

# The Revised IBA Guidelines on Conflicts of Interest in International Arbitration

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## **I. Introduction**

The independence and impartiality of arbitrators is a cornerstone to the arbitration process: it is one of the fundamental pillars for the legitimacy of arbitration as a private adjudication system and it is indispensable in order to maintain the confidence of its users. In recent years, and in the aftermath of the success and the growth in numbers of investment-treaty arbitrations, the issue of arbitrator neutrality has become even more important in international arbitration. Therefore, it is essential to set certain criteria which are internationally accepted.

The IBA recognized the significance of the issue of conflicts of interest early in the last decade and the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (the “2004 Guidelines”) have given parties, arbitrators, institutions and courts standards to rely on when called upon to deal with issues of impartiality, independence, disclosure, objections and

challenges of arbitrators. The aim of the 2004 Guidelines was to uniform how such questions were to be dealt with by the arbitration community. It was also the goal of the 2004 Guidelines to set a balance between full transparency, on the one side, and unnecessary disclosures, on the other side, since excessive disclosures both hinder the arbitration process and impede a party's right to nominate an arbitrator of its choosing. This was done with the so-called "Green List" which enumerates certain situations that need not be disclosed.<sup>4</sup>

The 2004 Guidelines have been a success. Not only have they been used by arbitration practitioners in their daily work, they have also been relied upon by the arbitral institutions and by State courts when developing case law addressing issues of arbitrator impartiality and independence.<sup>5</sup>

In 2012, the IBA Arbitration Committee formed an expanded Conflicts of Interest Subcommittee (the "Subcommittee") and entrusted the Subcommittee group with the review process of the 2004 Guidelines in view of their tenth anniversary in 2014. The International Bar Association approved the revisions in the form of the 2014 Guidelines on Conflicts of Interest in

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<sup>4</sup> See Otto L O de Witt Wijnen, 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, 433-458), in which the term Green List is defined as "an enumeration of specific situations in which there is no appearance of a lack of impartiality and independence and so no conflict of interest", p. 434.

<sup>5</sup> Court decisions in various jurisdictions have also referred to the 2004 Guidelines (see Belgian Case No R G 2007/AR/70, *République de Pologne c/ Eureko BV et al*, 26 (published in ASA Bull. 565 (2008)); English decision *ASM Shipping Ltd v TTMI Ltd of England* [2005] EWHC 2238 (Comm); German Case No 26 Sch 8/07; German Case No T 24488-06, *Andres Jilken v Ericsson AB*, 5 (published in Stockholm Int'l Arb Rev 167 (2007)); Swedish Case *Korsnas Aktiebolag v AB Fortun Värme samägt med Stockholms stad*, T 1565-09; Swiss Case No 4A\_528/2007 (published in ASA Bull. 575 (2008) (where the Swiss Federal Supreme Court held that the 2004 Guidelines are "a valuable working tool to contribute to the uniformization of standards in international arbitration in the area of conflicts of interests and as such this instrument should impact on the practice of the courts and the institutions administrating arbitration proceedings"); U.S. decision *New Regency Productions, Inc.*, 501 F.3d at 1110). In addition, several ICSID arbitral tribunals have referred to the 2004 Guidelines in assessing arbitrator bias (see *OPIC Karimum Corporation v Venezuela* ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (5 May 2011), p. 48-49; *Alpha Projekt Holding GmbH v Ukraine* ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010), p. 56; *Tidewater, Participaciones Inversiones Portuarias SARL v Gabon* ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator (12 November 2009); *Hrvatska Elektroprivreda v Slovenia* ICSID Case No. ARB/05/24, Decision on Disqualification (6 May 2008)).

International Arbitration (the “2014 Guidelines”) in late October 2014 at the occasion of the annual IBA Conference which was held in Tokyo.<sup>6</sup>

In keeping with the approach taken with the 2004 Guidelines, the revisions have been based upon statutes and case law in jurisdictions of Subcommittee members, and upon the judgment and expertise of Subcommittee members. In addition, the revisers sought and considered the views of the users, arbitral institutions, etc., through a questionnaire circulated in 2012. There were over 150 participants completing the questionnaire and the result of the survey identified the material which should be the focus of the revision from the perspective of the arbitration community.

Likewise, the same structure of the 2004 Guidelines is maintained in the 2014 Guidelines, i.e., the seven General Standards expressing the underlying principles, and the three Practical Application lists containing over fifty specific factual circumstances intending to give hands-on guidance to their users. Also, as to their core content, the 2014 Guidelines are no different to the 2004 Guidelines in that they try to strike an equilibrium between, on the one hand, the parties’ right to disclosures of situations that may reasonably call into question an arbitrator’s impartiality and independence and their right to a fair hearing, and, on the other hand, the parties’ right to select arbitrators of their choosing. Rather than bringing about a radical change, the main purpose of the revision was to update the 2004 Guidelines and align them with the developments of the past ten years. Although the 2014 Guidelines – as with the 2004 Guidelines – are not binding as such, they are intended as an expression of best practices in international arbitration.

The present article first briefly explains the revision process. The content of the 2014 Guidelines is thereafter dealt with by topic areas which are often raised in this realm of the discussions on conflicts of interest in arbitration, and which were also to a considerable extent at the core of the discussion within the Subcommittee. In addition, the authors have also indicated what can be considered as the most important new additions to the 2014 Guidelines, what has been reformulated from the 2004 Guidelines and what remains the same. Finally, the article also touches upon areas which – although discussed by the revision-makers – were chosen not to be thoroughly addressed in the revised guidelines.<sup>7</sup> The aim of the present article is not only

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<sup>6</sup> [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> Any references to “General Standards” include references to the General Standards as enumerated in the revised 2014 IBA Guidelines on Conflicts of Interest (“2014 Guidelines”). Any reference to the 2004 Guidelines and the numbering contained therein is made with an explicit citation to the 2004 IBA Guidelines on the Conflicts of Interest (“2004 Guidelines”).

to highlight those aspects of the 2014 Guidelines which are new or which modify the 2004 Guidelines, but also to provide a comprehensive analysis of the guidelines as a whole.

## II. General Principle of the Guidelines and their Scope of Application

The standard for arbitrators set forth in the 2004 Guidelines has remained intact and was reconfirmed with the 2014 revision. According to General Standard 1, the General Principle of the 2014 Guidelines is that “[e]very 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 finally terminated.” This standard has its origin in Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration which contains almost identical language.<sup>8</sup> The 2004 IBA Working Group on Conflicts of Interest in International Arbitration decided to accept the wording “*impartiality or independence*” as understood under Article 12(2) of the UNCITRAL Model Law in recognition of the fact that any new definition thereof would only give rise to confusion.<sup>9</sup> This standard for impartiality and independence is also reflected in almost all major institutional and ad hoc arbitration rules.<sup>10</sup>

In order to identify conflicts of interest, the 2014 Guidelines put forward two tests which remain identical to those originally set forth in the 2004 Guidelines:

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Any term which is not defined in this article shall take on the same meaning as that set forth in the 2014 Guidelines.

<sup>8</sup> Article 12(2) UNCITRAL Model Law on International Commercial Arbitration reads as follows: “*An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*”

<sup>9</sup> See also Otto L O de Witt Wijnen, Nathalie Voser and Neomi Rao, “*Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*”, in *Business Law International* (Vol. 5 No. 3, September 2004, 433-458), pp. 440-441.

<sup>10</sup> As regards institutional arbitration rules see *inter alia* Article 11(1) of the International Chamber of Commerce Rules of Arbitration 2012 (ICC), Article 9(1) of the Swiss Rules of International Arbitration 2012, Article 14(1) of the Stockholm Chamber of Commerce Rules 2010 (SCC), Article 5.3 of the London Chamber of International Arbitration Rules 2014 (LCIA), Article 13(1) of the International Dispute Resolution Procedures of the American Arbitration Association Rules 2014. As regards ad hoc arbitration rules see UNCITRAL Arbitration Rules 2010, Article 11.

