Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration – The Enlargement of the Usual Shortlist?

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I. Introduction

On 12 July 2004, the International Bar Association ("IBA") announced the publication of its Guidelines on Conflicts of Interest in International Arbitration ("Guidelines") (1). The Guidelines represent the culmination of two years consultation and review by the IBA working group (2) and aim to reflect the best international practice in their approach to conflicts of interest. (3) The Guidelines work by setting out a series of General Standards which are then followed by explanatory notes. Advice on the practical application of the General Standards is provided by four colour-coded lists. These lists provide examples of situations which raise considerations of conflict of interest. The colour of the list upon which the situation appears, dictates the action that the General Standards require. Hence, if a situation appears on the non-waivable red list, then an arbitrator facing that situation should not accept the appointment. If it appears on the waivable red list, then the arbitrator should only accept the appointment if the parties give fully informed consent and agree to the appointment despite the existence of the conflict. If a situation appears on the orange list, then the arbitrator should disclose the circumstances causing potential conflict to the parties and any "45" applicable appointing authority. The parties then have up to 30 days under the Guidelines to challenge the appointment. (4) They may in reality have less time, as many institutional rules provide for a shorter time period in which to make such challenges. (5) Finally, a green list details situations in which no conflict of interest arises and for which no disclosure by the arbitrator need be made.

The purpose of this article is not to examine the entirety of the Guidelines in detail as that has been done elsewhere. (6) Rather, the focus is placed upon a particular fact situation that appears in Rule 3.3.7 of the orange list (hereinafter referred to as 'Rule 3.3.7'). Rule 3.3.7 provides that if an arbitrator has within the last three years received more than three appointments from the same counsel or the same law firm, then he must disclose this fact before accepting the appointment. The implications of this rule may not be immediately obvious, but they are significant. As a result, a number of new issues will now need to be considered by counsel who are routinely called upon to select arbitrators for appointment.

II. The Grounds for Challenge

At the outset, it is important to remember that disclosure pursuant to the orange list is not an admission of a conflict of interest. The Guidelines go to great lengths to stress that in such situations the arbitrator considers that they are impartial and independent despite the disclosed facts. (7) If the arbitrator considered that the disclosed facts compromised their impartiality, then they would have resigned. Therefore, disclosure under Rule 3.3.7 cannot be considered as an automatic admission by the arbitrator concerned that they have an actual bias.

Rather, the situation described in Rule 3.3.7 is considered to be such that it could cause justifiable doubts in the minds of the parties. A party therefore has 30 days from the date of disclosure to challenge the appointment (8) (although the rules of some institutions prescribe a shorter period). (9) The use of the phrase 'justifiable doubts' is revealed in the Background Information on the Guidelines (10) as being inspired by Article 12(2) of the UNCITRAL Model Law. (11) which stipulates the circumstances in which an arbitrator's appointment may be challenged.

The concern of the working party is presumably that an arbitrator who becomes reliant upon a single law firm for the majority of his appointments may find his impartiality compromised and may favour the appointing law firm's arguments so that he might secure the flow of future appointments. This is always going to be a question of degree. Like most of the situations on the orange list, the question of whether a party's doubts are actually justifiable is one to be decided on the specific facts. Therefore, the essential issue is not the actual number of appointments an arbitrator has received from one firm, but whether the arbitrator is reliant on one firm for a significant proportion of his income. Consider the situation where an arbitrator receives twelve separate appointments equally divided between four different law firms, known as Firms A, B, C and D, over three years. He then finds himself appointed for a fourth time by Firm A in a dispute where Firm A's opponent is Firm B. In this situation he will probably not be compromised if he accepts the fourth appointment from Firm A, even though it is his fourth appointment from that firm. In this situation Firm B knows that appointments from Firm A are not the arbitrator's primary income stream. However if the arbitrator had received 12 appointments from Firm A over three years, and those appointments were his primary income stream, then the doubts of Firm B would become more justifiable and more likely to be sustained.

