of most arbitration rules and of most national arbitration laws. Indeed, the Guidelines recognise that an 'objective test', rather than the Guidelines' subjective test, 'exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law'. (53) It is the consensus of all of these authorities that the test of when disclosure is required is an 'objective test', i.e., 'facts which might lead a reasonable person, not knowing the arbitrator's state of mind, to have justifiable doubts as to an arbitrator's impartiality or independence.' (54)

To make the test for disclosure dependent upon the state of mind of the parties in particular cases requires the arbitrator who contemplates disclosure to take into account the state of mind of one or more people whom he or she may never have met. The Guidelines state that '[i]n determining what facts should be disclosed, an arbitrator should take into account the circumstances known to him or her, including to the extent known the culture and customs of the country of which the parties are domiciled or nationals'. (55) A goal of the Guidelines is to encourage the uniform application of rules. It would seem inconsistent with that goal to adopt a rule under which the requirement to disclose depends on what a given arbitrator may know about what strange, possibly different cultures, may think at a given time.

One must note, however, that the 'subjective' test of when disclosure is to be made is supported by significant precedent. Article 2.2 of the ICSID's Rules of Arbitration requires disclosure of facts 'of such a nature as to call into question the arbitrator's independence in the eyes of parties' (emphasis added). The Working Group states that it has chosen to follow the ICSID rule on this point. (56) There are cogent reasons for such a rule. As Fouchard, Galliard and Goldman point out in their treatise, '[t]he purpose of the arbitrator's duty of disclosure is to ensure that the parties are able to challenge that arbitrator if, in their view, the arbitrator does not meet the applicable conditions'. (57) If the purpose is to give parties the opportunity to protect their interests as they see them, then certainly the test for disclosure must be 'in the eyes of the parties'. It is noteworthy also that, when the Working Group canvassed the views of leading arbitration institutions, it found that these institutions favoured the subjective test for disclosure, and 'expressed strong opposition to an objective test'. (58)

This latter view, even though it still may be a minority view, is also a view that may be increasingly well accepted. It is noteworthy that the 2004 ABA/AAA Code of Ethics (Canon II.A.2) also adopts this 'subjective' test. Nevertheless, unless an arbitration is held under the rules of the ICC or in the rare jurisdiction (if such there be in which the law applies) both the 'subjective' test for disclosure, arbitrators and parties would be ill-advised to rely too heavily on the Guidelines for direction on this point.

Thirdly, it should be noted that the Working Group has drafted General Standards that in one significant way undercut the Group's desire to reduce the number of unnecessary disclosures that are now made. General Standard 3(c) provides, 'Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure'. (59) Interestingly, the Working Group found that 'the majority of the jurisdictions' do not impose an affirmative duty to disclose in situations where the arbitrator has doubts as to whether or not disclosure is required. (50) The only countries that require disclosure in such cases, the Group found, are Germany and the USA. (In the case of the USA, the Group cited as the basis for its analysis not statutory or case law, but the non-binding Rules of Ethics of the American Arbitration Association and the American Bar Association.)

In adopting a Standard requiring disclosure in the case of doubt, even though this could well exacerbate the problem of 'over-disclosure', the Working Group has again responded to the views of the arbitral institutions that it consulted in the course of its work. 'The arbitral institutions ... considered it very important to include a rule for doubt' (10). The Working Group has here clearly given precedence to the need to preserve the confidence of parties and the public in the integrity of the arbitral process.

Finally, there is language in the explanatory sections of the Guidelines that further undercuts the 'subjective' test for disclosure of General Standard 3(a). In its explanation of Standard 3(a), the Working Group states that 'because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective' (emphasis added). (52) Is it true that, when the role is left for the subjective test? Is the true test of whether to make disclosure the test of whether a reasonable third person would have justifiable doubts as to the arbitrator's neutrality? If that is the test, then we are returned to the status quo ante. The apparent internal inconsistency of the Guidelines on this point reveals, if nothing else, that the draftsman were grappling with and trying to reconcile strongly differing points of view.

c. The Green List

The Green List reflects the Working Group's effort to help arbitrators avoid unnecessary disclosures that could lead to umunntorious challenges. The Green List is a non-exhaustive enumeration of specific situations: (eight are listed) "337" where no appearance of, and no actual, conflict of interests exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose such situations. It is noteworthy that in describing the Green List, the Working Group again undercuts the subjective test for disclosure that was enunciated in Standard 3(a). In drawing up the Green List, the Working Group has applied an objective test. There should be a limit to disclosure, based on reasonableness, in some situations, an objective test should prevail over the purely subjective test of "the eyes of the parties". As to the eight listed items where no disclosure is required, at least some appear to reflect commonly held views: an arbitrator need not disclose (as a general rule) that he or she belongs to the same club or professional association as another arbitrator, or owns an 'insignificant amount of share'' in a company or its affiliate. It has published an article or given a talk concerning an issue that arises in the arbitration, so long as he or she has not addressed the case to be arbitrated. (This latter point reflects Martin Hunter's famous dictum that, in choosing a neutral arbitrator, one looks for a maximum predisposition and a minimum of bias.) Even these apparently easy cases, however, must be subject to exceptions and to the exercise of good sense and judgment. How else, for example, can one determine whether a sharing of interests is 'insignificant'? Other cases on the Green List - if not indeed all of them - must be subject to occasional exceptions under the rule of reason. They are not situations that will never lead to disqualification but that will virtually never lead to disqualification under the subjective test (emphasis added). 