- The so-called “subjective test” of General Standard 2(a) provides that an arbitrator shall decline to accept an appointment, or refuse to continue to act as an arbitrator, *if he or she* has any doubt to his or her ability to be impartial or independent.
- The second type of test is the so-called “objective test” of General Standard 2(b), which specifies that an arbitrator shall decline to accept an appointment, or refuse to continue to act as an arbitrator, if facts of circumstances exist which, *from the point of view of a reasonable third person* having knowledge of such information, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence.<sup>11</sup>

Doubts as described in General Standard 2(b) are justifiable if a “*reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*”.<sup>12</sup> The only minor, but useful, addition introduced by the 2014 revision in this context is the clarification that any of the situations described in the non-waivable Red List by default give rise to “*justifiable doubts*” as to the arbitrator’s impartiality or independence.<sup>13</sup>

Pursuant to General Standard 5(a), the guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed (i.e. whether through party-appointment or through an arbitral institution).<sup>14</sup> Removed from the 2014 Guidelines – as no longer relevant in the context of international arbitration – is the allowance of “*non-neutral*” arbitrators even if permitted by the applicable arbitration rules and domestic law.

General Standard 5(b) now also expressly provides that administrative secretaries, or assistants to the arbitral tribunal or an individual arbitrator, are bound by the same duty as arbitrators. This addition is an example of a clarification introduced by the 2014 Guidelines. It elevates to the level of a General Standard what had previously only been discussed in the explanatory section of the 2004 Guidelines.<sup>15</sup> General Standard 5(b) incorporates what has been the general practice among arbitration practitioners. With this duty of

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<sup>11</sup> General Standard 2(b).

<sup>12</sup> General Standard 2(c).

<sup>13</sup> General Standard 2(d): “*Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the non-waivable Red List*”.

<sup>14</sup> Removed from the 2014 Guidelines is the discussion of party-appointed arbitrators being non-neutral if permitted by arbitration rules and domestic laws.

<sup>15</sup> Explanation to General Standard 5 of the 2004 Guidelines.

independence and impartiality also comes a duty of disclosure on the part of administrative secretaries.<sup>16</sup> Ultimately, however, it is the responsibility of the arbitral tribunal to ensure that such duties are respected.<sup>17</sup>

During the revision process, the Subcommittee, as its predecessor with the 2004 Guidelines, asked itself whether there should be specific rules for different types of arbitrations, and in particular, for investment-treaty arbitrations. The Subcommittee revisited recital 5 of the 2004 Guidelines which made clear that the provisions were to apply equally to investment-treaty arbitrations as to commercial arbitrations.<sup>18</sup> Ultimately during the revision process, the Subcommittee came to the conclusion that there should not be special rules for different types of arbitrations. This is due to the fact that the duty of impartiality and independence of arbitrators are common across the spectrum of arbitrations including both private commercial and investment-treaty arbitrations. Thus, in the view of the Subcommittee, all arbitrations warrant the same treatment pursuant to the guidelines. In addition, investment-treaty arbitrations can be held not only under the auspices of ICSID (International Centre for Settlement of Investment Disputes) or NAFTA (North American Free Trade Agreement) but also under the rules of institutions whose caseload primarily derives from private commercial arbitrations such as the SCC, the LCIA, the ICC and UNCITRAL. If investment-treaty arbitrations were to be singled out – and separate guidelines or special rules within the guidelines were established for this particular sect of arbitration – then this would result in difficulties when applying the provisions of those institutional arbitration rules for the appointment or challenge of arbitrators.

### **III. The 2014 Guidelines v the 2004 Guidelines: What is new, what remains the same, and what has been clarified?**

This section provides a summary reference point as to how the 2014 Guidelines compare to their predecessor and the issues mentioned herein as such are discussed in more detail in the following sections.

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<sup>16</sup> Explanation to General Standard 5(b).

<sup>17</sup> General Standard 5(b).

<sup>18</sup> Recital 5 of the 2004 Guidelines: “*Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in light of the comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).*”

The result of the revision can be broken down into three categories:

The first category covers those issues which have withstood the revision process and remain identical in the 2014 Guidelines. As identified above, what clearly has not changed is the General Principle which continues to require that impartiality and independence be owed by all arbitrators (whether co-arbitrator or president, whether in commercial or investment setting).<sup>19</sup> In addition, the standard of “*justifiable doubts*” from the viewpoint of a reasonable third person is still used to determine whether a conflict exists.<sup>20</sup> As well, the benchmark to measure whether disclosure by an arbitrator is necessary has not been altered as compared to the 2004 Guidelines, i.e. whether facts or circumstances exist, which, in the eyes of the parties, raise doubts as to the arbitrator’s impartiality and independence.<sup>21</sup> Finally, in line with the 2004 Guidelines is the 2014 Guidelines’ treatment of waivers of conflicts of interest.<sup>22</sup>

The second category of the revision includes those topics which, although in substance remain the same as the 2004 Guidelines, have been revised and clarified in the 2014 Guidelines. These topics include the discussion as to the impartiality and independence of administrative secretaries and their respective disclosure responsibilities.<sup>23</sup> Additional subjects not new but elucidated also include the extent of a party’s duty to disclose information of existing relationships<sup>24</sup> and the duty of arbitrators and the parties to conduct reasonable enquiries.<sup>25</sup> The 2014 Guidelines also shed further light on the treatment of relationships with partners of the same firm as the arbitrator or counsel for one of the parties<sup>26</sup> as well as the treatment of barristers of the same chambers.<sup>27</sup>

Lastly, the third category of the revision comprises of those issues which have for the first time been introduced with the 2014 Guidelines. What is new with the 2014 revision is the discussion of advance waivers, and in particular their impact on the duty of disclosure.<sup>28</sup> Additionally, with the 2014 Guidelines

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<sup>19</sup> See section II above and discussion of General Standards 1 and 5(a).

<sup>20</sup> See section II above and discussion of General Standard 2(b).

<sup>21</sup> See section IV.A.a) below and discussion of General Standard 3(a).

<sup>22</sup> See section IV.F below and discussion of General Standards 4(a)-(d).

<sup>23</sup> See section II above and discussion of General Standard 5(b).

<sup>24</sup> See section IV.B.a) below and discussion of General Standard 7(a).

<sup>25</sup> See section IV.C below and discussion of General Standards 7(c) and (d).

<sup>26</sup> See section IV.D.h) below and discussion of General Standard 6(a).

<sup>27</sup> See section IV.D.i) below and discussion of General Standard 7(a), Explanation to General Standard 6(a), and Practical Application Orange List item 3.3.2.

<sup>28</sup> See section IV.A.c) below and discussion of General Standard 3(b).



there is now guidance on the topic of third-party funders and insurers.<sup>29</sup> The 2014 Guidelines also introduce a new duty on parties to reveal names of members of its counsel at the outset and throughout the proceedings.<sup>30</sup> Finally, newly addressed with the revision, but still left for the most part open, is the topic of conflicts based on the subject matter in dispute, i.e. “issue conflicts”.<sup>31</sup>

As with the 2004 Guidelines, aside from the General Standards, the 2014 Guidelines also include three Practical Application lists covering many of the varied scenarios that commonly arise in practice. These lists reflect which situations represent a conflict of interest (Red List) or which, depending upon the specific facts, may be a potential conflict of interest (and at least require disclosure by the potential arbitrator) (Orange List), and situations that from an objective point of view cannot be considered to be a conflict of interest and do not require disclosure (Green List). The additions made to the Practical Application lists with the introduction of the 2014 Guidelines draw from practice by providing concrete examples concerning the relationship between the arbitrator and a party or its counsel (including e.g. the existence of enmity,<sup>32</sup> relationship as co-counsel,<sup>33</sup> connection to the appointing authority,<sup>34</sup> membership in the same charitable organization or social media,<sup>35</sup> and association through academia, conferences or seminars<sup>36</sup>).

