

**ARBITRATORS' CONFLICTS OF INTEREST REVISITED:**  
**A CONTRIBUTION TO THE REVISION OF THE EXCELLENT**  
**IBA GUIDELINES ON CONFLICTS OF INTEREST**  
**IN INTERNATIONAL ARBITRATION**<sup>1</sup>

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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* <sup>3</sup>

**FIRST.      PURPOSE**

The purpose of the following paragraphs is to succinctly comment on the IBA Guidelines on Conflicts of Interest in International Arbitration<sup>4</sup> as a contribution to their revision process, bearing in mind that the IBA and the Working Group (see Second, 1) view the Guidelines “as a beginning, rather than an end ... [and] seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience” (Introduction, 7).

**SECOND.    THE IBA GUIDELINES ON CONFLICTS OF INTEREST**

1. The making of the Guidelines

The Committee on Arbitration and ADR of the International Bar Association (IBA) appointed a Working Group (the “WG”) of 19 experts in international arbitration, with the intent of helping the

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<sup>3</sup> Abraham Lincoln Notes for a lecture, 1850.

<sup>4</sup> IBA, Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004.

decision-making process, national laws, judicial decisions, arbitration rules and practical 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 (Introduction, 3)<sup>5</sup>.

As a result of the WG's work, in 2004 the IBA adopted the Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines")<sup>6</sup>. The Guidelines consist of an Introduction, a Part I, General Standards Regarding Impartiality, Independence and Disclosure ("GS") and a Part II, Practical Application of the General Standards, with the "Application Lists".

## 2. 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<sup>7</sup>.

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. It includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such situations cannot cure the conflict and the arbitrator has to decline to accept or refuse to continue to act as an arbitrator.
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. Therefore, the arbitrator has a duty to disclose such situations. 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. In all of these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made (GS-4(a)).

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<sup>5</sup> Detailed background information to the Guidelines was published in "Business Law International", vol. 5, no. 3, September 2004, pp. 433-458 and is available at the IBA website [www.ibanet.org](http://www.ibanet.org).

<sup>6</sup> The Guidelines have been translated into eight languages and can be found at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)

<sup>7</sup> 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.

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 were interesting debates such as to whether there should be a Green List at all, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy, the conflicts arising from the arbitrator working in a law firm and others. 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 negative since party autonomy has its limits. The law firm as a source of conflicts was also much pondered.

Unlike the lists of disclosures of other organizations, which require enforceable disclosures<sup>8</sup>, “the Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the WG hope that these Guidelines would find general acceptance within the international arbitration community ... and that they thus will help parties, practitioners, arbitrations, institutions and the courts in their decision-making process ...” (Introduction, 6).

The WG released two drafts of the Guidelines (on 7 and 15 October 2002 and 22 August 2003<sup>9</sup>). 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 in authorization requires the balancing of many different interests, which is not an easy task. The IBA Council finally approved the draft on 22 May 2004 and adopted it as “Guidelines on Conflicts of Interest in International Arbitration”<sup>10,11</sup>.

### 3. The revision of the Guidelines

More than five years have elapsed since the adoption of the Guidelines and a great deal of commentaries<sup>12</sup>, actual applications and court decisions have created the substantial practical experience desired by the drafters of the Guidelines.

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<sup>8</sup> Like the California Ethical Standards for Neutral Arbitrators in Commercial Arbitration, 2002. See James Schwarz, “California’s Pioneering Spirit”, ICC United Kingdom, vol. VI.

<sup>9</sup> 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.

<sup>10</sup> The final text included all arbitration and not just commercial arbitration.

<sup>11</sup> At the 27th Annual Award Programme of the CPR Institute for Dispute Resolutions, the IBA was presented with the “2004 Outstanding Practice Achievement Award”.

