

Reaching Consensus on Arbitrator Conflicts: The Way Forward

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There is no consensus on arbitrator conflict of interest issues in international arbitration, but a significant step towards that goal may be imminent. There is soon likely to be a database of actual rulings by arbitral institutions on conflicts challenges. The current issues, in the author's view, are how that database will be constructed and by whom.

The absence of consensus about arbitrator conflicts is largely the result of a lack of publicly available information. Most disputes about arbitrator conflicts of interest are resolved by arbitral institutions without any reasoned decision or public record. Court decisions addressing arbitrator conflicts typically arise at the award enforcement stage, are relatively infrequent and provide little useful basis for systematic factual analysis. Judicial discussion of arbitrator conflicts unfortunately often goes no further than ad hoc characterisation of a particular disclosure or other conflict issue as 'material', 'trivial' or 'insubstantial', without any comparison to what other courts or institutions ruling on such matters have decided in similar situations.¹

Efforts to find or build consensus within the international arbitration community on evaluation of conflict issues began, for all practical purposes, with the drafting of the IBA Guidelines on Conflicts of Interest

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1 See James H Carter, 'Recent Developments in Arbitration Disclosure Law and Practice' in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Arthur Rovine, ed, 2007), 201, 203–05; Gary B Born, *International Commercial Arbitration* (2009), 1491; Catherine A Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 *Stan J Int'l L* 53, 54, 55, 77.

in International Arbitration,² which were issued by the IBA in 2004 and replaced, in part, the more general conflicts language in the 1987 IBA Rules of Ethics for International Arbitrators.³ The Guidelines were prepared by a Working Group of 19 drafters from diverse geographical and legal backgrounds,⁴ through a process involving extensive consultation with others. They nevertheless were not intended to be representative of all of the practices or court decisions in the field, nor were they designed to be implemented by means of a clause in parties' contracts. The Guidelines state that they are non-binding and not entirely comprehensive, but they nevertheless include much useful information for the guidance of counsel and arbitrators.⁵

The Guidelines begin with an explanation of 'General Standards Regarding Impartiality, Independence and Disclosures', but their major innovation is a list of 'practical applications' of those general principles to specific fact patterns, divided into 'Non-Waivable Red', 'Waivable Red', 'Orange' and 'Green' Lists of examples. The nature of the two Red Lists is self-explanatory. The Orange List is intended as a non-exhaustive enumeration of situations, which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator's impartiality or independence and must be disclosed but are not necessarily grounds for disqualification. The Green List enumerates situations where, according to the Guidelines, no appearance of and no actual conflict of interest exists 'from the relevant objective point of view', and no disclosure is required.

The various lists set out a total of 49 specific examples of potential conflicts situations (included in an appendix below), ranging from some that are encountered rather often to others that might be viewed as somewhat unusual. The categorisation of these examples into lists with differing

2 IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at www.ibanet.org. The Guidelines were preceded in the domestic US context by a discussion of conflicts in the American Arbitration Association/American Bar Association Code of Ethics for Arbitration in Commercial Disputes, first issued in 1977 and revised and reissued in 2004, available at www.adr.org.

3 IBA Rules of Ethics for International Arbitrators (1986), available at www.ibanet.org.

4 The author was one of the 19 Working Group members and therefore does not write from an entirely disinterested viewpoint.

5 'These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community... and that this will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions... The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation.' Introduction, para 6. 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' (2004) 5(3) *Bus LJ* 433.

disclosure consequences has led to a certain amount of controversy, including suggestions from various quarters that they reflect an attitude that is unduly favourable to arbitrators, limiting disclosure obligations and the number of presumptive (Red) disqualification situations more narrowly than is proper.⁶ The Guidelines continue to be under review by an IBA subcommittee but are not the subject of any likely revisions in the immediate future.

Whatever views one might hold about a specific Guidelines example and where it belongs in the lists, or whether a 'Green List' is a good idea at all, the Guidelines have won wide approval for their attempt to set out and organise a significant number and range of examples of issues that the Working Group knew from its collective experience to have arisen in practice. They were drawn in part, but only in part, from the national jurisprudence familiar to the members of the Working Group and others who were consulted. The list represented what probably was the first attempt to organise conflict examples in a hierarchical fashion.