As one reviews the application even of the Green List, questions of arbitrator neutrality come down as often as not to questions of judgment to be answered by the arbitrator, subject to review by an arbitral institution or a court. If the arbitrator concludes in a case on the Green List that he or she need not disclose, the arbitrator may take comfort in seeing the situation in the case at hand described in the Green List. But suppose, on the particular facts before him or her, that it is a question of a third person, that he or she should disclose. Then, disclosure should be made. Good judgment requires it. Probably the Guidelines themselves also require it. That a given fact situation may fit within a category on the Green List should not alter an arbitrator's decision to make disclosure if, taking all facts into consideration, either the hypothetical reasonable person, or the arbitrator, or (applying General Standard 3(a) without the qualifications added by the commentary) the parties themselves would conclude that those facts may give rise "338" to justifiable doubts as to the arbitrator's neutrality. To the extent the Green List, when applied to a particular fact situation, pushes beyond the standards set by the applicable arbitration law, reliance on the Green List will not free an arbitrator from his or her obligations under that law, and should not free him or her from obligations based on his or her own sense of probity and good conscience.

d. The Large Firm Problem

In preparing the Green List, the Working Group has pursued its objective of freeing arbitrators who are members of large firms from some of the difficulties that now regularly occur simply because of their law partnerships' activities. For example, the Green List provides that an arbitrator need not disclose that his firm, without his involvement, has acted against one of the parties in an unrelated matter. If I may refer to my personal past experience as a partner in a large law firm, it was my routine practice to do a computer search of matters involving all parties to an arbitration in which I might be asked to serve as an arbitrator. (This practice is now endorsed by General Standard 7(c) of the Guidelines.) If I discovered as a result of that search that a partner in another office of my firm was counsel for a company that had recently sued one of the parties to the arbitration, I would disclose it, even if the lawsuit had ended. I probably would not consider the conflict to be disqualifying, but I would not consider it trivial either. I would make my disclosure under the rules of Commonwealth Coatings, and also in anticipation of the embarrassment to me and my firm if I failed to make the disclosure and a party later discovered this apparent conflict, as in fact it very likely would. Under present practice that party very likely would object to my appointment, and under present practice in many countries the objection might well be sustained - either by the relevant arbitral institution or appointing authority, or, if the matter should get to court, by a court.

In the end, the Working Group may have gone too far in relaxing significantly those rules relating to the activities of arbitrators' law firms that it considers now to be undue restrictive. Again, the cardinal principle that the integrity, and the appearance of integrity, of the arbitration process must be maintained has put limits on the Working Group's efforts at liberalisation. This principle is very much in play in the current debate on arbitrator ethics. The felt need for further steps to ensure arbitrator neutrality was the core issue that led to the new, stricter California standards. Although the Working Group does not refer to the new California rules, these rules, and the concerns that led to their adoption, were necessarily part of the environment in which the Working Group operated as it drafted its Guidelines.

In its Draft Joint Report, the Working Group had included, in a proposed General Standard 5(a), a broad statement reflective of the need felt to remove "339" unnecessary obstacles to service as an arbitrator by members of large firms: 'the arbitrator's activities shall not be considered to be an equivalent to his or her firm's activities." This statement was deleted, in the face of severe criticism from individuals and institutions of which said the new rule 'could be viewed as an attempt by the large international firms to improve their market share". The Guidelines as finally adopted are more cautious. 'the activities of an arbitrator's law firm ... should be reasonably considered in each individual case'. This caution is probably salutary. When a party seeks to appoint as arbitrator someone who is a member of a large firm, the party and his counsel may be put to great trouble to find an arbitrator who is not affected by the relationship of one of his or her partners. That is a bad thing. Experience teaches that a requirement that eventually a qualified arbitrator will be found who is not subject to disqualification and not likely to be challenged, and the arbitration will proceed. The risk of an award being challenged on the ground of conflict of interest has been minimised. Most importantly, the confidence of the parties and of observers of the arbitral process in the integrity of the process has been maintained.
V. Conclusion

The Guidelines make an important contribution toward the analysis and solution of the problems they address. The Working Group’s detailed examination and debate of both principle and practice illuminate the complexity of the issues and the often conflicting considerations that must be brought to bear in addressing them. The Guidelines will be of significant assistance to arbitrators, arbitration lawyers and institutions, and probably also to many courts and legislators as well, in the future. However, as the introduction to the Guidelines states quite candidly, the IBA and the Working Group that drafted the Guidelines view them “as a beginning, rather than an end, of the process”.[72]

To the extent the Guidelines are an attempt to bring certainty and international uniformity to the treatment of arbitrator conflicts of interest, they succeed only somewhat. The Working Group’s studies confirm that laws and practices now differ substantially in many respects from country to country. The elucidation and homogenisation of these laws and practices will come about only over time, through developments in one case and one country after another. In this process, the Guidelines provide helpful analysis and valuable suggestions. Beyond that, however, they cannot go.