<sup>12</sup> On the Guidelines, see Tore Wiwen-Nilsson, “IBA Draft Guidelines on Impartiality, Independence and Disclosure”, Stockholm Arbitration Newsletter, 2, 2003. About the IBA Guidelines, see Otto de Witt Wijnen (the chair of the Working Group), Nathalie Voser and Neomi Rao, “Background information on the IBA Guidelines on Conflicts of Interest in International Arbitration”, Business Law International, vol. 5, no. 3 September 2004, pp. 433-458. Simon Robert Tissot and Lydia Hanssell, “UK challenging a Judge or Arbitrator for Bars”, Monday. David A. Lawson, “Impartiality and Independence of International Arbitrators. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration”, ASA Bulletin, vol. 23, no 1, 2005, p. 22, 55. Nicholas Longley, “The IBA Guidelines on Conflicts of Interest in International Arbitration”. Available at <http://www.tannerdewitt.com/index.php> Click “Publications” select “February 2005”. Markham Ball, “Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?”, Arbitration

A Subcommittee of the IBA Committee on Arbitration and ADR is currently working on the revision of the Guidelines after analyzing the different experiences in these five years.

### **THIRD. SOME SUGGESTIONS FOR SUPPLEMENTING, REVISING AND REFINING THE GUIDELINES**

#### **I. General favourable acceptance**

Generally, the Guidelines have received a very favourable acceptance<sup>13</sup>. They represent an important contribution to the arbitration activity and particularly to the independence and impartiality of arbitrators, which constitute the key element in arbitration. The IBA, the Committee of Arbitration and ADR and the WG deserve, then, the gratitude of all of those who, from different quarters, work in arbitration and the society in general, which benefits of this important instrument of dispute solving.

But there is no rose without a thorn. During the drafting, the Guidelines were criticized by some entities and commentators. In particular it was said that the Guidelines were based on “bad example” of parties using conflicts and disclosure issues to obstruct the proceedings<sup>14</sup> and providing a well-sprung platform for new tactical challenges to arbitrators<sup>15</sup>.

Moreover, some arbitral institutions have also taken the view that, while the Guidelines are an interesting attempt to deal with complex and difficult discussions, they are not guidelines for them, since they apply their own standards and practices rules with challenges for conflicts of interest<sup>16</sup>.

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International, 2005, pp. 223 – 341. Gary Born and Rachael Kent, “The Internationalisation of International Commercial Arbitration”, Wilmer, 22 February 2005. Loretta Malintoppi, “Independence, Impartiality and the Duty of Disclosure in Investment Arbitration” ILA Committee on Investment Law, 22 July 2005. Anne Hoffman, “Duty of Disclosure and Challenges of Arbitration: The standards applicable under the new IBA Guidelines on conflicts of interest and the former approach”, Arbitration International, 1 November 2005. Fernando de Trazegnies Granda, “Conflictuando el conflicto. Los conflictos de interés en el arbitraje”, Lima Arbitration, no.1, 2006, p. 163. Leon Trakman, “The Impartiality and Independence of Arbitrators Reconsidered”, University of New South Wales Faculty of Law Research Series, 2007, paper 25. Dana Freyer and Julie Bédard, “The Concept of Ethical Rules or the New IBA Guidelines on Conflicts of Interest in International Arbitration”, in AAA, ADR & The Law, 21st Edition, March 2007. Tom Canning, “International Arbitrators: Conflicts of Interests and Bars”, DLA Piper International Arbitration Newsletter, 25 May 2007. Lewis Silkin, “Arbitrators, Mediators and Conflicts of Interest”, available at [www.Legal 500.com](http://www.Legal 500.com), June 2007. Nathalie Voser, “IBA Guidelines on Conflicts of Interest. How they have been received”, AJIA Conference, Moscow, 27 June 2008. Matthias Scherer, “The new case law from Austria, Switzerland and Germany regarding the IBA Guidelines on Conflicts of Interest in International Arbitration”, Transnational Dispute Management, 2008, vol. 5, Issue 4.

<sup>13</sup> See, for instance, David A. Lawson, “Impartiality and Independence of International Arbitrations. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration”, ASA Bulletin, vol. 23, no. 1, 2005, pp. 22 and 55. Markham Ball, op. cit., p. 323. Leon Trakman, op. cit., p. 2. Hilmar Raeschke- Kessler, op. cit., p. 655. Gary Born and Rachael Kent, op. cit., p. 22.