The IBA's Conflicts of Interest Subcommittee monitored use of the Guidelines and issued a *Report on the First Five Years* covering references to the Guidelines in court decisions and in the practice of arbitral institutions from 2004 to 2009.⁷ The Report found only a smattering of references to the Guidelines in reported court cases of various nations but reported their informal use, at least to some extent, by arbitral institutions in their consideration of challenges based on claims of conflicts. The Report found that the Guidelines provide useful guidance to counsel and arbitrators making day-to-day decisions.

In addition to their use as a reference point in some national court decisions, the Guidelines have become a source of authority cited to International Centre for Settlement of Investment Disputes (ICSID) panels ruling on arbitrator conflict challenges.⁸ These rulings are published and considered significant authorities on conflict issues generally.

6 Eg Ramón Mullerat, 'Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration' (2010) 4 *Dish Res Int'l* 55.

7 Matthias Scherer, 'The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years, 2004-2009' (2010) 4(1) *Disp Res Int'l* 5; see also Judith Gill, 'The IBA Conflicts Guidelines – Who's Using Them and How?' (2007) 1(1) *Disp Res Int'l* 58.

8 For example, in 2011, the Guidelines were invoked in challenges to arbitrators Professor Brigitte Stern and Professor Guido Tawil in *Universal Compression International Holdings, SLU v The Bolivarian Republic of Venezuela*, ICSID No ARB/10/9 (20 May 2011), available at ita.law.uvic.ca, and Argentina relied on them in its challenge to the service of arbitrator Professor Gabrielle Kaufmann-Kohler in *Compania de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID No ARB/97/3 (10 August 2010), available at ita.law.uvic.ca.

Nevertheless, national judicial attitudes towards the Guidelines seven years after their promulgation continue to be tentative. The case law reflects some willingness to accept them as ‘trade’ usage in a recognised international arbitration community.⁹ However, national courts typically appear reluctant to accept them as transnational standards appropriate for direct application in court decisions.

For their part, arbitral institutions remain guardedly receptive to the Guidelines. Although each institution has its own rules for conflicts, disclosure and challenges, and none has simply adopted the Guidelines as its official standard, institutions acknowledge that the Guidelines are now cited with some regularity in challenge applications to them and provide a point of reference in the process by which the institutions deal with the challenges.¹⁰

But what is the actual practice of institutions that rule on conflicts challenges? Historically, arbitral institutions have resisted publication of, and in most cases even the drafting of, reasoned rulings on challenges of arbitrators. Many such rulings occur at the start of arbitration, before the parties have much time or money invested in the proceedings and when institutional statistics reflect a higher degree of acceptance of challenges, as compared to challenges made later in the proceedings.¹¹ Institutions stress that their rulings on conflict challenges are administrative in nature and may be inappropriate for memorialisation for a variety of reasons.

Institutions argue that such decisions, if reduced to writing, would be too fact-specific to provide general precedents, and the time and cost required to make such a record would be prohibitive. In addition, it has been noted that written rulings of this type might be dangerous because they could encourage what V V Veeder has called ‘new tactical challenges to arbitrators, a malign practice that appears to be increasing everywhere’.¹² Arbitral institution spokespeople have gone so far as to express the hope that there will be no ‘case law’ of their rulings on arbitrator conflicts.¹³

9 Eg *A and Others v B* [2011] EWHC 2345 (Comm) (15 September 2011) (IBA Guidelines’ ‘spirit’ invoked as evidence of ‘what the international arbitration community considers does give rise or may give rise to a real risk of bias’; Court considered and distinguished Guidelines examples).

10 See, eg, Jason Fry and Simon Greenberg, ‘The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases’ (2009) 20(2) ICC Ct Bull 12, 17–18; Anne Marie Whitesell, ‘Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators’ (2008) ICC Ct Bull Special Supp 2007 Independence of Arbitrators 7, 10.

11 See, eg, Dominique Hascher, ‘ICC Practice in Relation to Appointment, Confirmation, Challenge and Replacement of Arbitrators’ (1995) 6(2) ICC Ct Bull 4, 16.

12 V V Veeder, *The English Arbitration Act 1996: its 10th and future birthdays*, quoted in Leon Trakman, ‘The Impartiality of Arbitrators Reconsidered’ (2007) 10 Int Arb L Rev 999.