III. The Selection of Arbitrators

This ground for challenge could have unforeseen consequences for counsel charged with selecting arbitrators to sit on arbitral tribunals. This is due to its impact on the common practice in law firms of maintaining an informal shortlist of preferred arbitrators, respected for a combination of their expertise, integrity and judgement. (12) When selecting an arbitrator to sit on a tribunal, law firms will often choose one from their shortlist. However, the introduction of Rule 3.3.7 means that this practice could increase the likelihood that a party's choice of arbitrator could be subjected to challenge. The use of a shortlist of approved arbitrators could mean that some are selected more than three times in three years. Extensive use of such procedures could leave appointments open to challenge under Rule 3.3.7. This risk may cause some difficulty for counsel making appointments. If they routinely select from a very small pool of arbitrators, they will have to note the number of appointments that their preferred arbitrator has received from their firm in the past, and assess the possibility of a challenge. Even if counsel has an extensive list of potential arbitrators, they will still have to note the number of appointments they give to an individual arbitrator, to ensure that questions of impartiality do not emerge. Those selecting from a small pool may find that their range of choice could narrow rapidly. If counsel is determined to go ahead with appointing an arbitrator who has received more than three appointments from his firm over three years, then counsel should prepare for a challenge from the opposing party. It would be advisable in such circumstances to seek information from the prospective arbitrator as to whether counsel's previous appointments have made up a significant proportion of the arbitrator's practice over the last three years. As this information will have to be disclosed to the opposing party in any event, the prospective arbitrator should have no objection to such a request. In this way, counsel can argue that the appointments the arbitrator has received from his firm do not operate in such a way as to compromise the arbitrator's impartiality, as they do not make up a significant proportion of his income.

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IV. Potential Challenges

A second question raised by Rule 3.3.7, is whether it will increase the number of challenges made against party-appointed arbitrators. The answer to this question will depend on two factors; i) the extent to which counsel are making appointments from a small pool as described above; and ii) the extent to which the parties become aware of Rule 3.3.7 as a ground of challenge. There is no doubt that receiving a large number of appointments from a single source was a ground for challenge prior to the publication of the Guidelines. This is made clear by the fact that the working party aimed to make the Guidelines a summary of "best practice". (13) Lew, Mistelis and Kröll also note that:

Where an arbitrator accepts repeat appointments from the same party, the other party may have concerns about his independence, fearing that the arbitrator's independence may be tainted by the wish to receive further appointments. (14)

However, the publication of the Guidelines, may mean that practitioners will be more aware of this ground for challenge than they were previously. There may well be a 'codification effect', as a challenge based upon Rule 3.3.7 of the Guidelines will have greater weight and authority than a challenge based purely upon counsel's submissions that an arbitrator has been compromised by the number of appointments he has received. By codifying such a situation under Rule 3.3.7, the Guidelines provide a neat package for future challenges and publicise this ground for challenge. Furthermore, as stated above, Rule 3.3.7 states that the situation gives rise to 'justifiable doubts', a phrase taken from Article 12(2) of the UNCITRAL Model Law which lays down circumstances in which appointments can be challenged. The phrase is also used in the LCIA Rules (15) and the DIS Rules (16) in the same capacity. Thus, the 'codifying effect' seems likely to produce an assumption that when Rule 3.3.7 is invoked an arbitrator should step aside.

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While acknowledging the statements in the Guidelines to the effect that Rule 3.3.7 creates no presumption of impartiality, it seems most likely that the majority of arbitrators will wish to avoid a confrontation. If a challenge is raised early, they are likely to step aside, especially if it comes with the weight of the Guidelines in support. It has been noted that the ICC is far less likely to confirm an appointment if an objection is raised (17) and it seems probable that the ICC International Court of Arbitration will err on the side of caution and refuse to confirm an appointment in the face of an early challenge. These factors increase the motivation of parties to make a challenge as part of a strategy to disrupt their opponents' preparation for arbitration. Those charged with scrutinising appointments should be alert to the use of such methods.

V. Lack of Awareness of Previous Appointments

Rule 3.3.7 also begs the question as to what the consequences would be if an arbitrator failed to disclose his previous appointments received from his appointing party, and these appointments were subsequently revealed by the opposing party?

General Standard 3 (a) of the Guidelines states that an arbitrator should disclose facts that may in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence prior to accepting an appointment or, if thereafter, as soon as he or she learns about them i.e. there is a
duty of continuing disclosure. However, in the situation outlined above, the arbitrator has been exposed as failing to make disclosure, rather than making a late disclosure on his own initiative. The Guidelines offer no specific guidance in the red, orange and green lists as to the consequences of a failure to make disclosure. Arguably, the parties are therefore thrown back on to a first principles application of the General Standards, in particular General Standard 2 (b) which states as follows:

[An arbitrator shall decline to accept an appointment or refuse to continue to act] ... if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, ...