<sup>14</sup> Nathalie Voser, op. cit.

<sup>15</sup> V.V. Veeder, “The English Arbitration Act 1996: its 10<sup>th</sup> and Future Birthdays”, Experts in Commercial Arbitration. Available at <http://www.expertguides.com>.

<sup>16</sup> Michael Hwang, op. cit., p. 242. Nicholas Geoff and Constantine Partasides, “LCIA to publish challenge decisions”, June 2006.

## **II. A proposal to restructure Part I (General Standards) of the Guidelines**

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 General Standards as adopted are as follows:

- 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 his nomination 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 the 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, including during any appeal period;
- General Standard 2 (Obligation to decline). One of the main obligations 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.

### **III. The Application Lists in particular**

As I said, the Guidelines must be commended for their important contribution to international arbitration. However, although they have often followed the case law of the jurisdictions with great experience in arbitration, in my view, the Guidelines have adopted in some situations a rather *pro arbitro* attitude (that is an attitude too favourable to arbitrators), than a more desirable *pro partibus* or *pro institutione arbitralis* one.

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”, 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 some cases the Guidelines have taken a position too *pro arbitro*. The Guidelines should more reflect the philosophy expressed in GS-3c that “any doubt an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure”.

In my view, in case of discord in the equation between the need that arbitrators are, and are seen as, independent and impartial 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.

“Balance” means a state of equilibrium and “equilibrium” (from *equi + libra*) means “condition in which forces cancel one another”. I think that the real interests of the parties that submit to arbitration and the arbitration institution itself should paramount to any other interest, particularly in a field like this where there is a great deal of psychological perception and where appearance proves to be superior than reality. That is why I believe that some chromatic operations should be further introduced in the Guidelines.

A few examples taken from the situations of the Applications List will show what I mean:

A) 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 there from [Non-waivable Red List] .*

This circumstance in the Non-waivable Red List obliges arbitrators to decline the acceptance or to refuse the appointment and cannot be cured by the parties consent. Without prejudice of the difficulty to define “a significant financial income”, this requirement limits the impeding circumstance unnecessarily. Also disqualified as arbitrators should be persons who have an important and actual relationship with either party such as being the party’s ordinary lawyer or advisor. 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. But a long-standing and continuing relationship with the arbitrator’s law firm logically casts doubts on the arbitrator’s independence<sup>17</sup>.

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<sup>17</sup> Lew, Mistelis, & Kröll, *op. cit.*, p. 262. Craig, Park, Paulsson, ICC Arbitration, para 13-03.

The situation described in 1.4 must be compared with the one in 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. 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 a case in which his client is involved.

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 therefrom or not (1.4 and 2.3.7). The reason is clear: an arbitrator must be independent and impartial, like a judge, whereas a lawyer must be independent but partial (defender of one party).

B) 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* [Waivable Red List].

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<sup>18</sup>. In my view, more than a mere predisposition, it is 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 even informally advanced his award.

Many commentators view 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<sup>19</sup>. Similarly, the courts have held that an award is rightly rejected if, previous to the selection of the arbitrators, they 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<sup>20</sup>. Finally, the courts have also found lack of impartiality where an arbitrator has discussed the merits of the case with a party prior to appointment and indicated his views<sup>21</sup>.

For these reasons, I believe that 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.

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<sup>18</sup> Craig, Park, Paulsson, *op. cit.*, para 13-03.

<sup>19</sup> Craig, Park, Paulsson, *op. cit.*, p. 211.

<sup>20</sup> *Conrad v. Massasoit Ins. Co.*, 86 Mass. 20 (1862).

<sup>21</sup> See *Metropolitan property & Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co.*, 780 F. Supp. 885 (D. Conn 1991).

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

The arbitrator should be also 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”.

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.