13 Stephen R Bond, ‘The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration’ in *The Arbitral Process and the Independence of Arbitrators*, ICC Pub No 472 at 9, 14 (1991).

Nevertheless, arbitral institutions have begun to move gradually towards some disclosure of their rulings on conflicts challenges. Two leading institutions have released highly relevant information.

ICC challenge summaries

The International Chamber of Commerce (ICC) has published three reports containing general summaries of its challenge decisions, without providing any stated reasons but disclosing the results. The first report was authored by Stephen Bond in 1991,¹⁴ the second by Dominique Hascher in 1995¹⁵ and the third by Anne Marie Whitesell in 2008.¹⁶

The Bond report, based on ICC Court experience from January 1986 to June 1988, described itself as ‘perhaps the first statistical analysis’ of ICC experience with arbitrator confirmation and challenge proceedings. Although the report did not include detailed descriptions of individual decisions, it did disclose the outcome of objections or challenges in a limited number of specific situations. For example, the Court refused to confirm a prospective chairman ‘because the person had provided a consultation to one of the parties some time before’.¹⁷ But most of the article discussed ICC procedures and challenge outcomes in general terms. Stephen Bond emphasised that ‘cases require an appreciation of the relevant facts’ and urged that ICC Court decisions on questions of independence ‘not be used to establish a “case law” on the subject’.¹⁸

The Hascher report took up the story of ICC experience with the second half of 1988 and carried it forward to 1994. It also explained ICC procedures but went further by discussing decisions on arbitrator conflicts organised according to certain categories. That organisation was:

- A Relationships between arbitrators and the parties
 - 1. Business relationships and personal links between arbitrators and parties
 - 2. Nomination of civil servants
 - 3. Successive nominations of the same arbitrator
 - 4. Preliminary contacts between the party and the arbitrator
- B Relationship between the arbitrators and the parties’ lawyers
 - 1. Social relationships and family connections
 - 2. Links of subordination

14 *Ibid.*

15 Hascher, note 11 above.

16 Whitesell, note 10 above.

17 Bond, note 13 above, 14.

18 *Ibid.*

3. Professional links between lawyers
 - i. Activities of the arbitrator's associates and partners
 - ii. Opinions and advice given by the arbitrator
 - iii. Barristers and solicitors
 - iv. Cooperation between firms
4. Involvement in a previous arbitration

C Pre-Existing relationship between arbitrators

D Information in the possession of the arbitrator [from a related arbitration]

The Hascher report referred to a number of specific examples, although again they were generally grouped in paragraphs that made it difficult to distinguish particular cases. The report disclosed some specific information, such as the fact that the ICC Court rejected a party's challenge of the chairman of a tribunal based on the fact that he was a partner in a firm that shared offices with another law firm that had a client in the same group of companies as one of the parties to the arbitration.¹⁹

The 2008 Whitesell report, based on ICC experience from 1998 to 2006, is much more specific, containing summaries of conflict results that are particularly instructive. They are surrounded by caveats concerning the fact-based nature of many decisions, and the commentary emphasises that more than one factor may be present in a particular challenge.²⁰ Like the examples in the earlier reports, the case descriptions are organised in relation to the types of situations in which the challenges were encountered by the ICC Court, whether or not disclosures of the situation led to objections, and how the ICC Court disposed of them.

But the 2008 ICC case descriptions contain, in most instances, a concise case summary that would make it possible to organise the data and patterns reflecting the actual situations that arise regarding conflicts, albeit without the full detail that would enable one to understand more about the cases. Useful examples, in each of which the ICC Court declined to confirm the challenged arbitrator, include:

'Case 3. The arbitrator nominated jointly by the claimants disclosed that several partners of her firm, located in other offices mostly in other countries, represented the claimants or affiliates of the claimants. She also stated that she knew and had worked with some lawyers working for the claimants' counsel, but none of those lawyers was involved in the present dispute. The respondent objected, considering that there was an established client relationship between the claimants and the nominee's firm.'²¹

¹⁹ Hascher, note 11 above, 13.

²⁰ Eg Whitesell, note 10 above, 37–38.

²¹ *Ibid* 22–23.

...

