ARBITRATOR DISCLOSURE — NO ROOM FOR THE COLOUR BLIND

by Nathalie Allen* and Daisy Mallett**

This article addresses some suggested amendments to the International Bar Association ('IBA') Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines'). This article considers the framework provided by such guidelines currently and the problems which the international arbitration community continues to face in the context of arbitrator disclosure. It argues that the suggested amendments could help reduce uncertainty as to what should and should not be disclosed by potential arbitrators. It also argues that guidelines can be introduced to bring about greater sanctions for arbitrators who do not disclose appropriately.

A. Introduction

In international arbitration, parties agree to arbitrate their dispute in what is usually a confidential forum, with limited recourse to appeal. Unlike in a national court system, where the decision-maker is a judge appointed by the state and held out by the state as independent and impartial, in international arbitration the parties have great flexibility to choose the credentials and characteristics of the individuals who decide their dispute. This is one of the key attractions of international arbitration. However, this does not mean that parties are prepared to do away with the impartiality and independence they expect from their tribunal. Instead, in resolving their dispute through

---

* MA (Oxford) Modern Languages; Solicitor (England and Wales); Senior Associate, Wilmer Cutler Pickering Hale and Dorr LLP.

** BA/LLB (Hons I); Solicitor (Australia), Solicitor (New South Wales), Solicitor (England and Wales); Senior Associate, Mallesons Stephen Jaques.

The authors would like to thank Franz Schwarz for his support and advice in writing this article.

ASIAN INTERNATIONAL ARBITRATION JOURNAL, VOLUME 7, NUMBER 2, PAGES 118–147.

international arbitration, parties rely heavily on the individuals within the system to uphold its continued integrity. The parties' reliance on the integrity of the decision-makers is essential to the reputation of international arbitration. The ability of parties to challenge arbitrators on the basis that they do not meet the required standards of impartiality and independence is, therefore, integral to the parties' confidence in the arbitral process and to the parties' continued belief in arbitration as a viable and attractive alternative to state court litigation.

The freedom of parties to challenge arbitrators who they suspect have fallen foul of the standards of impartiality and independence is necessary to the continued legitimacy of international arbitration. The impartiality and independence of arbitrators is a fundamental element of the international arbitration system. Most institutional rules and domestic laws stipulate that arbitrators must be and remain impartial and independent. Thus, the appointment of overtly non-neutral arbitrators is only really seen in fully *ad hoc* arbitrations and the occasional domestic arbitration.[1] Even then, it is rare. The fact that arbitral institutions across the board stipulate a requirement that arbitrators be impartial and independent at all times reveals the importance of this requirement in international arbitration. It ensures that both parties can have the details of their dispute and their respective arguments heard in a neutral forum and where the issues in dispute are determined fairly, on their merits, in accordance with the pertinent jurisdiction.

The ability to challenge arbitrators who fall foul of these standards is important since it should, in theory at least, oblige arbitrators to be accountable to the parties to help maintain their confidence in those determining the dispute. This accountability is important because it helps maintain party confidence in the process which the parties have chosen. There are several reasons for this. Firstly, international arbitration is usually confidential and, hence, the processes adopted and decisions rendered are not subject to the same public scrutiny as state court decisions. Secondly, arbitral awards cannot be appealed on the merits and, thus, parties do not have the same avenues

---

1 Some domestic arbitration rules allow for non-neutral party-appointed arbitrators. By way of example, s R.12(b) of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, stipulate that '[w]here the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R.17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R.17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards'. Thus, independence and impartiality are a standard from which a party-appointed arbitrator can deviate, on the condition of prior approval of both of the parties.

of recourse available to them as they might have in court litigation. Thirdly, arbitrators are usually appointed by the parties themselves and, thus, do not go through the same detailed state appointment processes as judges.

An arbitrator challenge can occur at any time in an arbitration. Challenges most commonly occur at the start of proceedings, when parties are focused on the appointment and constitution of the tribunal. Challenges made at or towards the commencement of the arbitration are commonly more successful than challenges made at a later stage in the arbitration. This is because there are, at that stage, fewer practical concerns to consider. Institutions are eager to ensure that parties have faith in the system and trust that their views will be heard impartially. It is less disruptive to an arbitration to replace an arbitrator at the start than after submissions have been exchanged and witnesses have been heard. In practice, institutions, when called upon to make a decision on a challenge, need to consider the practical consequences that their decision may have on the development of the arbitration.[2]

Challenges that are filed once submissions have been made and oral hearings have taken place are typically less successful. A successful challenge at this stage, resulting in the replacement of an arbitrator, is inevitably more disruptive and costly than a successful challenge at the very start of an arbitration. It can delay the arbitration greatly — parties and arbitrators will be invited to put forward their views and arguments on the challenge. These arguments are then considered by the relevant decision-making body, who then delivers a decision. If the challenge is successful, time is taken to find a replacement arbitrator and that arbitrator is given time to become familiar with the arbitration and to be in a position to contribute usefully to the tribunal's deliberations. Processes, such as examination of witnesses, may be repeated or even, on rare occasions, the arbitration may start again from the beginning. Reaching decisions on these issues is inevitably unsettling and adds to the cost of the arbitration, whilst also affecting the parties' confidence in the process. This is all the more so when one considers that such challenges can be made deliberately, to unsettle the arbitral process in the hope that a differently disposed arbitrator may be appointed to the tribunal, prior interim awards may be revised, or that the extra cost and delay may encourage a party to entertain a settlement option which it may not otherwise have considered.

Challenges made once an arbitration is in full swing not only disrupt and delay an arbitration. They can also adversely affect the continuation of the arbitral proceedings once a decision has been rendered on the challenge. Challenging an arbitrator is commonly an adversarial process which can

---

2 IBA Guidelines, General Standard 3, Explanation (d).

significantly damage the various relationships present within an arbitration amongst parties, counsel, members of the tribunal and the arbitral institution. These types of challenges are increasingly becoming a concern.[3] That is not to say that such challenges should never be made. There is currently little jurisprudence published by arbitral institutions on arbitrator challenges. This leaves parties somewhat in the dark as to what can constitute and has constituted bases for a successful challenge. Similarly, parties are not well informed as to what has been considered insufficient for a successful challenge. Thus, parties frequently lack the guidance of jurisprudence when submitting a challenge and, consequently, some challenges made in good faith are misguided. Yet, these challenges still need to be addressed. Costs are still incurred and the arbitration is generally still delayed. The authors encourage a wider distribution by institutions of the reasons behind the decisions on challenges — both successful and unsuccessful — to help provide further guidance to arbitrators and parties.[4] It is understood that the London Court of International Arbitration ('LCIA') intends to commence publishing decisions on challenges. Such a development would be a welcome advancement in enabling the international arbitration world at large to understand what has, and what has not, been considered sufficient grounds for a successful challenge.

Measures which can help to reduce the number of unnecessary challenges should be carefully considered and encouraged. It would seem that most of these measures should relate to the disclosure of conflicts of interest. There is no set of internationally-applied, binding rules on the measures arbitrators should adopt in relation to disclosure of potential conflicts of interest. However, the IBA Guidelines do provide practitioners and arbitrators with a thorough outline of the best practice in respect of disclosure by arbitrators in relation to their impartiality and independence. The IBA Guidelines are not binding, but they represent a detailed and realistic set of measures arbitrators should adopt, which are reflective of best practice in international arbitration in developed jurisdictions. The IBA Guidelines are regularly applied by arbitral tribunals

---

3 S Luttrel, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (2009), Kluwer Law International, p 4; P Mitchard, 'Ethics in European Arbitration', *Global Arbitration Review*, p 1.

