The IBA guidelines on conflicts of interest revisited
Another contribution to the revision of an excellent instrument,
which needs a slight Daltonism treatment

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Discourage litigation.
Persuade your neighbours to compromise whenever they can.
Point out to them how the nominal winner is often a real loser
in fees, expenses and waste of time

INTRODUCTION

The purpose of the following pages is to comment on the independence and impartiality of arbitrators and particularly on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, bearing in mind that “the IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process … seek comments on the actual use of the Guidelines, and plan to supplement, revise and refine the Guidelines based on that practical experience”.

The success of arbitration proceedings rests on the moral and professional qualities of the arbitrator and the trust of the public on the arbitrators and the arbitration institution. For this reason, arbitrators are subject to rigorous legal and ethical obligations. The dignity and reputation of the arbitral process depends on the strict observance of these obligations. Undoubtedly, the most prominent of them is the duty of arbitrators to be fully independent and impartial.
1. Different perceptions on the circumstances affecting independence and impartiality

Independence and conflicts of interest – in politics, in business, in professional practice - are issues which raise difficult problems and attract the attention of lawmakers, ethicists and the public. Problems of independence increasingly challenge international arbitration. Arbitrators are often unsure about which circumstances need to be disclosed, and they may make different choices about disclosures than other arbitrators in a similar situation. The growth of international business, including interlocking corporate relationships and larger international law firms, has required more disclosures and, as a result, has created more difficult independence issues to evaluate.

It is difficult to determine the criteria that must be followed *separately* in order to evaluate the arbitrator’s independence and impartiality. Different cultures have different perceptions on particular circumstances. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. The complexity of these varying standards creates a tension on the balance between the parties’ rights to a fair hearing, which embodies the disclosure of facts that may reasonably call into question an arbitrator’s independence or impartiality, and the parties right to select arbitrators of their choice. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and a lack of uniformity in their application. As a result, members of the international arbitration community frequently apply different standards in making decisions concerning disclosure, objections and challenges.

2. Developing international standards

The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group (the “WG”) of 19 experts in international arbitration, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical

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Detailed background information to the Guidelines has been published in “Business Law International”, vol. 5, no 3, September 2004, pp. 433-458 and is available at the IBA website www.ibanet.org
considerations regarding independence and impartiality and disclosure in international arbitration. In an effort to introduce some international uniformity and provide guidelines, the WG believed that greater consistency, fewer unnecessary challenges, and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that do or do not warrant disclosure or disqualification of an arbitrator. Designated Red, Orange and Green (the “Application Lists”).

Unlike other lists of disclosures, which require enforceable disclosures\(^\text{15}\), “the Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the WG hopes that these Guidelines will find general acceptance within the international arbitration community” (Introduction 6).

The WG released two drafts of the Guidelines (on 7 and 15 October 2002 and 22 August 2003\(^\text{x}\)). The WG received many conflicting comments about which situations should fall within the different lists. While judicial independence can remain, in large part, a matter for national jurisdictions taking into account local customs, culture and legal history, the formulation of universal standards of independence and impartiality requires the balancing of many different interests. The IBA Council finally approved the draft on 22 May 2004 and adopted it as “Guidelines on Conflicts of Interest in International Arbitration”\(^\text{xii}\).

The Guidelines consist of an Introduction; Part I: General Standards Regarding Impartiality, Independence and Disclosure; and Part II: Practical Applications of the General Standards (including the Application Lists). In this article, I will comment on these Standards and some of the situations addressed by the Application Lists.

II. PARTICULAR CONSIDERATIONS ABOUT THE GUIDELINES

I. General standards regarding impartiality, independence and disclosure

(1) General Standard 1. General Principle (GS-1)

The title of the GS-1 and the whole text of the Guidelines place the concept of “impartiality” before the concept of “independence”\(^\text{xiii}\). Although some believe that there tends to be an overemphasis on the latter (independence) at the expense of the former (impartiality), in my view the order should be inverted, because “independence” (the quality of being free from the influence, guidance or control of others) comes intellectually first. “Independence” is a situation of fact, while “impartiality” is a state of mind. An arbitrator can be independent but be biased\(^\text{xiv}\). In my view, then, “independence” should be placed before “impartiality”\(^\text{xv}\).

The WG was guided by the principle that the arbitrator must be independent and impartial at the time he accepts an appointment and must remain so during the entire course of the proceedings.

\(^{15}\) See the California Ethical Standards for Neutral Arbitrators in Commercial Arbitration, 2002. See James Schwarz, “California’s Pioneering Spirit”, ICC United Kingdom, vol. VI.

\(^{x}\) In the second draft, the WG developed the objective and subjective test for disqualification, it moved to the Orange List some Green Lists situations and divided the Red List into non-waivable and waivable circumstances.

\(^{16}\) The final text included all arbitration and not just commercial arbitration.

\(^{xii}\) At the 27th Annual Award Program of the CPR Institute for Dispute Resolution, the IBA was presented with the “2004 Outstanding Practice Achievement Award”.

\(^{xiii}\) With some exceptions like GS-5, which places independence before impartiality.


\(^{xv}\) There is no sufficient reason to follow the inverse order of impartiality and independence given by art. 12 of the UNCITRAL Model Law.
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The WG considered whether this obligation should extend even during the period that the award may be challenged, but decided against this and took the view that the arbitrator’s duty ends when the arbitral tribunal has rendered the final award or the proceedings have otherwise been finally terminated. In my view, the arbitrator’s obligation to remain independent and impartial remains after the termination of the proceedings. An arbitrator, for instance, should not receive gifts or employment or professional offers from the parties until after the proceedings are fully completed. That is why some rules require that arbitrators “shall be and remain at all times impartial and independent of the parties” (art. 5.2, LCIA Rules) and the National Arbitration Forum Code of Conduct for Arbitrators (Canon 2) provides: “for a reasonable period of time after a case, arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the unfavourable appearance that they had been influenced by the anticipation or expectation of the relationship or interest”.

(2) General Standard 2. Conflicts of Interest (GS-2)

The main ethical guiding principle is that actual bias from the arbitrator’s own point of view must lead to that arbitrator declining his appointment. Courts have held the bias must be direct, definite and capable of reasonable documentation, rather than remote or speculating. They have also refused vacation of the award when the charge of the arbitrator’s misconduct was based on an affidavit of a party’s original attorney, which was entitled to no weight inasmuch as it was a verbose collection of conjectures, surmises, assumptions, and outright demands of personal knowledge of the subject matter, and statement of self-doubt attributed to the arbitrator was constructed by arbitrator’s simple, clear and self-confident award in the matter.

The Guidelines evoke the concept of “conflict of interests” in the title of the Guidelines and of the GS-2. I wonder whether the principle to be evoked should be “independence”. Although the ethics for arbitrators does not coincide with the ethics for lawyers, regarding the latter the lawyers’ three basic ethical principles are: independence, confidentiality and avoiding conflicts of interest (loyalty) and all other lawyers’ ethical duties derive from the three basic ones. Therefore, at least from a legal ethics perspective, the obligation to avoid conflicts of interests derives from the loyalty and not the independence principle. The situations addressed by the Guidelines are basically related with independence. On the other hand, if the arbitrator’s function is comparable to that of judges (rather to that of lawyers), judges are disqualified for lack of independence or impartiality.

In any case, the title of this GS-2 (“Conflicts of interest”) is wrong because all the Guidelines, not only GS-2, refer to such conflicts. GS-2 should be renamed as “Arbitrator’s obligation to decline or to refuse”.

The GS-2 contains four paragraphs (a), (b), (c) and (d), all of them at the same level. Paragraphs (a) and (b) contain the basic principle of the necessity to refuse the appointment in two cases: (a) when the arbitrator considers himself not to be independent or impartial; and (b) if facts or circumstances give rise to justifiable doubts to a reasonable third party. In my view, this GS-2 should only contain the two mentioned paragraphs (a) and (b); paragraph (c) (defining “justifiable doubts”) should be attached to paragraph (b); paragraph (d) should be deleted.

Paragraph (a) uses the expression “if he or she has any doubts as to his or her ability to be impartial or independent”. This may be a question of semantics, but if “ability” is the quality of being able to do something or a natural or acquired skill or talent, the expression is not correct because the quality or independence or impartiality does not depend on the arbitrator’s ability. I

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103 For instance, if the arbitrator has given a lecture related to the dispute (Application List 4.1.1), the arbitrator may not be independent but does not have a conflict.
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would suggest to use another expression as “consider himself or herself to be impartial and independent” as used, for example, by GS-3(b).

Paragraph (b) obliges arbitrators to decline or refuse to act as arbitrator if circumstances exist “that, from a reasonable third person’s point of view ... give rise to justifiable doubts”. I wonder whether the elements of “reasonability” and “justification” could not be also required in paragraph (a) when similar doubts are raised by the arbitrator.

Paragraph (d) should be deleted. There is no point in GS-2 in repeating the situations of the Non-Waivable Red List, particularly when it only mentions some of them and omits the others. Mentioning only part of them can be dangerous.

(3) General Standard 3. Disclosure by the Arbitrator (GS-3)

If GS-2 contains the fundamental obligation of declining or refusing if the arbitrator considers himself not to be independent or impartial, GS-3 consists of the obligation of disclosure. If “in the eyes of the parties” there are factors that may influence the independence or impartiality of the proposed or already appointed arbitrator, the arbitrator must disclose them, because, if, in the “arbitrator’s own eyes”, they influence his independence or impartiality, he must decline or refuse the appointment (GS-2(a)).

