

# **The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009**

*The IBA Conflicts of Interest Subcommittee, a Subcommittee of the IBA Arbitration Committee\**

## **Introduction to the IBA Guidelines and the Report**

In 2004, the Arbitration Committee of the International Bar Association (IBA) issued a booklet that has since had an undeniable impact on the practice of international arbitration: The IBA Guidelines on Conflicts of Interest in International Arbitration (Guidelines).

This article aims at summarising the main findings of the report focusing on the case law referring to the Guidelines, the feedback received by arbitral institutions, and criticism expressed by legal commentators. The report remains a work in progress and future subcommittees will continue to identify areas for possible improvement.

The Guidelines were developed to respond to a need for more uniformity in the standards applied in making decisions concerning disclosure, objections and challenges of arbitrators, and ultimately to ensure that arbitration proceedings are not hindered by ever-increasing conflict of interest issues.

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\* Matthias Scherer, Chair of the IBA Conflicts of Interest Subcommittee (2008/2009). The draft is based on feedback provided to the subcommittee by a number of practitioners and arbitral institutions. For a full list of subcommittee members, please see [www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx). Special thanks are owed to members Julie Bédard and Ramon Mullerat for their valuable contributions, as well as to David Bonifacio and Sam Moss of Lalive for their research assistance.

Five years after the dissemination of the Guidelines, most international arbitrators consult the Guidelines whenever they must exercise their judgment on whether to disclose circumstances that might be viewed as conflicts. Whilst the courts in most cases rightly do not directly apply the IBA Guidelines, the cases reported below illustrate that courts called on to decide on challenges to arbitrators are increasingly referring to the IBA Guidelines.

### **The IBA Conflicts of Interest Subcommittee**

The IBA Arbitration Committee established a subcommittee the main objective of which is to monitor the jurisprudence referring to the Guidelines and to gather feedback from practitioners which might assist the IBA in future revisions and improvements of the Guidelines. The members of the Conflicts of Interest Subcommittee of 2008-2009 can be viewed in the full report which can be accessed on the Arbitration Committee section of the IBA website at: [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx).

### **Case law referring to the IBA Guidelines<sup>1</sup>**

Decisions rendered by state courts specifically dealing with the IBA Guidelines are not legion. In her survey of 2006, Judith Gill<sup>2</sup> received reports from 19 key jurisdictions which yielded three court cases, one in England,<sup>3</sup> and two in the United States.<sup>4</sup> In all likelihood, the principal reason for the dearth of case law at that point in time was the relatively recent adoption of the Guidelines (in 2004).

In addition, courts' reluctance to refer to the Guidelines may lie on the belief that domestic law provides a comprehensive regime governing arbitrators' independence and impartiality. State courts thus may not find it necessary or appropriate to refer to foreign rules or guidelines issued by private organisations when making their decision, whatever the practical importance of such rules among arbitration practitioners. This can be observed also with respect to the UNIDROIT Principles of International Commercial Contracts or the IBA Rules on the Taking of Evidence in

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1 Appendix 1 to the Report contains a synoptic table of the judgments rendered by state courts. This appendix, along with other appendices, are part of the full version of the report which can be accessed at: [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx).

2 Judith Gill, 'The IBA Conflicts Guidelines – Who's Using Them and How?', 1 *Disp Res Int'l*, 58 (2007).

3 *ASM Shipping Ltd of India v TTMI Ltd of England*, [2005] EWHC 2238 (Comm) (19 October 2005).

4 *HSN Capital LLC (USA) v Productora y Comercializador de Televisión SA de CV (Mexico)*, 2006 WL 1876941 (M D Fla) (5 July 2006).

International Commercial Arbitration.<sup>5</sup>

As there is evidence in practice that parties are now routinely referring to the Guidelines in challenges to arbitrators and arbitral awards, it can be expected that not only the awareness about the Guidelines but also the willingness to refer to them in judgments will increase among municipal courts in the future.

Indeed, since Judith Gill's survey, judgments referring to the Guidelines from several further jurisdictions have become known to the public.<sup>6</sup> It is probably not a coincidence that existing judgments mentioning the Guidelines, although not large in number, have been made by courts in jurisdictions who historically host many international arbitration proceedings (Switzerland, England, the United States, Sweden, The Netherlands, Austria, with France as a notable absent).

#### *Austria*<sup>7</sup>

In Austria, the Vienna Commercial Court had to rule on an application for challenge reliant on paragraph 3.1.3 of the IBA Guidelines' Orange List, covering instances of multiple appointments by a claimant party in an arbitration conducted under the Rules of the International Arbitral Centre of the Austrian Federal Economic Chamber. On 24 July 2007 the court handed down a decision.

In this case, the claimant had sought to challenge the respondent's appointed arbitrator arguing that the same individual had been appointed on four prior occasions by the respondent in addition to the case in connection to which the challenge was being filed. In its submissions, the respondent did not deny this allegation.

In essence, it was submitted by the challenging party that all the prior cases in which the arbitrator had been appointed dealt with the same matter. In the claimant's view, these frequent nominations raised justifiable doubts as to the arbitrator's independence. In addition, it was argued that as a result of his prior involvement in the field, it had to be expected that he had already formed an opinion on the questions to be decided in the case at hand, giving the appearance that he was not capable of acting impartially.

In two of the proceedings in which the arbitrator had previously been appointed, the claimant had not been a party. According to the applicant,

<sup>5</sup> Adopted by the IBA Council on 1 June 1999.

<sup>6</sup> New case law from Austria, Belgium, Germany, the Netherlands, Sweden, Switzerland and the USA.

<sup>7</sup> Vienna Commercial Court, Case No 16 Nc 2/07w (24 July 2007), unpublished. Abstract based on Matthias Scherer, 'New Case Law From Austria, Switzerland and Germany Regarding the IBA Guidelines on Conflicts of Interest in International Arbitration', 4:5 *Transnat'l Disp Mgmt* (2008).

in those proceedings the arbitrator being challenged had acquired confidential information which he was not entitled to share with the co-arbitrators in the present case but which would inevitably colour his determination. Therefore, it was argued that there was an imbalance within the arbitral tribunal.

In the challenge application, it was finally maintained that the arbitrator had been named as a witness in a number of proceedings in relation to the case at hand and it could not be ruled out that he could have to testify in the ongoing case. The applicant considered that this potential double role as witness and arbitrator amounted to a potential conflict of interest that raised doubts as to his independence and impartiality.

The claimant submitted that an objective test should apply to the question of whether or not an arbitrator is independent and impartial and that the IBA Guidelines were to be taken into account by the Vienna Court in its decision. According to the claimant, the overall objective of the new Austrian arbitration law of 2006 (*Schiedsrechtsänderungsgesetz*) was to bring Austrian arbitration practice in line with international standards. The IBA Guidelines were said to reflect these standards.

The Vienna Court dismissed the challenge. Regarding the relevance of the IBA Guidelines, the court accepted that the new Austrian law had intended to make Austria a more attractive seat for international arbitration proceedings. However, failing a clear statement of the legislator to the contrary, the court reasoned that it could not be admitted that Austrian law must, as a rule, be interpreted in light of international legal authorities and usages. In the present circumstances, the court found that there was no clear choice of the legislator directing to the application of the IBA Guidelines.

In any event, the court took no issue with the fact that an arbitrator may be appointed on multiple occasions. Referring to the practice in the Austrian court system, the court recalled that it is quite common that the same judge deal with a number of disputes between the same parties. This was perceived as an advantage, not a disadvantage. Moreover, the court noted that the arbitral tribunal's decision was to be taken by three arbitrators and not by the allegedly impartial arbitrator alone. The other members of the tribunal were not obliged to follow the views of the arbitrator in question, reasoned the court.

The court also noted that the challenged arbitrator's prior experience would allow him to suggest further evidentiary measures in order to fully elucidate the factual and legal issues in dispute. Arbitrators who have no such experience would not necessarily be able to realise that such measures are warranted. The court clearly rejected the view taken by the claimant that an arbitrator who has already been involved in prior related proceedings

is necessarily partial because he has already formed an opinion on the matter. Indeed, the court confirmed that there is no presumption that an arbitrator who has acted in similar legal disputes has a preset opinion on the issues before him.

The court also did not accept the claimant's concern regarding the possibility that the arbitrator might have to testify on his involvements in prior proceedings. On the one hand, the claimant had failed to establish that there was such a concrete risk in the case under scrutiny. On the other hand, the court found that it is not unusual for arbitrators to be called upon to give testimony on prior arbitration proceedings before state courts. As a result, this did not constitute a ground for challenge concluded the court.

The court added that it was quite natural that a party would nominate an arbitrator who had special knowledge of its needs and this would include knowledge of the factual matrix of prior proceedings. However, the court recognised that it is not the task of the arbitrator to push the position of the nominating party with the benefit of a better knowledge of the facts in a case. Rather the arbitrator's task is that of an independent and impartial judge, who is liable to the parties for any violation of his professional duties.<sup>8</sup>

### *Belgium*

In Belgium, the Court of Appeal of Brussels was called on to decide whether to overturn a lower court decision dated 22 December 2006<sup>9</sup> rejecting a challenge filed on the grounds that an arbitrator had failed to disclose to the parties facts which allegedly would give rise to doubts as to his impartiality. The Court of Appeal, relying in part on the IBA Guidelines, dismissed the appeal on 29 October 2007.<sup>10</sup>

In the case in question, an arbitration had been initiated by Eureko B V against the Republic of Poland on the basis of a bilateral investment treaty (BIT). Eureko had appointed Judge Stephen Schwebel as its party-appointed arbitrator, whereas Poland chose Mr Jerzy Rajski. An arbitral tribunal, which had its seat in Belgium, was finally constituted with the

8 The German original of the relevant passage of the court's decision reads: 'naturgemäss, [werden nominiert] Erfahrene, die eben in den Bedürfnissen der entsendenden Partei besondere Kenntnisse haben, wozu eben auch Kenntnis der Sachverhalte aus Vorprozessen zählen wird. Allerdings ist es nicht die Aufgabe des Schiedsrichters [...] den Standpunkt der entsendenden Partei wider besseres Wissen auszudrücken im Schiedsgericht. Vielmehr ist seine Aufgabe unabhängig von der entsendenden Partei die eines unabhängigen und unparteilichen Richters, der bei Pflichtverletzung [...] den Parteien Schadenersatzpflichtig wird.'