4 The authors are not alone in this suggestion. See Geoff Nicholas and Constantine Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' (2007) 23 *Arbitration International* 1–41; Nick Gray and Deborah Crosbie, 'Winds of Change? The Pending Publication of LCIA Reasoned Decisions on Arbitral Independence', available online at <http://arbitration.practicallaw.com/8-385-7892?q=Nick%20Gray%20and%20Deborah%20Crosbie> (accessed 2 August 2011).

and considered by practitioners and arbitrators in the field, such that they can be described as reflecting international standards and practice.

This article critically examines the IBA Guidelines and the standards which they endorse. It then goes on to propose a number of amendments which could reasonably be made to the IBA Guidelines. The authors consider that the amendments set out in this article will provide arbitrators with clearer guidance as to the circumstances they should disclose and the consequences for failing to do so. The authors also consider that these amendments will assist parties by setting out the standards which they could reasonably expect an arbitrator to respect and potential measures which could be adopted when these standards are not met, or do not appear to have been met. As such, the authors consider that these amendments, if implemented, would reduce the number of challenges to arbitrators, thereby improving the functioning of the international arbitration process.

B. The IBA Guidelines

As a general rule, developed jurisdictions require and expect arbitrators to be and to remain impartial and independent. Most jurisdictions adhere to the well-known principle of no man being his own judge. This standard has been established for centuries. In ancient Greece and Rome, the word for arbitrator was synonymous with impartiality.[5] Today, this principle is interpreted in different ways across different jurisdictions. Many jurisdictions[6] have adopted the wording of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration,[7] which states that '[a]n 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'.[8] This imposes a substantive standard of impartiality and independence.[9] England requires facts leading a fair-minded, informed observer to conclude that there are 'justifiable doubts as to [the arbitrator's] impartiality'.[10] English courts have taken divergent approaches to the interpretation of this standard. Some have stipulated

---

5 Gary Born, *International Commercial Arbitration* (2009), Kluwer Law International, p 1462.

6 Australia, Canada, Germany, Mexico, the Netherlands, New Zealand and Singapore.

7 General Assembly Resolution 40/72, adopted on 11 December 1985 ('UNCITRAL Model Law').

8 UNCITRAL Model Law, Art 12(2).

9 Born, *supra*, n 5 at p1466.

10 Arbitration Act 1996 [Eng], s 24(1)(a).

the need for a 'reasonable suspicion' of bias,[11] others a 'real danger' or 'real possibility' of bias.[12] The United States sets a standard of 'evident partiality' which has been defined by federal courts as something above and beyond 'remote and speculative claims' of bias, but is not 'actual bias'.[13] France does not differ greatly from the UNCITRAL and English models. French courts have not sought to explain the standards of impartiality and independence in detail but the French Cour de cassation has stated that 'the independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties. Further, the circumstances relied on to challenge that independence must constitute, through the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favor of a party to the arbitration'.[14]

In international arbitration, where arbitrators, counsel and parties come from all walks of life — different jurisdictions, cultures, religions and industries — these disparities can add to the confusion. The IBA Guidelines reflect the need for international best practice guidelines to help arbitrators navigate and to set an internationally applied uniformity of expectations as to arbitrator disclosure of conflicts of interest. The IBA Guidelines also help to manage the parties' expectations. The IBA Guidelines seek to set out, via the General Standards and the accompanying explanations, the grounds on which an arbitrator's impartiality and independence may be challenged. In doing so, the Working Group which drafted the IBA Guidelines considered how various jurisdictions have defined the standards for challenging an arbitrator on his impartiality and independence in domestic legislation.

Most jurisdictions expect an arbitrator challenge on impartiality and independence to be determined objectively, *ie* from the perspective of a fully-informed, reasonable third person. The Australian court has set this out as 'a fair-minded lay observer with knowledge of the material objective facts'.[15] The Working Group determined that the appropriate standard for such a challenge was that of an objective appearance of bias. Under General

---

11 *R v Mulvihill* [1990] 1 All ER 436 at 441, CA.

12 *AT&T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 at 134–135, CA.

13 Born, *supra*, n 5 at pp1466–1470.

14 Judgment of 2 June 1989, 1991 Rev arb 87 (Cour d'appel, Paris); Thomas Clay, *Chronique du Droit de l'Arbitrage No 4*, *Petites Affiches — Placard* 06/03 [11H30] — No PA179770.5GM. See Emmanuel Gailard and John Savage, *Fouchard Gailard Goldman on International Commercial Arbitration* (1999), Kluwer Law International, p 565.

15 *Webb v The Queen* (1996) 181 CLR 41, HCA.

Standard 2(b), an arbitrator must refuse to act if facts or circumstances exist that from a reasonable third person's point of view with knowledge of the relevant facts give rise to justifiable doubts as to the arbitrator's impartiality or independence. Justifiable doubts, as a term, is explained in General Standard 2(c) of the IBA Guidelines as:

> [d]oubts are justifiable if a reasonable and informed third party would reach the conclusion that there was 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.

The IBA Guidelines reflect the international standard and expectation that arbitrators must be and remain impartial and independent throughout the arbitration.

The IBA Guidelines were approved by the Council of the International Bar Association on 22 May 2004 in order to provide guidance in relation to the standards of impartiality and independence expected of arbitrators. The IBA Guidelines were drafted to address the increasing problems with conflicts of interest in international arbitration in the increasingly complex commercial world: '[t]he growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine'.[16] The Working Group which drafted the IBA Guidelines had a difficult task — to put forward best practice guidelines which balance the need for full and frank disclosure against abuse of process by '[r]eluctant parties [who] have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice'.[17] The IBA Guidelines address an increasing need for clarity and transparency in arbitrator disclosure: 'explicit expression in these Guidelines helps to avoid confusion and to create confidence in procedures before arbitral tribunals'.[18] The purpose of the IBA Guidelines was thus to clarify the measures expected of arbitrators in international arbitrations by clearly establishing the norms applicable to arbitrators' disclosure of conflicts. This was perceived as necessary in order to avoid the 'confusion' of different arbitrators judging their conflicts of interest according to their own cultural and legal backgrounds, which were frequently different to the standards applied by other arbitrators within the tribunal or the standards expected by the parties and their counsel. It was also necessary to respond to delay

16 IBA Guidelines, Introduction, para. 1.
17 IBA Guidelines, Introduction, para. 1.
18 IBA Guidelines, General Standard 2, Explanation (a).

and disruption tactics increasingly used by parties reluctant to engage in an arbitration.

The IBA Guidelines are not pertinent to arbitrators alone. They contain stipulations as to expected conduct from the parties in relation to conflicts of interest. They also make clear that integrity in international arbitration is everybody's responsibility and does not fall on the arbitrators' shoulders alone:

> [t]he Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration.[19]

However, inevitably, the principal focus of obligations within the IBA Guidelines lies with the arbitrators rather than the parties.

The IBA Guidelines are divided into three sections: an introduction explaining the background to and need for the IBA Guidelines. Part I contains the General Standards regarding impartiality, independence and disclosure and explanations thereto, and Pt II sets out the practical application of the General Standards. Part II includes practical assistance in determining what facts should be disclosed by arbitrators in the form of Application Lists organised into internationally-recognised traffic light colours — red, orange and green. The Application Lists categorise different hypothetical fact scenarios, indicating whether or not it is appropriate for an arbitrator to make disclosure of such facts. These lists are indicative only, but they provide clear and concise guidance. The Red List is divided into two parts, one part setting out fact scenarios that indicate conflicts which are not waivable by the parties (the non-waivable Red List), and one setting out fact scenarios which are waivable only with the parties' express consent (the waivable Red List). The Orange List sets out fact scenarios which an arbitrator is required to disclose, and to the extent the parties do not object, they are deemed to have accepted that such a situation does not create a conflict of interest. There is also a Green List, which sets out examples of scenarios which would create no conflict of interest, and, therefore, which the arbitrator is not required to disclose.