For this reason, GS-3(b) justly reminds us that “an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he would have declined the nomination ... or resigned”. However, the arbitrator has to make the disclosure for two reasons: first, so that the parties or the institution understand the existence of a fact that may affect the independence or impartiality and accept it if they so decide; second, to protect the appearance of independence and impartiality which is important for all adjudicators.

Although the language should be improved, the Guidelines take a dual-test approach for disqualification of arbitrators: an objective one and a subjective one. The objective test for disqualification of the arbitrator is set out in GS-2(b) (“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”). The subjective test is described in GS-3(a) (“if facts of circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence”).

Although generally admitted, I think that the notions of “objective” and “subjective” are imprecise. The views of a third person are as subjective as the views of the parties. Perhaps “external” and “internal” would be better denominations, but I will refer to the admitted terms.

As the Explanation to GS-3 states, a purely objective test for disclosure exists in the majority of jurisdictions and in the UNCITRAL Model Law. Nevertheless, the WG recognised that the parties have an interest in being fully informed about any circumstances that may be relevant in their view and added a subjective disclosure approach. Because of the views of many arbitration institutions that the disclosure test should reflect the perspectives of the parties, the WG accepted, after much debate, a subjective approach for disclosure and adopted the language of article 7(2) of the ICC Rules. However, the WG believed that this principle 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 contains some situations in which disclosure should not be required.
Explanation (b) also says that “the test for disqualification should be an objective one and the use of an appearance test, based on justifiable doubts or to the independence and impartiality of the arbitrators\textsuperscript{100} is to be applied objectively (a “reasonable third party test”). GS-3(d) could be suppressed simply by inserting a few words in GS-3(a): “If facts or circumstances, at the beginning or at a later stage, exist...”.

(4) General Standard 4. Waiver by the Parties (GS-4)

GS-4 is disorganised. First, I think that the waiver of the facts and circumstances described in the Application Lists should be addressed by its own separate standard. Similarly, the possibility for arbitrators to assist the parties on reaching a settlement should be in a separate standard. Second, I think that the possibility of waiver should be clearly distinct. This should start with the impossibility to waive the situations of the Non-Waivable Red List, followed with the possibility to waive by express waiver the situations of the Waivable Red List, and end with the possibility to waive the situations of the Orange List by the parties’ silence during a 30-day period.

Concerning the situations listed in the Orange List, once the arbitrator communicates any of the circumstances that may influence the independence or impartiality, the parties can object to the appointment or the continuance of the arbitrator. This objection needs to be done in a reasonable time after the circumstance is disclosed by the arbitrator or the party learns about it. The GS-4(a) currently requires that an explicit objection needs to be made within 30 days after the receipt of the arbitrator’s disclosure or after the party learns of the circumstance that could constitute a potential conflict. The 30 day period seems to be sufficient when the dies a quo is the first case (making the disclosure) but not sufficient in the second case (if the party learns of the facts, which can be totally independent from the disclosure), because, for the party who may learn of the facts (often living in a different country from the arbitrator’s), 30 days may be insufficient to explore the reality or the impact of such facts on the arbitrator’s independence.

The courts have declared that when a party has had ample notice of an arbitrator’s impartiality, but has failed to raise any objection until the award is rendered, will not thereafter be allowed to repudiate the award on the grounds of the arbitrator’s partiality\textsuperscript{101}, that, similarly, if a party, although aware of certain conditions that might influence on the arbitrator’s judgement, nevertheless has not objected, cannot thereafter question the award on the grounds that the arbitrator did not act in good faith\textsuperscript{102}, that when a representative of a party has, during the proceedings, become aware of the existence of bias, prejudice or fraud on the part of the majority of the references but does not raise an objection, preferring instead to take advantage of the possibility of a favourable outcome, proof of his awareness as to the existence of “bias, prejudice or fraud” is a weak premise for disqualification;\textsuperscript{103} and that the defeated party cannot object to an award when he had notice of the existence of conditions which might influence the arbitrators’ judgement, or, when he had knowledge of the partiality of one or more of the referees to entitle him to raise an inquiry but he chose to remain silent\textsuperscript{104}.

The Guidelines accept that arbitrators can also act as mediators if both parties expressly agree. This is a concept that is not common in the US but is known in Europe\textsuperscript{105}, where cases are often

\textsuperscript{100} See art. 12.2 of the UNCITRAL Model Law.
\textsuperscript{102} Sherman v. Alliance Ins. Co. of Philadelphia, 163 N.E. 908, 265 Mass 305 (1928).
\textsuperscript{103} Tobacco Co. v. Alliance Ins. Co., 131 N.E. 213, 238 Mass. 514 (1921).
\textsuperscript{105} In Germany, Section 32.1 of the DIS Arbitration Rules: “... the arbitral tribunal should seek to encourage an amicable settlement of the dispute...”

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settled through arbitration. The CPR Institute insisted that the Guidelines specifically mention mediation and cited the CPR Rules for non-administered Arbitration of International Disputes but required someone other than a member of the arbitration tribunal to act as the neutral. GS-4(d) allows arbitrators to assist the parties in reaching a settlement, provided that the arbitrator receives an express agreement by the parties that acting in such measures shall not disqualify him from continuing to serve as arbitrator. My suggestion is that, instead of the phrase "shall receive an express agreement by the parties", "shall receive an agreement by all parties in writing" would be preferable. In spite of what is said in the Explanation, I think that the parties' agreement to the arbitrator's assistance in a settlement is an exceptional enlargement of the arbitrator's normal attributes, which needs to be protected with the maximum guarantees.

(5) General Standard 5. Scope (GS-5)

GS-5 provides that the Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators, but it excludes "non-neutral arbitrators", who do not have an obligation to be fully independent and impartial.

The GS-5 states that the non-neutral arbitrators "do not have an obligation to be independent and impartial" and that the Guidelines should not apply to them since their purpose is to protect impartiality and independence. All arbitrators, including non-neutral arbitrators, must be independent and impartial. However, some rules allow them to be "predisposed" towards and have communications with the appointing party, while subject to a general obligation "to act in good faith and with integrity and fairness".

The current GS-5, which refers to whom it applies, should be located as the last GS at the end of Part I, since it refers to all other GS and not only to the previous four.

(6) General Standard 6. Relationships (GS-6)

I find the title of this GS-6 ("Relationships") insufficient and it might be changed to "Law firms and legal entities" or some similar one. Indeed, GS-6 refers only the relationships of the arbitrator's law firm with one of the parties (paragraphs (a) and (b)). Paragraph (c) does not refer to relationships but identifies, for the purpose of the Guidelines, that managers, directors and members of the supervisory board of a legal entity as equivalent to the legal entity itself. The Application Lists refer to other relationships, for instance, the one between the arbitrator and another arbitrator or counsel (3.3), the relationships between the arbitrator and the parties (3.4), or the relationships between the arbitrator and another arbitrator or the counsel for one of the parties through memberships in the same professional association or social organization (4.4.1). For this reason, I propose that the title of this GS to be changed.

In spite of what the Explanation to GS-6(a) says, in reality GS-6(a) creates a presumption of the arbitrator's independence from his firm unless the facts or circumstances of the case destroy such a presumption. In my opinion, in the interest of the arbitration institution, this presumption should be reversed. If the arbitrator must in principle be considered identical to his or her law firm, the activities of the arbitrator's firm should affect his or her independence or impartiality, unless proven otherwise, which no doubt will be difficult. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be carefully considered in each individual case.

The WG uses the term 'involvement' rather than 'acting for' because a law firm's relevant connections with a party may include activities other than representation on a legal matter.

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301 Art. 3.2.4 of the Code of Conduct for Lawyers in the EU (CCBE Code) provides that "where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members".
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A similar comment can be made of GS-6(b). Paragraph (c) is well intended, but poorly drafted. Managers and directors cannot be “considered to be equivalent of the legal entity”, but “shall be assimilated to the legal entity for the purposes of these Guidelines”. Instead, an arbitrator will not be found to be independent in a case involving a legal entity if his or her law firm gives legal services to the directors or managers of such entities.

(7) General Standard 7. Duty of Arbitrator and Parties (GS-7)

The title (“Duty of Arbitrators and Parties”) can be improved. Most of the Guidelines, not only GS-7, refer to arbitrators’ duties. The title should be “Obligations to investigate causes of disclosure” or a similar one.

To reduce the risk of abuse by unmeritorious challenges, it is necessary that the parties disclose any relevant relationship between them or any affiliate with the arbitrator. 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 or independence.

The Explanation to GS-7 states that it is the arbitrator’s or putative arbitrator’s obligation to make similar enquiries and, to disclose any information that may cause his impartiality or independence to be called into question. The word “putative” (which means commonly thought to be, or reputed) is wrongly used. It should say “potential arbitrator”.

2. Practical application of the General Standards

A. In general

In Part I, the Guidelines set up the General Standards regarding independence, impartiality and disclosure. Part II contains the Practical Application of the General Standards (the “Application Lists”).