9 Court of First Instance of Brussels, Case No R G 2006/1542/A (22 December 2006), available at: <http://ita.law.uvic.ca>.

10 Brussels Court of Appeal, Case No R G 2007/AR/70 (29 October 2007), *République de Pologne c/ Eureko BV et al*, 26 *ASA Bull* 565 (2008).

appointment of Mr Yves Fortier as chairman. On 19 August 2005, the tribunal rendered a partial award holding Poland liable for breaches of the Netherlands-Poland BIT.

After the tribunal issued its partial award, Poland requested that Judge Schwebel, the arbitrator appointed by Eureko, step down from the tribunal. It submitted that it had discovered that Judge Schwebel had previously represented an investor in an arbitration involving similar claims against Poland, also under a BIT (the *Cargill* case).<sup>11</sup> According to Poland, this fact raised doubts about Judge Schwebel's independence and impartiality. Poland also alleged that not only had these facts not been disclosed to the parties, but also that there had in fact been an attempt to hide them from Poland.

As Judge Schwebel refused to step down, Poland initiated a challenge procedure before the Court of First Instance of Brussels in accordance with Article 1691.2 of the Belgian Judicial Code. In the court proceedings, Judge Schwebel argued that he had not been involved in the *Cargill* case as asserted by Poland and that his office in Washington was independent from that of Cargill's counsel, the law firm Sidley Austin. Poland, on its side, relied both on press releases issued by Sidley Austin and on an online publication (the *American Lawyer's Focus Europe*) in which Judge Schwebel was referred to as a member of the team representing Cargill in its claims against Poland. Judge Schwebel argued that this information was erroneous and had subsequently been rectified.

On 23 December 2006, the Court of First Instance rendered a decision by which it rejected Poland's challenge application. The court ruled that it had not been established that Judge Schwebel had been involved in the *Cargill* case. The fact that Judge Schwebel had his office in the same building as Sidley Austin was not considered to be a circumstance that gave rise to justifiable doubts about Judge Schwebel's independence and impartiality.

Poland filed an appeal against the judgment rendered by the Court of First Instance of Brussels. In its decision, the Court of Appeal of Brussels rejected the appeal, expressly addressing and accepting one of Eureko's arguments based on the IBA Guidelines. The court held that '[r]ightly, Eureko BV points out that the IBA (International Bar Association) Guidelines indicate that if such ties relied upon by the Republic of Poland exist but have not been disclosed, this fact as such does not automatically lead to a disqualification. Only the facts or circumstances by themselves which were not disclosed can have that effect (see: IBA Guidelines on Conflicts of Interest in International Arbitration, Annex 12, p

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11 ICSID Case No ARB/04/2, *Cargill, Incorporated v Republic of Poland*.

367-368), which is not the case at hand'.<sup>12</sup>

### *England*

The High Court's judgment in *ASM Shipping Ltd of India v TTMI Ltd of England*<sup>13</sup> remains to date the only reported decision of an English court which refers to the IBA Guidelines. In that case, the court was however not invited by the parties to rely on a particular provision in the IBA Guidelines, but rather to draw inferences from the non inclusion in the IBA Guidelines' various lists – in particular the Red List – of the facts alleged to have caused a bias on the part of one of the arbitrators.

The decision, dated 19 October 2005, deals with an application to set aside an arbitral award on the ground of serious irregularity pursuant to section 68 of the Arbitration Act 1996. The application arose out of a maritime arbitration in which the third arbitrator, who was appointed by the other two arbitrators, was challenged during the arbitration hearing by the applicant on the ground of apparent bias. The main facts giving rise to the applicant's objection were: (i) the arbitrator had previously been instructed by the respondent's solicitors in another arbitration involving different parties but the same principal fact witness; (ii) in that arbitration, there were serious allegations made against the same principal fact witness in relation to the disclosure process, which the arbitrator was involved in as counsel.

The arbitrator refused to step down, considering his involvement in the previous matter as being irrelevant to the proceedings in which he was now sitting as an arbitrator. The tribunal thereafter rendered an award which the applicant sought to set aside on the ground of serious irregularity pursuant to section 68 of the Arbitration Act 1996.

In determining the application, the court discussed what test should apply when determining whether apparent bias of an arbitrator exists. The court held that the issue at stake was whether, on the facts, there was a real possibility of bias of the arbitrator. If so, this would constitute a 'serious irregularity'. The court had to consider whether in this particular instance the arbitrator had crossed the bias threshold so as to warrant setting aside

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<sup>12</sup> Working translation, original in French: 'A juste titre EUREKO BV souligne que les instructions de l'IBA (International Bar Association) indiquent que si des liens tels qu'invoqués par la République de Pologne existent mais ne sont pas divulgués, cette circonstance comme telle ne doit pas conduire automatiquement à une récusation. Seul les faits ou circonstances en soi qui n'ont pas été divulgués peuvent avoir cette conséquence (voir: Directives de l'IBA sur les conflits d'intérêts dans l'arbitrage international, annexe 12, p 367-368) - ce qui n'est pas le cas en l'espèce comme il a été exposé ci-devant'.

<sup>13</sup> *ASM Shipping Ltd of India v TTMI Ltd of England*, [2005] EWHC 2238 (Comm) (19 October 2005).

the partial award.

In its reasoning, the court stated that '[i]t is true that in specialist arbitrations prior contact between parties and their lawyers and arbitrators is to be expected. The mere fact, for example, that a person selected as arbitrator had previously had a trade dispute with one of the parties would not thereby have caused an objectionable situation. But even in such a case, much would depend on the facts'. However, the court went on to conclude that there was a real possibility of bias in this case and that the arbitrator should not continue to act in the proceedings. The court cited the following facts in support: 'The nature of the allegations [against the principal witness]; the pattern of them; the involvement of the same solicitors; [the arbitrator's] involvement in the disclosure process a short time before sitting as an arbitrator in judgment on the alleged dishonest party'.

In reaching its decision, the court addressed an argument by the respondent suggesting that no serious irregularity could have existed because the facts alleged to have given rise to a serious irregularity did not fall within the situations identified in the IBA Guidelines' Red List. The court held that '[t]he IBA guidelines do not purport to be comprehensive and as the Working Party added "nor could they be".' According to the court, the Guidelines are to be 'applied with robust common sense and without pedantic and unduly formulaic interpretation'.

#### *Germany*<sup>14</sup>

In Germany, the Higher Regional Court of Frankfurt am Main rendered a decision on 4 October 2007 regarding a challenge to the chairman of one tribunal under the auspices of the German Institution of Arbitration (DIS) in a case where EU competition law issues were in discussion.<sup>15</sup>

The crux of the challenge was based on the fact that the chairman of the arbitral tribunal was a member of the board of the DIS and one of three co-editors of a publication (*the DIS series*) and that, in that quality, he had co-signed the preface of the issue of *the DIS series* published in September

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14 Abstract based on Scherer, *supra* note 11 at 11-12.

The Higher Regional Court of Frankfurt am Main has also cited the IBA Rules of Ethics for Arbitrators in its decision in Case No 26 Sch 21/07 (10 January 2008): 'Verletzt ein Schiedsrichter seine Offenbarungspflicht, kann sich daraus wiederum ein Grund für seine Ablehnung ergeben, sofern der Verstoß für sich bereits Zweifel an seiner Unparteilichkeit weckt (Münch a a O, Rdn 12; Baumbach/Lauterbach/Albers/Hartmann, ZPO, 68. Aufl., § 1036 Rdn 2; Lachmann a a O, Rdn 618; ebenso Art 4.1 der IBA Rules of Ethics of international Arbitrators, vgl Weigel, MDR 1999, 1360, 1362).'

15 Higher Regional Court of Frankfurt am Main, Case No 26 Sch 8/07 (4 October 2007), Summary in English available at [www.kluwerarbitration.com](http://www.kluwerarbitration.com) and full text in German at [www.lareda.hessenrecht.hessen.de](http://www.lareda.hessenrecht.hessen.de).

2006 dedicated to EU competition law and arbitration. In that particular issue there was a text reproducing a speech delivered by the respondent's counsel at a conference which was organised precisely by the DIS.

In particular, this speech expounded on the topic of arbitrators' powers under Articles 81 and 82 of the EU Treaty and in particular on the question of whether arbitral tribunals are required to investigate alleged violations of EU competition law, possibly with the assistance of the EU Commission. In both the speech and the publication, respondent's counsel advocated that arbitral tribunals are not required to investigate alleged EU competition law violations.

After the publication of *the DIS series* containing the speech of respondent's counsel, in January 2007 the arbitral tribunal informed the parties that it intended to close the evidentiary proceedings without ordering further investigations on the parties' compliance with EU competition law. The claimant alleged that only shortly thereafter it became aware of the respondent's counsel's speech and of its subsequent publication.