The non-waivable Red List, as its name indicates, set out examples of fact scenarios that, even if disclosed, must never be waived. The IBA Guidelines state disclosure of such a situation cannot cure the conflict, and as such, these situations need to be disclosed and appropriately addressed. Such circumstances emanate from the principle that no person can be his or her

---

19 IBA Guidelines, Introduction, para 4.

own judge, which is as important in international arbitration as it is in court litigation. As such, the non-waivable Red List establishes that there must be a conflict of interest where there is: (1) an identity between a party and an arbitrator; (2) an arbitrator is a legal representative of a legal entity that is a party to the arbitration; or (3) an arbitrator has a significant financial or personal interest in the matter at stake. The IBA Guidelines also establish another series of situations that are 'serious' and can only be waived 'if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator'.[20] These situations are listed in the waivable Red List. It is important to note that, if a fact falling within the categories listed in the waivable Red List is not disclosed, the parties are not in a position to waive the conflict of interest and are, therefore, prevented from reaching an informed opinion on the arbitrator in question.

C. Proposed Amendments to the IBA Guidelines

Since their introduction in 2004, the IBA Guidelines have not been revised and the authors are not aware of any imminent intention to do so. It would seem that the IBA Guidelines are growing in importance, as can be seen from reference to the IBA Guidelines in case law and general endorsement of the IBA Guidelines in articles and treaties written by international arbitration lawyers.[21] Increasing reliance on the IBA Guidelines is welcomed and encouraged by the authors. At the same time, the authors consider that certain amendments could be made to the IBA Guidelines to reflect the ever-growing and ever-developing commercial and legal practices of today.

International arbitration is becoming a more widely used form of dispute resolution across the globe. The diversity of cultural, commercial and legal backgrounds of the participants in the process is consequently increasing. The continued legitimacy of international arbitration requires arbitrators to be uniformly independent and impartial irrespective of their jurisdictional background. It is suggested that the most sensible manner of achieving that goal is to require all arbitrators to adhere to the same high standards with

---

20 IBA Guidelines, Pt II, para 2.

21 Ramon Mullerat, 'Arbitrator's Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration', *Dispute Resolution International* (May 2010); Matthias Scherer, 'New Case Law from Austria, Switzerland and Germany Regarding the IBA Guidelines on Conflicts of Interest in International Arbitration', *Transnational Dispute Management* 4(2008); Judith Gill, 'The IBA Conflicts Guidelines — Who's Using Them and How?', *Dispute Resolution International* (June 2007).

respect to the disclosure of conflicts of interest at the start and throughout the arbitration. This is especially important given the fact that many arbitrators also act as counsel in global, multi-discipline law firms whilst other arbitrators operate as professional arbitrators and find themselves participating in multiple arbitrations dotted all over the world, involving a cornucopia of parties, counsel and tribunal members. Thus, the possibility of crossed paths is on the increase and renders clear and uniform standards of disclosure by arbitrators imperative. Despite this, the IBA Guidelines remain guidelines, rather than binding rules, and accordingly there is no obligation on arbitrators or courts to follow them. Nonetheless, the IBA Guidelines have gained significant respect in the years since their introduction and were drafted by experienced practitioners and arbitrators with a developed understanding of many different jurisdictions and their varying approach to disclosure of conflicts of interest. They are also highly respected by parties and counsel involved in arbitration as they provide a useful and relevant framework of reasonable disclosure expectation. Indeed, studies have demonstrated that most international arbitrators refer to the IBA Guidelines in considering what information must be disclosed to the parties.[22] This practice demonstrates precisely the need for these guidelines and the complexity of the questions which arbitrators may need to address in relation to the disclosure of conflicts of interest.

In that connection, the authors set out four proposed amendments to the IBA Guidelines. It is believed that these amendments would help to further assist arbitrators in understanding what to disclose and the potential consequences of non-disclosure, as well as helping parties to better understand what to expect from their arbitrators. The main aim of these suggested amendments is to ensure that disclosure obligations are at the forefront of an arbitrator's mind and that these obligations remain there throughout the arbitration.

1. *Introduction of a Negative Inference from an Arbitrator's Failure to Disclose*

The purpose of the IBA Guidelines is to clarify the uncertainty and lack of consistency in arbitrators' different approaches to the disclosure of conflicts of interest. Arbitrators come from all walks of life. Not all arbitrators are lawyers or legally-trained and not all jurisdictions adopt the same approach

22 Matthias Scherer, 'The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009' *Dispute Resolution International* (May 2010).

to disclosure of potential conflicts of interest. Yet, arbitrators are ambassadors of international arbitration who put themselves in a position of serious responsibility. This is not a position to be taken lightly. Thus, it is suggested that the IBA Guidelines' purpose would be better served and more effective if there was a presumption of a sanction resulting from a failure to disclose a potential conflict of interest in the eyes of parties both at the start of and throughout the arbitration.

Such an amendment is intended to encourage arbitrators to be more proactive and inclusive in disclosing potential conflicts of interest from the outset of the proceedings. This would require a challenged arbitrator to show that any relationship which they fail to disclose and which subsequently comes to light was not a relationship which needed to be disclosed to the parties. Specifically, it is proposed that when considering a challenge against an arbitrator, where a fact has come to light which the challenged arbitrator did not disclose, and that fact is contained in either the waivable Red or Orange Lists, it should be appropriate to draw a strong adverse inference that the arbitrator's failure to disclose is indicative of their lack of independence or impartiality. Knowing of the sanction and knowing the 'if in doubt, disclose' premise of the IBA Guidelines, the arbitrator must have a clear and valid reason for failing to disclose a conflict of interest. It would then be for the arbitrator to disprove this adverse inference. Of course, the inference must be stronger with a waivable Red List relationship than with an Orange List relationship. It is hoped that this amendment would lead to all arbitrators being more diligent in making full and frank disclosures, which would lead to greater confidence in the arbitrators and fewer challenges — especially once the proceedings are well under way — for failure to make adequate disclosures.

The IBA Guidelines indicate that the Red Lists contain facts which suggest that 'an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts'.[23] The non-waivable Red List contains facts or circumstances supporting conflicts of interest which cannot be cured, even if they are disclosed. The waivable Red List contains circumstances which are 'severe', and should only be waived if the parties expressly state their willingness to have such a person act as arbitrator. If a fact falling on the waivable Red List is not disclosed to the parties, they will not be provided with the opportunity to provide their consent and similarly parties and the arbitral institution are not in a position to object to the appointment of the potential arbitrator. There is currently no sanction for an arbitrator's failure to disclose a conflict of interest. Rather, the IBA Guidelines specifically state that a failure to disclose should *not* be used to infer a lack of impartiality or independence, but only the fact itself should be taken into consideration:

---

23 IBA Guidelines, Pt II, para 2.

> non-disclosure cannot make an arbitrator partial or lacking independence, only the facts or circumstances that he or she did not disclose can do so.[24]

This failure to sanction arbitrators who do not make adequate disclosure is inconsistent with the basic premise that, in cases of doubt, the arbitrator should disclose. Essentially, this position is at odds with the rest of the IBA Guidelines and can allow an arbitrator to not be as thorough or rigorous in their checks prior to accepting an appointment. This, in turn, fails to uphold the need for absolute transparency and integrity in international arbitration.