B. The Application Lists

The Application Lists consist of 4 lists: 1. The Non-waivable Red List; 2. The Waivable Red List; 3. The Orange List; and 4. the Green List. The Guidelines following the first draft only contained one Red List which consisted of two parts. But in its final text, the Non-waivable List and the Waivable List are two separate lists. The language of Part I, 2, which says that “the Red List has two parts,” should be amended, because each former part has become a list of its own.

1. The Non-Waivable Red List (see GS-2(c)) is an enumeration of situations, which give rise to justifiable doubts as to the arbitrator’s impartiality and independence; i.e., in these circumstances an objective lack of independence exists from the point of view of a reasonable third person having knowledge of the relevant facts (see GS-2(b)). It includes situations deriving from the overriding principle that no person can be his or her own judge. The Guidelines (Part II, 2) erroneously refer to GS-2(c) and 4(b) since the reference should be to GS-2(d) and 4(b).

2. The Waivable Red List (GS-4 (c)) encompasses situations that are serious but not as severe as those in the Non-Waivable Red List. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the situation, nevertheless expressly state their willingness to have such a person act as arbitrator.

3. The Orange List is an enumeration of situations which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator’s independence or impartiality. It thus reflects situations that would fall under GS-3(a), therefore, the arbitrator has a duty to disclose such situations. In all of them, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made (GS-4(a)). Such disclosure does not automatically result in a disqualification of the arbitrator. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — i.e., from a reasonable third person’s point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator’s independence or impartiality. Then, if the conclusion is negative, the arbitrator can act. He can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, a specific acceptance by the parties in accordance with GS 4(c).

4. The Green List contains an enumeration of situations where no appearance of lack of independence or impartiality exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.

There was much debate as to whether there should be a Green List at all, and also, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the WG maintained its decision that the subjective test for disclosure should not be the absolute criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the WG was that party autonomy has its limits.

3. The Application Lists in particular

3.1. Non-Waivable Red List

3.1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

Undoubtedly this is by antonomasia the best clear case of lack of independence and the consequence of the fundamental principle that one is nobody can be judge in his own case.

In my view, the second situation (“the arbitrator is a legal representative of an entity that is a party in the arbitration”) should be separated from paragraph 1.1, either constituting a new situation or attaching it to situation 1.2 with which it has a closer relationship.

3.1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.

The reason for this non-waivable situation is described at GS-6(c) (“managers, directors and members of a supervisory board ... shall be considered to be the equivalent of the legal entity”). Since an “influence” is just an effect on someone or something, I would be inclined to say “a controlling power or influence” in one of the parties.

3.1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

This situation (“having an interest”) includes two situations of a heterogeneous nature, because the meaning of the term “interest”, in each case, is different. In the first case (a financial interest) means a right or legal share; in the second case (an interest in the outcome) means a regard for one’s own benefit. Therefore this situation should be split into two new separate situations.
The reason that having a significant financial interest in one of the parties is a non-waivable situation is because, in such a case, the arbitrator becomes the judge in his own case. A financial relationship between an arbitrator and one of the parties is a clear basis for a challenge to the lack of independence or impartiality of the arbitrator. A challenge on the basis of past relationships is less likely to be successful than one based on a continuing financial relationship, however each challenge must be looked at on its own merits.

Courts have evaluated unacceptable bias of an arbitrator, and vacated the judgement made by the biased arbitrator. Bias includes an arbitrator’s financial interest in the outcome of the arbitration; an arbitrator’s ruling on a grievance that directly concerns his own lucrative employment; a family relationship that makes the arbitrator’s impartiality suspect, the arbitrator’s former employment by one of the parties; and the arbitrator’s employment by a firm represented by one of the parties’ law firm. The clearest basis for bias is the arbitrator’s material, undisclosed financial interest in the outcome of the arbitration.

The IBA Rules of Ethics (32) set out the principles defining unacceptable bias such as: “Facts which might lead a reasonable person, not knowing the arbitrator’s true state of mind, to consider that he is dependent of one party, create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it”.

3.1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Without prejudice of the difficulty to define “a significant financial income”, this requirement limits the impeding circumstance unnecessarily. Also disqualified as arbitrators are persons who have an important and actual relationship with either party such as being the party’s ordinary lawyer. However, in most cases the issue is less obvious and usually a question of degree depending on the time and extent of the relationship with a party. A long-standing and continuing relationship with the arbitrator’s law firm logically casts doubts on the arbitrator’s independence.

The situation described in 1.4 must be compared with 2.3.7. Both situations refer to the arbitrator regularly advising the appointing party. In the first one (1.4), the arbitrator derives a significant financial income from such advice, and therefore, the Guidelines make it a non-waivable situation, whereas in the second one (2.3.7) when he does not derive a significant financial income therefrom, it is waivable. In my view, the situation in which “the arbitrator regularly advises the appointing party” should always be non-waivable, regardless that the arbitrator derives a financial income significant or insignificant, from such advice or not. Situation 2.3.1 (arbitrator currently represents or advises one of the parties) is also comparable. It is clear to me that a lawyer who acts for someone, even pro bono publico, should not act as an arbitrator in which his client is involved.

3.2. Waivable Red List

3.2.1. Relationship of the arbitrator to the dispute

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[Referencias bibliográficas]

Middletex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); In re Friedman, 231 N.Y.S. 369 (App. Div. 1925) (award made void because the arbitrator borrowed money from one of the parties during arbitration); Knuevenhove Textile Corp. v. Shingles, Inc., 16 N.Y.S.2d 435, aff'd, 20 N.Y.S.2d 985 (App. Div. 1939) (award vacated because the arbitrator was the president of a party to a first arbitration and arbitrators issued contemporaneous awards in favour of each other’s firms); Shirley Silk Co. v. American Silk Mills, Inc., 23 N.Y.S. 2d 254 (App. Div. 1940); Hyman v. Pottberg & Co., 101 F.2d 262 (2d Cir. 1939) (award made void as the arbitrators were also potential claimants); Rand v. Readington, 13 N.H. 72 (1842) (award made void because the prevailing party was indebted to the arbitrators and amounts received were pledged to repay arbitrators’ claims).

2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

Craig, Park and Paulsson sustain that a clear predisposition in relation to a dispute exists when the arbitrator has already provided an expert opinion on the concrete legal question. In my view, it is more than a mere predisposition, a strong proclivity since, if the factual situation remains the same, a competent and honest arbitrator will always give an award consistent with the opinion given. To some extent, the arbitrator has already informally advanced his award.

Some commentators have viewed the circumstance of having previously given a legal opinion as an absolute bar to serve as an arbitrator even with the agreement of the other party. Judge Pierre Bellet, a former First President of the French Supreme Court, once said that it is a more serious obstacle to impartiality to have given a prior consultation in a case than to have ties of friendship with the party; ties of friendship may be disregarded as a matter of professional rigor, but the pride that accompanies adhering to one’s earlier opinion is a stronger emotion. Similarly, the courts have held that an award is rightly rejected if, previous to the selection of the arbitrators, a portion of them made an ex parte examination of the matter afterwards submitted to them, at the request of one of the parties, to whom the substance of the result at which they arrived was known, and these facts were not communicated to the other party. In my view, both situations described in 2.1.1 and listed in Waivable Red List should be non-waivable circumstances and included in List 1 as Non-waivable Red List.

The courts have found lack of impartiality where an arbitrator has discussed the merits of the case with a party prior to appointment and indicated his views.

I would replace “legal advice” for unqualified “advice” (as it happens in 1.4). An architect-arbitrator, who has given technical advice, should also be disqualified.

The arbitrator should also be objectionable if he has given advice or provided an expert opinion on the dispute to someone who is not a party, like a shareholder, an advisor of the party, etc. Therefore, I would delete “to a party or an affiliate of one of the parties”.

2.1.2 The arbitrator has previous involvement in the case.

As courts have held, an indisputable basis for bias is the arbitrator’s prior involvement in the parties’ dispute, either as a lawyer, decision maker, or witness.

A previous involvement in the case is clearly a circumstance to be disclosed, because, using both the objective test for disqualification and the subjective test for disclosure, parties can refuse the arbitrator. But what happens when the prior involvement has been trivial or insignificant, for instance, when the arbitrator participates in a “beauty contest” (without the party giving sensible information to the future arbitrator and without the arbitrator giving his professional views) but finally the matter is entrusted to a different firm from that of the arbitrator?

Although a semantic comment, I think that 2.1.2 should say “the arbitrator has had previous involvement in the case”.

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\textsuperscript{500} Craig, Park, Paulsson, op. cit., para 13-03.
\textsuperscript{501} Craig, Park, Paulsson, op. cit., p. 211.
3.2.2. Arbitrator’s direct or indirect interest in the dispute

a. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

The circumstance described in 2.2.1 (the arbitrator holds, either directly or indirectly, shares in one of the parties, which is privately held) must be compared with 3.5.1 (the arbitrator holds shares, either directly or indirectly, which constitute a material holding in one of the parties, which is publicly listed) and with 4.5.2 (the arbitrator holds an insignificant amount of shares in one of the parties which is publicly listed). The Guidelines distinguish the circumstance in which the arbitrator holds shares in one of the parties which is privately held (2.2.1) and when the holding is one of the parties which is publicly listed (3.5.1 and 4.5.1). It also distinguishes between any holding (2.2.1), a material holding (3.5.1) and an insignificant holding (4.5.2) (by the way, the two adjectives should be consistent). The holding of any amount of shares, directly or indirectly, in a privately held entity is considered a serious case by the Guidelines (2.2.1), less serious when the holding in a publicly listed entity is material (3.5.1) and no disclosable case when the holding is insignificant (4.5.2).