In the applicant's view, the respondent's counsel had addressed in the speech the very facts that were contentious in the arbitration. These circumstances were alleged to indicate that by co-signing the preface, the chairman of the tribunal had condoned the content of the article. The applicant argued that the situation was similar to that contemplated by paragraph 3.5.2 of the Guidelines, whereby the fact that an 'arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper, a speech or otherwise' may give rise to justifiable doubts as to his or her impartiality or independence and would require an arbitrator to step down if faced with such circumstances.

The Higher Regional Court of Frankfurt rejected the challenge holding that there was no evidence whatsoever that the chairman had publicly advocated a specific legal position in the discussion. The court found that he had not attended the conference where the speech had been delivered and had not even read the paper authored by the respondent's counsel before it was published in *the DIS series*. The court held that it was not unusual that one or several editors of a scientific journal would not be aware of all the contributions to a given issue, even if, as was the case here, he co-signed the preface of the issue. In any event, the mere fact that an academic journal published an article did not mean that the editor(s) condoned the views expressed therein, reasoned the court.

Faced with such circumstances, the court concluded that a reasonable party could not draw the conclusion that the arbitrator lacked impartiality in the instant case, even if the article discussed an ongoing case. Whether

the published speech did or did not discuss the case was therefore irrelevant according to the court. Moreover, it was noted that the claimant had not established that the chairman of the tribunal had decided to put an end to the evidentiary proceedings after having read the article in question. The claimant had also failed to establish that the chairman had any knowledge whatsoever of the content of the speech delivered by the respondent's counsel or of its subsequent publication.

The court left open the question of whether a failure to disclose a relevant circumstance could give rise to legitimate doubts about an arbitrator's impartiality because, in the present case, there was simply no disclosure obligation: it had not been established that the arbitrator had publicly advocated a specific position in the discussion. A violation of paragraph 3.5.2 of the IBA Guidelines was therefore not demonstrated.

Despite its express reliance on the IBA Guidelines to reach its decision, the Frankfurt court did not grapple with the key question of what relevance the IBA Guidelines may have, or should have, in challenges before municipal courts.

#### *Netherlands*

On 18 October 2004, the District Court of the Hague issued a decision in a case in which it was called on to decide on the applicable standard for assessing the impartiality of a party-appointed arbitrator. The case dealt with an investment arbitration.<sup>16</sup> Both parties had submitted arguments to the court relying on the IBA Guidelines, with one party relying on General Principle 2 and the other on paragraph 4.1.1 of the Green list.

According to the petitioner, the challenge of the arbitrator – Professor Gaillard – was warranted because the case at hand dealt with identical legal issues to those arising in an ICSID annulment proceeding in which Professor Gaillard was simultaneously acting as counsel – *RFCC/Morocco* case – as had been disclosed to the parties by Professor Gaillard himself.

In particular, it was argued that Professor Gaillard had adopted a position adverse to the petitioner precisely because he was representing an investor in the ICSID annulment proceedings. Relying on the IBA Guidelines, the petitioner argued that Professor Gaillard, 'who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgment of that same notion or approach in a case in which he acts as an arbitrator.'

The petitioner relied inter alia on General Principle 2 of the IBA Guidelines, according to which doubts are justifiable if a reasonable and informed third

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<sup>16</sup> District Court of The Hague, Challenge No 13/2004, Petition No HA/RK/2004.667 (18 October 2004), *Republic of Ghana v Telekom Malaysia Berhad*, 23 ASA Bull 186 (2005).

party would reach the conclusion that there would be a likelihood that the arbitrator in reaching his or her decision might be influenced by factors other than the merits of the case as presented by the parties.

The defendant argued, to the contrary, that Professor Gaillard's disclosure concerned 'a circumstance which according to Article 4.1.1 of the "Green list" of the IBA Guidelines did not require disclosure.' It argued also that 'Article 4.1.1 after all states that 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).'

The court confirmed the appearance of partiality and decided to uphold the motion challenging Professor Gaillard unless he expressly and without reserves would notify the parties of his resignation from his role as counsel in the ICSID annulment case. According to the court, even if this arbitrator was able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings filed against the *RFCC/Morocco* award, account should in any event be taken of the appearance of him not being able to observe such distance. Since he had to play these two roles, it was held that it would be impossible for him to avoid giving the appearance of not being able to keep these two roles strictly separated.

The District Court of the Hague however reached its conclusion without addressing the competing arguments based on the IBA Guidelines put forward by each party. Instead, the court relied on Dutch law: 'In examining a plea of absence of impartiality or independence of an arbitrator within the meaning of Article 1033 of the Code of Civil Procedure, it has to be assumed that an arbitrator may be challenged if from an objective point of view – ie, as a result of facts and circumstances – justified doubts exist with respect to his impartiality or independence. The analysis of whether there are sufficient grounds for a challenge should also take account of outward appearance.'

### *Sweden*

In 2006, the Svea Court of Appeals, and later the Swedish Supreme Court, were seized with an application by Mr Anders Jilkén to set aside an award rendered in a dispute against his former employer, Ericsson AB. Arbitral proceedings with seat in Stockholm had been initiated by Mr Jilkén after Ericsson had terminated his employment contract in 2002.

Former Supreme Court Justice Johan Lind was appointed jointly by the party-appointed arbitrators Professor Bert Lehrberg and Mr Ingvar Gunnarson to serve as the chairman of the arbitral tribunal. The tribunal rendered an award on 7 June 2004 in which it dismissed Mr Jilkén's claims.

In September 2004, Mr Jilkén sought to set aside the award before the Svea Court of Appeal and petitioned the same court for an interim order preventing Ericsson AB from enforcing the award against him. In a decision dated 4 October 2004, the Svea Court of Appeals issued an interim order preventing the enforcement of the award by Ericsson AB.

In the setting aside proceedings before the Svea Court of Appeals, Mr Jilkén submitted that after the conclusion of the arbitral proceedings, he had become aware *inter alia* that the law firm with which Mr Lind normally shared offices had represented the Ericsson group in other matters. He argued that Mr Lind was linked to Mannheimer Swartling Advokatbyrå as a consultant with the task of providing legal advice to the lawyers of the firm. Mannheimer Swartling Advokatbyrå, in turn, had a considerable number of mandates from the Ericsson Group, including from Ericsson AB (Mr Jilkén's opposing party in the arbitration proceedings). In particular, Mr Lind had personally given advice to the Ericsson Group by means of two legal opinions.

Mr Jilkén argued that these facts raised doubts about Mr Lind's impartiality under section 8 of the Swedish Arbitration Act. Mr Jilkén further argued that, pursuant to section 9 of the Swedish Arbitration Act, the chairman of the tribunal had to disclose that the Ericsson group was a client of the law firm Mannheimer Swartling Advokatbyrå and that a failure to do so was in itself a circumstance calling Mr Lind's impartiality into question.

In its final judgment dated 5 May 2006, the Svea Court of Appeals<sup>17</sup> dismissed Mr Jilkén's application to set aside the award and withdrew its previous interim order prohibiting enforcement of that award. The Svea Court of Appeals held that the facts were not sufficient to justify a loss of confidence in the chairman's impartiality under section 8 of the Swedish Arbitration Act. To arrive at this conclusion, the court conducted an in-depth analysis of the relationship between the chairman and the law firm in question. The court considered that Mr Jilkén was correct to assert that the chairman had not fulfilled his obligation to disclose circumstances which might prevent him from sitting as an arbitrator in the case. Nonetheless, the court found that, in the case at hand, the failure to disclose did not in itself amount to a circumstance which showed the chairman's lack of impartiality. Considering the relevance of the case however, the Svea Court of Appeals granted leave to appeal its decision pursuant to section 43 of the Arbitration Act, and Mr Jilkén ultimately appealed to the Swedish Supreme Court.

In the arguments put forward before both the lower court and on appeal before the Supreme Court, the applicant appears to have relied on the IBA

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<sup>17</sup> Svea Court of Appeals, Case No T 6875-04 (5 May 2006), *Anders Jilkén v Ericsson AB*, available in Swedish at: [www.kluwerarbitration.com/document.aspx?id=ipn80980](http://www.kluwerarbitration.com/document.aspx?id=ipn80980).

Guidelines, though this is not explicitly stated in the Svea Court ruling. In his appeal, Mr Jilkén submitted a statement issued by the Arbitration Institute of the Stockholm Chamber of Commerce in support of his arguments. In the statement, the Arbitration Institute set out that on the basis of its own rules as well as the IBA Guidelines, it would most probably have found that there was a conflict of interest and that the arbitrator would not have been considered impartial. In the Institute's opinion, there was, in this context, no reason to distinguish between a law firm and the lawyers employed by the law firm.

The Swedish Supreme Court overturned the Svea Court of Appeals decision on 19 November 2007, relying on the IBA Guidelines.<sup>18</sup> The Supreme Court decided that the award should be set aside, holding that '[a]t least when, as in the present case, the relationship between the law practice and the client is of commercial importance to the law practice, it must be considered that the bands of interests and loyalties between the partners of and lawyers employed in the law practice, on the one hand, and the client, on the other, constitute a circumstance that may diminish confidence in the impartiality of an arbitrator employed at the law practice, when the client is a party to the arbitration (cf Lindskog, *Skiljeförfarande (Arbitration)*, 2005, p 453 note 63). Such a conclusion finds support in the IBA Guidelines and in case-law from the Arbitration Institute of the Stockholm Chamber of Commerce. A relationship that impairs confidence must be deemed to exist even if the arbitrator himself did not have direct client contact with the party, the arbitration work was conducted separately from the work as a lawyer or the arbitration dispute concerned matters other than those normally included in the engagement for the client.'<sup>19</sup>

The Swedish Supreme Court held that the circumstances mentioned by the lower court as to Mr Lind's contract, tasks and position within the law firm did not justify any differentiation from an employee of the firm. The court conducted an objective analysis, as opposed to an analysis of the risk that Mr Lind himself would be influenced by his relationship with the Ericsson Group in the particular case in question.