‘Case 5. The arbitrator nominated by the respondent disclosed that he had met with the respondent to discuss the possibility of representing the respondent in the matter. The respondent subsequently retained other counsel. The claimant objected to the arbitrator’s confirmation, alleging that disclosures may have been made during the meeting that could have an impact on the arbitrator’s independence.’²²

...

‘Case 7. The arbitrator nominated by the claimant disclosed that his law firm was currently rendering professional services to two subsidiaries belonging to the same group of companies as the claimant. The respondent objected to his confirmation, stating that although the two subsidiaries were not directly related to the claimant, nor directly involved in the matter in dispute, the same parent company had financial and administrative control over the claimant and those two subsidiaries and had apparently played an important role in negotiating the agreements that were the subject of the arbitration.’²³

One might use these summaries to classify the examples under general headings. For example, putting it simply, ‘Case 3’ deals with current representation of a party by the arbitrator’s law firm. ‘Case 5’ belongs under a heading for arbitrator contacts with counsel in the arbitration. ‘Case 7’ is a member of the subset of cases involving current representation by an arbitrator’s law firm of subsidiaries or affiliates of a party. The ICC authors have not sought to classify all of their examples by general subjects, but it would not be difficult to do so.

The published ICC summaries in this form extend only to 2006, so the ICC has almost five more years of experience still unreported. More data will possibly be forthcoming in due course.

²² *Ibid* 23.

²³ *Ibid*.

LCIA challenge digests

The London Court of International Arbitration (LCIA) decided in 2006 that it would publish 'sanitised' digests of its challenge decisions,²⁴ which are unique among major institutions in taking the form of reasoned written opinions. This task evidently proved more difficult than was originally contemplated, however, because the effort took five years to come to fruition. The sanitised digests of decisions, together with commentary summarising their highlights by Thomas Walsh and Ruth Teitelbaum, were published at the end of 2011 in *Arbitration International*.²⁵

The LCIA decisions include rulings in 28 cases (some involving multiple challenge rulings in a single case) dating from 1996 to 2010. All the arbitrations were sited in London, and all challenges were decided under English law. Each challenge digest identifies the members of the LCIA Court Division responsible for resolution of the challenge and includes a case summary, followed by a no-names description of the factual background, grounds of the challenge, criteria to be applied and the reasoning behind the decision.

The LCIA challenges dealt with both conflict of interest situations and allegations of arbitrator misconduct in the course of the handling of a case. They include precedents for some of the widely accepted principles applicable to arbitrator conflicts, such as the presumption that activities of a partner in a law firm will be attributed to other partners for conflicts purposes and the contrary presumption (at least for the present) that members of barristers' chambers are viewed as solo practitioners generally unburdened by any such attribution. The LCIA examples also provide insight into examples of common situations such as challenges to an arbitrator on the basis of prior instruction by a party's counsel in other matters and, towards the other end of the spectrum, common membership by an arbitrator and counsel in a professional organisation. A number of these rulings are examples of precisely the situations that have been used in the IBA Guidelines.

The summaries of some of the LCIA rulings also parallel case descriptions in the ICC data, describing the decisions with sufficient generality to allow them to be catalogued with other, generally similar factual cases. For example:

24 See Geoffrey Nicholas and Constantine Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' (2007) 23(1) *Arb Int'l* 1.

25 Thomas W Walsh and Ruth Teitelbaum, 'The LCIA Court Decisions on Challenges to Arbitrators: An Introduction' (2011) 27(3) *Arb Int'l* 283 (with challenge digests at 315 et seq).

‘The fact that a party was a former client of a law firm at which an arbitrator worked briefly does not, of itself, constitute circumstances giving rise to doubts as to the impartiality of the arbitrator, who had severed all professional and personal ties with that party.’²⁶

...

‘The fact that an arbitrator practising outside England is a door tenant of an English barristers’ chambers, thus having a “base” in England, does not amount to his being “based in” England.’²⁷

The LCIA summaries disclose the names of the Division members ruling on each challenge, and this data will undoubtedly also be mined for potential future use. This is probably not a precedent that other institutions will follow, because it could deter those asked to participate in challenge rulings from doing so. The summaries themselves, however, are concise and useful.

What do these publications tell us?

