A CRITIQUE OF THE 2014 INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

By
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Introduction

In 2004, the International Bar Association (“IBA”) issued a publication entitled “Guidelines on Conflicts of Interest in International Arbitration” (“Guidelines”). These Guidelines addressed the issue of arbitrator impartiality and independence which are critical threshold matters in every arbitration, whether domestic or international. The Guidelines were designed by the IBA as an expression of best practices in the field, including a set of standards which would enhance legal certainty and preserve the integrity, fairness and fairness of arbitral proceedings. Following a review and revision of the Guidelines by the IBA’s Arbitration Committee instituted in 2012, the IBA Council adopted revised Guidelines on October 23, 2014. This article addresses that document.

The Guidelines fill an important need for the arbitral community and for those parties whom it serves, in giving substantial case specific content to the very general standard that an arbitrator must be impartial and independent. Nonetheless, because each factual situation which may be presented in this area is singular and different, and also because some of the judgments made by the Guidelines’ drafters are subject to valid criticism, their document cannot be the last word on the matter. In particular, as will be discussed, the drafters have unnecessarily conflated the issues of disclosure and of conflict, taking away important safeguards from the parties to arbitrations.

The basic requirements of independence and impartiality are well accepted and often stated. Thus, the Code of Ethics for Arbitrators in Commercial Disputes, most recently approved in 2003 by both the American Bar Association and the American Arbitration Association, recognized a presumption of neutrality for all arbitrators. This presumption places the responsibility of independence and impartiality, including disclosure obligations, on all persons wishing to serve as arbitrators. The standard requires timely disclosure by the potential arbitrator of all existing or past financial, business,

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2 For articles assessing the earlier version of the Guidelines, see, e.g., Catherine A. Rogers, “Ethics in International Arbitration”, Oxford University Press 2014 at 2.86.
professional or personal relationships which might reasonably affect his or her impartiality or independence in the eyes of any of the parties.

Disqualification of an arbitrator is a matter that may be left for action by the courts after an arbitration panel has already rendered its award. In the United States, under Section 10 (2) of the Federal Arbitration Act\(^3\) ("FAA"), the federal district court in and for the district where an arbitral award was made may vacate the award "where there was evident partiality or corruption in the arbitrators, or either of them…" But this is a difficult showing to make, and the process is wasteful since it takes place only after the arbitral proceeding has been completed. It is therefore generally considered essential to "vet" the arbitrator(s) for independence and impartiality at the outset.

The U.S. Supreme Court had occasion to consider the application of Section 10 of the FAA to arbitrator partiality in the case of Commonwealth Coatings Corp. v. Continental Casualty Co. et al.\(^4\) One of the arbitrators in that case, the supposedly neutral member of the panel, had a substantial business relationship with one of the parties which the Court described as "sporadic" but nonetheless "repeated and significant". This relationship had not been disclosed. The Court reversed the lower courts’ refusals to set aside the arbitral award. The plurality opinion of the Court reasoned as follows:\(^5\)

"It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

The Court was necessarily addressing the situation in that case on an ad hoc basis, with reference to the record before it. It declared a requirement of disclosure for any case where an impression of possible bias might be created. This statement of the underlying obligation leaves for resolution a critical question which must be addressed in each situation: can a given relationship be deemed to pose a reasonable threat to the arbitrator’s independent judgment, thus requiring disclosure? Except in the most obvious cases, the devil is in the details, i.e., the nuances of the particular situation. This brings us

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\(^3\) 9 U.S.C. §§1-14.  
\(^4\) 393 U.S. 145 (1968).  
\(^5\) Id. at 148-49.
to the IBA’s Guidelines which seek, so far as possible, to create answers to the different types of questions which may arise in appraising arbitrator independence and impartiality.

The Guidelines

The Guidelines are intended to apply to investment, as well as commercial, arbitration and to cover both legal and non-legal persons serving as arbitrators. The Guidelines consist of two parts. The first declares general standards regarding arbitrator impartiality, independence and disclosure. In the second part, specific application of the general standards to various situations is offered. The drafters, members of the IBA, represented diverse legal cultures and sought to present a balanced approach which did not weigh in favor of any national practice. As will be discussed subsequently, it is in the specific applications section of the Guidelines that “the rubber meets the road” and where some of the drafters’ judgments can be questioned, especially with regard to the disclosure obligations of potential arbitrators.

The general rule adopted by the Guidelines sets the necessary benchmark “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise been finally terminated.”