In another case, the Svea Court of Appeals has also relied on the IBA Guidelines. In a judgment rendered on 10 December 2008 in *Korsnäs Aktiebolag v AB Fortum Värme samägt med Stockholms stad*,<sup>20</sup> the claimant had sought to set aside an arbitral award rendered by a tribunal composed by

18 Swedish Supreme Court, Case No T 2448-06 (19 November 2007), *Anders Jilkén v Ericsson AB*, 5 *Stockholm Int'l Arb Rev* 167 (2007).

19 *Ibid*, 174.

20 Unpublished. Reported in Karl-Erik Danielsson & Björn Tude, 'Sweden: Two different arbitration cases – The role of the IBA Guidelines on conflicts of interest in international arbitration in Sweden', 28 *Int'l Fin L Rev* 33 (April 2009).

inter alia a well known Swedish arbitrator who had been appointed by the respondent. According to the claimant, and applicant in the setting aside proceedings, the arbitrator allegedly did not meet the minimum requirements of impartiality required under Swedish law.

According to the applicant, the annulment of the award would be warranted as respondent's appointed arbitrator had been repeatedly appointed by respondent's law firm: three appointments in three years. It was also alleged that in addition to these appointments as party-appointed arbitrator, the same individual had been twice appointed to chair tribunals where respondent's law firm was representing one of the parties and, as a result, the firm had also appointed one of his co-arbitrators in each of the cases.

According to the court, '[During] the three-year period preceding the appointment as arbitrator in the arbitration between Fortum and Korsnäs, [the party-appointed arbitrator] has on two occasions been appointed as arbitrator by a party represented by counsels from [the law firm in question]. Since the application of the IBA Guidelines presumes that an arbitrator during the stated time period has received more than three appointments, ie, at least four appointments, from the same counsel or the same law firm, the necessary requirements are not met in order to consider disqualified [the party-appointed arbitrator] as an arbitrator in the dispute between Fortum and Korsnäs on account of such rules.'

Thus, it appears that the Svea Court of Appeals dismissed the applicant's lack of impartiality argument as well as the setting aside application exclusively on the basis of the 'four-appointments criterion' in the Guidelines.<sup>21</sup>

### *Switzerland*<sup>22</sup>

The Swiss Federal Supreme Court has referred to the IBA Guidelines in a decision of 20 March 2008. Paragraph 4.4.1 of the Green List was under discussion regarding membership of professional organisations. The Federal Supreme Court held that the IBA guidelines are 'a valuable working tool to contribute to the uniformisation of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions

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21 Since this decision is reported to have been appealed, the publication of the Supreme Court decision should be expected in 2010.

22 Abstract based on Scherer, *supra* note 11 at 5-11.

administering arbitration proceedings'.<sup>23</sup>

The dispute arose out of a contract concluded between a Swiss marketing executive and the Turkish Football Federation. It related to the organisation of, and TV rights to, five friendly football matches which were to take place prior to the 2006 World Cup in Germany. The parties had agreed in the contract to submit any dispute to the Court of Arbitration for Sport (CAS)

The games took place as agreed. Nonetheless, they attracted a far smaller audience than had been expected by the Swiss organiser. According to the organiser, the Turkish Football Federation had breached the contract by allowing a TV network to broadcast the games live. The organiser initiated arbitration proceedings against the Federation before the CAS. The Turkish Football Federation designated Mr B as its party-appointed arbitrator and subsequently appointed external counsel, Mr C, to represent it before the CAS. The two party-appointed arbitrators nominated Mr P as chairman of the arbitral tribunal.<sup>24</sup>

Following the dismissal of his claims by the CAS, the Swiss organiser filed an appeal with the Swiss Federal Supreme Court requesting the annulment of the award on the grounds, inter alia, of the irregular composition of the arbitral tribunal. The Swiss organiser (claimant) submitted that after the issuance of the award he had discovered by chance that the arbitrator appointed by the Turkish Football Federation (Mr B), the chairman, (Mr P), and the Turkish Football Federation's counsel, Mr C, all belonged to a professional organisation called 'Rex Sport',<sup>25</sup> which was composed of 26 members and the website of which was protected by a secret access code. Yet the arbitrators in question had not disclosed this information in their declaration of independence. The claimant requested that the Federal Supreme Court annul the award and appoint two other independent arbitrators.

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23 Swiss Federal Supreme Court, Case No 4A\_506/2007 (20 March 2008), 26 *ASA Bull* 575 (2008): 'elles n'en constituent pas moins un instrument de travail précieux, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts (Berger/Kellerhals, op cit, n 734 in fine), lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux (Kaufmann-Kohler/Rigozzi, op cit, n 374).'

24 According to the summary of the judgment in *Global Arbitration Review (GAR)* of 23 May 2008, the arbitrator appointed by the Turkish Football Federation was Mr Efram Barak, and the chairman Mr José Juan Pintó Sala. The publication of the judgment on the Supreme Court's webpage [www.bger.ch](http://www.bger.ch) does not identify the names of the arbitrators and parties.

25 According to the summary in *GAR*, see above.

The Swiss Federal Supreme Court rejected the challenge.<sup>26</sup> It held that the claimant had foregone its right to challenge the independence and impartiality of the two arbitrators. Indeed, the jurisprudence of the court clearly provides that any challenge to arbitrators must be made forthwith, as soon as a party has learnt of the relevant facts, or could reasonably have been expected to be aware of them. The court found that had the claimant performed a proper due diligence when he was informed of the identities of the arbitrators, the existence of the link between the chairman and the arbitrator appointed by the other party would easily have been discovered. Indeed, on the chairman's profile on his law firm's website, his position as president of Rex Sport was clearly mentioned.

'In the circumstances, and given the size of the claim, which was in excess of €1 million, the importance of the choice of the arbitrators could not reasonably have escaped the claimant. The most basic prudence therefore dictated that the claimant had to make enquiries to ensure that the arbitrators who were called to decide his claim offered sufficient guarantees of independence and impartiality. He could not limit his enquiries to the general statement of independence that every arbitrator provides on an ad hoc disclosure form. The publicly available information on [Mr P's] webpage clearly mentions that he was the president of [Rex Sport]. In light of this information, the claimant at the very least could have been expected to conduct further enquiries into the nature and membership of the organisation, and in particular to ask himself if other members of the panel, and even the counsel to the opponent, were also members. Such an investigation would not have been overly time-consuming.

This is borne out by the fact that the claimant was able to perform the investigation in the 30 days that followed his receipt of the tribunal's award. The password protecting the webpage of [Rex Sport] did not prevent him from accessing the association's website. Even if he had been prevented from accessing the site, he could have made enquiries directly with the arbitrators regarding their possible affiliation with the association. The claimant also had access to other, unprotected sources, including the website of the law firm of which [Mr P] was a partner. The claimant had even produced a newsletter printed from that website, which reported on the general assembly of Rex Sport, presided over by [Mr P] and conducted in the presence of other persons including Mr C [counsel to the Turkish Federation]. In the circumstances, the

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<sup>26</sup> Swiss Federal Supreme Court, Case No 4A\_506/2007 (20 March 2008), 26 *ASA Bull* 565 (2008).

claimant has lost his right to argue that the arbitral tribunal was not properly constituted, either because he knew already shortly after the appointments of the arbitrators of the ground for challenge he then invoked before the Federal Supreme Court, or because he should have known about it by exercising the diligence that could be expected of him in the circumstances.’<sup>27</sup>

The Federal Supreme Court went on to explain that even if the claimant had not foregone his right to challenge the impartiality and independence of the arbitrators, the challenge would have been dismissed for lack of merits.

The claimant had argued that the 26 members of Rex Sport systematically appointed each other as arbitrators in the cases in which they were involved. Moreover, the claimant had asserted that Mr P was also the founder of a company which was in competition with the claimant’s own company. This latter argument was flatly rejected by the court since the claimant failed to establish the purported competition between the activities of the two companies.

With regard to the affiliation of the two arbitrators and the Turkish Federation’s counsel, the court ruled that they did not need to be disclosed. In its reasoning on this point, it referred to the IBA Guidelines, and stated that, in line with paragraph 4.1.1, such a social and professional relationship between the arbitrators and the party’s counsel was not likely to give rise to an objective doubt with respect to the impartiality of the arbitral tribunal.<sup>28</sup> The court noted in particular that this guideline reflects the ‘principles set forth by the case law of the Federal Supreme Court in consideration of the peculiarities of international arbitration in the area of sport.’

In this respect, the Federal Supreme Court referred to, but did not defer to the IBA Guidelines:

‘In order to verify the independence of their arbitrators, the parties can also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 [citations omitted]. Certainly, the Guidelines do not have force of law, yet constitute a valuable working tool to contribute to the uniformization of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions administering arbitration proceedings. The Guidelines state general principles. They also contain a non-exhaustive list of particular circumstances. A red list, divided in two parts (circumstances where a legitimate doubt as to the independence and impartiality exists and where the parties cannot waive the most serious

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<sup>27</sup> *Ibid*, para 3.2, working translation. Original in French, 26 *ASA Bull* 565 (2008).