To “hold shares in one of the parties” seems awkward and perhaps “to hold shares in one of the parties, which is a corporation” is semantically better.

b. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

Final Note 4 explains that, throughout the Application Lists, the term “close family member” refers to “a spouse, sibling, child, parent or life partner”. Does “parent” include an ancestor?

The circumstance 2.2.2 has to be put in relation with circumstance 1.3 (the arbitrator has a significant financial interest in the outcome of the case). The latter case (arbitrator himself has the interest) is a non-waivable case, where the former case (a close family member of the arbitrator has the interest) is a waivable situation.

It is doubtful if the affecting circumstance “financial interest” is correct or it would suffice “any interest” in the outcome of the dispute. The US courts have held that “to demonstrate evident partiality under the FAA, the party seeking vacation has the burden of proving that a reasonable person would have to conclude that an arbitrator was partial to the other party of the arbitration,” and the fact that the brother of the arbitrator was employed by one of the parties was not sufficient to invalidate the award since neither the arbitrator nor his brother “had any discernible interest in the outcome of the proceeding”.

c. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

The English Court of Appeal had the occasion to rule upon a failure to disclose relevant information under the ICC Rules in AT&T Corp. & Lucent Technologies Inc. v. Saudi Cable Co., [2000] 2 All ER (Comm) 625. AT&T is an international telecommunications company which successfully bid for a project in Saudi Arabia, a condition of which was that the cable required for the project should be purchased from Saudi Cable. Disputes arose when AT&T discovered that, as a result of a clerical error, the tribunal chairman’s curriculum vitae did not include reference to his non-executive directorship of Nortel, a rival to AT&T in

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Consolidation Coal Co. v. Local 1643, United Mine Workers of America, 48 F.3d 125 (4th Cir. 1995).
bidding for the project. AT&T claimed that there was an appearance of bias and applied for the chairman to be removed and the award set aside. The Court of Appeal found that, although AT&T would have rather known the full disclosure of the chairman regarding his independence, there was no showing of real danger that required the award to be set aside. The court reasoned that in future cases failure to disclose similar circumstances, that pose a real danger to the independence and impartiality of an arbitrator, could be grounds to vacate an award.

3. 2.3. Arbitrator’s relationship with the parties or counsel

The courts have held that, if an arbitrator has substantial, undisclosed business dealings or a close personal relationship with a party, bias can be found, thereby affecting the independence or impartiality of the arbitrator.

a. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

A challenge has a good chance of success where a proposed arbitrator is, in his capacity as a lawyer, frequently engaged on behalf of one of the parties. A challenge is more likely to succeed in the situation where, although the proposed arbitrator himself has never acted for one of the parties, other members of his firm do act for one of them, on a regular basis, than if one person, in an office on the other side of the world, acted in a very limited capacity and some time ago for one of the parties. The extent of a current business relationship may, however, be misleading. A law firm may only have conducted a small amount of work for a party but it may have aspirations to conduct significantly more work in the future. See comparable situations 1.4 and 3.1.1.

b. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

In this circumstance I believe the Guidelines are too “pro arbitro”. It seems to me that if the arbitrator is a partner in a law firm whose partners (and therefore with common pecuniary interests) are working, even for unrelated matters for one of the parties, this creates an apprehension of partiality at least in the eyes of the public.

The fact that this situation is a waivable one may be considered as a benefit to large firms. I wonder whether, to protect the sacrosanct independence principle of arbitration, the rule could not be reworded in the sense that it provides that the arbitrator’s firm is normally considered as a source of conflict unless specific circumstances show the contrary. I think that the commentary of the Explanation to GS-6(a) that “the arbitrator must in principle be considered as identical to his or her law firm” should be specifically reflected in Part I.

c. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

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Ronnie King and David Cave, op. cit., p. 20.

Middeliker Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Sanko S.S. Co. v. Cook Industries, Inc., 495 F.2d 1260 (2d Cir. 1973) (case remanded for factual inquiry on the arbitrator who had business relations with the party and its lawyer); American Guaranty Co. v. Caldwell, 72 F.2d 209 (9th Cir. 1934); National Shipping Co. of Saudi Arabia v. Transamerican Steamship Corp., No. 92 Civ. 0258, 1992 WL 380302 (S.D.N.Y. 1992); Brondex Intax Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160 (S.D.N.Y. 1987); Masheed Oil Drilling Corp. v. Fleck, 549 F. Supp. 854 (S.D.N.Y. 1982); Misercocchi v. Peavey Int'l Inc., 78 Civ. 1571 (S.D.N.Y. 1978) (arbitrators' company's undisclosed receipt of $40,000 in commissions is a basis for finding bias); a family relationship between an arbitrator and one of the parties, one of the parties' principals, or a witness can sustain a finding of bias: Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983).

See Consolidation Coal Co. v. Local 1643, United Mine Workers of America, 48 F.3d 125 (4th Cir. 1995).
One affiliate company is a company effectively controlled by another company. Under the Investment Company Act, 15 U.S.C.A. § 80a-3(A), for example, a company is an affiliate of another if the latter holds an ownership (direct or indirect) of 5% or more of the voting stock. Note 5 of the Guidelines says that “throughout the Application Lists, the term “affiliate” encompasses all companies in one group of companies including the parent company”.

The limitation that the affiliate is “directly involved” in the subject matter of the dispute is unnecessary. In my view, the independence and impartiality of the arbitrator may be affected if he is a manager or director in an affiliate of one of the parties even if the affiliate is not involved or is indirectly involved in the subject matter of the dispute. Otherwise the “indirectness” could be easily fabricated by interposing a shell company.

d. The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

In Datichi Hawai'i Real Estate Corp. v. Lichter, the court found that the mere fact of a prior relationship with someone that represented one of the parties is not in and of itself sufficient to disqualify arbitrators; the relationship between the arbitrator must be with the party's principal and of intimate, either personal, social, professional, or financial, nature so as to cast serious doubt on the arbitrator’s impartiality.

e. The arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

A long-standing and continuing relationship with the arbitrator’s law firm may cast doubts on the arbitrator’s independence. The courts have rejected challenges because the business relationship existed ten years ago, also by contrast, if the law firm has only worked in a completely unrelated matter for either party that may not impair an arbitrator’s independence depending on the circumstances.

In Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., the Court of Appeal held that the assignee was not entitled to rely on the theory that there was "evident partiality" on the part of the arbitrator. There, just because the employer of one of the arbitrators had substantial business dealings with the buyer and assignee, who had also done business with said employer, and who was aware of the relationship between the arbitrator and the employer at the time of submission to arbitration raised no objection as to partiality during the course of arbitration proceedings. Every party involved in the arbitration process knew of the relationship between the arbitrator’s law firm and the party, so the court set a precedent by which it would take into consideration the opportunity of the party to state its objection to the selection of the arbitrator. However, if the objection is not made in a timely fashion, the remedy in case of a biased award might be lost.

f. The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.

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notes:

1. Datichi Hawai'i Real Estate Corp. v. Lichter, 82 P.3d 411 (Hawai'i 2003).
The courts have found that when presented with proof that shows a familial relation between an arbitrator and one of the parties did not necessarily invalidate the award. Indeed, the court found no error in law was present despite a factual finding that the arbitrator was familiarly acquainted with one party, and to whom the arbitrator stated the facts of the pending case and expressed his opinion on the outcome. The Court decided that the arbitrator's failure, during the course of a hearing, to disclose the nature of his relationship with relatives of counsel for the defendant was sufficient to demonstrate the appearance of partiality. Thus, the Court correctly determined that the arbitration award should be vacated, because the appellant could not prove that his decision was unbiased.

*A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*

In *Spearman v. Wilson*, 44 Ga. 473 (1871) the Court decided that it was not adequate for an arbitrator to render an award in favour of the party, which had become the property of the son of the arbitrator, pending the arbitration. The law which governs arbitration demands the same freedom from all bias that applies to judges, and the fact stated by the arbitrator, showing that, by his previous opinions expressed, his judgment had not changed by the subsequent purchase by his son, cannot make valid that which, from the fact of the purchase, when known to the arbitrator, and without notice to the other party, disqualified him to act in the case. The common denominator between all this cases and the root of 2.3.9 situation is that arbitrators should be free from interest or relationship in all cases, unless such disqualifications are waived by informed parties.

However, in another case, the Supreme Court of Tennessee held that in the arbitrator's failure to disclose that his brother conducted substantial business with a subsidiary of a party's parent corporation did not necessitate vacating the award. Even assuming that the arbitrator was aware of his brother's business relationship with the subsidiary, there was no demonstration of the existence of actual bias on part of the arbitrator. Arbitrators serve a quasi-judicial function only by consent of the parties to an arbitration agreement. An arbitrator's jurisdiction to act is conferred solely by contract or submission appointing them, and, therefore, they, unlike judges, are not disqualified for being interested in the result if such circumstance had been disclosed to the party adversely affected thereby.

### 3.3. Orange List

#### 3.3.1. Previous services for one of the parties or other involvement in the case

*a. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.*

The circumstance that the arbitrator has, in the past, served as counsel for one of the parties even in an unrelated matter is a matter of controversy. Some court judgements have found that there is no ground for setting aside an arbitrator's award because he had formerly been member of counsel, in another action, for a party whom he found in favour. Although this fact was not communicated to the party against whom the award was made, there was no evidence that the fact was intentionally concealed.