C) An important and difficult issue in this area is when the arbitrator works in a firm with other lawyers (especially large firms), and the conflicts arising therefrom. 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. It is important to take into consideration the principle of identification of the lawyers with their firms in the field of conflicts that all the ethical rules proclaim (“principle of imputation”)<sup>22</sup>. The CCBE Code of Conduct (3.2.4) says that “where lawyers are practicing in association, paragraphs 3.2.1 to 3.2.3 above (conflict of interest) shall apply to all its members” and the ABA Model Rules (1.10, Comment [2]) declare that “a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to a client”. The situations mentioned by the Guidelines are inconsistent with this principle, which the Guidelines recognise when declaring that “the arbitrator must in principle be considered as identical to his or her law firm” (Explanation to GS-6(a))

*2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties* [Waivable Red List].

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.

*2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties* [Waivable Red List].

In this circumstance, I also 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 shared pecuniary interests) are working, even for unrelated matters, for one of the parties, this creates an appearance of partiality at least in the eyes of the public<sup>23</sup>. The identification of a lawyer to his law firm, which I mentioned in the last paragraph, should be reiterated.

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<sup>22</sup> The principle of imputation of all lawyers in a firm has been compared to the mosqueteer rule: “one for all, all for one”. Ramon Mullerat, “The service of two masters. Lawyers conflict of interest”, 2009, p. 24.

<sup>23</sup> See *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125 (4th Cir. 1995).

The fact that this situation is a waivable one may be considered as a concession to large firms. I wonder whether, to protect the sacrosanct independence principle in arbitration, the presumption *juris tantum* that, even if “the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator’s firm should not automatically constitute a conflict of interest” (Explanation to GS-6(a)) should not be reversed and provide that an arbitrator’s firm is in principle considered as a source of conflict unless the specific circumstances may show the contrary.

D) 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 (Orange List) but the explicit waiver (Waivable Red List) of the parties.

*3.2.1 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 [Orange List].*

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 challenged arbitrator was aware of the appointment of his law firm on whether he was involved in the preparation of the legal opinion<sup>24</sup>.

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<sup>25</sup>.

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 therefore to be moved to the Waivable Red List.

*3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm [Orange List].*

The future compatibility of international arbitration and an arbitrator who is a partner in a large law firm has been questioned by some authors<sup>26</sup>. Again the community of interests of partners of the same firm makes the Guidelines’ weak treatment of this type of situations very arguable. Again, the principle of identification lawyer/law firm (“imputation principle”) should be applicable here. In any case, this description should say “the arbitrator and another arbitrator in the same arbitration...”

*E) 4.2.1. The arbitrator’s law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator [Green List]*

In my view, 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. Therefore, circumstances like this should be moved from the Green to the Orange List.

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<sup>24</sup> *Schüds*; V2 2003, 94, cited by Wolfgang Kühn and Ulrike Gontenberg in *Arbitration World*, 2004, p. 188.

<sup>25</sup> *Parekh Const. Inc. v. Pitt Const. Corp.*, 577 N.E.2d 632, 31 Mass. App. Ct. 354 (1991).

<sup>26</sup> David A. Lawson, *op. cit.*, p. 37. Leon Trakman, *op. cit.*, p. 16.

#### **IV. 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<sup>27</sup>. I also believe that a few more cases could be included, since the more inclusions the better guidance. 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<sup>28</sup>.
- b. is employed by one of the parties<sup>29</sup>. 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' competitors. 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 parties' law firm<sup>30</sup>.
- 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)<sup>31</sup>.
- g. has been instructed by the same lawyers in another matter, in which, similar allegations had been made against the same witness<sup>32</sup>.
- h. has had direct contact with a witness but failed to inform the parties<sup>33</sup>.

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<sup>27</sup> Judith Gill, LCIA's Symposium, Madrid, 3 May 2007, Session A, question 22.

<sup>28</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1986) decision by Justice Black.

<sup>29</sup> Craig, Park and Paulsson, *op. cit.*, p. 211.

<sup>30</sup> In the California case *Banwait v. Hernández*, 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".

<sup>31</sup> *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 house 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.

<sup>32</sup> See *ASM Shipping Ltd. of India v. TTMI Ltd. of England*, [2005] EWCA Civ 1341.

<sup>33</sup> See *Norbrook Laboratories, Ltd. v. Tank Moulson Chemplant, Ltd.*, [2006] EWHC 1055 (Comm).