Permitting an adverse inference as a result of a failure to disclose facts or circumstances falling under the waivable Red or Orange Lists would not impose an automatic sanction upon the arbitrator who fails to disclose, but rather only a presumption of such a sanction. The onus is then on the arbitrator to explain or prove why he or she did not disclose the pertinent facts or circumstances. Accordingly, where the arbitrator has a valid reason for his or her failure to disclose, no adverse inference would be drawn. Such an approach allows the arbitral process to maintain flexibility, while delivering greater certainty and predictability to users generally. It also encourages arbitrators to pay close attention to the fact or circumstance in question. It obliges an arbitrator to take seriously the 'if in doubt, disclose' premise within the IBA Guidelines.

While there are many highly experienced arbitrators practising in the field of international arbitration who take a careful approach to the disclosure of conflicts of interests, this is not uniformly the case. International arbitration is a dispute resolution process that is growing rapidly globally. Not all arbitrators have extensive experience as arbitrators or even as counsel in international arbitrations. To add to the confusion, most institutional rules do not stipulate that disclosure must be considered within the framework of 'in the eyes of the parties'.[25] Thus, the same facts or circumstances may be disclosed under some rules, but not under others. Furthermore, parties come from a variety of legal backgrounds and may well have differing opinions on the type of information a prospective arbitrator should disclose. However, it is 'of fundamental importance that justice not only be done, but should manifestly and undoubtedly be seen to be done'.[26] Therefore, the 'in the eyes of the parties' standard for making disclosure is fundamental to maintaining the integrity of international arbitration. As a basic guideline, and in order to maintain such integrity, a prospective arbitrator should disclose to the parties all the facts and circumstances which might affect his judgement and which

---

24 IBA Guidelines, Pt II, para 5.

25 In fact, only the International Chamber of Commerce ('ICC') Rules of Arbitration 2010 stipulate such a requirement at art 7(2).

26 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256.

could bring about a justifiable doubt as to his impartiality and independence in a party's mind.

Some arbitrators pay little attention to standards and expectations of disclosure of conflicts of interest in each case, considering their own view of their ability to be impartial and independent in the proceedings, rather than also considering whether they would meet such standards in the eyes of the parties. Some arbitrators do not necessarily have sophisticated or thorough conflicts checks processes established. This is unacceptable and can be highly damaging to the integrity of the arbitral process as well as significantly damage parties' belief and confidence in international arbitration. It can also be costly for the parties. It is necessary that each time an arbitrator accepts a new appointment, he or she turns his mind to the issue of conflicts of interest and is encouraged to disclose appropriately so that the parties are properly informed from the outset of the proceedings, of all facts which they may consider to place the arbitrator in a conflict of interest. It is also necessary that he or she continue to consider this throughout the duration of the proceedings, in order to be able to disclose such facts or circumstances 'as soon as he or she learns about them'.[27]

Inevitably, there will be criticisms that the proposed amendment to the IBA Guidelines would lead to a greater number of opportunistic challenges at the time of appointment as a result of arbitrators being cautious about over-disclosing. However, the IBA Guidelines clearly assert that disclosure is not an admission of a conflict:

> [a]n arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or resigned.[28]

It is the authors' position that this premise should not be amended. As the basic rule under the IBA Guidelines is 'if in doubt, disclose', the introduction of a sanction would only reinforce the importance of this presumption. It is important for arbitrators to take this premise seriously. It is also important for parties to have confidence in the integrity of their tribunal and for parties to believe that arbitrators understand the significance of the responsibilities placed upon them.

Sanctioning a negative inference from a failure to disclose pertinent information would encourage all arbitrators to take the disclosure of conflicts of interest seriously from the outset, ultimately reducing disruption to the

---

27 IBA Guidelines, General Standard 3.

28 IBA Guidelines, General Standard 3.

arbitral process. If arbitrators are encouraged to be more diligent in considering disclosures, it is likely that there will be fewer challenges initiated by parties during the course of proceedings and fewer possibilities for opportunistic challenges later, aimed at disrupting or delaying the arbitration. When challenges are initiated during the substantive phase of the arbitration, they can be extremely disruptive — for example, in some circumstances a successful challenge will result in a change in the constitution of a tribunal, which causes significant delay and disruption. Challenges can also be costly and delay the process, as well as having a negative effect on the rest of the proceedings and any possible challenge of an eventual award in the relevant courts. All of the above adversely affects the aims of international arbitration and can damage a party's opinion of international arbitration. Thoroughly addressing disclosure prior to the constitution of the tribunal (as well as ensuring a continued thorough approach to disclosure) will, therefore, be of ultimate benefit to the efficiency of the proceedings and to international arbitration generally.

There are likely to be criticisms that this proposed amendment to the IBA Guidelines would impose too heavy a burden on arbitrators. Yet, this proposed amendment to the IBA Guidelines should have no impact on those arbitrators who do study their conflicts closely, and disclose appropriately. These arbitrators will already be taking the approach of 'if in doubt, disclose', and will, therefore, be disclosing facts which fall into the categories on the waivable Red or Orange Lists. Furthermore, such a burden would serve to reinforce the reality that to put oneself forward as an arbitrator is to place oneself in a position of serious responsibility. The decision to be an arbitrator is not a decision to be undertaken lightly and is not a responsibility which can, or should, be open to everybody. Indeed, many arbitral institutions and parties already expect an adherence to this high standard from arbitrators. These arbitrators are made aware of these expectations. If we look, by way of example, at the wording of the ICC's Declaration of Acceptance and Statement of Independence, arbitrators are already expected to disclose any 'facts or circumstances which … might be of such a nature as to call into question my independence in the eyes of the parties'.[29] Thus, arbitrators are already expected to disclose any information which may, in the eyes of the parties, give rise to a conflict of interest. The introduction of a strong negative inference for failing to disclose relevant facts would serve to underscore the importance of disclosure as viewed through the eyes of the parties, as opposed to the arbitrator. The introduction of a strong inference, as opposed to an automatic sanction, still allows for a reasonable amount of flexibility — the challenged arbitrator still has an opportunity to explain the reasons why the uncovered facts or circumstances were not disclosed. If the standards have been applied

29 ICC Arbitrator's Declaration of Acceptance and Statement of Independence.

appropriately, the challenged arbitrator should be able to provide an adequate explanation. As a result, the introduction of a strong negative inference would not be disproportionate or onerous, but would rather be supportive of the current principles of the IBA Guidelines.

Some critics of the authors' suggestion might say that it would discriminate against arbitrators who did not know of the existence of the relationship and, therefore, could not disclose it. For this reason, the authors do not propose the introduction of an automatic sanction. Arbitrators must be given an opportunity to show that they have applied the correct standards and that they have conducted diligent checks on a regular basis. A careful and compliant arbitrator will make sure that they conduct reasonable and regular checks to ensure that there are no new facts or circumstances to disclose to the parties. Thus, a challenged arbitrator who genuinely did not know of the existence of a potential conflict of interest should be able to show that they have conducted regular checks to comply with the standards of the parties. A challenged arbitrator who fails to do so has evidently not complied with the standards expected by the parties and has not ensured maintained independence and impartiality.