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*See also Ondrus Companhia Maritima, S.A. of Kissavos v. Marc Rich & Co., A.G., 579 F. 2d 691 (2d Cir. 1978).*

*Gutrich v. Hulbert, 123 Mass. 190 (1877).*
Spanish courts have addressed this issue on several occasions. The judgement of the Provincial Court of Baleares of 4 February 1997 considered lack of impartiality of the arbitrator who acted as lawyer of the main shareholder (37.5% of the shares) of a company which was party to the proceedings. Another judgement of the Provincial Court of Barcelona of 9 December 2003 held the existence of “objective partiality” of the arbitrator stemming from the circumstances: a) the previous legal advice given by Price Waterhouse Coopers (which agreed with the party the legal advice of Arbitec) to one of the parties; and, b) the conflict of interest between one of the parties and its advisors. Austrian courts\textsuperscript{a,b} have decided that the arbitrator lacks independence when he has represented one of the parties throughout a long period and on a regular basis. Finally, German courts\textsuperscript{a,c} granted a challenge because, during the arbitration, the sole arbitrator represented one party in court proceedings against the other party.

A similar situation, however relating to judges, was considered in the Locabail case\textsuperscript{1} by the Court of Appeal in England. The case concerned a solicitor sitting as a deputy judge who discovered during the proceedings that his firm had acted in litigation against the ex-husband of one of the parties. The Court held that the pecuniary interests involved in the case were not of such nature to automatically disqualify the judge but that it had to be determined on the basis of the particular facts of the case whether there was a “real danger” of bias. There, the court denied the existence of such a danger because the judge’s knowledge of the case involving the ex-husband was limited and the judge’s interest in the fees earned by his law firm in that case was tenuous and insubstantial\textsuperscript{b}.

Although the three year period may be “an appropriate general criterion, subject to the special circumstances of any case” (Part II, 8) three years is a short period\textsuperscript{b}. The arbitrator that has served as counsel for one of the parties within the last three years, may abuse the confidentiality duty owed to his former client since such duty does not expire with the termination of the client-attorney relationship\textsuperscript{b}. This situation can be considered as waivable from a common law perspective, where confidentiality belongs to the client, who can release the lawyer from such duty\textsuperscript{b}, but not from a civil law perspective where the “professional secrecy” is absolute.

b. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

An arbitrator may have been appointed by one of the parties on a number of occasions in the past (the “repeat arbitrator”). Whilst such practice does not automatically give rise to a likelihood of partiality, and whilst challenges on such grounds are considerably less likely to succeed than those based upon one of the parties being a client of an arbitrator’s firm, there are occasions when such a challenge may succeed. The appropriate question is whether an arbitrator’s prior appointments might impact the parties’ view of his independence, and constitute a reasonable ground on which one party might object to his appointment\textsuperscript{b}.

\textsuperscript{a} Supreme Court 15 September 2004, 9 Oba 94/04w.
\textsuperscript{b} High Regional Court of Dresden 27 January 2005, 1 SchH 02/04.
\textsuperscript{1} Locabail (UR) Ltd. v. Bayfields Properties [2000] 1 All ER 65.
\textsuperscript{a} Lew. Mistelis, Kroll, op. cit., p. 263.
\textsuperscript{b} California’s Ethical Standards make a required disclosure category the prior service in the last five years.
\textsuperscript{c} CCBF Code of Conduct, 2.3.3: “The obligation of confidentiality is not limited in time”.
\textsuperscript{b} ABA Model Rules, Rule 1.6: “A lawyer shall not reveal information relating to representation of a client unless the client consents...”
\textsuperscript{b} Ronnie King and David Cave, op. cit., p. 20.
\textsuperscript{c} In an Austrian case (Commercial Code Vienna, Decision 24, July 2007), according to the claimant, the arbitrator had been appointed on five occasions by the respondent, which, according to the claimant, raised justifiable doubts as to the arbitrator’s independence and that the IBA Guidelines were to be taken into account. The Vienna court
In my view, if an arbitrator has been repeatedly appointed by one of the parties, this is likely, "in the eyes of the parties", to give rise to doubts as to the arbitrator’s impartiality or independence (GS-3 (a)). If in this situation, as in most cases, the award outcome has been basically favourable to such party, I would include it in the Waivable Red List.

An arbitrator who is a “professional” arbitrator, (he who is more or less a full-time arbitrator and depends exclusively on arbitration for income) raises some issues for the fear that he may try to “satisfy” or “please” the choosing parties in order that he is chosen again. Further, that he may be inclined to “split the baby” to keep both parties reasonably happy or equally unhappy and prevent more definitive rulings when there may be more “accurate” or “just”. For these reasons, in California, prior to the promulgation of formally approved arbitration standards, early efforts to regulate arbitrator conflicts of interests demanded disclosure of all cases handled by a particular arbitrator for ten years.

c. The arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

In a US case the court held that the arbitrator’s relationship as previous attorney for an attorney for one of parties did not require that the arbitration award be vacated on grounds of bias. The court reasoned that where an attorney-client was not representing a party in the pending arbitration matter, and the arbitrator met the attorney representing a party in the dispute for first time on the date of an arbitration hearing and did not have business relationship with that attorney. Further, the attorney who was the arbitrator’s client, and attorney, representing a party maintained separate law offices. Even the fact that the wife of the attorney representing the party in arbitration dispute worked with a second attorney, who had been a client of the arbitrator, and assisted her husband by providing research support for papers filed in arbitration dispute, was not sufficiently significant to warrant disclosure by the arbitrator, even if the arbitrator was aware of the connection.

In another case, the plaintiff brought pro se action in the state court against the arbitrator, the arbitrator’s law firm, the arbitration association, the plaintiff’s former employer, the corporate affiliates of the former employer and the employer’s law firm. The US District Court for the Western District of Washington dismissed the action and denied the plaintiff’s motion to remand. The Court of Appeals held that: (1) claims against the arbitrator and the arbitrator’s law firm were barred by doctrine of arbitral immunity, and (2) dismissal for lack of proper service was required.

3.3.2. Current services for one of the parties

a. The arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.

The Deutsche Institution für Schiedsgerichtsbarkeit agreed with the challenge on the grounds that the defendant had requested the law firm of the challenged arbitrator to provide a legal opinion for one of its subsidiaries indicating that it was of no relevance whether the
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challenged arbitrator was aware of the appointment of his law firm on whether he was involved in the preparation of the legal opinion.

A US court also vacated an award for a subcontractor and against a contractor on grounds of partiality. This finding was not affected by the fact that the arbitrator was a lawyer in a small firm which had represented the contractor and its president. In my view, the fact that the arbitrator's law firm is currently rendering services to one of the parties is a serious one which needs the express approval of the parties and to be moved to the Waivable Red List.

b. A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.

The Application List distinguishes two related situations: when a law firm shares fees with the arbitrator's law firm and renders services to one of the parties (3.2.2), which is included in the Orange List; and, when a law firm is associated with the arbitration law firm but does not share fees or render services to one of the parties (4.3) which is included in the Green List.

3.3.3. Relationship between an arbitrator and another arbitrator or counsel

a. The arbitrator and another arbitrator are lawyers in the same law firm.

This description should say "the arbitrator and another arbitrator in the same arbitration..." The future compatibility of international arbitration and an arbitrator who is a partner in a large law firm has been questioned by some authors. Again the community of interests of partners of the same firm makes the Guidelines' weak treatment of this type of situations very arguable.

b. The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.

The question of English barristers ("advocates" in Scotland) working in the same chambers is a questionable one regarding arbitration. The position of the courts is not uniform. In the *Laker Airways Inc. v. FLS Aerospace* case, the court held that the fact that the arbitrator was from the same chambers as counsel for one of the parties did not give rise to justifiable doubts as to his independence or impartiality. The court decided differently in *Liverpool Roman Catholic Trust* in which, a barrister was appointed as tax expert on behalf on another barrister from his chamber and with whom was also a good friend. The court looked to see if there was "a relationship between the proposed expert and the party calling him with what, a reasonable observer might think, was capable of affecting the views of the expert so as to make the expert unduly favourable to the party". The judge there found that such relationships did exist and held the barrister expert not to be independent.

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*a* Schied; V 2003, 94, cited by Wolfgang Kühn and Ulrike Gontenberg in Arbitration World, 2004, p. 188.
*dd* David A. Lawson, op. cit., p. 57, Leon Trakman, op. cit., p. 10.
*ff* *Laker Airways Inc. v. FLS Aerospace Limited* [1999] 2 Lloyd's Rep. 45.
*gg* In its *amicus* submission in the case, the Bar Council argued that if membership in the same chambers created a conflict of interest, then the public interest would be harmed since public access to a pool of barristers, particularly in specialists fields, would be considerably reduced. However, the decision was criticized as an insular *ex parte* decision by an England judge (Rix J. a former barrister) to protect the interests of the English Bar.
*hh* *Liverpool Roman Catholic Archdiocesan Trust v. Goldberg* [2002] 4 All ER 950.
*ii* Llew, Mistelis, Kroll, op. cit., p. 263.
The French Tribunal de Grande Instance (Court of Appeal)\textsuperscript{166}, concluded that while the independence of barristers within the same chambers is said to be a generally accepted principle in the practice of English law, it is difficult to say that the practice is not of such a nature as "might call into question the arbitrator’s independence" at least in the eyes of a non-British party (a point which was made in commentary heavily criticising the Laker Airways decision)\textsuperscript{167}. Accordingly, the circumstances should be disclosed by the barrister arbitrator and might occasion further questions about the relationship, or even a challenge where there were close ties between the barristers. Standing alone, however, the relationship would not be disqualifying\textsuperscript{168}.