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A failure to disclose prior appointments from an appointing party appears to be a not unreasonable basis from which to argue that a reasonable third person would have justifiable doubts as to the arbitrator's impartiality or independence. The consequence stipulated by General Standard 2 (b) would be that the arbitrator should step down.

If the arbitrator refuses to step down, then there are severe implications for the enforceability of any award. There would be very little advantage in the appointing party seeking to retain the arbitrator in such circumstances, as it would ultimately provide grounds for the opposing party to challenge the validity of any award that it deemed unfavourable.

VI. New Blood?

There is a further effect to Rule 3.3.7, although it is uncertain whether it formed part of the working party's thinking on the subject. If counsel's preferred arbitrators are increasingly subject to challenge on the grounds that counsel has appointed them too many times in the past, then counsel will have to look further afield, rather than putting his faith in established names. The main beneficiaries of this will be younger and less well known arbitrators who are looking to build a reputation for handling larger disputes.

The longevity of international arbitrators has been commented upon in the past. (18) Similarly, Lord Mustill has recently lamented the difficulty that younger arbitrators experience in breaking into the cadre of arbitrators that handle major disputes and expressed his hope that a more satisfactory system for introducing new talent might yet emerge. (19) Perhaps an unintended side effect of Rule 3.3.7 could be a mechanism whereby Lord Mustill's hopes are fulfilled. This can be no bad thing.

VII. Conclusion

The comments in this article are not intended as adverse criticism of the Guidelines, as the authors are in agreement with the majority of the arbitration community in regarding their publication as a welcome development in a complex area of practice. Rather, the intent is to "51" acknowledge that the rules of the game have undergone a subtle shift of emphasis and that some of these shifts may not be immediately apparent.

Rule 3.3.7 is an example of one of these shifts. Subsequent to its adoption, counsel should be aware that they might have to ration the use of their arbitrators. There may be a situation where it is best not to appoint a particular arbitrator to a tribunal forming in the immediate future, but to save his appointment for a case that may begin in a month's time. Records will also need to be kept of the number of appointments made of an individual arbitrator and counsel should be alert to the possibility that their appointments may be challenged on the grounds that they have chosen the same arbitrator too often.

However, practitioners will hopefully see an opportunity in which to broaden the field from which they select their arbitrators. If selecting their usual arbitrator is too risky, they may be persuaded to appoint a comparatively new face to a panel and give a less well known arbitrator the chance to gain experience. While Rule 3.3.7 by no means provides a cast-iron guarantee that new talent will emerge, it does (whether intentionally or otherwise) offer at least a partial solution to the problem highlighted by Lord Mustill.

Quite discreetly but efficiently, the younger generation of arbitrators seem to have made progress in enlarging the shortlist of the usual suspects. Even though somewhat biased, these authors think that by providing an opportunity for such an enlargement, Rule 3.3.7 of the new Guidelines might contain positive side effects for the entire arbitration community.

Summary:

On 12 July 2004, the International Bar Association announced the publication of its Guidelines on Conflicts of Interest in International Arbitration. The article notes that Rule 3.3.7 of the new Guidelines provides that if an arbitrator has within the last three years received more than three appointments from the same counsel or the same law firm, then he must disclose this fact before accepting the appointment. The article raises questions over the effect that this new provision will have, particularly on the practice of maintaining an approved shortlist for the selection of arbitrators which is common to many law firms, and the opportunities it presents for younger arbitrators looking to establish a reputation. "52"
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2 The members of the working group were: (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 Maricott, 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) Otto de Witt Wijnen, The Netherlands (Chair).


5 E.g. see Article 10.4 LCIA Rules (15 days), Section 18.2 DIS Rules (2 weeks), Article 8.1 AAA Rules (15 days) and Article 19.3 NAI Rules (1 week).


7 IBA Guidelines on Conflict of Interest in International Arbitration: General Standard 3(b); Explanation to General Standard 3, ¶ (b); Part II, ¶¶ 3-4.


9 As stated above, see footnote 5.


15 Article 10.3.

16 Section 18.1.