<sup>28</sup> Para 4.4.1 of the Green List reads: ‘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 organization.’

among them); an orange list (intermediate situations of circumstances that have to be disclosed but do not necessarily justify a challenge); a green list (situations that objectively do not constitute conflicts and that do not need to be disclosed by the arbitrators). It goes without saying that irrespective of the existence of such lists, the circumstances of each case will always be decisive in order to determine whether there is a conflict of interest'.<sup>29</sup>

The court noted that the circumstances in the case at hand, in other words, the relationship between an arbitrator and another arbitrator or counsel in the framework of a professional association or socially, is precisely akin to the situation described in paragraph 4.1.1 of the Green List. The court found that '[a]s a result, this [professional relationship] was not in itself sufficient to ground a request for challenge of the independence of the arbitrators, and it did not oblige the arbitrators who are a member of the association [Rex Sport] to mention their membership in their respective declarations of independence.' On this point, the Guidelines reflect the case law of the Federal Supreme Court addressing the particularities of international sport arbitration (Federal Supreme Court Decisions 129 III 445 paragraphs 3.3.3 and 4.2.2.2, confirmed in SCD 4P.105/2006 of 4 August 2006, paragraph 4).

Therefore, only additional circumstances could have led to a different appreciation of the situation before the Federal Supreme Court. The claimant argued that there were indeed such circumstances, namely the secretive and opaque nature of the association, the aim of which was the furtherance of its members' interests in international sport arbitration, especially in the framework of CAS proceedings. The claimant also referred to the data he had compiled purportedly showing that members of Rex Sport systematically appointed co-members as arbitrators.

The court found that there was insufficient data to allow for any conclusions to be arrived at on that question. It also noted that in the case at hand, the arbitrator had been nominated before counsel was appointed. Moreover, even if the members were indeed designating each other, this would not necessarily be a relevant factor to judge their independence and impartiality as arbitrators. The court referred to its precedent, 129 III 445 paragraph 4.2.2.2., and cases quoted therein. It ruled that there is a presumption that the members of an arbitral tribunal are capable of seeing past the circumstances of their designation when they are called to render a specific decision in the exercise of their mandate.

In an *obiter dictum*, the court hinted that the outcome may have

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<sup>29</sup> Swiss Federal Supreme Court, Case No 4A\_506/2007 (20 March 2008), para 3.3.2.2. (working translation), 26 *ASA Bull* 565 (2008).

been different if the data the claimant produced had shown systematic cross-appointments among the association's members and that arbitral tribunals comprising a member of the association systematically decided in favour of the party represented by another member. Had this been the case, there may indeed have been objective doubts as to the independence of the arbitrators.

As to the purportedly secretive nature of the association, the Federal Supreme Court once again noted that the claimant's own evidence showed that the challenged arbitrator had no intention of keeping his affiliation secret. The requirement of a password to visit the association's webpage did not prevent the claimant to gain access to it, and was by no means a peculiarity, since many other organisations, such as the Swiss Arbitration Association (ASA), restrict access to certain content on their websites to their members.

In a decision handed down only a few days after its decision in the case involving the Swiss marketing executive and the Turkish Football Federation, the Federal Supreme Court dealt with another challenge that was based on the same ground, ie, membership in the sport association Rex Sport.<sup>30</sup>

In this case, unlike what occurred in 4A\_506/2007, the period for filing a request to set aside the award had lapsed by the time the claimant had become aware of the relevant memberships. The only remedy left was therefore an application for review,<sup>31</sup> raising the question of whether the alleged improper composition of the arbitral tribunal was a ground for review. The court left the latter question open. It found that the application could in any event not be admitted.

The Federal Court held that parties to arbitration proceedings have to take reasonable steps to identify possible conflicts of the arbitrators ('Es obliegt ihnen, die ihnen zumutbaren Abklärungen zeitgerecht

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30 Swiss Federal Supreme Court, Case No 4A\_528/2007 (4 April 2008), 26 *ASA Bull* 580 (2008). According to *Global Arbitration Review* of 23 May 2008, the parties were Saudi Arabian football club Al Ittihad (claimant), which had lost a CAS arbitration over a failed transfer bid for a player, and the Brazilian team Vitória (respondent). The CAS tribunal was composed of Jan Paulsson (France) (President), Luigi Fumagalli (Italy) (appointed by the claimant), and José Juan Pintó Sala (Spain) (appointed by the respondent). The claimant took issue with the fact that both José Juan Pintó Sala and respondent's counsel were members of Rex Sport.

31 In addition to the statutory remedy of a request to set aside an arbitral award on the limited grounds of Article 190 PIL Act, the Federal Supreme Court's case law affords another, even more extraordinary remedy: the review or revision (*révision*) of an award can be requested in case of crimes having had an impact on the outcome of the proceedings, or new evidence not yet available at the time of the proceedings. An application for review can be filed even after the time limit for lodging a request to set aside the award (30 days from notification) has expired.

vorzunehmen, um allfällige Ausstandsgründe zu erkennen'). A party that fails to undertake such reasonable verifications cannot argue that it has discovered an arbitrator conflict, a ground that might justify a challenge of an arbitrator, once the time limit for challenging the award has expired. At this stage the court refers to the above-mentioned judgment of 20 March 2008 in 4A\_506/2007, dealing with paragraph 4.4.1 of the IBA Guidelines. The ground for challenging an arbitrator could only form the basis of a request for review if it could not have been discovered in the arbitration.<sup>32</sup> The Federal Court found that even minimal diligence would have permitted the claimant to become aware that both of the counsel to the respondent and the respondent's arbitrator were members of Rex Sport. Indeed, the letterhead of the Brazilian counsel and each page of every submission to the arbitral tribunal carried the association's logo and the word 'member'. The arbitrator's affiliation and presidency of the association was mentioned on the easily accessible webpage of the CAS.<sup>33</sup> Had the claimant really not been aware of these circumstances already during the arbitration, it was due to its own negligence. Consequently, the claimant forfeited its right to rely on the circumstances to request a review of the award.

#### USA

The extent to which US courts have relied on the IBA Guidelines to provide a reliable standard to interpret the 'evident partiality' notion under the Federal Arbitration Act (FAA) appears to remain as controversial an issue as the definition of the standard of 'evident partiality' itself.

Two decisions rendered in the *Aimcor* case, one by a Federal District Court<sup>34</sup> and another by the Second Circuit Court of Appeals,<sup>35</sup> are a good illustration of the unsettled nature of this discussion. In this case, whereas the reasoning followed by the lower court was to establish the proper standard of disclosure of an arbitrator by reference to the IBA Guidelines, the appellate court however adopted a different standard of disclosure from that set out in the IBA Guidelines, despite citing the relevant IBA Guidelines when referring to the lower court decision.

The facts of the *Aimcor* case are the following: the parties had formed

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32 For a discussion of the very different approaches taken by Swiss and French Courts regarding the arbitrators' duty to disclose and the parties' duties to investigate, see Philippe Schweizer, 'Récusation d'arbitre', 27 *ASA Bull* 520 (2009).

33 [www.tas-cas.org/arbitreslistegen](http://www.tas-cas.org/arbitreslistegen)

34 *Applied Industrial Materials Corp v Ovalar Makine Ve Ticaret Sanayi*, Case No 05 CV 10540 (RPP), Not Reported in F.Supp.2d, 2006 WL 1816383, SDNY, (28 June 2006).

35 *Applied Industrial Materials Corp v Ovalar Makine Ve Ticaret Sanayi*, 492 F.3d 132, C A 2 (N Y) (9 July 2007).

a joint venture according to which Aimcor was to purchase and transport to Turkey petroleum coke, whereas Ovalar was to distribute and sell it in Turkey. The relationship turned sour in 1997 and, pursuant to a Submission Agreement, an arbitral tribunal was constituted to resolve a dispute between the parties over rights to profits. The party-appointed arbitrators jointly selected as chairman of the tribunal the CEO of a company – Mr Fabrikant – whom, pursuant to the requirements set out in the Submission Agreement, submitted his formal unqualified disclosure to the parties at the outset of the proceedings, subject to possible future clarifications.

During the arbitration proceedings, however, Aimcor was sold to another company, Oxbow. The chairman of the tribunal subsequently disclosed that one of the offices of his company was negotiating with Oxbow, adding that he had not personally been engaged in the discussions with Oxbow and that he would not do so in the future. No subsequent disclosures were made and the tribunal issued a partial award in favour of Aimcor on the basis of a two-to-one majority, with the chairman casting the decisive vote.

Later, Ovalar discovered that one of offices of the chairman's company had been engaged in a business relationship with Oxbow which had not been disclosed, and therefore requested that the chairman step down. The chairman however refused to step down and Aimcor filed for confirmation of the partial award in US courts, whereas Ovalar filed for its vacation as well as for the removal of the chairman from the panel.

The case raised the question of whether the standard of 'evident partiality' as a ground for vacating an arbitral award under section 10(a)(2) of the FAA is met if an arbitrator failed to disclose a commercial relationship between his company and one of the parties. The issue in question was, therefore, the standard of disclosure imposed on an arbitrator under the FAA.

The District Court issued an Order denying confirmation of the award, and that Order was affirmed by the Court of Appeals. However, the Court of Appeals did not follow the same analysis as the lower court in reaching its decision. The Court of Appeals held that the absence of actual knowledge 'is not dispositive of evident partiality', nor is subjective good faith the test to be applied: an arbitrator will be disqualified only 'when a reasonable person would have to conclude that an arbitrator was partial to one side.'

The District Court had applied a test of 'appearance of partiality'. According to the Court of Appeals however, this was too low a standard. Instead, the Court of Appeals held that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must investigate the conflict or disclose his reasons not to investigate it: 'not doing any of the two is indicative of evident partiality.'

In the Court of Appeals' opinion, it followed that, in the case at hand,

a reasonable person would have to conclude that evident partiality existed since the arbitrator – being under an express obligation to disclose conflicts under the Submission Agreement and having previously assured the parties that he intended to comply with that obligation – failed to investigate the contract discussions between his company and one of the parties to the arbitration or, alternatively, disclose that no further inquiries into that relationship would be carried out.