At times, however, simply complying with regular checks will not be sufficient. The recent and much discussed case decided by the Paris Court of Appeal supports this. In *SA J&P SA v Société Tecnimont SpA*,[30] the Paris Court of Appeal annulled a partial award in an ICC arbitration because the chairman of a tribunal omitted to disclose circumstances which did not exist at the time of appointment and of which the chairman was not even made aware. It transpired that the chairman's law firm — a global, multi-discipline law firm — had, during the proceedings, provided legal assistance to a company which had become a member of the same group of companies as one of the parties to the arbitration. The chairman, who was not made aware of the relationship, evidently failed to disclose it. The challenging party uncovered the relationship by chance at a conference. Thus, the chairman was challenged by one of the parties. The challenge was rejected by the ICC Court, with no reasons provided, as is habitual with the ICC. [31] The partial award which had already been delivered was challenged in the French courts and, was annulled by the Paris Court of Appeal pursuant to art 1502-2 of the French Code of

---

30 Judgment of 12 February 2009 (Court of Appeal, Paris), (2009) Rev Arb 186, note Clay ('*Tecnimont*').

31 Article 7(4) of the ICC Rules states that '[t]he decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated'; Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd Ed, 2005), Kluwer Law, pp 139–140.

Civil Proceedings on the ground that the arbitrator had failed to comply with his duty of disclosure. It is not suggested that the chairman's independence or impartiality were actually in any way tarnished. Instead, this case serves as a good example of the necessity to conduct thorough checks at the time of appointment and regularly throughout the arbitration and problems which may arise from a lack of uniform approach to disclosure.

2. *Introduction of Automatic Removal for an Arbitrator's Deliberate or Negligent Failure to Disclose non-waivable Red List Facts or Circumstances*

The authors also consider that it would be appropriate to introduce the automatic removal of an arbitrator who has been shown to have deliberately or negligently failed to disclose facts or circumstances falling under the non-waivable Red List. The authors consider that this would be an appropriate measure, reflective of the purpose and aim of the IBA Guidelines, especially in light of the description of the non-waivable Red List provided in the IBA Guidelines:

> [t]he non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict.[32]

The non-waivable Red List is limited in scope, pertaining to a selective set of situations. Its application, therefore, does not arise too often. However, the non-waivable Red List encompasses facts or circumstances so serious that they cannot be waived and, therefore, the arbitrator cannot accept or continue the appointment.

The authors suggest that, if an arbitrator knowingly fails to disclose any situation set out in the non-waivable Red List, that arbitrator should automatically be replaced. By deliberately failing to disclose such a situation, the arbitrator discredits the importance of independence and impartiality in international arbitration. It appears that even when an arbitrator is challenged for failing to disclose a non-waivable Red List relationship (and thus, has refused to refrain from accepting the role as arbitrator) and that this relationship has subsequently come to light, that arbitrator is not always removed from the tribunal. It is the authors' suggestion that this failure to automatically remove the arbitrator undermines the segregation of the Red Lists in the IBA Guidelines and is not acceptable. The authors, therefore, suggest the introduction of an explicit sanction resulting in immediate removal

---

32 IBA Guidelines, Pt II, para 2.

of an arbitrator who knowingly fails to disclose any relationship set out in the non-waivable Red List.

The authors consider it is appropriate for this amendment to encompass both a deliberate failure to disclose, as well as a negligent failure to disclose: the purpose of this suggested amendment is to encourage arbitrators to be more rigorous in their approach to the disclosure of conflicts. As such, it is important that arbitrators should not be able to seek refuge in the defence that their failure to disclose was negligent.

Some critics may describe this suggestion as a rash amendment. However, such an amendment would serve to uphold the importance of independence and impartiality in international arbitration, as well as party autonomy. It would also reinforce and endorse the globally respected principle that 'no person can be his or her own judge'. If this suggestion is deemed too radical, the authors suggest that as an alternative, if all parties consent to the arbitrator remaining after his deliberate failure to disclose has been revealed, the arbitrator could be permitted to continue his appointment. Of course, it is likely that all parties would only agree to this in exceptional circumstances. Furthermore, the parties would need to consent to this explicitly. Such a consent would constitute a waiver by the parties, which would, in turn, prevent them from resisting enforcement or recognition of an award on the basis of lack of tribunal independence and impartiality, arising from that specific incident.

Inevitably, the implementation of such an amendment would need to be accompanied by a high standard of proof. Thus, the authors argue that it would be necessary for the challenging party to show, beyond all reasonable doubt, that the challenged arbitrator had either deliberately or negligently failed to disclose facts or circumstances falling under the non-waivable Red List. This requirement of a high standard of proof is important, as a finding against an arbitrator in this respect would have serious consequences for the arbitration in progress, and potentially it would also have significant consequences on the arbitrator's reputation.

It is hoped that such an amendment would reinforce the difference between the two Red Lists, reinforcing the fact that there are some conflicts which cannot, and should not, be waived. The authors recognise that such an amendment, if introduced, would not be applied frequently. However, such an amendment would serve to draw an arbitrator's attention to the importance of disclosing non-waivable Red List facts or circumstances and the severe consequences for failing to do so.

3. *Removal of 'excessive disclosures thus unnecessarily undermine the parties' confidence in the process' in Explanation to General Standard 3(c)*

It is anticipated that the proposed introduction of a negative inference from a failure to disclose pertinent facts or circumstances would result in greater disclosure from arbitrators at the time of appointment and a greater adherence to the requirement that arbitrators conduct regular checks of their conflicts throughout the course of the arbitration. Inevitably, greater disclosure provides parties with more grounds for challenge. It can also reduce party confidence in the process, since parties question just how impartial and independent their arbitrators are:

> [u]nnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process.[33]

However, in the interests of the continued integrity of international arbitration, as well as speed and efficiency, it is preferable for arbitrators to be challenged at the start of an arbitration as opposed to further down the line when the proceedings are well under way. This is because if 'within 30 days after the receipt of any disclosure by the arbitrator or after a party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest by the arbitrator based on such facts or circumstances and may not raise any objection to such facts or circumstances at a later stage'.[34] Thus, the parties have then waived their right to challenge on the basis of those particular facts or circumstances. Full and frank disclosure also reduces the chances that a party may attempt to challenge a final award in the national courts on the basis of an arbitrator's failure to disclose a potential conflict of interest, thereby reducing the opportunity for further delay to the final resolution of the dispute. In this way, early full and frank disclosure would be consistent with strengthening one of the main features of international arbitration, namely, the finality of the award.

The authors suggest that the following should be removed from the Explanation (c) to General Standard 3 of the IBA Guidelines:

---

33 IBA Guidelines, General Standard 3, Explanation (c).

34 IBA Guidelines, General Standard 4.

> [u]nnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process.[35]

This explanation undermines the principle in the IBA Guidelines 'that in case of doubt the arbitrator should disclose'.[36] This principle is fundamental to the IBA Guidelines. To deviate from this is to run the risk of confusing the inexperienced arbitrator. It can also encourage an arbitrator who is already reluctant to disclose facts or circumstances, not to disclose. It is inconsistent with the underlying message of the IBA Guidelines of 'if in doubt, disclose'. It also detracts from the fundamental premise in the IBA Guidelines that:

> [d]isclosure is not an admission of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned. An arbitrator making disclosure thus feels capable of performing his or her duties.[37]

That is not to say that concerns about the effects of over-disclosure are not valid. Evidently, excessive disclosure can fuel opportunistic challenges from a party reluctant to arbitrate. They can be used to unsettle the opposing party, to add to the costs of an arbitration, to help create a spirit of mistrust in the arbitration and, potentially, to pressure a party to settle where it might otherwise not have been inclined to do so. However, tactical challenges cannot be completely erased. They are a reality of international arbitration.