- i. is a member of an organization that practices discrimination on the basis of race, sex, religion, national origin or sexual orientation<sup>34</sup>.
- j. has given advice or provided an expert opinion on the dispute to someone who is not a party of the arbitration.
- k. has qualifications contradictory to the parties' arbitration agreement<sup>35</sup> (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<sup>36</sup>.

**V. Minor complementary suggestions for a revision**

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.

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<sup>34</sup> California Ethics Standards, Standard 7.13.

<sup>35</sup> This disclosure is required, e.g., by Section 588, 1 Austrian Arbitration Law 2006.

<sup>36</sup> Austrian Supreme Court, 3 November 2005, 6 Ob 235/05k.

6. In general, an effort should be made to define some of the major terms used in the guidelines<sup>37</sup>.

#### **FOURTH. RECOGNITION OF THE GUIDELINES BY THE COURTS**

As the Guidelines stated (Introduction, 6), the WG hoped that the “Guidelines would find general acceptance within the international arbitration community ... and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision- making process. The drafters’ hope has been fulfilled.

With regard to the courts, in the five years which have elapsed from their adoption, some courts have taken the Guidelines as a ground for or mentioned them in their decision strengthening the Guidelines’ legal value.

I will mention some of the cases up to 2008:

- a. Austria, Commercial Court Vienna, Decision of 24 July 2007 (16 No 2/07w). (Situation 3.1.3 of the Orange List)<sup>38</sup>.
- b. Belgium. Brussels, Appellate Court, Decision of 29 October 2007, Republic of Poland v (1) Eureko BV (2) Stephen Schwebel (3) Yves L Fortier (4) Jerzy Rajski
- c. England. ASM Shipping Ltd of India v TTMI Ltd of England, [2006] 1 Lloyds Rep 375
- d. Sweden. Supreme Court, 19 November 2007, T 2448-06, Anders Jilkén v Ericsson AB
- e. Germany. OLG Frankfurt. Decision of 4 October 2007. (Situation 3.5.2 of the Orange List)<sup>39</sup>
- f. USA. Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. July 9, 2007)
- g. USA. New Regency Productions v. Nippon Herald Films, 501 F.3d 1101 (9th Cir. 2007)
- h. Switzerland. Federal Supreme Court, Decision of 20 March and 4 April 2008. (Situation 4.4.1 Green List)<sup>40</sup>.

#### **FIFTH. A CONCLUSION**

*Ad astra per ardua*

My suggestion to make the excellent work of the Guidelines a set of stricter recommendations is motivated by the need to protect and improve the reputation of the institution of arbitration, which needs to enhance the perfect independence and impartiality of the arbitrator but also the appearance

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<sup>37</sup> Michael A. Lawson, *op. cit.*, p. 38.

<sup>38</sup> Matthias Scherer, “New case law from Austria, Switzerland and Germany regarding the IBA Ghidleines on conflicts of interest in international arbitration”, Transnational Dispute Management, vol. 5, issue 4, July 2008.

<sup>39</sup> Matthias Scherer, *op. cit.*

<sup>40</sup> Matthias Scherer, *op. cit.*

and perception 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”<sup>41</sup>. As Lord Hewitt<sup>42</sup>’s aphorism said: “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

The Guidelines are a sensational instrument to improve the sacrosanct principle of independence and impartiality of arbitrators. If they would not exist, they should have to be invented. But nothing is perfect and, as their authors recognised five years ago, they need to be constantly supplemented, revised and refined.

In my view, in the process of revision of the Guidelines, in case of doubt, the “pro-client” and “pro arbitration” attitudes should always prevail on the “pro-arbitrator” one. As the Romans said: *ad astra per ardua*

Richard H. Paul<sup>43</sup> of Paul Weis, speaking to a seminar on lawyers’ conflicts of interest, said that when he advised clients confronted with conflicts of interest: “My one and only touchstone in this: is answering them, I ask myself, ‘how would it look in the New York Times?’ ”.

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<sup>41</sup> *Webb v. The Queen*, 1996, 181 CLR 41 (HCA).

<sup>42</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

<sup>43</sup> Cited by Sol M. Linowitz, *The betrayed profession*, p. 228.