The difficulties come in giving specific content to this rule.

One of the issues with which the drafters of the Guidelines struggle, and one which is of particular concern to the members of the International Bar Association, is that of lawyers in a firm who wish to serve as arbitrators in cases in which a firm client or past client is one of the parties. Taking into account “the growing size of law firms”, the Guidelines conclude that “[while the] arbitrator is in principle considered to bear the identity of his or her law firm…[t]he fact that the activities of the arbitrator’s firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure.” This position places the Guidelines in the dangerous position of riding two horses at the same time. The traditional principle is indeed that a firm of lawyers is essentially one lawyer for purposes of rules governing loyalty to the client.

The Guidelines avoid another sticky wicket with regard to the relationships among members of barristers’ chambers, declaring that “no general standard is proffered for [conflict issues involving] barristers’ chambers [but] disclosure may be warranted in view of the relationships among barristers, parties or counsel.”

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6 Guidelines at p. 4.
7 Guidelines at p. 13.
While the efforts of the Guidelines drafters to identify situations in which possible arbitrator/counsel conflict issues in large law firms do not necessarily cause disqualification are defensible, it is submitted here that limiting disclosure obligations, as do the Guidelines in many respects, rather than positing tentatively presumed no-conflict zones, is the wrong way to go about the matter.

Supreme Court Justice Louis D. Brandeis once coined the phrase that “sunlight is said to be the best of disinfectants.”10 Namely, what we now call complete “transparency” is highly desirable for the making of informed judgments, whether by the public or by a decision-maker. So too, in the selection of suitable arbitrators, full disclosure of any possible relationships that might give concern over the individual’s possible partiality has always been regarded as essential to the arbitrator selection process. Disclosure of a relationship does not necessarily mean that a serious conflict exists and that disqualification must follow. However, without disclosure, a fair judgment on these issues in particular cases cannot be made.

In its only pronouncement on the subject, in the Continental Coatings case discussed above, the U.S. Supreme Court emphasized the importance of full disclosure by arbitrators of any relationships to the subject matter or the parties in the dispute. It is unfortunate that the drafters of the Guidelines did not meet the full necessities of the situation in this regard. This was presumably due to their belief that “Disclosure of any [arbitrator’s] relationship[s], no matter how minor or serious, may lead to unwarranted or frivolous challenges.”11 Indeed, there are several references in the Guidelines’ Introduction to ill-founded or unnecessary challenges which may delay the process or impair the parties’ ability to select arbitrators of their choosing. But it is doubtful that limiting disclosure by arbitrators about their relationships is a suitable or desirable remedy for improving the arbitral process. Surely, some reasonable period of delay is justifiable for the purpose of assuring that a person is fit to serve as an arbitrator.

The courts in the U.S. have thus held that the potential arbitrator cannot be the ultimate decider as to whether a possible conflict should be disclosed. Commonwealth Coatings establishes that the parties rather than the arbitrators or the courts should be the judges of the partiality of arbitrators. While some courts have sought to limit the reach of Commonwealth Coatings by labeling it as only a plurality opinion given Justice White’s more limiting concurring opinion in that case, even under that more limited standard a valid argument for non-disclosure would still apply only to trivial or insubstantial relationships between the arbitrator and the parties to the proceeding.12

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11 Guidelines at p.13.
12 See, e.g., Positive Software Solutions, Inc. v. New Century Mortgage Corporation, 476 F. 3d 278 (5th Cir. 2007); Schmitz et al. v. Zilveti et al., 20 F. 3d 1043, (9th Cir. 1994).
There are particular concerns in the law firm context that make the potential arbitrator a poor ultimate decider on the matter of disclosure. For example, at what point in time does a client cease being a client of a law firm if the client consults the firm faithfully but only when problems come up? Does it matter if the client also consults other law firms from time to time? What amounts of billings of the client by the law firm can be called de minimis for purposes of disclosure?

Indeed, the standard for disclosure is correctly stated in the general standards of the Guidelines: “If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances…”\(^{13}\) (emphasis added). Let us see how this standard is applied in the Guidelines’ Application Lists.

*The Application Lists*

The second part of the Guidelines seeks to provide specific guidance as to what situations constitute conflicts of interest for potential arbitrators and when disclosure of a relationship is necessary. The first List, the Red List, is in two parts, a Non-Waivable Red List and a Waivable Red List. The Waivable Red List consists of circumstances in which an objective conflict of interest is deemed to exist from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances. The Non-Waivable Red List covers situations that are serious but not as severe, so that the situation can be considered waivable if and when all of the parties, being aware of the conflict of interest situation, expressly state their willingness to have the person act as an arbitrator in the particular case.