In construing the obligation to disclose, the lower court had held that ‘reason dictates that there must be a continuous obligation on the part of the arbitrator to avoid partiality or the appearance of partiality’. The ‘reason’ alluded to was drawn mainly from an analysis of the content of the IBA Guidelines. The Court of Appeals however considered that the continuous obligation to disclose had its source in the mere fact that the arbitrator was aware of the conflict of interest, and not in the fact that he had accepted the appointment as an arbitrator. As such, the Court of Appeals expressed a more restrictive view. Whereas the lower court had recognised a general continuous duty to disclose, the Court of Appeals appeared to require continuous disclosure only if the arbitrator becomes aware<sup>36</sup> of the conflict of interest.

As to the role of the IBA Guidelines before US courts, the Court of Appeals decision in the *Aimcor* case was not an isolated instance of a US court refusing to rely on the IBA Guidelines despite the fact that the parties before it had explicitly referred to the Guidelines. In proceedings relating to an ICC arbitration in *HSN Capital LLC (USA) v Productora y Comercializador de Televisión SA de CV (Mexico)*,<sup>37</sup> a US District Court in Florida also refused to follow the respondent’s express reliance on the IBA Guidelines’ provisions when rendering its decision on a case dealing with a failure to disclose a purported ‘substantial friendship’ between an arbitrator and one of the parties’ counsel in the arbitration.

The facts of the *HSN Capital* case were as follows. In 2001, HSN and PCTV entered into an Affiliation Agreement on the basis of which HSN initiated arbitration the following year against Productora y Comercializador de Televisión SA (PCTV) under the ICC Rules. The parties jointly agreed to nominate David Griffiths as chairman of the tribunal. However, Mr Griffiths subsequently withdrew from the tribunal on medical grounds.

The ICC then appointed David R Haigh to replace Mr Griffiths. Mr Haigh

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36 Not just by implication, this difference is mirrored in a more express way in the very *dicta* of the decision ‘[o]nce the arbitrator was aware that a nontrivial conflict of interest might exist, the calculus changed’.

37 *HSN Capital LLC (USA) v Productora y Comercializador de Televisión SA de CV (Mexico)*, 2006 WL 1876941 (M D Fla) (5 July 2006).

completed the ICC independence statement and attached a letter in which he disclosed a professional relationship with PCTV's counsel, José Abascal and Luis Enrique Graham Tapia. Indeed, he disclosed that all three had served on a NAFTA committee several years prior to the arbitration. Haigh stated that he believed that these links to Messres Abascal and Tapia would not interfere with his impartiality. In the meantime, another counsel, Mr José Astigarraga, joined the team representing PCTV. HSN made no objections throughout the arbitration to Mr Haigh's continued service as chairman of the tribunal.

The tribunal rendered its award on 3 June 2005, dismissing HSN's main claims and upholding the counterclaims of PCTV, awarding it monetary damages, attorneys' fees and costs. On 14 September 2005, HSN wrote a letter to the ICC seeking the disqualification of Mr Haigh due to his undisclosed conflicts of interest with Mr Astigarraga. On 24 October 2005, the ICC issued a ruling rejecting both HSN's challenge request to disqualify Mr Haigh and the co-arbitrators as well as its request to set aside the final award.

HSN petitioned the United States District Court for the Middle District of Florida to vacate the award, alleging that, while it received Mr Haigh's disclosure form, it had not received Mr Haigh's letter in which he disclosed his professional relationship with PCTV's counsel. HSN argued also that due to Haigh's failure to fully disclose his 'substantial friendship' with Mr Abascal and his relationship with Mr Astigarraga, the ICC mandatory rules and procedures were not followed and the award should be set aside.

In its judgment, the District Court held that the mere fact the chairman and counsel for the respondent had served on the same board of directors and were members of the same organisation was insufficient to support *vacatur* of the award, particularly in light of the fact that the AAA board of directors in 2005 consisted of 94 individuals, and the NAFTA 2022 committee was made up of approximately 38 individuals from three different countries. The District Court confirmed the award and dismissed the setting aside motion, but did not address the arguments expounded by respondent on the basis of the IBA Guidelines.

More recent US court decisions have however expressly referred to the IBA Guidelines. In particular, the US Court of Appeals for the Ninth Circuit in *New Regency Productions v Nippon Herald Films* endorsed the growing acceptance of the IBA Guidelines as reflecting the standards generally accepted in international arbitration practice worldwide.<sup>38</sup> Like the District Court decision in *Aimcor*, the court in *New Regency* explicitly sought guidance from the IBA Guidelines, in particular from General Standard 7(c), to assess the disclosure requirements imposed by the 'evident partiality' test

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<sup>38</sup> *New Regency Productions, Inc v Nippon Herald Films, Inc*, 501 F.3d 1101, 1108, 2007 (5 July 2006).

contained in the FAA.

The case arose out of a dispute concerning the production of a movie in Japan. Throughout 2004, the sole arbitrator in the case issued several orders. In the same year, the sole arbitrator was employed by the Yari Group, a film company. At that time, he served as senior executive vice president and chief administrative officer of the company. In his role, he oversaw the company's business and legal affairs, as well as its general administration. The company was at the time actively negotiating for the right to finance a film developed by New Regency, one of the parties to the arbitration, and produced by the daughter of its principal owner. Thus, during the arbitration proceedings, the sole arbitrator was overseeing a substantial transaction in which his company was seeking rights from one of the parties.

The Court of Appeals in *New Regency* held that a conflict of interest existed and confirmed the lower court decision to vacate the award. It emphasised that in order to give rise to a challenge, conflicts of interest must not be trivial. In its reasoning, it referred to General Standard 7(c) of the ICC Guidelines, observing that although the IBA Guidelines 'are not binding authority and do not have the force of law, they reinforce our holding in *Schmitz* that "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it".'

#### *Other jurisdictions*

No court decisions from other jurisdictions have so far been reported to the subcommittee to have explicitly relied on the IBA Guidelines in deciding challenges to arbitrators or setting aside applications grounded on lack of impartiality of the tribunal (or one of its members).

### **The approach of arbitral institutions<sup>39</sup>**

#### *The International Chamber of Commerce (ICC)<sup>40</sup>*

The ICC provided a report to the subcommittee where it examined cases between 1 July 2004 and 1 August 2009 in which the ICC Court was called upon to decide on a challenge or contested confirmation and in which the Guidelines were referred to from a total of 187 cases either under the ICC

<sup>39</sup> Appendix 2 to the Report contains a synoptic table of published decisions rendered by arbitral institutions and tribunals.

<sup>40</sup> Feedback provided by José Ricardo Feris, ICC Counsel, and Simon Greenberg, ICC Deputy Secretary General. See also J Feris and S Greenberg, 'References to the IBA Guidelines on Conflicts of Interest in International Arbitration when Deciding on Arbitrator Independence in ICC cases', Appendix 1 to J Fry and S Greenberg, 'The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases' (2009), 20:2 *ICC ICArb Bull* 12.

### Rules or not ICC Rules.

According to the ICC, in 106 of the 187 cases, at least one article of the Guidelines was referred to as potentially contemplating the situation. In the remaining 81, the secretariat considered that no article of the Guidelines contemplated the situation. Paragraphs 3.1.1, 3.1.4, 3.1.5 from the Orange List, paragraph 2.1.2 from the waivable Red List, and paragraph 4.4.2 from the Green List were the most referenced articles. The vast majority of references were to articles of the Orange List.

Some of the situations not contemplated by the Guidelines include: (i) a situation when the arbitrators who are indirectly employed or whose salary is some way paid by a state party or who are in some other way dependent on a state party; (ii) a situation where the arbitrator was not confirmed because his brother had professional relationships with a party; (iii) a situation where an arbitrator and the spouse of the counsel who nominated him worked in the same law firm; (iv) a situation where an arbitrator is acting as a co-arbitrator in another case involving the opposing party (but not involving the nominating party); (v) a situation where an arbitrator was previously a director of a company which had been advised by counsel; (vi) a situation where an arbitrator is a board member of a competitor of a party and the competitor is involved in three litigations against that party; (vii) a situation where an arbitrator counsel have a bad social relationship; (viii) a situation where an arbitrator's current or prior law firm was previously represented by a counsel; (ix) a situation where an arbitrator was regularly referring clients to counsel who nominated him; (x) a situation where an arbitrator was counsel for a third party seeking to take over one of the parties; (xi) a situation where an arbitrator has been previously unsuccessfully challenged by counsel of one of the parties in an unrelated case; and (xii) a situation where an arbitrator had a close connection and acted as legal counsel of an academic institution to which one of the parties had a continuing lender-borrower relationship.

The court has encountered situations that are closely related but somehow limited by the Guidelines, some of these situations include: (i) a situation when an arbitrator and a counsel are currently serving as co-counsel in an unrelated matter (Article 4.4.2 refers to having served as co-counsel in the past); (ii) a situation where the arbitrator was or is acting as counsel opposing a counsel in another matter (Article 3.1.2 only refers to an arbitrator who acted against a party or an affiliate of a party within the past three years); (iii) a situation where a partner or employee of the arbitrator's law firm is a spouse of a counsel (Article 3.3.5 contemplates the reverse situation); (iv) a situation where an arbitrator was counsel of parent company of entity which is currently adverse to one party in an unrelated arbitration (where the

arbitrator did not appear to fall into the provisions of paragraphs 3.1.1, 3.1.2 and 3.4.1); (v) a situation where the arbitrator was the in-house counsel of company with commercial relations with both parties (where the arbitrator did not appear to fall into the provisions of paragraphs 2.3.6, 3.2.3 and 4.5.3); (vi) a situation where the arbitrator was the former counsel of subsidiaries of group of companies of one party (closest situation described by paragraph 3.1.1); (vii) a situation where the arbitrator's law firm requested the legal services of counsel of one of the parties (closest situation described by paragraph 4.4.2); (viii) a situation where the nominated arbitrator had acted as chairman and is currently acting as chairman in another arbitration (closest situation described by paragraph 3.1.3); (ix) a situation where the arbitrator is currently counsel in litigation adverse to one party (a situation like this is contemplated in paragraph 3.1.2, however for previous services within the past three years); and (x) a situation where the arbitrator was previously a counsel for a director of the party that nominated him (arguably covered by using General Standard 6(c) to interpret other rules).