Although barristers are independent solo practitioners not working in partnership and not sharing profits but only sharing premises and services, they are structurally organised within the chambers, under the administrative management of clerks, who evenly distribute the work into the members of the chamber and negotiate the fees with the clients. Today, at least externally, they look like a rather integrated structure (probably more clearly to non-lawyers or non-English lawyers’ clients), advertising the chamber’s services as a whole, share senior and junior clerks and carry out the recruitment of new members collectively. Therefore the inclusion of this circumstance in the Orange List should be carefully reconsidered.

c. A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

Friendship between the arbitrator and one of the parties’ counsel is not uncommon. The arbitration world is relatively small. Often it is the counsel who proposes to the client the arbitrators to be appointed and, logically, he proposes persons that he knows. The problem arises when the level of friendship can influence the impartiality of the arbitrator.

In one arbitration in the US, the arbitrator was successfully challenged on the grounds of partiality for his behaviour during the arbitration because it was discovered that he had spent two nights in the hotel room of a female lawyer representing the successful party in the arbitration\textsuperscript{169}.

The US courts have held that an undisclosed connection between arbitrator and attorney for a sales representative seeking arbitration could not form a basis for vacating the award on the ground of partiality of the arbitrator. There the arbitrator did not participate in any legal matters in which the lawyers of his firm and the sales representative’s lawyer’s firm were mutually involved and the arbitrator had only two contacts or associations with the sales representative’s attorney\textsuperscript{170}.

In a Swiss Supreme Court case\textsuperscript{171}, a party-appointed arbitrator had a partner who represented a third party acting against an affiliate of a party in the arbitration. There, the court held that the arbitrator was independent. Further, the court held that ‘while arbitrators must be independent from the parties and their counsel, arbitrators need not be independent from counsel to a third party, even if the arbitrator is the opponent of a party in the arbitrations in another case. While the arbitrator was a partner of the third party counsel, and

\textsuperscript{166} Kuwait Foreign Trading Contract & Investment Co. v. Iconi Estero Spa (1993) 2 ADRLJ 167.
\textsuperscript{168} Other judgements against the independence in similar situations exist like Nye Sanders & Partners v. Alan E. Briston (1977) 37 BLR 92.
thus not independent of that counsel, it did not matter; because the Court found that there was no interest in deciding in favour of a party in the arbitration just because that party was opposed to a client of the arbitrator's firm.

In *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126 (Tex. App. 2003) the plaintiff alleged that the arbitrator failed to disclose a prior relationship with the attorney for the adverse party. The District Court dismissed the action for want of subject-matter jurisdiction. The Court of Appeals held that: (1) as a matter of first impression, the disclosure requirement of an arbitration agreement was a function of arbitrator's position as an arbitrator, and thus, the arbitrator was immune from suit, and (2) even assuming the arbitrator was not protected by arbitral immunity, the Federal Arbitration Act afforded the party with an exclusive remedy to contest the arbitration award on the theory that the arbitrator's impartiality was compromised.

In *Cellular Radio Corp. v. OKI America, Inc.*, 664 A.2d 357 (D.C. 1995), the court determined that an involuntary, adversary relationship between an arbitrator and a party to arbitration, involving minimal contact that had terminated prior to arbitration, cannot be deemed one that might cause bias. Because in the case, there was no evident partiality arising from prior relationship between the arbitrator and the party's counsel, although arbitrator had, on two previous occasions, represented a client of the law firm that represented a party in the arbitration. The only conceivable interest of the arbitrator was in not alienating an attorney he might in the future oppose, a concern that would apply to virtually every lawyer who is an arbitrator.

Relationships between arbitrators and the law firms representing the parties can also form the basis for a challenge on the grounds of lack of independence or impartiality. Once again, no generalisations can be made and decisions must be made based on the facts in each case. In jurisdictions with split legal professions such as the UK, a law firm representing a party may nominate a barrister frequently retained by that firm. Again, self restraint is called for on the part of the nominee. If he feels any inhibition at the prospect of finding against the client of the firm which has nominated him, he must decline the appointment. Challenges may be upheld where the arbitrator's spouse or other close relative is acting for one of the parties, or is a partner in the law firm that represents that party.

In another US case, the court found that the alleged facts did not create a sufficient basis for "evident partiality" on the part of the arbitrator and that the facts alleged were tenuous at best. There, the arbitrator and the lawyer for one of the parties were two of 34 lawyers that previously represented a corporation, not a party to the current arbitration, in a case that concluded at least seven years earlier. Further US courts do not find "evident partiality" of the arbitrator who was formerly employed as a legal advisor to a government entity and a distant familial relation to the President of the US. Based on such facts, the court found that there were not sufficient grounds for a finding of "evident partiality" towards the US government.

*d. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.*

This circumstance (repeated appointments by the same counsel) is related to circumstance 3.1.5 (repeated with one of the parties).
Where an arbitrator accepts repeated 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 future appointments. Prior appointments by one party should not, in principle, be sufficient to cast doubts on the independence of an arbitrator unless there is a pattern of regular appointments by that particular party.

However, if the awards have been unfavourable to the interests of the appointing counsel, it would be acceptable. In my view, the description of this circumstance should make reference to the result of the arbitration and I would propose the following wording: "the arbitrator has been appointed on two or more occasions ... unless the award or awards, which have been previously rendered by the arbitration have been adverse in the majority or all occasions to the interests of the appointing party".

3.3.4. Relationship between arbitrator and party and others involved in the arbitration

a. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

This situation would need, in my view, to be listed in the Waivable Red List and therefore requiring the express will of the parties to be waived.

b. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Attention should be paid to the requirement of "professional capacity" because a "profession" is a calling requiring specialized knowledge, and often long and intensive academic preparation, which would exclude people without such knowledge.

I would add at the end of the sentence: "... such as a former in-house counsel, employee or partner".

In the English case Jackson v. Barry Railway (1893), the court refused to set aside an award where the engineer of the building owner was nominated as arbitrator in the contract and it was alleged that he could not have an open mind. In Nuttal v. Manchester Corporation (1892), a borough surveyor was nominated by the building contract as arbitrator. The substance of the builder's case was that it was the surveyor himself who had made mistakes, which were solely responsible for a subsidence. The court held that it would be impossible for him to sit in judgement of his own professional competence and refused to stay an action begun by the builder. In Kimberley v. Dick (1871) it was alleged that the architect had made a secret bargain with the building owner that the cost would not exceed a certain sum. The Court treated that as a disqualification and thus refused to order the stay of an action for an account.

In the US, the fact of having acted as the agent of one of the parties regarding the matter in controversy, or to have received and acted on ex parte representation or evidence, or otherwise permitted undue influence from any other quarter, has been considered to constitute such partiality as would have invalidated an award.

c. A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in

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* The California Ethics Standards require the disclosure of the results of each case.
one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

Although to measure the level or closeness of friendship is not an easy task, ethical rules and court judgements can help in the assessment.

The 33d Canon of US Judicial Ethics provides that: “Social relations: [A judge] should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct”.

In his concurring opinion in the seminal case Commonwealth Coatings Corp. v. Continental Casualty Co, Justice White declared that “the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Art. III of Judges . . . It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicane in giving effect to their awards. But it does mean that arbitrators are not automatically disqualified by a business relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators”.

The courts have also held that there was no “impression of partiality” because the arbitrator and the defendant’s president had been active in the affairs of the town and because the arbitrator knew the father-in-law of the defendant’s president but that the entertainment of an arbitrator by one of the interested parties ordinarily is censurable and may be so flagrant as to require the setting aside of the award. In another case, the court negated the allegation that the arbitrator had “a close personal and professional relationship” with the president of the firm that operated the vessel involved in the arbitration. The court refused to vacate the award on the basis of a close relationship that the arbitrator and the company executive had served together on 19 arbitration panels and no other concrete support was furnished for characterizing the arbitrator and the executive as “close personal friends”.

d. If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.

In order to maintain the reputation of both the judges and the arbitrators, the parties should be aware if the arbitrator has intervened as a judge in any case involving one of the parties. I would suggest deleting the adjective “significant” because the former judge could have received sensitive information regardless the significance of the case.

A California Court of Appeal disqualified an entire law firm when a retired judge, who had conducted settlement talks involving two parties, joined the law firm representing one of the parties.

3. 3.5. Other circumstances

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a. The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.

In a German case\(^{36}\), the respondent’s counsel was a speaker at a convention organized by the German Institution of Arbitration (DIS) during which he expounded on the issue of arbitrators’ powers under arts. 81 and 82 of the EU Treaty, in particular on the question of whether arbitral tribunals are required to investigate alleged violations of EU competition law and the proceeds of the conference were published in a volume of the DIS arbitration series. The challenge to the arbitration award was that the chairman of the tribunal was a member of the board, one of the co-editors of the DIS series and had co-signed the preface of the volume of the DIS publication. The claimant submitted that these circumstances showed that the chairman had authorized the contents of the article and argued that the situation was similar to that contemplated by paragraph 3.5.2 of the Guidelines, which requires an arbitrator faced with such circumstances to step down. The Higher Regional Court of Frankfurt found that there was no evidence that the chairman had publicly advocated a position and rejected the challenge.