Arbitrators may also, understandably, fear that over-disclosure may result in a successful challenge (even where the arbitrator does not consider his impartiality or independence impaired), resulting in their not being appointed and damage to their reputation. There is currently considerable discussion relating to repeat appointment challenges which relates to this issue. Reputation is very important in the field of international arbitration. It is one of the ways in which we measure arbitrators and it influences parties' choice of appointment. Thus, its significance both to the arbitrator and the other participants in the international arbitration process should not be overlooked. However, the damage to an arbitrator's reputation can be far greater where they have deliberately concealed a relationship, rather than where they have disclosed a relationship in the conviction that said relationship does not impede their impartiality and independence. Therefore, whilst disclosure of repeat appointments may encourage a challenge, it is hoped that arbitrators

---

35 IBA Guidelines, General Standard 3, Explanation (c).
36 IBA Guidelines, General Standard 3, Explanation (c).
37 IBA Guidelines, General Standard 3, Explanation (a).

will continue to disclose such repeat appointments. After all, recent examples have demonstrated that repeat appointments do not necessarily interfere with an arbitrator's impartiality and independence.[38]

4. *Introduction of Further Detailed Guidance on the Requirement that an Arbitrator Make Reasonable Attempts to Investigate*

In compliance with the IBA Guidelines, arbitrators must not only declare possible conflicts of interest, but also conduct due diligence in order to identify possible conflicts. General Standard 7(c) states:

> an arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.[39]

The IBA Guidelines set out that even where an arbitrator is unaware of a relationship which might give rise to a conflict of interest, that arbitrator is nonetheless required to make reasonable attempts to investigate whether such relationships exist. This, essentially, takes the 'if in doubt, disclose' requirement to another level. It requires arbitrators to make 'reasonable enquiries' to ensure that either there is no conflict of interest or that any potential conflict of interest can be and is, disclosed. It requires the arbitrator to disclose that which he or she does not yet actually know. In a world of global law firms practising across a wide range of specialist areas of law, this becomes particularly important and precarious. While an arbitrator may be confident that he or she is independent and impartial, they must go beyond this to ensure that they inform themselves of any facts or circumstances which may lead their impartiality and independence to be called into question by the parties. Having investigated potential conflicts (even those of which they had no prior knowledge), arbitrators must determine what facts should be disclosed to the parties.

This reflects the Explanation to General Standard 6 which states that:

> [t]he growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration ….

---

38 *Tidewater Inc & Ors v Bolivian Republic of Venezuela* Case No ARB/10/5 (ICSID).

39 IBA Guidelines, General Standard 7.

> The relevance of such activities, such as the nature, timing and scope of the work by the law firms, should be reasonably considered in each individual case.[40]

Thus, the IBA Guidelines recognise that law firms are growing geographically, economically and in areas of expertise. This reality makes the disclosure of conflicts of interest by arbitrators all the more complicated. Traditionally, the view was that an arbitrator's interests would be considered to be identical to those of his law firm, and thus that all the law firm's conflicts were attributed to the arbitrator. To apply this view strictly would be to hinder the party's right to appoint an arbitrator of its choice. In the rapidly growing worlds of international arbitration and international law firms, it may become difficult, under a strict application of the traditional approach, to appoint an arbitrator of one's own choosing.

In order to balance these two conflicting aspects, the IBA Guidelines explain that such relationships should be disclosed and 'should be reasonably considered in each individual case'.[41] Disclosure of a conflict of interest does not indicate that arbitrators consider themselves to be lacking in impartiality or independence, nor does it mean that arbitrators should resign or refrain from accepting an appointment. (Indeed, if it does mean that, then the arbitrator should not accept the appointment or should resign.) Rather, under the IBA Guidelines, the potential conflict must be 'reasonably considered' to determine whether it would cause the arbitrator's impartiality and independence to be questioned in the eyes of a reasonable person.[42] This allows parties to have a say and to address the circumstances revealed by the arbitrator, thus acknowledging that at the root of arbitration lies party autonomy. The parties have chosen to resolve their dispute through arbitration. Full and frank disclosure from the potential arbitrators is imperative to maintaining the integrity of the dispute resolution system which the parties have chosen. Such disclosure enables the parties to have continued confidence in the people and the process they have chosen to resolve their dispute.

---

40 IBA Guidelines, General Standard 6, Explanation (a).

41 IBA Guidelines, General Standard 6, Explanation (a).

42 The LCIA Rules, Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber ('Vienna Rules'), Swiss Rules of International Arbitration ('Swiss Rules'), German Institute of Arbitration Rules ('DIS Rules'), Arbitration Rules of the Singapore International Arbitration Centre ('Singapore Rules') and UNCITRAL Rules do not contain such an explicit requirement. Article 7(2) of the ICC Rules, however, stipulates that 'a prospective arbitrator shall sign a statement of independence and disclosure in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrators' independence in the eyes of the parties'.

As described above, the guiding principle of the IBA Guidelines is that in the case of *any* doubt, an arbitrator should disclose a fact which may give rise to doubts as to the arbitrator's impartiality or independence 'in the eyes of the parties'.[43] Thus, the IBA Guidelines support the proposition that arbitrators should take no risks with disclosure: in the event of doubt, the arbitrator should disclose, and this presumption should continue to apply throughout the arbitration. The principle of the IBA Guidelines supports the old adage — 'better out than in'.

In connection with this standard, the IBA Guidelines state that an arbitrator 'is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned'.[44] By way of explanation of this standard, the IBA Guidelines explain that:

> it is necessary that the parties disclose any relevant relationship with the arbitrator. In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying to the general standard, might affect the arbitrator's impartiality and independence. It is the arbitrator or putative arbitrator's obligation to make similar enquiries and to disclose any information that may cause his or her impartiality to be called into question.[45]

Whilst the IBA Guidelines, by way of the Lists, set out what a 'relevant relationship' might be, the IBA Guidelines offer no explanation as to what might constitute 'reasonable enquiries'. There is no guidance as to the depth, the extent or the regularity of these checks. The authors suggest that it would be appropriate for the IBA Guidelines to be amended to include more specific guidance as to what constitutes 'reasonable enquiries' in the light of modern practices and modern technology.

It is evident that arbitrators from all large international law firms will be able to conduct parts of the necessary checks with greater ease than arbitrators who do not come from such a background. By the same token, arbitrators from large international law firms are more likely to have a greater number of conflicts of interest to disclose. Many arbitrators from large, international law firms have access to the conflicts checks processes already in place at their law firms. Conflicts checks processes vary from firm to firm, but essentially, they usually involve putting in all the relevant names of the parties — claimants

---

43 IBA Guidelines, General Standard 3: '[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure'.

44 IBA Guidelines, General Standard 7.

45 IBA Guidelines, General Standard 7.

and respondents — in the firm database for the database to highlight any potentially related matter. Where the (potential) arbitrator has the information, he or she should also provide his firm with the names of the parties' parent company, subsidiaries and main shareholders. He or she should also run conflicts checks against counsel for the parties to the arbitration. Where possible, the arbitrator should also provide the conflicts team with a description of the subject matter of the dispute and list of key words. However, in most instances, for reasons of confidentiality or simply because the arbitration is not yet sufficiently advanced, the (potential) arbitrator rarely has this information to give to his firm's conflicts checks teams. Yet arbitrators are left in the dark as to what constitutes 'reasonable enquiries' under the IBA Guidelines. Would it be reasonable to expect an arbitrator to run conflicts checks every time a new company name is introduced into the arbitration, or each time an expert or witness is brought into the arbitration?