These are facts which would technically fall within the scope of the Guidelines (triggering the ensuing disclosure obligation). However, given the relevant circumstances of the case, the court reached a different result than that which the colours of the Guidelines would suggest. For example, a situation that would fall within the Green List but in which the arbitrator was not confirmed. Additionally, the court has faced the situation in which two or more existing grounds which, if analysed individually would not seem to demand disclosure or lead to disqualification, when analysed as a whole may create a perception in the eyes of the parties that the arbitrator's independence may be called into question and may lead to disqualification.

#### *The London Court of International Arbitration (LCIA)*

The London Court of International Arbitration provides reasoned decisions in arbitral challenges. These decisions are often well detailed, sometimes reaching 30 to 40 pages in length. According to the report sent to the subcommittee, analysing these decisions in order to report on areas in which the LCIA Court's decisions have coincided with or departed from the IBA Guidelines would be a substantial task. The subcommittee has been informed that the LCIA plans to publish challenge decisions, but only in the form

of significantly-redacted abstracts. The reporter was aware that numerous challenge divisions of the LCIA Court have referred to the IBA Guidelines, but only as one element in a broad analysis of prevailing standards.

A decision by a challenge division of the LCIA Court which exceptionally has been made public is the decision rendered in the *National Grid* case. The division was called upon to rule on an application challenging one of the members of the tribunal sitting in an investment arbitration under the UNCITRAL Rules opposing National Grid to Argentina.<sup>41</sup> Argentina challenged Mr Judd L Kessler based on Article 10 of the UNCITRAL Arbitration Rules. In addition to the UNCITRAL Rules, Argentina referred in its challenge application to Standard (2)(b) of the IBA Guidelines, according to which an arbitrator shall decline to accept an appointment or refuse to continue to act as an arbitrator ‘if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4)’.

In this case, arbitrator Kessler, during the cross-examination of Dr Cassagne (National Grid’s legal expert), made a comment that ‘it’s now clear that there are certain facts that the witness is not familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation and it’s not hypothetical because we are all here. We know the facts generally speaking that there was major harm or major change in the expectations of the investment.’

Argentina considered this comment to be incompatible with the impartiality and independence that each arbitrator ought to maintain vis-à-vis the parties throughout the entire course of the arbitration proceedings. According to Argentina’s submission, Mr Kessler’s comment during the hearing touched upon an issue which was at the very core of the dispute between the Parties. Argentina also argued that Mr Kessler’s reference to a ‘major change in the expectations of the investment’ revealed that he was predisposed to the investor’s claim on the merits. Indeed, according to Argentina, in other investment cases tribunals had ruled that a change in the legitimate expectations of an investor implies a violation of the standard of fair and equitable treatment. National Grid’s expectations regarding its

41 UNCITRAL Case *National Grid Plc v The Republic of Argentina*, LCIA Case No UN 7949, Decision on the Challenge to Mr Judd L Kessler. Challenge Division constituted by Messrs Klaus Sachs (Chair), Hassan Ali Radhi, Paul B Hannon. The underlying arbitration was based on the bilateral investment protection treaty between the United Kingdom and Argentina. The parties agreed that the challenge be submitted to the LCIA Court. The decision is available at: [www.iisd.org/pdf/2008/itn\\_lcia\\_rulling\\_kessler\\_challenge.pdf](http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf).

investments in Argentina were a key issue between the parties.

According to Argentina, Mr Kessler's conduct indicated that he would not exclusively base on the evidence, arguments and applicable law his decision in the case particularly since the case was not concluded at the time the comment was made and both the claimant and the respondent would still have the opportunity to put forward arguments and evidence.

In addition, Argentina alleged that there would be a breach of impartiality, independence as well as of the neutrality due by an arbitrator if there is an appearance of bias and not only where the arbitral proceedings are tainted by actual bias of the arbitrator(s), ie, when a reasonable person has justifiable doubts as to the arbitrator's impartiality or independence as per Standard (2) (b) of the IBA Guidelines.

A reasonable third person would have had, according to Argentina, justifiable doubts as to Mr Kessler's impartiality to the extent that the comment he made during the hearing fully endorsed the allegations made by National Grid. In support of this argument, Argentina also sought guidance in paragraph 3.5.2 of the Orange List, which covers instances in which the arbitrator 'has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise' as well as in Rule 3 and 3.2 of the International Bar Association Rules of Ethics for International Arbitrators.

In its submission to the challenge division, National Grid argued that the test in Standard 2(c) of the IBA Guidelines is an objective one, adding 'that the objectivity standard is further defined as the conclusion reached by a reasonable and informed third party that there was likelihood that the arbitrator might be influenced by factors other than the merits of the case'. National Grid also submitted that Argentina did not succeed in bringing forward any authority supporting its prejudgment argument and argued that the orange list provisions were irrelevant as the arbitrator did not publicly 'advocate a specific position regarding the case'.

In its reasoning, the Division examined in particular the IBA Guidelines and noted that there was no disagreement between the parties that a reasonable third person test such as that of Standard 2 of the IBA Guidelines must be applied to determine whether there are justifiable doubts as to the impartiality of an arbitrator within the meaning of Article 10.1 of the UNCITRAL Rules.

The division acknowledged that if it was not read in the context in which it was made, Mr Kessler's comment might have given the impression to a reasonable third person that the arbitrator had 'a firm view' regarding the

merits prior to the conclusion of the proceedings. However, the division concluded that, after applying the third person test to the specific facts of the case, Argentina's arguments had to be dismissed. It noted that it would not be appropriate to assess the arbitrator's impartiality simply by focusing on the statement taken in isolation without considering the whole of the arbitrator's conduct and the circumstances at the hearing on which the remark was made. The division therefore analysed the hearing transcript and found that it indicated that the suggestion to Argentina's counsel to pose hypothetical questions to the opponent's legal expert had 'merely referred to the allegations that had been made in the arbitration.'

*The Stockholm Chambers of Commerce (SCC)*<sup>42</sup>

The SCC Board issues five to ten decisions on challenges of arbitrators pursuant to the SCC Rules each year. In a few cases, the challenged arbitrator also opts to resign before a decision is rendered by the SCC Board.

It is rare that parties refer to the IBA Guidelines when challenging an arbitrator under the SCC Rules, however the SCC always consults the IBA Guidelines when an arbitrator is challenged. In practice, the legal counsel in charge of the case identifies which situation (or situations, as the case may be) set out in the IBA Guidelines' lists most closely resemble the circumstances of the case. A brief is then presented to the SCC Board identifying the applicable situation and the colour of the list under which it can be found. This information is also referred to in the oral presentation of the case to the SCC Board.

As a rule, the SCC Board does not sustain a challenge of an arbitrator when the circumstance invoked is found on the IBA Guidelines' Green List, and does not dismiss a challenge of an arbitrator when the item can be found on the Red List. Challenges based on items on the Orange List are often subject to discussion. One observation of the SCC practice is that when there are aggravating circumstances, such as repeated conduct, or more intense or longer breaches, the challenge is always sustained.

It is fair to say that the IBA Guidelines are used as a tool by the SCC to measure and assess circumstances giving rise to a challenge of an arbitrator. By applying the IBA Guidelines, the SCC's practice has become more cogent and more transparent.

Moreover, the SCC has not identified any gaps in the IBA Guidelines. The circumstance most frequently invoked by challenging parties is that in paragraph 3.1.1 of the Orange List. The SCC has been able to reduce

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<sup>42</sup> Feedback provided by Mr Ulf Franke, Secretary General, Arbitration Institute of the SCC, and Linn Bergman, Legal Counsel at the SCC.

challenges due to alleged bias based on connections with firms by applying the three year rule, instead of the previous five-seven year rule.

*The Swiss Chambers of Commerce (Swiss Rules)*<sup>43</sup>

According to Article 9 & seq of the Swiss Rules, arbitrators shall be and remain at all times impartial and independent of the parties. Arbitrators may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. If the arbitrator does not withdraw, the Special Committee of the Swiss Chambers will decide on the challenge.

From 2004 – when the current version of the Swiss Rules was enacted – to August 2009, only six challenges to arbitrators have been brought before the Special Committee, and none of them has been admitted.

The decisions of the Special Committee are not reasoned at all or are only summarily reasoned. They are not made public. Challenges submitted by parties often refer to the IBA Guidelines. The Special Committee does not apply the IBA Guidelines but will verify whether the Guidelines address the circumstances on which the challenge is based. For arbitration proceedings having their seat in Switzerland, the Special Committee will also rely on the relevant case law of the Swiss Supreme Court. The Supreme Court applies an objective test, ie, it is not sufficient for a party to the arbitration to merely allege doubts as to the arbitrator's impartiality or independence. Rather, a party challenging an arbitrator has to show that any party in the same situation could legitimately doubt the arbitrator's independence or impartiality.