3.4. Green List

3.4.1. Previously expressed legal opinions

a The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

Generally, publications dealing in an abstract way with the legal issue in question - but not an opinion on the concrete question (situation 2.1.1) – do not impair the arbitrator’s impartiality. In particular, party-appointed arbitrators are sometimes chosen according to their perception or their expected attitude on open-mindedness to a particular agreement or scientific viewpoint\(^{37}\).

It is unlikely that a challenge would succeed merely on the grounds that a potential arbitrator has had an academic article published in a legal journal in which certain views that may not be favourable to a particular party’s position in the arbitration in question were expressed. However, there could conceivably be a challenge based upon the views that a potential arbitrator may have expressed publicly. The more extreme these views, the greater the grounds for challenge on the basis of lack of impartiality.

The issue is arguably more sensitive where there is a political or philosophical element to the question in dispute. For example, the appropriate measure of compensation following the expropriation of an investment is a matter of international debate with differing political views being expressed by the governments of developed states and those of developing states. There may be the suspicion that public expression of views on political questions are a sign of partiality and could lead to disqualification.

Books and newspapers should also be included, and “review” instead of “law review”. “The arbitrator has previously expressed a general opinion in an unrelated forum (i.e. in a book, newspaper, review …”). The adjective “general” before “opinion” is superfluous.

\(^{36}\) OLG Frankfurt, Decision of 4 October 2007, cited by Matthias Scherer, op. cit., p. 11.

\(^{37}\) Lew, Mistelis, Kröll, op. cit., p. 260.
3.4.2. Current services for one of the parties

a. A firm in association or in alliance with the arbitrator’s law firm, but which does not share fees or other revenues with the arbitrator’s law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

b. Arbitrators from law firms which are affiliated to, or have an alliance with, a firm representing one of the parties may not be considered independent by any kind of tests\textsuperscript{a26}.

3.4.3. Contacts with another arbitrator or with counsel for one of the parties

a. The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

The arbitrator who has a relationship with the lawyer of one side through such membership may be considered independent. It would depend on the type or size of the association or organization or if the relationship is a “close” one. The arbitrator’s membership in an association, party to the proceeding, may give rise to doubts regarding the arbitrator’s independence\textsuperscript{a27}.

The Federal Supreme Court of Switzerland rejected a challenge against an award on the grounds that two arbitrators and the counsel of one of the parties belonged to the same professional organization and the Court cited the IBA Guidelines\textsuperscript{a28}.

3.4.4. Contacts between the arbitrator and one of the parties

a. The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator’s availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

Lack of impartiality should be found where an arbitrator has discussed the merits of the case with a party prior to appointment and indicated his views.\textsuperscript{a29} The interviewing of arbitrators before appointment does not impair the impartiality of an arbitrator if properly conducted. It requires that the case is not discussed in detail and that the arbitrator does not give a party advice as to how to proceed and to frame its case\textsuperscript{a30}.

The courts have refused to invalidate an award when an arbitrator has been shown certain key documents by the party appointing him when he was being considered for appointment because the arbitrator had not formed a judgement on reviewing these documents\textsuperscript{a31}.


\textsuperscript{a27} Austrian Supreme Court 7 November 1991, 6 Ob 617/91, cited by Matthias Scherer, op. cit.

\textsuperscript{a28} Federal Supreme court of Switzerland, Decisions of 20 March and 4 April 2008. In this case, one of the parties filed an appeal with the Supreme Court requesting the annulment of the award on the grounds of the irregular composition of the arbitral tribunal because two arbitrators and the counsel for one of the parties belonged to a professional organization called “Rex Sport”, which was composed of 26 members and the website of which was protected by a secret access code. The Supreme Court rejected the challenge because it found that had the claimant performed a proper due diligence when he was informed of the identity of the arbitrators, the link between the chairman and the arbitrators appointed by the other party would easily had been discovered. Cited by Matthias Scherer, op. cit., p. 5.


\textsuperscript{a30} Lew, Mistem and Kröll, op. cit., p. 260.

\textsuperscript{a31} Employees Ins v. National Union Fire Ins., 933 P.2d 1481 (9th Cir. 1991).
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In the arbitration law of the People’s Republic of China there is a special provision, which stipulates that an arbitrator must withdraw from an arbitration not only where he is a close relative of the party or has a personal interest in the case, but also where “the arbitrator has privately met with the party or agent or accepted any invitation for entertainment or gift from a party or agent”

\[\text{\textsuperscript{a}}\text{. The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.}\]

The qualification of “insignificant” will always depend on a case-by-case analysis. In \textit{AT&T Corp. v. Saudi Cable Co.\textsuperscript{b,c}} the English Court of Appeal held that owning 474 common shares was a sufficiently small number and was not therefore considered to have any impact on the arbitrator’s impartiality. In the same sense, in \textit{Weatherill v. Lloyd TSB Bank}, 26 July 2006, the judge unknowingly held 470 out of 5.5 billion issued shares.

\[\text{\textsuperscript{IV. GENERAL CONSIDERATIONS ABOUT THE GUIDELINES}}\]

1. General favourable comment

Generally, the Guidelines have received a very favourable acceptance\textsuperscript{c}. They represent an important contribution to the arbitration activity and particularly to the independence and impartiality of arbitrators, which constitute a key element in arbitration. The IBA and the WG deserve, then, the gratitude of all of those who, from different angles, work in arbitration and the society in general, which benefits of this important instrument of dispute solving and harmonisation effects.

However, during the drafting, the Guidelines were criticized by some bodies and commentators. In particular it has been said that the Guidelines was based on “bad example” of parties using conflicts and disclosure issues to obstruct the proceedings\textsuperscript{d} and providing a well-sprung platform for new tactical challenges to arbitrators\textsuperscript{e}.

Some arbitral institutions have taken the view that, while the Guidelines are an interesting attempt to deal with complex and difficult discussions, they are not guidelines for them, which apply their own standards and practices rules with challenges for conflicts of interest\textsuperscript{f}.

2. A proposal to restructure Part I (General Standards) of the Guidelines

In spite of their advantages, in my view, the structure of Part I (General Standards) and the title of each standard are deficient, lack systematization, and need to be restructured. The adopted General Standards are as follows:


\[\text{\textsuperscript{d}}\text{Natalie Voser.}\]


- General Standard 1 (General Principle) states that every arbitrator shall be impartial and independent;
- General Standard 2 (Conflicts of Interest) contains the arbitrators’ obligation to decline for lack of independence and the objective test ("a reasonable third party point of view");
- General Standard 3 (Disclosure by arbitrator) contains the subjective test ("in the eyes of the parties");
- General Standard 4 (Waiver by the parties) refers to the parties approval of the arbitrator by silence to the disclosure and the participation of arbitrator in the settlement of the dispute;
- General Standard 5 (Scope) refers to the applications of the Guidelines to all arbitrators;
- General Standard 6 (Relationships) refers to the arbitrators’ relation with law firms;
- General Standard 7 (Duty of arbitrators and parties) urges parties and arbitrators to investigate any potential circumstance to impair the independence.

Since all the Guidelines basically refer to the independence and impartiality and the duty to disclose and its consequences, I think that the Standards should be only 5, as follows:

- General Standard 1 (Basic principle: arbitrator’s independence and impartiality) The basic principle: I would keep the current wording, although I would extend the obligation to be independent and impartial further to the issuing of the award, and even during any appeal period;
- General Standard 2 (Obligation to decline). Within the main obligation for arbitrators is to decline the appointment if they deem themselves to be dependent or partial vis-à-vis to one of the parties or the dispute. Explanation Standard 2(c) and 2(d) should be related;
- General Standard 3 (Objective test). If the facts or circumstances give justifiable doubts "from a reasonable third person’s point of view", the arbitrator shall disclose them. So the current GS-2(b) should become a Standard of its own;
- General Standard 4 (Subjective test). If the parties have the knowledge, after disclosure or otherwise, that the arbitrator is not independent or impartial, the arbitrator must decline. So the current GS-3 should become Standard 2 (with a reference to the Explanation Standard in the current 2(c) and 2(d); and
- General Standard 5 (Waivers of the parties). This Standard should regulate all the possibility of waivers by the parties to facts and circumstances that may impede the arbitrator’s independence or impartiality. It should include the impossibility to waive some circumstances, those which need express waiver and those that only require implicit waiver.

The remaining current Standards do not require a separate Standard. Standard 5 (Scope) is wrongly placed and does not need to be a Standard by itself. It could be added in proposed Standard 1. Standard 6 (Relationship) and Standard 7 (Duty of arbitrators and parties) could be added to the proposed Standard 2.