More explicit guidance as to what might constitute 'reasonable enquiries' would also assist all arbitrators and parties contemplating a challenge. Firstly, explicit guidance need not be exhaustive, but rather up-to-date guidance which reflects modern practices, the technology available and the growing complexity of international arbitration. Secondly, explicit guidance would assist sophisticated global firms in ensuring that their conflicts checks systems can conduct the most thorough checks possible when their practitioners hope to accept an arbitral appointment. Thirdly, explicit guidance would be most beneficial to arbitrators from smaller firms who may not have sophisticated conflicts checks processes in place.

The conflicts checks processes described above address professional relationships. Only the arbitrators themselves can consider and check personal relationships. The parties have to rely on the integrity of the arbitrators to reveal the existence of any personal facts or circumstances which may need to be disclosed to the parties. Here, the waivable Red List and Orange List provide some useful guidance on what kinds of personal relationships should be disclosed. By way of example, Item 2.3.8 on the waivable Red List provides for disclosure when:

> [t]he 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.

Again, the exact parameters surrounding the definition of a 'close family relationship' are not defined. Thus, whilst Tony Blair acting as an arbitrator may know and, therefore, disclose any pertinent roles undertaken by Cherie Booth, does he or she know all the roles undertaken by his brother, Bill Blair QC? Should he or she be expected to know, or to investigate? Or should he or she simply disclose those which are known?

An unusual situation arises when a barrister acting as counsel in an arbitration is confronted with a member of the same chambers serving as an arbitrator in the same arbitration. This has been debated in various jurisdictions with conflicting decisions, again highlighting a lack of uniformity of approach. Much of the discomfort felt by parties when confronted with this situation comes from an understandable lack of familiarity with the English system of solicitors and barristers. For parties unfamiliar with the English system, it is difficult to appreciate that barristers are self-employed lawyers who share the costs of running chambers but not the profits. Therefore, one barrister does not benefit financially from the success of another barrister. This issue has been addressed in the IBA Guidelines, in the Orange List at Item 3.3.2. Thus, the IBA Guidelines consider that the situation where an arbitrator is a member of the same set of chambers as a barrister to one of the parties 'may give rise to justifiable doubts as to the arbitrator's impartiality or independence'.[46] This was elaborated upon by the Working Group behind the IBA Guidelines as follows:

> [w]hile the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms. It is because of this perception that the Working Group decided to keep an Orange List, and thus subject to disclosure, the situation in which the arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers.[47]

Another concern with chambers arises from maintaining confidentiality and ensuring that there is no incorrect distribution of documents or correspondence. Barristers from the same chambers are often opposing counsel in court litigation, and, therefore, chambers have to ensure that they have reliable administrative systems safeguarding against erroneous distribution of confidential documents. However, courts and tribunals have been called upon to consider and analyse the situation in which an arbitrator is a member of the same chambers as one of the parties' counsel.

This issue was addressed in *Laker Airways Inc v FLS Aerospace Ltd & Stanley Jeffrey Burnton*[48] by the English High Court in 1999. When Laker Airways, a

---

46 IBA Guidelines, Pt II, para 3.

47 Otto LO de Witt Wijnen, Nathalie Voser and Neoni Rao, 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration'.

48 [2000] 1 WLR 113 ('*Laker Airways v FLS*').

United States company, understood that FLS's counsel included a barrister from the same chambers as the arbitrator appointed by FLS, Laker Airways applied for the arbitrator to be removed. Laker Airways objected to the arbitrator on the basis that 'circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality, the circumstances being that he practises at the Bar from the same set of Chambers as the advocate instructed in the arbitration and in parallel litigation in behalf of FLS'.[49] Laker Airways' application was dismissed because its 'non-appearance to support its own application is tantamount to its withdrawal'.[50] However, Mr Justice Rix still gave consideration to the issues which he set out in full in his judgment. Rix J considered the application of the 'real danger of bias' test set out in *R v Gough*[51] and in s 24 of the Arbitration Act 1996. He explained that 'practising barristers are prohibited by the rules of their profession from entering partnerships or accepting employment precisely in order to maintain the position where they can appear against or in front of one another'.[52] He also stipulated that 'it remains the case in my view that chambers are made up of their individual barristers with their separate reputations, each working on their own papers for their own clients, and sharing neither career nor remuneration'.[53] With this in mind, and in consideration of the facts of the case, Rix J did not agree with Laker Airways that the circumstances gave rise to justifiable doubts as to the arbitrator's independence and impartiality. The decision in *Laker Airways v FLS* was confirmed in *Locabail (UK) Ltd v Bayfield Properties*[54] and *AT&T Corp v Saudi Cable Co*.[55]

The decision in *Laker Airways v FLS* is not without its critics.[56] Rix J has been criticised for overlooking the fact that whilst barristers are in competition with each other, so are various sets of chambers and '[t]his is why clerks, never mentioned by Rix J, will refer solicitors seeking representation to other members of chambers if the requested barrister in unavailable'.[57] It has been

---

49 *Id* at p 3.
50 *Id* at p 6.
51 [1993] AC 646.
52 *Laker Airways v FLS*, *supra*, n 48 at p 18.
53 *Id* at p 22.
54 [2000] 2 WLR 870.
55 CCH New Law, 15 May 2000, CA.
56 Joanne Riches, 'Case Comment: *Laker Airways Inc v FLS Aerospace Ltd* [2000] I WLR 113 (QBD (Comm))' (1999) 2 *International Arbitration Law Review* 175–180.
57 Armen H Merjian, 'Caveat Arbitor: Laker Airways and the Appointment of Barristers as Arbitrators in Cases Involving Barrister-Advocates from the Same Chambers' (2000) 17 *Journal of International Arbitration* 31–70.

argued that the fact that chambers advertise as a set, reflects a sense of shared interest:

> [t]he use of advertisements alone seriously impeaches the sweeping assertion that these are merely "independent self-employed practitioners". A reasonable complainant viewing these advertisements could understandably harbour doubts as to the barristers' ability impartially to judge their fellow members of chambers. Indeed, barristers that tout their skills as a unit may fairly be said to have a stake in the success of their fellow barrister. It is noteworthy, moreover, that the seminal change in the advertising law occurred after the decisions in three of the cases relied upon by Rix J, and nine of the authorities that Rix J cited discusses the impact that this change has had, at the very least, on the appearance of impropriety.[58]

More recently, the ICSID case, *Hervatska Elektroprivreda, dd v The Republic of Slovenia*,[59] moved away somewhat from prior decisions on this issue. In this instance, Hervatska did not ask for the removal of the president of the tribunal who was a door tenant at the same set of chambers as counsel for Slovenia, but rather for the removal of said barrister representing Slovenia. A few weeks prior to the substantive hearing, it emerged that Mr David Mildon QC was to represent Slovenia. This was the first Hervatska had heard of such representation. It was also the first that the president knew of such representation. Coming from a legal system different to that adopted in England, Hervatska and its American counsel sought further information on Mr Mildon's role in the arbitration. Hervatska was not satisfied with the further information provided by Slovenia's counsel. The issue was discussed at the hearing with Mr Mildon absent for the duration of these discussions. Neither party wanted the chairman to resign; instead Hervatska wanted Mr Mildon to withdraw from the arbitration. The tribunal determined that Mr Mildon could no longer participate as counsel in the arbitration.[60] In its ruling, the tribunal acknowledged that two barristers from the same chambers may not necessarily result in a conflict of interest, or an appearance of a conflict of interest:

> [t]he Tribunal does not believe there is a hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect. The justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include, first, the fact that the London Chambers system is wholly foreign to the Claimant;

---

58 *Ibid*.

59 Case No ARB/05/24 (ICSID), Ruling regarding the participation of David Mildon QC in further stages of the proceedings (6 May 2008) ('*Hervatska*').