Overall, the 2014 revision puts greater emphasis on the updating of the General Standards (Part I of guidelines) than the Practical Application lists (Part II of the guidelines). Although the Practical Application lists do not purport to be comprehensive, in the opinion of the authors more could have been done to provide additional guidance for recurring situations. In any event, the changes to the Practical Application lists fall also into one of the three categories of the result of the revision set forth above (i.e. those which are unaltered, those which remain the same in substance but were clarified in wording, and those which are completely new as a result of the revision).

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<sup>29</sup> See sections IV.B.a) and IV.D.b) below and discussion of General Standards 6(b) and 7(a).

<sup>30</sup> See section IV.B.b) below and discussion of General Standard 7(b).

<sup>31</sup> See section IV.E below and discussion of Paragraph 6 of the introductory paragraphs to Part II of the 2014 Guidelines.

<sup>32</sup> See section IV.D.c) below and discussion of Practical Application Orange List item 3.3.7.

<sup>33</sup> See section IV.D.d) below and discussion of Practical Application Orange List item 3.3.9.

<sup>34</sup> See section IV.D.e) below and discussion of Practical Application Orange List item 3.5.3.

<sup>35</sup> See section IV.D.f) below and discussion of Practical Application Green List item 4.3.1, and Practical Application Green List item 4.4.4.

<sup>36</sup> See section IV.D.g) below and discussion of Practical Application Green List item 4.3.3, and Practical Application Green List item 4.3.4.

## IV. Overview of the 2014 Guidelines by Topic

### A. Disclosure Responsibilities of Arbitrators and Administrative Secretaries

#### a) Standard for disclosure

Even if facts or circumstances exist which, from the perspective of the arbitrator (subjective test) or a reasonable third person (objective test), do not raise doubts as to the arbitrator's impartiality or independence, arbitrators may nevertheless have a duty to disclose such information. This is due to the notion that parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view irrespective of whether they *per se* result in a conflict of interest.<sup>37</sup>

Based on this purpose, as set forth in the 2004 Guidelines, the 2014 Guidelines provide that “[i]f 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 prior to accepting his or her appointment, or as soon as he or she learns of such facts.<sup>38</sup> Any doubt as to whether an arbitrator should make a disclosure should be resolved in favor of disclosure.<sup>39</sup> This duty remains ongoing throughout the entire proceedings.<sup>40</sup>

In summary, arbitrator disclosure requirements as applied by the Practical Application lists include the following:

- Items on the non-waivable Red List *per se* raise justifiable doubts as to the arbitrator’s impartiality and/or independence, and as a consequence equate to a conflict of interest. Thus, an arbitrator should, if such circumstances are present, decline appointment or immediately resign. These facts or circumstances would therefore not be the subject of future disclosures as arbitrators cannot leave it to the parties to waive the conflicts arising of the facts and circumstances in such cases.

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<sup>37</sup> Explanation to General Standard 3(c) (“An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties [...] the purpose of disclosure is to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further”).

<sup>38</sup> General Standard 3(a).

<sup>39</sup> General Standard 3(d).

<sup>40</sup> General Standard 3(e).

- Items on the waivable Red List also raise justifiable doubts as to the arbitrator’s impartiality and/or independence and, for the arbitrator to continue to act in his or her function, there must be a full disclosure of the conflict of interest and express agreement that the arbitrator may continue to serve despite the conflict of interest.<sup>41</sup>
- Items on the Orange List require disclosure from an arbitrator since the facts and circumstances are considered by the drafters as those which would give rise to doubts as to the arbitrator’s impartiality and/or independence from the perspective of parties. Pursuant to the subjective and objective tests of General Standard 2, if these facts raise doubts in the arbitrator’s mind as to his or her impartiality and independence, or would raise justifiable doubts from an objective third person’s viewpoint, then the arbitrator does not reach the question of disclosure as he or she would be required to refuse appointment as arbitrator or resign from service.
- Items on the Green List by definition of the guidelines could not lead to disqualification under the objective test set forth in General Standard 2, let alone be considered from the eyes of parties as raising doubts as to the arbitrator’s impartiality and/or independence, and thus need not be disclosed by an arbitrator.

#### **b) Relevance of disclosures and non-disclosures**

Disclosure of certain facts or circumstances does not as such disqualify an arbitrator.<sup>42</sup> As summarized above, with disclosure one is in principle<sup>43</sup> in the situation where the facts and circumstances do not, from the perspective of the arbitrator (or for that matter a reasonable third person), raise doubts as to the arbitrator’s independence. An arbitrator considers himself or herself as impartial and independent despite the disclosure. The purpose of the disclosure is “*to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further*”.<sup>44</sup> The disclosure itself does not demonstrate doubts sufficient to disqualify the arbitrator nor does it create “*a presumption in favour of disqualification*”.<sup>45</sup> This exact wording is included in the guidelines in order to eliminate the

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<sup>41</sup> See section IV.F.b) below and discussion of General Standard 4(c).

<sup>42</sup> Explanation to General Standard 3(c).

<sup>43</sup> An exception exists for the items which are or should be in the waivable Red List. Here a conflict is presumed but it is of a nature that it can be waived by the parties although only with an explicit waiver declaration; see General Standard 4(c).

<sup>44</sup> Explanation to General Standard 3(c).

<sup>45</sup> Explanation to General Standard 3(c).

misconception “*that disclosure itself implies doubts sufficient to disqualify the arbitrator.*”<sup>46</sup>

In addition, as maintained from the 2004 Guidelines and now further made clear in the Explanation to General Standard 3(c), “*a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.*” This clear wording should prevent, what is sometimes perceived, that the disclosure of facts that would in the eyes of the parties give doubts to impartiality and independence as such equates to a lack of impartiality or independence on the part of the disclosing arbitrator. This assumption is not correct, rather the standard as elaborated above remains to be tested – i.e. whether from an objective third person the facts or circumstances give rise to justifiable doubts.

**c) Advance waivers and their impact on an arbitrator’s duty of disclosure**

The 2014 Guidelines newly address the concept known in practice as advance waivers. In recent years, this phenomenon emerges in particular from arbitrators who work at larger law firms. The practice involves such arbitrators submitting in “advance” to the arising of a potential conflict of interest a waiver for the parties to sign prior to the arbitrator accepting his or her appointment. Such type of waivers may take on various forms but typically amount to a request for advance clearance from the parties to the effect that the acceptance of the arbitral appointment will not inhibit other lawyers from the same law firm from acting for or against any party involved in the arbitration, so long as such separate mandate is unrelated to the arbitration.<sup>47</sup> The potential benefits seen with advance waivers is that it allows parties access to highly competent arbitrators with a sufficient administrative support to handle large and document-intensive cases who may otherwise be excluded from the pool of available arbitrators due to their affiliation with a larger law firm.<sup>48</sup> The downside seen with the use of

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<sup>46</sup> Explanation to General Standard 3(c).

<sup>47</sup> Explanation to General Standard 3(b): “*Advance waivers*” are described as “*declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result [therefrom]*”.

<sup>48</sup> Additional arguments in favor of advance waivers can include “*that such waivers are, as a practical matter, necessary in matters involving members of large law firms who serve as arbitrators in international commercial matters. Conflicts checks are snapshots at a particular moment in time, and it may be unrealistic to expect that a lawyer/arbitrator will be able to conduct daily conflicts updates to review and describe new matters not personally involving him or her and that in fact pose no threat to neutrality*”. James H. Carter and John

such waivers is that it could constitute a so-called “blanket approval” for any future conflict of interest situation which is not in the interest of the party granting such approval.