To a common law lawyer, and probably to most lawyers, it can come as neither a surprise nor a disappointment to learn that there is, and can be, no final, complete and definitive rulebook, or that the governing rules now differ in different countries. The common law is quite used to solving cases one at a time,[340] in one jurisdiction at a time, balancing one interest against another, and to seeing rules evolve case by case. Most lawyers will be quite comfortable with the notion that, after all the debate and illumination, the decision in the next case that arises must be based, not only on general rules, but also on common sense, good judgment and the rule of reason in applying those rules. It should come as no surprise that, for the foreseeable future, the answer to a conflict of interest question in a difficult case will remain to a large extent a “judgment call.”[341]

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1 A copy of the Guidelines is available at www.ibanet.org/pdf/InternationalArbitrationGuidelines. A list of the Working Group’s members appears at the bottom of p. 1 of the Guidelines. If the international arbitration community is a ‘club’, as some say, the members of the Working Group must be counted as members of the club’s board of directors.

2 Guidelines, p. 2.


4 Guidelines, p. 2.

5 ibid.

6 ibid. p. 3.

7 ibid.

8 Cal. Rules of Court, Division VI, adopted pursuant to Cal. Code of Civil Procedure, s. 1281.85.

9 e.g. UNCITRAL Model Law, Art. 12(1).

10 Draft Joint Report, para. 1.1.

11 The document (‘Background’) is scheduled for publication in the IBA’s Business Law International.

12 Background, para. 1.3.1. As at the date of writing, the National Reports themselves have not been published.

13 The six are Canada, Germany, Mexico, Singapore, Australia and New Zealand. Draft Joint Report, para. 2.1. Art. 12 of the UNCITRAL Model Law provides:

(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 (emphasis added).

14 Draft Joint Report, para. 2.1.

15 See Background, para. 1.3.4.

16 See supra n. 9.


18 1987 Rules, Introductory Note.
Draft Joint Report, para. 5.1.

ibid.

Guidelines, p. 4.

Guidelines, p. 2.

ibid.

Draft Joint Report, para. 1.1. The Working Group's Background report recognises that 'the Guidelines are both descriptive and normative': Background, para. 1.3.4. The Background states, however, that the Working Group concluded that in most of the jurisdictions that 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 would need to study the individual National Reports prepared by Working Group members (which have not yet been published) to form one's own opinion on whether the Guidelines are or are not 'inconsistent' with prevailing national norms.

Guidelines, p. 4.


See Draft Joint Report, para. 2.1.

Guidelines, p. 5 (emphasis added).


ibid. pp. 7–8.

ibid. p. 9; see ibid. pp. 5, 10.

ibid.


Guidelines, p. 14. It is not clear why the draftsmen did not say 'impartiality or independence'. Most of the situations described in the Red List in fact relate solely or principally to lack of independence.

In its original version it was called a 'Black' list. See Draft Joint Report, para. 1.1.

Guidelines, p. 6.

ibid. p. 15.

ibid. p. 6.

ibid. p. 16.

Draft Joint Report, para. 3.3.

ibid.


The Guidelines would not, however, permit the parties to agree validly to an arbitration in which a sole arbitrator or the arbitrator with a deciding third vote is biased. Even if national law or chosen arbitration rules permit two of three arbitrators in a proceeding to be biased, the Guidelines apply to the third arbitrator according to General Standard 5. It is an open question whether the courts of most countries would enforce an agreement providing that a final decision could be made by a clearly biased arbitrator. Arguably, they would decline to do so in many cases, perhaps on the theory that the agreement was unconscionable, perhaps on the theory that a proceeding under a biased arbitrator would not be an arbitration as defined by the national arbitration statute.

Guidelines, p. 15.

ibid. p. 17.


ibid. pp. 18–22.


ibid.

ibid. p. 16.

Draft Joint Report, para. 6.1.

The rule derives from the following language in the opinion of White J., concurring, in the US Supreme Court case of Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145, 150 (1968): 'Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. In Commonwealth Coatings an award was set aside on the ground that one of the arbitrators had a previous business relationship with one of the parties, even though all three arbitrators, including the one who had the undisclosed prior relationship, had ruled against that party, and even though actual bias was neither alleged nor proven.

Guidelines, p. 7. See Draft Joint Report, para. 3.1; Background, para. 3.1; see also 1987 IBA Rules of Ethics, art. 4.

ibid. art. 3.2.

Guidelines, p. 8.

ibid. p. 7.


Background, para. 3.1.

Guidelines, p. 7.

Draft Joint Report, para. 3.2.

Background, para. 3.2; see Draft Joint Report, para. 3.2.

Guidelines, p. 7.

ibid. p. 15.

ibid.


Hunter, 'Ethics of the International Arbitrator' in (1987) 53 Arbitration 219 at p. 223: 'When I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias'.

Background, para. 3.1.

Guidelines, p. 22.

Draft Joint Report, para. 4.