60 *Ibid*.

> second, the Respondent's conscious decision *not* to inform the Claimant or the Tribunal of Mr. Mildon's involvement of the case, following his engagement in February of this year, third, the tardiness of the Respondent's announcement of Mr. Mildon's involvement and, finally, the Respondent's subsequent insistent refusal to disclose the scope of Mr. Mildon's involvement, a matter of days before the commencement of the hearing on the merits. The last three matters were errors of judgment on the Respondent's part and have created an atmosphere of apprehension and mistrust which is important to dispel.[61]

Hervatska highlights a problem which is again particular to barristers. Barristers in the same set of chambers, as sole practitioners, practice independently of each other and there are, therefore, no systems in place through which conflicts checks could be conducted. In this way, and many others, barristers' chambers are run very differently from solicitors' law firms. In addition, a barrister's involvement in a case or arbitration is not always known or apparent until shortly before an oral hearing. Therefore, an arbitrator is likely to be unaware of the involvement of a barrister from the same chambers. The Working Group suggested that:

> [f]ull disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. Thus, barristers (including persons who are 'door tenants' or otherwise affiliated to the same chambers) should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity.[62]

In addition to this, the authors suggest that the IBA Guidelines be amended to reflect an obligation on the parties to declare the involvement of any barristers from the same chambers as an arbitrator as soon as that involvement commences. Whilst a tribunal does not necessarily have the authority to exclude a barrister advocate from an arbitration — although the tribunal in *Hervatska* did precisely that — such openness will enable the parties and the tribunal to openly discuss the issues and afford them more of an opportunity to reach a mutually acceptable solution.

The law firm, Berwin Leighton Paisner, recently produced a report on 'perceived conflicts of interest involving arbitrators and advocates coming from the same set of chambers'.[63] This report shows that this situation involving barristers from the same set of chambers is still regarded with considerable suspicion:

---

61 *Ibid*.

62 Witt Wijnen, Voser and Rao, *supra*, n 47.

63 Berwin Leighton Paisner, 'Research based report on perceived conflicts of interest', p 3.

> [a] significant majority of lawyers responding considered it to be inappropriate for there to be a barrister on the tribunal from the same set of barristers' chambers as the advocate for one of the parties.[64]

In addition, the report found that '65% [of lawyers asked] felt that, under domestic laws, a challenge to an arbitrator that came from the same chambers as one of the advocates was likely to succeed'.[65] Immediate disclosure by parties may reduce challenges in domestic courts during the arbitration or at the time of enforcement of the award.

Further, the IBA Guidelines provide no guidance as to the regularity with which conflicts checks should be conducted by arbitrators. The authors' experience is that arbitrators generally disclose facts or circumstances of which they become aware during the course of arbitral proceedings. Yet how many conduct regular checks of their own volition? Case law suggests that regular checks would be advisable. Let us look again at the Paris Court of Appeal case of *Tecnimont*,[66] in which the Paris court quashed an award on the basis that an arbitrator had failed to disclose circumstances that did not exist at the time of his appointment and which he had subsequently not been made aware of. As a result, an in-depth award, representing years of work from the tribunal and parties, as well as significant expense incurred by both parties, have been discarded. Regular conflicts checks may have prevented such an outcome, for earlier disclosure would have given the parties an opportunity to form an opinion on the relevant circumstances and would have enabled the decision-making body (in this instance, the ICC Court) to make a decision on a challenge at an earlier stage in the proceedings.[67] Accordingly, the authors suggest that the IBA Guidelines be amended to include, in accordance with international practice, some more detailed guidance as to how often arbitrators should conduct conflicts checks.

Evidently, if the IBA Guidelines become too prescriptive, their use will be reduced. Some arbitrations move slowly and can take several years to be resolved. Other arbitrations are conducted on an expedited basis. Reasonable timeframes for regular conflicts checks may be dramatically different in each case. However, the IBA Guidelines could stipulate a guideline timeframe for regular checks which could, of course, be amended to reflect the reality of individual arbitrations.

---

64 *Id* at p 6.

65 *Ibid*.

66 *Supra*, n 30.

67 The arbitrator was challenged in accordance with the ICC Rules. The challenge was rejected but it is not known if the challenge was rejected on its merits or because it was made outside of the stipulated time-limit.

More explicit guidance on what constitutes 'reasonable enquiries' and on how often these enquiries should be conducted cannot provide a complete and exhaustive list of checks to be conducted by the arbitrator. The responsibility for disclosure remains — and must remain — with the arbitrator. However, adherence to this explicit guidance and conducting regular enquiries can and should count towards the arbitrator's integrity and his commitment to the global standards of independence and impartiality.

D. Conclusion

The authors hope that the proposed amendments discussed in this article will contribute to the wealth of debate which surrounds arbitrator disclosure and the IBA Guidelines. While it is understood that the IBA Guidelines are not being revised at present, it is hoped that the authors' suggestions will be considered at such time as they are revised.

The integrity of the arbitral process and the parties' confidence in the arbitrators determining their disputes is pivotal to the proper functioning and development of international arbitration. The introduction of the negative inference where an arbitrator fails to disclose any facts included on the IBA Guidelines' waivable Red or Orange Lists would encourage all arbitrators to be more diligent in the disclosure of potential conflicts of interest from the start of the arbitration and throughout the proceedings. Such an inference would provide a clearer disclosure framework for arbitrators and parties alike.

It is important to note that the introduction of a negative inference arising from an arbitrator's failure to disclose matters on the waivable Red or Orange Lists would have no bearing on arbitrators who currently adhere to the IBA Guidelines. Rather, this inference would confirm the validity of their current approach and would ensure that a greater number of less-experienced arbitrators have clearer guidance in relation to disclosure. Evidently, the IBA Guidelines are not binding. However, they are thorough and representative of what arbitrators should consider and what parties can reasonably expect from arbitrators. The proposed amendment cannot guarantee that arbitrators will better address disclosure of conflicts of interest from the start of the arbitration, but it is likely to be strong incentive for them to do so.

The introduction of an automatic removal of an arbitrator for deliberate failure to disclose facts or circumstances from the non-waivable Red List would further reinforce the importance of full and frank disclosure. Whilst it is hoped that such situations are rare, this does not reduce the need for such an automatic removal, once the relevant burden of proof has been met by the challenging party.

The removal of IBA Guidelines' commentary concerning the risks of over-disclosure would make the IBA Guidelines more consistent with the underlying message of the Guidelines of 'if in doubt, disclose'. This would reinforce the premise that arbitrators should be providing full and frank disclosure, which is fundamental to providing the transparency necessary to ensure the parties are able to consider whether the arbitrators determining their dispute are independent and impartial.

The provision of further detail on the requirement that an arbitrator makes reasonable attempts to investigate conflicts of interest would provide both arbitrators and parties with guidance on what is becoming a vexed issue. Guidance on what constitutes 'reasonable enquiries' and how often these enquiries should be conducted would bring about a greater uniformity of approach to disclosure during the course of arbitral proceedings, which is when challenges can be most disruptive.

The role of arbitrator is a serious one, carrying a heavy responsibility. Arbitrators have a clear obligation to the parties, the institutions and each other to be full and frank in their disclosure both at the time of appointment and throughout the arbitration. As ambassadors to international arbitration, they have an obligation to maintain and further the integrity of international arbitration, which in turn rests on party agreement and hence party confidence in international arbitration. The IBA Guidelines work in conjunction with this principle and it is hoped that these proposed amendments may contribute to the debate to ensure that the IBA Guidelines continue to fulfil this function.