Because of the disadvantage mentioned, advance waivers are controversial. It therefore depends on the applicable legal system whether such waivers can validly be granted or not and what their effect and scope would be. The 2014 Guidelines themselves have not addressed this precise issue and do not set standards as to when such advance waivers should be considered valid. Rather they provide that this issue must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand, and the applicable law.<sup>49</sup> The 2014 Guidelines do however make clear that advance waivers do not diminish an arbitrator’s obligation to disclose facts and circumstances which, in the eyes of the parties, give rise to doubts as to his or her impartiality or independence under General Standard 3(a).<sup>50</sup>

## **B. Disclosure Responsibilities of Parties**

### **a) Duty to reveal information of an existing relationship**

Pursuant to General Standard 7(a), parties are required to inform all relevant persons involved in the arbitration of “*any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*”

Thus, the 2014 Guidelines, as their predecessor, dispel the notion that the duty to check for and disclose possible conflicts of interest, if any, falls solely on the arbitrator. It can be often the case that – especially when large companies with complex group of companies’ structures are involved – it is the parties themselves who are in possession of more information. This is particularly the case with respect to information that concerns the existence of parties who may have some relation to the arbitrator. As such, pursuant to reformulated General Standard 7(a), the parties themselves are called upon to put forward the existence of a relationship between the arbitrator and the party,

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V.H. Pierce, “2014 IBA Guidelines on Conflicts of Interest in International Arbitration”, in New York Law Journal, 17 November 2014, p. 2.

<sup>49</sup> Explanation to General Standard 3(b).

<sup>50</sup> General Standard 3(b).

which – with the revision – also includes in the definition of “party” any “*individual having a controlling influence on the party in the arbitration.*”

With the 2014 revision, the list of examples as to when this duty would arise has been expanded to beyond the group of companies situation to now also require disclosure of relationships between the arbitrator, and “*any person or entity with direct economic interest in the award*”, i.e. third-party funders,<sup>51</sup> or any person with “*a duty to indemnify a party to the arbitration*”. In the opinion of the authors of this article, it seems logical that this burden rests on the shoulders of the parties since they are the ones who would more likely be aware of contractual relationships that exist in the surroundings of the dispute.

Finally, the newly formulated General Standard 7(a) makes clear that the parties have to provide the necessary information on their own initiative and as quickly as possible.

**b) Duty to reveal names of members of counsel and relationship to arbitrator**

According to General Standard 7(b), parties are also required to inform all relevant persons involved in the arbitration of “*the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers’ chambers, between its counsel and the arbitrator.*”

This is an entirely new provision which reflects the focus of discussion not only on the relationship between the arbitrator and the parties themselves but also on the relationship between the arbitrator and the parties’ counsel. Another goal of this provision was to address the potential situation where new members of a party’s legal team are added in an effort to create a conflict with the already composed arbitral tribunal. In order to avoid any “surprise” effect to such an ill-intended strategy, parties are required on their own initiative and at the “*the earliest opportunity*” to inform of any changes in the members of its legal representation.<sup>52</sup>

**C. Duty to Conduct Reasonable Enquiries**

**a) Duty of the arbitrators**

General Standard 7(d) provides that “[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her

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<sup>51</sup> See below section IV.D.b) for revision to the 2004 Guidelines to address third-party funders.

<sup>52</sup> General Standard 7(b).

*impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries”.*

The 2014 Guidelines impose a duty to enquire both on the arbitrators and on the parties and harmonizes the standard according to which such searches need to be conducted.<sup>53</sup> That being, both parties and arbitrators have an obligation to conduct “*reasonable enquiries*”.<sup>54</sup> The 2014 Guidelines leave open what should be considered a “*reasonable*” enquiry and do not clarify how much time and effort needs to be invested in the investigation. What is a “*reasonable enquiry*” will of course depend on the circumstances of a given case (i.e., the complexity of the given arbitration, the amount in dispute, its expected duration, size and resources of the parties involved) including the resources or methods employed to conduct the enquiry.

According to the previous wording of this General Standard, arbitrators were required to “*make reasonable enquiries to investigate any potential conflict of interest*”.<sup>55</sup> This phrasing could be misunderstood as only requiring an arbitrator to examine a potential conflict of interest which is already on his or her mind, and not to enquire whether in fact there exists any other potential conflict of interest. Replacing the term “*investigate*” by “*identify*” makes certain that an arbitrator needs to not only check those conflicts which may or may not be in the forefront of his or her mind, but also to identify, i.e. search for, additional potential conflicts of interest, thereafter disclosing any such conflicts of interest which may exist.

As to the scope of information to include in the arbitrator’s enquiry, the Explanation to General Standard 7(d) establishes that like parties,<sup>56</sup> arbitrators are required to investigate “*any relevant information that is reasonably available to them.*”<sup>57</sup> For example, where an arbitrator has left his or her firm, he or she may no longer have “*reasonably available*” relevant information on the relationship between the firm and one of the parties or counsel. General Standard 7(d) also reformulates and confirms what was already contained in the previous edition of the guidelines that any lack of knowledge will not be considered an excuse “*if the arbitrator does not perform such reasonable enquiries*”.<sup>58</sup>

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<sup>53</sup> See below section IV.C.b) and clarified duty of parties.

<sup>54</sup> General Standards 7(c) and (d).

<sup>55</sup> General Standard 7(c) of the 2004 Guidelines.

<sup>56</sup> See section IV.C.b) below and clarified duty of parties.

<sup>57</sup> Explanation to General Standard 7(d).

<sup>58</sup> General Standard 7(c).

## b) Duty of the parties

General Standard 7(c) requires that “[i]n order to comply with General Standard 7(a)”, i.e. a party’s duty to inform all relevant parties of any relationship between the arbitrator and the party, a party shall be obliged to conduct “reasonable enquiries and provide any relevant information available to it”.

As indicated above, the 2014 revision aligns the standard for the scope of enquiries to be performed by parties with the standard also imposed on arbitrators.<sup>59</sup> As also highlighted above, the misconception that parties only had a duty to enquire to an attenuated extent is washed away by the plain language of the 2014 Guidelines. In particular, the revisions to the now General Standard 7(c) include the removal of the limitation of the scope of the search to that which was only “publicly available.” Instead, with the revision, the focus is on any relevant information available to a party – i.e. whether publicly or privately accessible. Thus, the range of information which needs to be searched would also cover information that the party may only know of internally at its organization, for example. With that said, the enquiry must nevertheless be reasonable, and the 2014 Guidelines do not foresee the need for parties to undertake overly burdensome attempts to investigate potential conflicts of an arbitrator.

A party’s duty to investigate any relevant information reasonably available to it is a continual obligation throughout the arbitration.<sup>60</sup>

The 2014 Guidelines are silent as to what would be the repercussions for a party who does not conduct reasonable enquiries pursuant to General Standard 7(c). In particular, whether a party may still challenge an arbitrator when such party failed to perform a reasonable enquiry which would have allowed it to learn the facts or circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality and independence, remains unanswered by the 2014 Guidelines, and will have to be answered by the law applicable to the issue.<sup>61</sup>

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<sup>59</sup> Pursuant to 2014 General Standard 7(d) and 2004 General Standard 7(c) – as already set out in the 2004 Guidelines and reconfirmed with the 2014 revision.

<sup>60</sup> Explanation of General Standard 7(c) (A party is required to make such reasonable enquiries not only at the outset but also “on an ongoing basis during the entirety of the proceedings”).