One of the historic arguments against publication of the results of arbitrator challenges is that each institution’s decision-making process is idiosyncratic, involving interpretation of its own rules and use of its unique procedures. The ICC Court, for example, makes decisions on arbitrator challenges on the basis of presentations to the entire Court membership attending a particular meeting. Members of the Court may decide in favour or against a challenge for their rather diverse reasons, so that it might be difficult to write a summary of the basis of decision.²⁸ The LCIA digests reveal that the Court Division members take pains to ground their decisions in LCIA rules and English case law regarding conflicts, reflecting considerable time and effort by the drafters.

But for the purpose of determining whether there is an international consensus in dealing with particular fact patterns, very little of this matters. The ICC procedural details are helpful to practitioners, but they are only part of the story. Examples of how a leading arbitral organisation has ruled can be useful as outcome predictors for conflicts challenges more generally. Similarly, the detailed LCIA digests provide useful insights into LCIA procedures and offer learned commentary on English arbitration law, but they will probably add very little to what a reader with more general interests might deduce about what could be a meritorious challenge from

26 LCIA Ref No UN3476, decision rendered 24 December 2004, note 25 above, 367.

27 LCIA Ref No 5700, decision rendered 28 October 2005, note 25 above, 374.

28 Whitesell, note 10 above, 38.

the summaries of the cases and knowledge of the results. The procedures of the particular institution and the national legal standards applicable to a challenge, while relevant to those administering them, do not in fact differ materially for the broad purpose of categorising types of arbitrator conflicts and suggesting potential challenge outcomes.

Both the ICC and LCIA have made major contributions by volunteering short, written summaries of the results of a significant number of rulings on challenges. The summaries, so long as they are prepared with care and include sufficient facts to give a flavour of the problem involved, can stand alone as elements of a database that might include examples from multiple institutions and perhaps also national case law. However, the institutions have not published the information in a common format thus far.

Organising the de facto conflicts database

As a result of the ICC and LCIA initiatives, there is now a growing database of information about rulings on somewhat simplified but nevertheless generally classifiable fact patterns. The ICC summaries in the Whitesell report total 97 specific examples, and the LCIA digests add another 28 decisions. The Guidelines themselves include 49 examples, which carry force because of their pedigree. Computers make organisation of data simple, and the internet ensures that the data are available everywhere. It is inevitable that the records of these 175 or so decisions and examples will be organised in some useable fashion and become available to the international arbitration community. The question is: how this should be done, and by whom?

The IBA Guidelines provide a possible starting point. The Red, Orange and Green lists include examples of potential conflict situations that are encountered quite frequently and others that might be seen as relatively unusual. Each is coded numerically in the Guidelines, and the international arbitration community could arguably simply use the Guidelines' categories as the basis for an organisational system. The ICC has taken this approach, to a degree, organising its challenge summaries published in 2008 generally along the lines of the IBA Guidelines' numbering system for statistical purposes, but without identifying its case summaries publicly with the relevant Guidelines sections.²⁹

A number of other circumstances are not covered specifically by the examples in the Guidelines, such as employment of arbitrators by

²⁹ Fry and Greenberg, note 10 above, Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration When Deciding on Arbitrator Independence in ICC Cases.

state organisations. These might be accommodated within the present Guidelines structure, perhaps by grouping them generally (in a category called ‘other’) under each of the Guidelines’ main headings. Alternatively, the Guidelines might be expanded to accommodate some of the omitted cases. This would require further debate concerning which of the lists each example might belong on.

But the examples in the Guidelines’ lists are not in fact organised for ease of subject-matter categorisation. IBA Guidelines example 3.5.2 (an arbitrator’s advocacy of a ‘specific position regarding the case that is being arbitrated’) is found on the Orange List, while what is essentially its obverse, example 4.1.1 (an arbitrator’s publication of a ‘general opinion’ concerning ‘an issue which also arises in the arbitration’) is located elsewhere, on the Green List. It would be helpful to organise the fact patterns more rigorously around general topics, without regard for which Guidelines list one might consider as the natural home of each example.