The Orange List is a non-exhaustive list of specific situations that may give rise to doubts about the arbitrator’s impartiality or independence. These are situations in which disclosure by the arbitrator must be made. Because the Orange List is a non-exhaustive list of examples of situations which raise justifiable doubts, the arbitrator may in some situations not listed nevertheless need to make disclosure.

Finally, the Green List includes a non-exhaustive list of specific situations in which, in the view of the Guidelines, no appearance and no actual conflict of interest can exist from an objective point of view, and therefore the arbitrator has no obligation to make disclosure. This is the most questionable section of the document, as will be discussed infra.

The Non-Waivable Red List is brief and non-controversial. It covers the obvious conflict situations such as where the arbitrator has a “significant” financial or personal interest in one of the parties or the outcome of the case, or where the arbitrator’s firm

\(^{13}\) Guidelines at p. 6.
“regularly” advises one of the parties and derives “significant” financial income therefrom. But problems of application lurk even in this briefly stated set of principles. For example, at what point does ownership of shares in a large publicly held corporation become a “significant” holding? How much income over what period of time is to be deemed a “significant” receipt of income? Because disclosure to the parties is required in situations of this sort, it can be considered that the conscientious arbitrator will make disclosure in the close cases and will thus let the parties and/or the administrator of the arbitration sort the matter out. As Supreme Court Justice Potter Stewart, concurring in *Jacobellis v. Ohio*\(^\text{14}\) stated concerning the difficulty of defining the elusive concept of obscenity “I know it when I see it.” Where disclosure has been made, the parties will usually know whether possible partiality on the part of the arbitrator is inherent in the context of the particular situation. This is what makes disclosure critical in such cases.

The Waivable Red List cites situations which are strikingly similar to those contained in the Non-Waivable Red List but are considered waivable because they are viewed as “serious but not as severe.”\(^\text{15}\) The situations named in the Waivable Red List include where the arbitrator has given legal advice on the dispute to a party, or holds shares in one of the parties, or currently advises one of their parties or their law firm, or has a close family relationship with one of the parties. A reading of the two lists leaves this observer with the view that one cannot say that the second list examples are noticeably less severe or egregious than the first list examples, but that it really does not matter much because the party fearing that the arbitrator will be partial against it can refuse to waive a disclosed possible conflict mentioned on the Waivable Red List and thus dispense with the arbitrator as readily as if the relationship had been subject to the Non-Waivable Red List.

As mentioned, the Orange List features situations which the arbitrator has a duty to disclose to the parties, in that they may give rise to justifiable doubts about the arbitrator’s impartiality or independence. “Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure.”\(^\text{16}\) This List includes e.g. situations in which the arbitrator or his law firm has, within the last three years, acted for or against one of the parties to the arbitration, or a close personal friendship exists between an arbitrator and a counsel of a party, or the arbitrator has within the past three years been appointed on more than three occasions by the same counsel or the same law firm. The significance of this category is that it sets up a free range of service and a non-disclosure area outside of the three year limit. The three year limit is artificial but not unreasonable if established as a rebuttable presumption that there is no conflict. But there is no reason to set a three year period on the disclosure requirement since strong relationships may be indicated from examining a longer period of years.

\(^{15}\) Guidelines at p. 17.
\(^{16}\) Guidelines at pp. 18-19.
The dangers posed by the limits on disclosure become even more apparent in the composition of the Guidelines’ Green List. This is their Trojan Horse wherein the chief lurking problems spill out. At the heart of this flaw is the elimination of disclosure in a number of situations in which the parties have a potential interest in determining the arbitrator’s impartiality, an approach by the Guidelines which may, indeed, shield important disqualifying information from the knowledge of the parties.

1. First on the Green List, and hence involving no duty to disclose on the part of the arbitrator, is the following situation:

“4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).”

There is not current consensus within the arbitral community on this question of what may be called “issue conflict” matters. For example, in the investment case arbitration of Urbaser S.A. et al. and The Argentine Republic the claimants sought to disqualify one of the panelists on the basis of views which the panelist had expressed in legal publications, although not involving the present dispute. These views, in the opinion of the claimants, established that the challenged panelist had already prejudged essential legal issues which were also present in the current arbitration, and thus he could not be deemed impartial. Referring to the standards of the ICSID Convention, the two other panelists rejected the proposal for disqualification, reasoning as follows:

“45. The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as witness or fellow arbitrator.”