<sup>61</sup> See e.g. in England, according to Section 73 of the Arbitration Act 1996, “[i]f a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection [...] (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to



## D. Conflicts Based on Relationships between Parties/Counsel and Arbitrators

### a) Repeat appointments as arbitrator or engagements of an arbitrator (or his/her law firm)

A recurrent topic in the discussion of conflicts of interest is the issue of repeat appointments of an arbitrator by one of the parties,<sup>62</sup> or similarly the repeat engagement of an arbitrator, or the arbitrator's law firm, *for* one of the parties.<sup>63</sup> These conflicts are based on the notion that repeat appointments or

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*take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection*". In Switzerland, the Swiss Federal Supreme Court has held that according to the principle of good faith, the parties are required to conduct a reasonable enquiry, failing which they forfeit their right to rely on the circumstances in order to bring a challenge of the arbitrator (DFT 136 III 605, section 3.2.2, 129 III 445, section 4.2.2.1). In Switzerland, this duty, which has been referred to as the "*devoir de curiosité*", also exists where the arbitrator was nominated by an arbitral institution (DFT 4A\_506/2007, section 3.1.2). In comparison, in Germany, according to Section 1037 ZPO Zivilprozessordnung (German Code of Civil Procedure) (free translation), "*if not agreed upon otherwise, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in section 1036 para. 2 ZPO, send a written statement of the reasons for the challenge to the arbitral tribunal*". In Germany, actual knowledge and not merely constructed knowledge is required (see Münch in Münchener Kommentar zur Zivilprozessordnung, 3rd edition 2008, section 1037 margin no. 12). Thus, unlike in England and Switzerland, German law seems to allow a party to bring a challenge of an arbitrator once it becomes aware of circumstances calling into question the arbitrator's impartiality and independence, irrespective of whether such party conducted an enquiry which would have allowed it to discover the ground for the objection.

<sup>62</sup> As with the 2004 Guidelines, under Practical Application item 3.1.3, it is an Orange List item if "[t]he 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." Footnote 5 to the 2014 Guidelines now mentions explicitly sports arbitration, a field which has heavily increased in the past years (thanks in particular to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland). However, due to the specificities of this field, the pool of individuals nominated as arbitrators remains especially small, making the probability of multiple appointments in a short time period quite likely and therefore in such instances not requiring disclosure of this fact when all parties in the arbitration should be familiar with such custom and practice. As maintained from the 2004 Guidelines, under Practical Application item 3.1.5, it is an Orange List item if "[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties or an affiliate of one of the parties."

<sup>63</sup> As set forth in the 2004 Guidelines, under Practical Application item 3.1.1, it is an Orange List item if "[t]he arbitrator has, within the past three years, served as counsel for one of the parties [...] but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship" (emphasis added). Similarly, according to Practical Application item 3.1.4, it is an Orange List item if "[t]he arbitrator's law firm has, within the past three years, acted

instructions signify a sort of ongoing working relationship between the party and the arbitrator concerned which may influence the arbitrator's judgment during the pending arbitration.

The 2014 Guidelines also introduced a similar conflict of interest caused by the repeat engagement of an arbitrator's law firm *against* one of the parties.<sup>64</sup> This addition stems from the idea that such previous involvement could mean that the arbitrator, through his or her firm, could gain knowledge of sensitive information concerning such party, or have access to preconceived opinions of the party (of its conduct, strategy, etc.). As their predecessor, the 2014 Guidelines also raise caution where it is the arbitrator who has acted against one of the parties.<sup>65</sup> In support of this Orange List item is the notion that if the arbitrator has acted on multiple occasions against one of the parties, he or she may be predisposed against that party's interest.

The above categories of conflict are dealt with specifically in the Practical Application lists. As seen also in other contexts, the Practical Application lists use a time period of three years as a guiding point for measuring a potential conflict. Although during the revision process there was much discussion among members of the Subcommittee as to whether to extend this time period from three years to five years, the three-year time limitation relevant to measure the repeat appointments or engagements in the 2004 Guidelines withstood the revision process. This solution is to be welcomed as it takes into account the danger of opening the door to unwarranted challenges, and the fact that a five-year time period would limit the pool of available arbitrators. Thus, as a result, if the circumstances occurred

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*for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator*" (emphasis added).

<sup>64</sup> New with the 2014 Guidelines is Practical Application item 3.1.4, which includes as an Orange List item instances where "[t]he *arbitrator's law firm* has, within the past three years, acted for *or against* one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator" (emphasis added).

<sup>65</sup> Practical Application item 3.1.2 confirms as an Orange List item instances where the "*arbitrator* has, within the past three years, served as counsel *against* one of the parties, or an affiliate of one of the parties, in an unrelated matter" (emphasis added). In its decision dated 6 October 2008 (DFT 135 I 14 section 4.3), involving a domestic arbitration, the Swiss Federal Supreme Court confirmed an appearance of lack of independence – from an objective perspective – where a chairman acted as counsel to a party in another lawsuit against one of the parties to the arbitration. The Swiss Federal Supreme Court observed that parties have the tendency to associate counsel with the party who he or she represents. Therefore, in the eyes of a party, it cannot be expected of the chairman to be suddenly independent and remain free of any preconceived opinions.

more than three years prior to the arbitrator's current appointment, it is as a general rule not mandatory for the arbitrator to disclose such facts.<sup>66</sup>

### **b) Third-party funding, insurers and indemnifiers**

The use of third-party funding in arbitration from professional third-party funders, banks, insurers, etc., has dramatically increased since the issuance of the 2004 Guidelines, without however being regulated on an international level (or at least very rarely).<sup>67</sup> As seen from the responses received from the questionnaire circulated at the start of the review process,<sup>68</sup> this topic is one that the arbitration community views as important and is an area in need of guidance.

In the 2014 Guidelines, third-party funding is dealt with in the revisions to the General Standards as well as in the Practical Application lists. In General Standard 6(b), now included in the definition of a party, is any legal or physical person having “*a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*”<sup>69</sup> In addition, General Standard 7(a) requires parties to disclose any relationship between an arbitrator and “*any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*”<sup>70</sup> The Explanation to General Standard 7(a) attempts to help define what is meant by “*direct economic interest*” and provides as an example a relationship with an entity providing funding for the arbitration.<sup>71</sup> Third-party funding is also addressed in the Practical Application lists, which were revised in two

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<sup>66</sup> This is a general rule, see paragraph 6 to Part II of the 2014 Guidelines explaining that “[b]ecause the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List.” Notably, some consider the three-year time period to be too short. See James H. Carter and John V.H. Pierce, “2014 IBA Guidelines on Conflicts of Interest in International Arbitration”, in *New York Law Journal*, 17 November 2014, p.2 (“[...] the AAA/ABA Code and U.S. case law do not contain such time limitations on disclosure and that U.S. arbitrators generally would not restrict such a disclosure to events or relationships during the last three years.” “Some U.S. lawyers [...] have suggested that the Guidelines set the bar too low [...]”).

<sup>67</sup> See e.g. Selwyn Seidel, “Third-Party Investing in International Arbitration Claims: To Invest or Not to Invest? A Daunting Question?” in ICC October 2013; Bernado Cremades, “Third Party Litigation Funding: Investing in Arbitration”, in *Transnational Dispute Management*, Vol. 8 Issue 4 (October 2011).

<sup>68</sup> See section I above.

<sup>69</sup> General Standard 6(b).

<sup>70</sup> General Standard 7(a).