One such structure was suggested in the Hascher report in 1995. Another alternative would be Gary Born’s categorisation of ‘recurrent factual circumstances and issues relating to impartiality and independence’ under the following headings:

‘Judge in Own Cause; Financial Interest in the Dispute; Present Employment by Party; Prior Involvement in the Dispute; Personal or Family Relationship with Party; Business Dealings with Party; Prior Representation of Party; Law Firm Conflicts; Barristers’ Chambers; Arbitrator’s Comments or Expressions of Opinion During Arbitration; Interviews of Arbitrators; Ex Parte Contacts During Arbitration; Non-Disclosure of Conflict; Recurrent Arbitral Appointments by Same Party; Appointments in Related Proceedings; Effect of Removal of One Arbitrator on Other Arbitrators; Improper Conduct by Arbitrator(s) vis-à-vis the Parties; Adversity to One Party; Relationship with Witness; Public Expressions of Opinion; and Professional Organizations.’³⁰

Perhaps the organisation of the data is a task that the IBA might undertake. It would not involve any separate exercise to revise the existing Guidelines, but rather creation of a different structure that might be used by those who publish future examples of actual conflicts rulings. Alternatively, such a project might perhaps be undertaken by the International Federation of Commercial Arbitration Institutions.

In any case, it would be helpful to organise the existing ICC and LCIA summaries of conflicts challenges in accordance with a unified index system.

³⁰ Born, note 1 above, 1515–28.

The way forward: increasing the data

In a recent interview, American Arbitration Association President William K Slate II emphasised the ‘critical need for data and metrics’ in the study of international arbitration. ‘The lack of data’, he said, ‘is a significant obstacle to permitting our field to reflect on ourselves and our relative successes and failures, as well as our shared and collective plans for the future’.³¹

More data on challenge outcomes perhaps can be elicited, if arbitral institutions could be assured of a degree of anonymity. Existing challenge summaries from the ICC and LCIA, as well as the public ICSID challenge rulings, are all identified with specific arbitral institutions. But this need not be the case for future summaries that might be prepared by institutions and submitted for a common database. Challenge decisions could be summarised for this purpose and submitted on a blind basis, so that they are not considered merely examples of the ‘case law’ for a particular institution.

Other institutions may be willing to publish simple summaries, without names, of decisions in conflict challenges that could be added to that database. The burden of doing so would not be enormous. The American Arbitration Association’s International Centre for Dispute Resolution rules on about 30 or so challenges to arbitrators each year,³² and a one-paragraph summary of the facts and result, with appropriate disclaimers and without identifying particulars, should not be difficult to prepare. If such information were released anonymously for use in a general database, without any necessary predictive role as ‘case law’ for the particular institution, practitioners and courts would benefit and institutional flexibility would be preserved. If data from multiple institutions, as well as relevant judicial opinions, were organised and made available, it would not constitute ‘case law’ for any particular arbitral institution.

What uses could be made of such a database? Examples no doubt would be cited to institutions and to courts in future challenges to arbitrators, much as examples from the IBA Guidelines now make up a part of the argument in such situations. As larger numbers of examples accumulate, it might be significant that many of them featuring similar facts lead to similar results. Alternatively, in some conflicts categories the results may show a divergence of outcomes, suggesting that the details have greater significance. To the extent that future examples of actual rulings are submitted on a blind basis, the weight of any particular example would probably be less than is now the case with the limited number of examples available to the public.

31 Cindy Fazzi, ‘Past, Present and Future: 10 Important Questions for AAA President Bill Slate’, *Dis Res J*, May–July 2011, at 16, 23.

32 Martin F Gusy, James M Hosking and Franz T Schwarz, *A Guide to the ICDR International Arbitration Rules* (2011), 117 n 1 (reporting acceptance by the ICDR of 13 of 27 challenges in 2008 and 16 of 37 challenges in 2007).

Examples of outcomes on challenges to arbitrators will inevitably be cited in some form, as occurs today. A database of this sort could be useful in providing a broader range of evidence against which such arguments might be judged.

Some further thoughts on ‘consensus’

Even if information on institutional challenge rulings becomes more widely accessible and leads to greater consistency of practice before arbitral institutions, bringing national court jurisprudence into such a consensus will present additional challenges. This broad consensus on arbitrator conflicts will remain elusive because of the difference between, on the one hand, the best practices or ethical goals for arbitrator disclosure and, on the other, the rules that a court may use as a basis for upsetting an award owing to arbitrator conflicts. As one commentator has observed, ‘courts move back and forth seamlessly, in their rhetoric and analysis, between the language of ethics and the language of arbitration award enforcement, conflating substantive standards with remedial consequences for transgression of those standards’.³³ The temptation will remain for courts to interpret the best practices encouraged by institutions, which typically favour disclosure of anything that one might think of as a potential conflict, as minimum standards of due process that, if violated, may result in vacatur of awards. The IBA Guidelines sought to deal with this problem by creating its ‘Green List’, which may or may not be an effective way to address and perhaps restrain the judicial audience.