This would appear to be a very narrow standard for measuring a potential arbitrator’s suitability to serve on a panel as an impartial referee. It is noteworthy that, in the Urbaser S.A. opinion quoted above, the two panelists buttressed their decision not to disqualify

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18 ICSID Case No. ARB/07/26, decided August 12, 2010.
the third arbitrator by finding that his challenged writings were not so airtight as to preclude his reaching a different conclusion in the case at hand.

This suggests quite pointedly that, while a panelist’s published writings on an issue may not bar his/her serving on a later case raising similar issues, those writings are not necessarily irrelevant to the question of the arbitrator’s impartiality. The author therefore submits that, while an arbitrator should not be charged with remembering every comment that he/she has made in public lectures, it is not too much to require that the arbitrator identify at the outset his/her published views on an issue of fact or law which he/she knows to be a component of the case for which he/she is being considered. The determination of one issue of fact or law can be the linchpin for the resolution of an arbitration and, if the arbitrator has conclusively taken a position on that issue, the parties have a right to know of it beforehand. Contrary to the view taken by the Guidelines, the onus should be on the arbitrator to disclose such of his/her writings as he/she knows to be pertinent, and not simply have it left to the parties to comb the legal literature in search of relevant comments.

2. Another set of provisions in the Green List denoting situations in which disclosure is not necessary under the Guidelines is as follows:

“4.3 Contacts with another arbitrator or with counsel for one of the parties
4.3.1 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 or charitable organization, or through a social media network.
4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.
4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.”

Putting aside the question of relationships existing under tenuous social networks like Facebook or Linked In, the Guidelines err, in this author’s opinion, by making relationships which arise in professional, charitable or academic contexts matters which do not require disclosure.

In our interconnected world, many of our strongest relationships which rise to the level of friendships, spring not from the neighbors on our block but from our involvement with other individuals in professional, charitable or academic activities. Admittedly, the
closeness among the cooperating individuals in these types of activities varies greatly and is therefore a matter of degree. For example, the mere fact that an arbitrator and the counsel to one of the parties are both members in the American Bar Association, which has some 400,000 members, is clearly not substantial enough to create by itself a “relationship” or a cause for disclosure to the parties. But, conversely, lawyers engaged in the same field of endeavor, e.g. arbitration law, may have very frequent contact in professional association matters, to the point where they could not easily dispute the charge that they are “friends.” Discerning who is a “friend” and who is merely a business associate is often a thorny matter. For this reason, the existence of a possibly conflicting relationship arising from frequent personal contacts in a professional or charitable organization should be disclosed for the arbitrating parties to make a judgment.

Similarly, relationships within an academic institution tend to vary greatly. Are the arbitrator and the counsel to one of the parties simply two of many professors in a large institution or are they, perhaps, teaching together and occasionally trading dinners? In the latter situation there should be disclosure of the relationship to the parties.

Although the Guidelines direct that each situation must be appraised on its own circumstances, these provisions in the Green List, making disclosure unnecessary, are in the nature of an open door inviting arbitrators to avoid disclosing significant relationships with counsel and others involved in the disputes to be arbitrated. This is ill-advised.

The original version of these IBA Guidelines has been occasionally relied on in U.S. court decisions involving arbitrator partiality. On the other hand, the International Centre for Dispute Resolution (ICDR) has let it be known that “[t]he ICDR does not apply the IBA’s Guidelines on Conflicts of Interest in International Arbitration as there are a number of scenarios where these Guidelines do not establish a duty to disclose and would not be consistent with the ICDR policy of broad disclosure...” The International Chamber of Commerce (ICC), in its institutional arbitration practice, has taken a similar position on the IBA Guidelines. While the ICC court views the IBA Guidelines as a commendable effort to try to identify uniform standards for disclosure related to conflicts of interest, the ICC court has repeatedly made clear that it does not consider those Guidelines as binding. The ICC rules, unlike the IBA Guidelines, do not consider it feasible to have a list of situations which are said to be objective and never requiring disclosure.

22 Ibid.
In conclusion, therefore, it is submitted that, while the drafters of the Guidelines have made a considerable achievement in bringing focus to specific situations that represent conflicts of interest for arbitrators as viewed against those that do not, by conflating the issue of conflict with that of disclosure, they have fallen short of their goal.