<sup>71</sup> Explanation to General Standard 7(a).

instances in order to take into account “*an entity that has direct economic interest in the award to be rendered in the arbitration.*”<sup>72</sup>

The use of the terms “*third-party funder*” and “*insurer*” as used in the 2014 Guidelines is meant to refer to “*any person or entity that is contributing funds, or other material support, to the prosecution or defense of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*”<sup>73</sup> Third-party funding, in general, includes funding towards fees and expenses of counsel, as well as funding for arbitrator fees, costs of investigation, document production and review as well as hearing expenses.<sup>74</sup>

The discussion in the 2014 Guidelines is not limited to third-party funders but also extends to other third actors who have an interest in the arbitration and whose very presence creates similar conflict concerns (i.e. including third parties with a duty to indemnify one of the parties “*for the award to be rendered in the arbitration*”).<sup>75</sup> These are persons who may not be *per se* funding the arbitration but who have a “*direct economic interest*” since they will, based on a contractual relationship or in law, hold harmless one of the parties in case of an unfavorable award (i.e. will pay on behalf of the losing party).

The involvement of third-party funders, insurers, or indemnifiers in a proceeding is relevant since it injects additional and often varying interests into the arbitration which may or may not give rise to conflicts with the arbitrators. The conflict, if present would arise not from the fact that there is a third party providing financing of the proceedings. Rather, the potential conflict stems

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<sup>72</sup> See Practical Application Red List item 1.2 (“*The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has direct economic interest in the award to be rendered in the arbitration*”) and Practical Application Orange List item 3.4.3 (“*A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board: of a party; of an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert*”).

<sup>73</sup> Explanation to General Standard 6(b).

<sup>74</sup> See Bernado Cremades, “*Third Party Litigation Funding: Investing in Arbitration*”, in *Transnational Dispute Management*, Vol. 8 Issue 4 (October 2011), p. 2. “*In essence, third party litigation funding is a modern twist on the classic contingency fee agreement, as it could be described as a contingent fee offered by non-lawyers. In third party funding, a funder covers the costs and expenses of the litigant in consideration of the assignment by the latter of a share in any future compensation. [...] If the funded litigant loses, the funder will lose the investment. However, if the claim is successful, either in litigation or settlement, the funder will receive a portion or percentage of the recovery.*” *Id.*

<sup>75</sup> General Standard 6(b) and Explanation to General Standard 6(b).

from the involvement of a third person in the dispute with a direct financial stake in the outcome, which means that potential concerns with regard to relationships between the arbitrator and counsel extend to this third party, and thus whose presence could influence, or appear to influence, an arbitrator's decision-making.

**c) Enmity between the arbitrator and the parties and/or counsel**

The 2014 Guidelines introduce an entirely new category of relationship which considers whether enmity exists between the arbitrator and counsel appearing in the arbitration.<sup>76</sup> This requires the arbitrator to take into consideration whether he or she holds any grudges against the counsel due to previous dealings with him or her, or for any other reason. A similar standard is applied for situations where enmity exists between an arbitrator and a manager or director or a member of the supervisory board of a party, of an entity that has a direct economic interest in the award, or of any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.<sup>77</sup>

Although this addition could be considered an interesting development, one would wonder whether this would be a piece of information which an arbitrator is willing to disclose since once the information is released into the small community of international arbitration practitioners, it is difficult to retrieve. Thus, it is unlikely that this new circumstance will have a high practical impact.

**d) Relationship as co-counsel**

According to the 2014 Guidelines, an arbitrator must disclose whether he or she and another arbitrator or counsel for one of the parties in the arbitration “*currently act or have acted together within the past three years as co-counsel*”.<sup>78</sup> Within the practice of international arbitration, this scenario occurs more often than one would consider.

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<sup>76</sup> Practical Application Orange List item 3.3.7 (“*Enmity exists between an arbitrator and counsel appearing in the arbitration*”).

<sup>77</sup> Practical Application Orange List item 3.4.4 (“*Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert*”).

<sup>78</sup> What was formerly Practical Application Green List item 4.4.2 of the 2004 Guidelines, “*The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel*”, is now elevated to Orange List status in the 2014 Guidelines. Practical Application Orange List item 3.3.9 provides that “*The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel*”.

Concerning a concurrent relationship as co-counsel between two of the arbitrators, if and when such arbitrators meet as co-counsel on a different mandate, they may be viewed as excluding the third arbitrator not present. This is particularly the case if the co-counsel relationship is between the president of the arbitral tribunal and one of the party-appointed co-arbitrators. As this could make the party that has appointed the non-present co-arbitrator uneasy, the concurrent relationship among members of the arbitral tribunal as co-counsel amounts to an Orange List item.

Concerning a concurrent relationship as co-counsel between one of the arbitrators and counsel for one of the parties, similarly a concern arises that one of the parties, through its counsel, has greater “access” to one of the arbitrators which the other side does not, therefore also warranting an Orange List classification.

During the revision process, discussion arose among the members of the Subcommittee as to whether only past relationships and not also current relationships between the arbitrator and another arbitrator or counsel for one of the parties should be disclosed. With regard to a past co-counsel relationship between an arbitrator and another arbitrator, or counsel for one of the parties, the issue of access to information or *ex parte* communication among members of the arbitral tribunal is not present since the co-counsel relationship has ended. Thus, with respect to co-counsel relationships of the past, the possible concern of the drafters might have been to have disclosed any financial interest that an arbitrator (himself or herself) derives from acting as co-counsel with the arbitrator or counsel involved in the proceedings.

**e) Arbitrator and ties to appointing authority**

The revision also introduces the necessity to disclose the fact that an arbitrator holds a position with the appointing authority in a committee, court, organ or body of an arbitral institution that has the appointing authority over the dispute.<sup>79</sup>

It should be pointed out that the institutions themselves contain restrictions as to the possibility of being appointed by the institution while someone has an official role in such institution. Thus, this new situation addresses the perceived need of transparency of such set of circumstances.

**f) Relationship through social groups or social media**

The revisers considered the situation where one person on a social media list is an arbitrator in proceedings where counsel to the parties is also

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<sup>79</sup> Practical Application Orange List item 3.5.3 (“*The arbitrator holds a position with the appointing authority with respect to the dispute*”).

a member of the same list. The revisers looked into this issue since it has within the last decade been more frequently used to challenge the impartiality and independence of arbitrators. Upon reflection, the Subcommittee considered that if an arbitrator has a relationship with another arbitrator or counsel for one of the parties through membership in the same professional association or social or charitable organization, or through a social media network, this relationship will in terms of the 2014 Guidelines be considered a Green List item.<sup>80</sup>

As a result, no disclosure is required of such facts and circumstances and the relationship alone cannot be grounds for calling into question an arbitrator's impartiality or independence. Similarly, it is also a Green List item if the arbitrator has a relationship with one of the parties or its affiliates through a social media network.<sup>81</sup>

**g) Relationship through academia, conferences or seminars**

According to the 2014 Guidelines, no doubts should be raised as to an arbitrator's impartiality and independence in cases where he or she teaches in the same faculty or school as another arbitrator or counsel for one of the parties, or serves as an officer of a professional association, or social or charitable organization, with another arbitrator or counsel for one of the parties.<sup>82</sup>

Also included as a Green List item are instances where the arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties.<sup>83</sup>

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<sup>80</sup> Practical Application Green List item 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 organisation, or through a social media network*”). The addition of “*charitable organisation*” covers organizations such as the Lion’s Club with over 1.3 million members, of which many lawyers are members, and which serves as basis for networking. Networks such as Facebook, LinkedIn and Xing fall under “*social media*” aspects of item 4.3.1.

<sup>81</sup> Practical Application Green List item 4.4.4 (“*The arbitrator has a relationship with one of the parties or its affiliates through a social media network*”).

<sup>82</sup> Practical Application Green List item 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*”).

<sup>83</sup> Practical Application Green List item 4.3.4 (“*The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties*”).