Finally, it is well to remember that the pursuit of consensus is not without its risks. As Gary Born puts it:

‘The publication of challenge decisions serves the constructive and important purpose of providing greater predictability and clarity with regard to standards of impartiality and independence. The publication of challenge decisions is also likely to enhance the confidence of parties in the arbitral process, by demonstrating that their objections have been seriously considered. On the other hand... , it is essential to consider the specific context of particular parties, industries, agreements and expectations in addressing issues of impartiality and independence. There is a risk that publication of excerpted institutional decisions

³³ Rogers, note 1 above, 77. Of course, some courts are attentive to the distinction, eg *A and Others v B*, note 9 above, para 71 (‘[T]he test as to when it is appropriate to disclose potential conflicts or other matters of embarrassment is lower than the test of apparent bias. In other words, it may be appropriate in a borderline case to disclose at an early stage because if there is an objection, then even if there is no apparent bias, the judge or arbitrator may still want to consider whether to withdraw.’).

on challenges will, unless carefully prepared, omit or distort these considerations, ultimately producing even more arbitrary and/or unpredictable decisions.’³⁴

The issue is now being forced by the increased publication that has occurred and will occur. In addition to their occasional analysis of provisions of the IBA Guidelines, national courts have begun to refer to arbitral institution data as relevant to interpretation of their arbitration laws. Justices of the Supreme Court of the United States, for example, last year referred to data submitted by the American Arbitration Association (in an amicus brief) in both majority and dissenting opinions in the important *AT&T Mobility* decision.³⁵ Reference by courts to institutional rulings on conflicts will inevitably come soon, even if only as secondary authority in the nature of ‘trade’ usage.

Factual issues will always arise in dealing with published examples of arbitral practice, and the results in individual examples should not be treated as absolute rules. But a new database resulting from current conflicts examples will be organised and will be used. It should be expanded. One may hope this will occur, as the Guidelines Working Group stated in 2004, ‘with robust common sense and without pedantic and unduly formalistic interpretation’.

³⁴ Born, note 1 above, 1560 (footnote omitted).

³⁵ *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740, 1758 (data on administration of class action arbitrations) (2011).

Appendix

1. IBA Non-Waivable Red List

- 1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.
- 1.2 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
- 1.3 The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
- 1.4 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. IBA Waivable Red List

- 2.1 Relationship of the arbitrator to the dispute
 - 2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
 - 2.1.2 The arbitrator has previous involvement in the case.
- 2.2 Arbitrator's direct or indirect interest in the dispute
 - 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
 - 2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.
 - 2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.
- 2.3 Arbitrator's relationship with the parties or counsel
 - 2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
 - 2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
 - 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
 - 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

- 2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
- 2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
- 2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.
- 2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.
- 2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. IBA Orange List

- 3.1 Previous services for one of the parties or other involvement in the case
 - 3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.
 - 3.1.2 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.
 - 3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.
 - 3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.
 - 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

3.2 Current services for one of the parties

- 3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.
- 3.2.2. A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.
- 3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

- 3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.
- 3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.
- 3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.
- 3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.
- 3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
- 3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organisations.
- 3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

3.4 Relationship between arbitrator and party and others involved in the arbitration

- 3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.
- 3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

- 3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organisations.
- 3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.
- 3.5 Other circumstances
 - 3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.
 - 3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.
 - 3.5.3 The arbitrator holds one position in an arbitration institution with appointing authority over the dispute.
 - 3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. IBA Green List

- 4.1 Previously expressed legal opinions
 - 4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).
- 4.2 Previous services against one party
 - 4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.
- 4.3 Current services for one of the parties
 - 4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

- 4.4 Contacts with another arbitrator or with counsel for one of the parties
 - 4.4.1 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 organisation.
 - 4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.
- 4.5 Contacts between the arbitrator and one of the parties
 - 4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.
 - 4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.
 - 4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.