3. Cases that are not covered but should be covered by the Application Lists
Although the Guidelines recognise that the Application Lists are not exhaustive, some authors suggest that the Lists should be expanded\textsuperscript{cvi}. I also believe that a few more cases should have been included. For instance, when the arbitrator:

a. has a substantial interest in a firm with, which he or she has done a more than trivial work with a party\textsuperscript{cvi}.

b. is employed by one of the parties\textsuperscript{cvi}. A person who had been employed, especially for a long period of time, by one of the parties may well be unable to act impartially with respect to that party, even if he believes himself to be able to do so. Furthermore, such a person may be in possession of information about that party, much of which may not be put forward as evidence before the tribunal, which could lead him to come to a decision at variance to that which would be reached by an arbitrator who did not possess such additional information.

c. has a financial interest in one of the parties’ competitor\textsuperscript{cvi}. In AT&T Corp. v. Saudi Cable Co., an eminent international arbitrator was appointed tribunal chairman in an ICC arbitration. One of the parties became aware that the chairman was a non-executive director of a competing company of that party, and that the competing company was also a disappointed bidder for the contract, out of which, the arbitration arose. The party lodged a challenge with ICC based on the chairman’s alleged lack of independence.

d. has hired one of the party’s law firm\textsuperscript{cvi}.

e. is a member, with no participation, in the government bodies of a health, cultural or other non-profit organisation which is a party of the arbitration.

f. has acted as legal advisor of an association to which one of the parties belongs should probably be included in Orange List 3.5 (other circumstances)\textsuperscript{cix}.

g. has been instructed by the same lawyers in another matter, in which, similar allegations had been made against the same witness\textsuperscript{cx}.

h. has had direct contact with a witness but failed to inform the parties\textsuperscript{cxi}.

i. is a member of an organization that practices discrimination on the basis of race, sex, religion, national origin or sexual orientation\textsuperscript{cxi}.

j. has given advice or provided an expert opinion on the dispute to someone who is not a party of the arbitration.

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\textsuperscript{cii} Judith Gill, LCIA’s Symposium, Madrid, 3 May 2007, Session A, question 22.

\textsuperscript{cvi} Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1966) decision by Justice Black.

\textsuperscript{cix} Craig, Park and Paulson, op. cit., p. 211.

\textsuperscript{cx} In AT&T Corp. v. Saudi Cable Co., an eminent international arbitrator was appointed tribunal chairman in an ICC arbitration. One of the parties became aware that the chairman was a non-executive director of a competing company of that party, and that the competing company was also a disappointed bidder for the contract, out of which, the arbitration arose. The party lodged a challenge with ICC based on the chairman’s alleged lack of independence.

\textsuperscript{cxi} In the California case Barnwall v. Hernandez, 252 Cal.Rptr. 647 (Cal. Ct. App. 1988) the court held that the fact that the neutral arbitrator had hired one of the parties’ law firm to represent him in a lawsuit which generated about $400 legal fees for the firm did not create an impression of possible bias “since the services rendered by the firm to the neutral arbitrator were insignificant”.

\textsuperscript{cxi} Houston Village Buildings, Inc. v. Falbaum, 105 S.W.3d 28 (Tex. App. 2003). The arbitrator of a dispute between the home owner and the builder was required to disclose his representation of the home builders trade association of which the builder and its parent company were members. Although they did not have a direct attorney-client relationship with the builder, because the arbitrator’s representation was personal and ongoing at the time of arbitration, the relationship created the impression of partiality in favour of the builder.

\textsuperscript{cxi} See ASM Shipping Ltd. of India v. TTTM Ltd. of England [2005] EWCA Civ 1341.

\textsuperscript{cxi} See Norbrook Laboratories, Ltd. v. Tank Mouison Chemplant, Ltd., [2006] EWHC 1055 (Comm).

\textsuperscript{cxi} California Ethics Standards, Standard 7.13.
k. has qualifications contradictory to the parties’ arbitration agreement\textsuperscript{iii} (i.e. experience, condition that arbitrator must be a lawyer, nationality, etc.)

l. has taken extreme and detailed views on political or economic issues related or affecting the arbitration\textsuperscript{iv}.

4. The Guidelines too “pro-arbitro”

The Guidelines must be commended for their important contribution to international arbitration. Although they have often followed the case law of the jurisdictions with greater experience in arbitration, in my view, the Guidelines have adopted in some aspects pro arbitro attitude rather than pro partibus or pro institutio arbitralis.

The Introduction of the Guidelines declares that “the WG has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of them have a responsibility for ensuring the integrity, regulation and efficiency of international commercial arbitration”. Further, while it is true that Part II, 8 recognises that “the borderline between the situations indicated is often thin,” and that “it can be debated whether a certain situation should be on one List instead of another” and that the second draft (22 August 2003) moved some Green List situations to the Orange List, still in many cases the Guidelines have taken an attitude too pro arbitro. In my view, in the equation between the need that arbitrators are, and are seen as, independent and impartial as possible and the parties’ right to select arbitrators of their choice (Introduction 2) the first option should prevail in the interest of the reputation of the institution of arbitration. That is why I believe that some chromatic operations should be further introduced in the Guidelines.

A few examples: It seems to me that an arbitrator who regularly advises (as a lawyer or not) the appointing party should be disqualified, either if he derives a substantial financial income there from or not (1.4 or 2.3.7); the arbitrator that has given legal advice or provided an expert opinion on the dispute (2.1.1) should also be disqualified and this situation included in the Non-Waivable Red List. Also, circumstances like the arbitrator representing the parties (2.3.1) or the arbitrator working as a lawyer in the same law firm as the counsel to one of the parties (2.3.2), or when the arbitrator is in the same firm as the counsel to one of the parties (2.3.3), which the Guidelines allow to waive, should be non-waivable. Also, if the arbitrator’s law firm is currently rendering services to one of the parties, whatever the circumstances (3.2.1) or two arbitrators are of the same law firm (3.3.1) and in a similar case, would require not the implicit but the explicit waiver of the parties. An arbitrator should disclose that his law firm has acted against one of the parties even in an unrelated matter and without the involvement of the arbitrator (4.2.1), etc.

Unlike what circumstance 4.4.2 recommends, I think that if the arbitrator and counsel for one of the party’s have previously served together as co-arbitrator or co-counsel this circumstance should be disclosed by the arbitrator\textsuperscript{v}.

5. Minor complementary suggestions for a revision

The Guidelines use “case” and “dispute”, for instance, in situations listed 2.1.1 and 2.1.2. It would be useful to be consistent and always use one of them.

\textsuperscript{iii} This disclosure is required, e.g., by Section 588, 1 Austrian Arbitration Law 2006.

\textsuperscript{iv} Austrian Supreme Court, 3 November 2005, 6 Ob 235/05k.

\textsuperscript{v} A US court decision (Positive Software Solutions v. New Century Mortgage Corp., 436 F.3d 495 (5th Cir. 2007)) where the losing party discovered that the arbitrator and his former law firm had previously, in an unrelated matter, been co-counsel, and the arbitrator had not disclosed these facts nor offered any explanation for the non-disclosure held that what is required is not disqualification, but disclosure.
The arbitrator is defined sometimes as “the arbitrator in some cases” (e.g. 3.1.5, 3.2.1, 3.3.1, etc.) and some other times as “an arbitrator” (e.g. 3.3.6, 3.4.3, etc.), and these expressions should be harmonised.

The Application Lists have numerous references (e.g., 2.2.2, 2.3.6, 2.3.7, 2.3.9) to the term “significant” (significant interest, significant commercial relationships). Although “significant” generally means important, notable, etc. and that a “significant amount of something means large enough to be important or make a difference”, it will be difficult at times to determine the significance of a particular situation. The WG believed that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive. However an effort should be made using other more specific terms like “important”, “material”, “substantial” or circumlocutory expressions.

One of the main areas which may affect the independence or impartiality is when the arbitrator (or his firm) has rendered legal services to one of the parties and the Guidelines contemplate many such situations. However, this is done by using different and confusing terminology. For instance, the Guidelines refer to the arbitrator “advising” (situations 1.4, 2.3.7) or “giving legal advice” (situation 2.1.1) or “representing or advising” (situations 2.3.1) or “acting as counsel” (situation 2.3.3) or being “a lawyer” (situation 2.3.3) or “having involvement in the case” (situation 2.3.5); or “served as counsel” (situation 3.1.1, 3.1.2); or “act for” (situation 3.1.4, 3.4.2); or “render services” (situation 3.2.1). It would be advisable to unify or harmonize such disparities in the interest of consistency and clarity.

Within the 49 situations of the 4 Application Lists, at least 25 of such situations refer to the “affiliate” of one of the parties. For instance, (2.1.1, 2.2.1, 2.3.1, 2.3.9, 3.1.1., 3.1.2, 3.3.1, 4.2.1, 4.5.1, 4.5.2) (2.1.1, 2.2.1, 2.3.1). I wonder whether, the description of the situations could be simplified by just adding a final note whereby all references to a corporate party necessarily includes their affiliates as defined in Note 5.

In general, an effort should be made to define some of the major terms used in the guidelines.\footnote{Michael A. Lawson, op. cit., p. 38.}

My suggestion to convert the Guidelines into a stricter set of recommendations is motivated by the need to protect and improve the good reputation of the institution of arbitration, which needs to enhance the perfect independence and impartiality of the arbitrator but particularly the appearance of such independence and impartiality not only to the eyes of the parties but to the eyes of the general public or “fair minded lay observers”.\footnote{Rebb v. The Queen, 1996, 181 CLR 41 (HCA).} I hope that these reflections can be useful for the revision.

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