**h) Relationship with partner of the same firm as arbitrator**

As with the 2004 Guidelines, the 2014 Guidelines address the contemporary problems in the world of large corporate groups/complex structures of multinational corporations and international multi-office law firms/globalization of international law firms. Pursuant to the revisions to General Standard 6(a), “[t]he arbitrator is in principle considered to bear the identity of his or her law firm”. According to the same provision, and to the question as to whether a disclosure should be made, the activities of the arbitrator’s firm, if any, should be reasonably considered in each individual case and shall not automatically constitute a conflict of interest or a reason for disclosure. Each situation must be considered on its own facts – disqualification occurs only if it is objectively justified under General Standard 2.<sup>84</sup>

**i) Relationship between barristers of the same chambers**

The traditional position as understood under English law is that barristers from the same chambers can be appointed as both arbitrators and counsel in the same arbitration without calling into question the impartiality or independence of the arbitrator.<sup>85</sup> However, recent case law and decisions of leading arbitral institutions have indicated a trend towards a less tolerant approach to the appointment of arbitrators and counsel from the same chambers.<sup>86</sup> With the revision to the 2004 Guidelines, the Subcommittee looked into the treatment of the relationship among members of the same barristers’ chambers under the 2004 Guidelines and considered whether there was need for any revisions.

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<sup>84</sup> General Standard 6(a).

<sup>85</sup> See David W. Brown, “*Arbitrators, Impartiality and English Law – Did Rix J. really get it wrong in Laker Airways?*”, in *Journal of International Arbitration*, Vol. 18 Issue 1 (2001), pp. 123-130 (discussing leading English decision *Laker Airways Inc. v. FLS Aerospace Ltd* rendered on 20 April 1999, in which it was held that the fact that a barrister-arbitrator was a member of the same set of chambers as an advocate representing one of the parties was not itself considered sufficient to constitute a conflict of interest or to justify doubts as to the arbitrator’s impartiality under Section 24 of the Arbitration Act 1996; and the Departmental Advisory Committee on Arbitration Law Report, which provides that “[...] it is often the case that one member of a barrister’s Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English Law.” (Departmental Advisory Committee on Arbitration Law Report, February 1996, at 119)).

<sup>86</sup> Berwin Leighton Paisner survey of opinions on the practice of having arbitrators and advocates from the same set of barristers’ chambers (surveying sixty-nine law firms from forty-eight countries).



As maintained from the 2004 Guidelines, in the 2014 Guidelines there is no blanket ban on the members of the same chambers appearing as counsel and arbitrator in the same case.<sup>87</sup> However, with the introduction of General Standard 7(b), a party shall disclose the identity of its counsel appearing in the arbitration “*as well as of any relationship, including membership of the same barristers’ chambers, between its counsel and the arbitrator*”. Other additions introduced in the 2014 Guidelines also make clear that “[a]lthough barristers’ chambers should not be equated with law firms for the purposes of conflicts [...] disclosure may be warranted in view of the relationships among barristers, parties or counsel.”<sup>88</sup> Thus, although “*no general standard is proffered for barristers’ chambers*”,<sup>89</sup> with the modifications introduced by the 2014 Guidelines, if the relationship among barristers is comparable to those of members of law firms, the same rules may apply.

### **E. Conflicts Based on Subject Matter (“Issue Conflicts”)**

An “issue conflict” is commonly understood as a situation where an arbitrator has a connection/relationship to the issue before him/her and not – as normally the case in conflict of interest discussions – to one of the parties, counsel or another arbitrator.<sup>90</sup> Thus, it does not concern a relationship with a person/entity but with the particular issues of the case before the arbitrator. The problem of issue conflicts arises particularly in the context of investment-treaty arbitration but it is not exclusive to it.

Issue conflicts can arise in different ways, which include but are not limited to the following scenarios:

- The arbitrator can have the same/a similar issue before him/her in another arbitration proceeding. This other arbitration can be either in the past and terminated or still ongoing.

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<sup>87</sup> Practical Application Orange List item 3.3.2 (“*The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers’ chambers*”).

<sup>88</sup> Explanation to General Standard 6(a).

<sup>89</sup> Explanation to General Standard 6(a).

<sup>90</sup> See Michael Hwang and Kevin Lim “*Issue Conflict in ICSID Arbitrations*” in *Transnational Dispute Management*, Vol. 8 Issue 5 (December 2011), pp. 17-18; Jan Paulsson, “*Ethics, Elitism, Eligibility*”, in *Journal of International Arbitration*, Vol. 14 Issue 4 (1997), pp. 14-15; Gary Born, “*International Commercial Arbitration*”, Vol. II, §12.05, p. 1884.

- The arbitrator can have had a similar issue to deal with as a counsel.<sup>91</sup> Again, the case in which the arbitrator has been a counsel might be in the past or still ongoing.
- The issue might have been raised outside the context of another arbitration proceeding.<sup>92</sup> This is particularly the case if the arbitrator has expressed his or her view on an issue which is also at stake in the arbitration, in a publication, such as an academic journal.

The issue at stake is whether or not some of these situations which are summarized above raise concerns and, from a reasonable third parties' point of view, have an impact on the impartiality or independence of the arbitrator.

Within the members of the Subcommittee, there was no unanimity of views. While some wanted to have a strict approach and include issue conflicts in the Orange List, if not in the non-waivable Red List, others considered this as less critical, mainly comparing the situation to State judges where this has not given rise to similar concerns.

Finally, the agreed result was to not expressly address the issue in the General Standards or as one of the Practical Application list items, but to instead make reference to it in paragraph 6 of the introductory paragraphs to the Practical Application lists. Paragraph 6 of Part II of the 2014 Guidelines now includes the following sentence: *“Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, [...] when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised.”*

There are several conclusions which can be drawn from this solution in the 2014 Guidelines:

- (i) First of all, the relevant provision only mentions the relationship between the same issue at stake for an arbitrator and a counsel. Therefore, by negative inference, it seems less critical if the same issue appears in a situation in which the arbitrator has already dealt with the same issue as an arbitrator in a previous case.

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<sup>91</sup> Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of the District Court of The Hague of 18 October 2004; Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004.

<sup>92</sup> In *Urbaser v Argentina* (ICSID Case No. ARB07/26), a challenge against Campbell McLachlan based on his academic writings failed. However in *Perenco v Ecuador* (ICSID Case No. ARB/08/06; PCA Case No. IR-2009/1), the claimant-appointed arbitrator Charles Brower was successfully challenged for statements regarding Ecuador's recalcitrant approach to investment-treaty arbitration generally given in an interview to a journalist.

- (ii) A further limitation can be concluded from the word “*concurrently*”. Apparently, the drafters had in mind a situation in which the arbitrator could influence the case law and thus potentially the outcome of a case where the individual concerned acts, at the same time as the arbitration where he/she is appointed as arbitrator, as counsel (the issue of “double hats”). Indeed, once the latter case is over, there is no threat of a potential impact by the former and thus no risk perception of bias any more.
- (iii) The caveat introduced in the 2014 Guidelines is not limited to investment-treaty arbitration.
- (iv) It is not necessary that the cases in question are related to one another in order to raise concern.

This paper is not the right place to discuss how far issue conflicts should go.<sup>93</sup> However, the rather “hands-off” as well as seemingly restrictive approach to issue conflicts taken in the 2014 Guidelines is in the opinion of the authors justified. Issue conflicts should not be accepted too easily as this can lead to the risk of obstructing arbitration proceedings by unwarranted challenges. In addition, widely accepting the notion of issue conflicts limits the pool of available arbitrators.

## F. Waivers of Conflicts of Interest

The ability of parties to waive conflicts of interest, and the limits thereof, was already a concept recognized in the 2004 Guidelines. The extent to which a waiver will be considered valid and respected vary from jurisdiction to jurisdiction.

For example under Swiss law, in principle no limitation exists on the possible waiver of known, and even unknown, facts or circumstances which give rise to justifiable doubts as to the arbitrator’s independence.<sup>94</sup> Whereas in

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<sup>93</sup> See e.g. Anthony Sinclair and Matthew Gearing “*Partiality and Issue Conflicts*” in *Transnational Dispute Management*, Vol. 5 Issue 4 (July 2008), at 2; Caline Mouawad “*Issue Conflicts in Investment Treaty Arbitration*”, in *Transnational Dispute Management*, Vol. 5 Issue 4 (July 2008), at 13; Judith Levine, “*Dealing with Arbitrator “Issue Conflicts” in International Arbitration*”, in *Transnational Dispute Management*, Vol. 5 Issue 4 (July 2008).

<sup>94</sup> This is made clear by the fact that parties can, under certain circumstances, waive their right to set aside an award. Article 192(1) of the Private International Law Act provides that: “*Where none of the parties have their domicile, habitual residence or business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for setting aside or they may limit it to one or several of the grounds listed in Article 190(2).*” Thus, it is considered that if parties

other jurisdictions, there can be greater restrictions as to what parties can and cannot waive. The 2014 Guidelines, as the 2004 Guidelines, cater to this legal diversity by reflecting the limits to the ability to “waive” which exists in some jurisdictions.

**a) Non-waivable issues**

With the 2014 revision, General Standard 4(b) confirms that, as with the 2004 Guidelines, in certain instances there can be no waiver of a conflict at all. This is the case if facts or circumstances exist as described in the non-waivable Red List.

General Standard 4(b) also includes the position of the 2014 Guidelines on the concept of advance waivers, and confirms that even a waiver made in writing in advance to a known conflict may not be used to cure the conflict of interest of an arbitrator as described in the non-waivable Red List.<sup>95</sup>

**b) Waivable issues if waiver expressly made**

As in the 2004 Guidelines, General Standard 4(c) provides that in certain circumstances, including those exemplified in the waivable Red List, a person may only serve as an arbitrator if all parties concerned have full knowledge of the conflict of interest and all parties expressly agree to his or her role as arbitrator despite the conflict of interest.

Pursuant to General Standard 4(d), if an arbitrator is to also assist the parties with conciliation or mediation at any stage in the proceedings, he or she should receive an express agreement by the parties to act in such capacity. Taking on such a role by an arbitrator, which is often done in civil law

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can waive the right to challenge the award on all grounds, they should *a fortiori* be entitled to waive the more limited right to challenge an arbitrator. However, this seemingly clear situation might be influenced by the professional rules applicable to a lawyer, and in particular by the Statute on the Free Movement of Lawyers within Switzerland (“Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte” (BGFA), SR 935.61) providing that a lawyer must remain free of conflicts (Article 12(c)). Whether or not arbitrators fall under these rules and what the limitations are to advance waivers under Swiss professional rules is not settled (see Kaspar Schiller, *Schweizerisches Anwaltsrecht*, 2009, para. 348, citing a decision of the Lawyers of the Canton of Zurich Supervisory Board dated 7 September 2001 in *ASA Bull.* 2001, pp. 313 et seq.). Notably, some Swiss commentators take the view that since a client may waive his or her attorney privilege rights (Article 321 Swiss Criminal Code and Article 13 BGFA), then it should also be possible to waive one’s right to an arbitrator free of any conflicts (Kaspar Schiller, *Schweizerisches Anwaltsrecht*, 2009, para. 828).

<sup>95</sup> See section IV.A.c) above for more details on the concept of advance waivers. Advance waivers are a form of express waivers envisioned under General Standards 4(c) and 4(d). Any attempt to obtain an advance waiver cannot circumvent the mandatory limits that apply to waivers as discussed in General Standard 4(b).

countries, is something recognized in the guidelines, and acting in such a manner should not *per se* disqualify an arbitrator from continuing to serve. The arbitrator shall however resign should, as a result of his or her involvement in the settlement process, he or she develop doubts as to his or her ability to remain impartial and independent.

**c) Waivable issues even if waiver implicitly made**

General Standard 4(a) provides that if “*within 30 days after receipt of any disclosure by the arbitrator*” or “*after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator*” a party does not raise an express objection, the party is “*deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances*”.

The language of General Standard 4(a) remains almost identical to its 2004 version. The purpose of this provision is to allow, as is consistent in many jurisdictions, for implicit waivers of a conflict where there is no express objection made within a reasonable period of time.

## V. Concluding Remarks

To summarize, the basic principles which made the 2004 Guidelines so popular and widely accepted endured the revision process and remain the same. It follows that new features were added only where it was felt necessary (in particular based on input by various categories of users) in view of developments in the past decade. These features include specifically effects of so-called “advance waivers” of potential conflicts of interest, as well as the treatment of third-party funding. As described above, newly addressed with the revision – but still left for the most part open – is the topic of conflicts based on the subject matter in dispute, i.e. issue conflicts.

Notably, some additions introduced by the 2014 Guidelines are not clear on what the repercussions would be if not implemented by the persons concerned. In particular, the new requirement that parties shall disclose “*the identity of its counsel appearing in the arbitration*” and of “*any change in its counsel team*”<sup>96</sup> does not include any sanction which would penalize a party who fails to disclose changes in its counsel team.<sup>97</sup> This is contrary to the

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<sup>96</sup> General Standard 7(b).

<sup>97</sup> See also on this issues the IBA Guidelines on Party Representation in International Arbitration, Guideline 4 (“*Party Representatives should identify themselves [...] at the earliest opportunity. A Party should promptly inform the Arbitral Tribunal and the other*

content of the guidelines regarding conflicts as such, which can be sanctioned – at least indirectly – through decisions of arbitral institutions and/or state courts reflecting the content of the 2014 Guidelines.

Moreover, while the modifications to the Practical Application lists of the 2004 Guidelines did include a greater focus on the relationship between the arbitrator and counsel, as compared to that between the arbitrator and the parties, the revisions to Part II of the guidelines could still be considered as not being comprehensive enough. Indeed, the 2014 revisions for the most part concern additions or clarifications to the General Standards (Part I of the guidelines). In the view of the authors, it would be worthwhile to focus on the Practical Application list items in the next decade by finding a way to record recurring issues that were not yet included in the 2014 revision. This would be a valuable endeavor since the Practical Application lists could be considered as the more widely used portion of the guidelines by arbitrators and arbitration practitioners.

Overall, the result is that there have not been drastic changes and the fundamental principles first set out in the 2004 Guidelines remain the same. The first reactions to the 2014 Guidelines through the presentations at the annual IBA Conference held in Tokyo were positive and it seems that the moderate revisions will be well received.

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*Party or Parties of any change in such representation”*); [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

Nathalie VOSER, Angelina M PETTI, *The Revised IBA Guidelines on Conflicts of Interest in International Arbitration*

### **Summary**

The present article analyzes the recent revision of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which were approved by the IBA in late October 2014. First introduced in 2004, the guidelines have become an essential tool relied upon by arbitration practitioners, institutions and courts when assessing questions of impartiality and independence of arbitrators and the extent of disclosure requirements.

The goal of this paper is not only to highlight those aspects of the revised guidelines which are new or clarified, but also to provide a comprehensive analysis of the guidelines as a whole. To that end, the authors have identified a number of key topic areas relating to conflicts of interest in arbitration which have been the subject of recurring debate and were also to a considerable extent at the core of the discussion during the revision process. These topic areas serve as a framework to analyze and better comprehend the impact of the various provisions of the guidelines.

In particular, the article addresses in detail the following specific subject matters: duties of disclosure and enquiry for arbitrators, administrative secretaries and parties, relationship-based conflicts (including third-party funding), issue conflicts, and waivers of conflicts of interest (including advance waivers).