*The Japan Commercial Arbitration Association (JCAA)*<sup>44</sup>

The JCAA is relatively small and has not made a determination on the challenge of an arbitrator in the past five years. Accordingly, the JCAA has not as of yet consulted the IBA Guidelines for the challenge of an arbitrator. On the other hand, during the course of arbitral proceedings, the JCAA has occasionally received inquiries from an arbitrator on whether he should disclose circumstances relating to possible conflicts of interest which he is unsure about. In such cases, the JCAA advised him to refer to the IBA Guidelines to determine whether such circumstances should be disclosed to the parties.

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43 Feedback provided by Mr Eric Biesel, Director, Arbitration and Mediation Services, Geneva Chamber of Commerce, Industry and Services and Dr Franz Kellerhals, Bern, Chair of the Special Committee of the Swiss Chambers.

44 Feedback provided by Mr Tatsuya Nakamura, Head of the International Arbitration Department of the JCAA.

In particular, the JCAA has received in a recent case an inquiry from the presiding arbitrator whom the JCAA had appointed on whether the following circumstances, which came about in the course of arbitral proceedings, should be disclosed to the parties: the presiding arbitrator had been an of-counsel lawyer in a law firm. A managing partner of that firm was elected to an outside board of the parent company of the respondent in the arbitration. The arbitrator had not represented in any cases which the firm handled, nor had he been paid any remuneration from his firm. The compensation paid to him by the firm consisted of the firm regularly covering on his behalf the membership fee of the bar association which he belonged to in addition to being by the firm allowed to use the firm's secretary for his work.

The arbitrator contacted the JCAA about whether he should disclose the above facts, and in response, the JCAA indicated to him that such a circumstance was similar to that specified in paragraph 3.2.1 of the Orange List of the IBA Guidelines, which set forth that the arbitrator's law firm is currently rendering services to an affiliate of one of the parties of an arbitration without creating a significant commercial relationship and without the involvement of the arbitrator. The JCAA suggested that he should disclose the situation in order to avoid any objections which might be raised by a party stating that he had violated his disclosure obligation. Thereafter, the arbitrator provided a disclosure statement to all concerned parties.

*The Chamber of Arbitration of Milan*<sup>45</sup>

Under the Arbitration Rules of the Chamber of Commerce of Milan ('Milan Rules'), the Arbitral Council, which is composed of nine members, is in charge of the appointment and the challenge of the arbitrators.

According to Article 19 of the Milan Rules, the secretariat can confirm the appointment of an arbitrator if he files a statement of independence without disclosing any circumstances and none of the parties submits any comment within ten days of receiving the statement of independence. If this is not the case, the Arbitral Council is called on to decide on the arbitrator's confirmation. As a general rule, no reasons are provided with the Council's decision. The IBA Guidelines are taken into consideration

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45 Feedback provided by Stefano Azzali, Secretary General. The CAM's experience on the independence of the arbitrators with particular reference to the IBA Guidelines has reported in the following papers: Stefano Azzali & Benedetta Coppo, 'Decision of England's Court of Appeal (Civil Division) rendered in 2000, case [2000] EWCA Civ 154 – The "Saudi Cable" Case', 5:2 *Stockholm Arb Rep* 108 (2003); Stefano Azzali & Benedetta Coppo, 'Chamber of Arbitration of Milan: A Survey of Recent Decisions on Independence of Arbitrators', 5 *ITA Monthly Report* 7 (2007); Stefano Azzali & Benedetta Coppo, 'Update on the recent decisions on arbitrators' independency', 6 *ITA Monthly Report* 10 (2008).

by the Council in making its decisions on confirmation.

Pursuant to Article 19, paragraph 2, of the Milan Rules, the arbitrator must declare any pending or past relationship with any of the parties or its counsel, and any kind of personal or financial interest in the subject matter of the dispute.

A challenge of an arbitrator under Article 20 of the Milan Rules, which must be submitted within ten days after a challenging party has received the statement of independence, is also decided by the Arbitral Council.

In practice, parties submitting challenges to the Arbitral Council have not referred to the IBA Guidelines. The Arbitral Council only takes the IBA Guidelines into consideration when deciding on a challenge if the facts of the case in question corresponds exactly to one of the situations set out in IBA Guidelines' various lists, which is not often the case. The IBA Guidelines have nevertheless been considered by the Arbitral Council in a number of cases.

For example, in a case that the Council examined in November 2004, the arbitrator disclosed that he and the counsel of the party which appointed him had been partners in the same law firm from February 2001 to April 2003, and that their partnership had formally ended in January 2004. Even if none of the parties filed any comment, the Arbitral Council examined the arbitrator's statement according to Article 19 of the Rules and did not confirm his appointment. The Arbitral Council reasoned that less than a year had elapsed since the end of the disclosed relationship. While discussing this case, the members of the Council took into consideration the three year period set out in paragraph 3.3.3 of the Orange List, although no express reference was made to the IBA Guidelines in the Council's decision.

In another case, the arbitrator disclosed that he and the party which appointed him had been partners for some 15 years, and that this partnership formally ended in 2002. The Council examined the case in March 2005 and confirmed the arbitrator's appointment. The Council gave no reasons for its decision, but the so called 'three year standard' set out in paragraph 3.1.1 the IBA Guidelines' Orange List supported its decision.

In March 2007, the Arbitral Council confirmed the appointment of an arbitrator who disclosed that between 2000 and 2007, he had received four appointments as arbitrator from the law firm which was

representing the party which appointed him, although none of those arbitrations were still pending. Again, the Council gave no reasons for its decision, but it considered the IBA Guidelines in its decision-making process.

In particular, the ‘three year period’ set out in the IBA Guidelines has become a common reference in the Arbitral Council’s analysis, even if its decisions do not always expressly mention it.

*The International Centre for Settlement of Investment Disputes (ICSID)*

Despite the particularity of investor-state arbitration and of the challenge system under the ICSID Convention, the IBA Guidelines are regularly relied upon by parties challenging an arbitrator and seeking annulment of awards.<sup>46</sup>

The IBA Guidelines have been relied upon before ICSID since their inception. The first reported ICSID dispute in which arguments relying on the IBA Guidelines were made was the softwood lumber case, which dealt with a complex set of investment claims brought by Canadian investors against the United States under the UNCITRAL Rules. ICSID served as appointing authority. The IBA Guidelines were relied on in at least four phases of this dispute, namely:

- the challenge filed by the United States against the investor-appointed arbitrator in *Canfor v United States*;<sup>47</sup>
- the request filed by the United States seeking consolidation of *Canfor v United States*, *Tembec Inc et al v United States*<sup>48</sup> and *Terminal Forest Products Ltd v United States*;<sup>49</sup>
- the challenge filed by the investor against the arbitrator appointed by the United States in *Canfor Corporation v United States*; *Tembec et al v United States* and *Terminal Forest Products Ltd v United States*;

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46 For other investment claims before UNCITRAL tribunals where the IBA Guidelines have been relied upon see above case law from Belgium and the Netherlands as well as the sections on the LCIA and the PCA.

47 UNCITRAL case *Canfor v United States*, all documents available at: [www.state.gov/s/1/c7424.htm](http://www.state.gov/s/1/c7424.htm)

48 UNCITRAL case *Tembec Inc et al v United States*, all documents available at: [www.state.gov/s/1/c11070.htm](http://www.state.gov/s/1/c11070.htm)

49 UNCITRAL case *Terminal Forest Products Ltd v United States*, all documents available at: [www.state.gov/s/1/c12024.htm](http://www.state.gov/s/1/c12024.htm)

- the ensuing litigation before US courts relating to the consolidated case.<sup>50</sup>

In *Canfor v United States*, the United States filed a challenge against the arbitrator appointed in November 2002 by the investor to decide on its claims under Chapter 11 of the North American Free Trade Agreement (NAFTA). After his appointment by Canfor, the arbitrator disclosed to the parties that he had delivered a speech in May 2001 to a Canadian government council.<sup>51</sup>

In the speech, the arbitrator had made the following comments concerning the softwood lumber dispute: 'Aside from agricultural subsidies, there are other issues that we have with the US. Take the softwood lumber dispute, for example. This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process'.

On the basis of the content and context of this speech, the United States filed a notice of challenge against the arbitrator in January 2003 and in February 2003 requested that ICSID decide on the challenge. As reported by one of the counsel representing the United States, the country's challenge application 'cited the following authorities as support, among others: International Bar Association, Guidelines for International Arbitrators, paragraph 3.2 (an arbitrator who "has already taken a position in relation to [the dispute]... create[s] an appearance of bias"); International Bar Association, Draft Joint Report of the Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration, 7 and 15 October 2002, paragraph 6.4.5 (listing the circumstance where "the arbitrator has taken a public position on the disputed matter" as an event that is "likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence").'<sup>52</sup>

In March 2003, ICSID informed the arbitrator that it would accept the challenge if the arbitrator did not withdraw from the tribunal. No decision was published regarding the challenge as the arbitrator accepted to resign in April 2003.<sup>53</sup>

The second softwood lumber case, *Tembec v United States*, was filed on 4 August 2004 under the UNCITRAL Rules. On 7 March 2005, the day the

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50 UNCITRAL case *Canfor Corporation v United States; Tembec et al v United States and Terminal Forest Products Ltd v United States*, all documents available at: [www.state.gov/s/1/c14432.htm](http://www.state.gov/s/1/c14432.htm)

51 Additional details about this challenge are reported in Barton Legum, 'Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures', 21 *Arb Int'l* 241 (2005).

52 *Ibid*, footnote 6.

53 *Ibid*, 244.

jurisdictional hearing was scheduled, the United States submitted a request to ICSID seeking the constitution of a consolidation tribunal. ICSID accepted the request and appointed a consolidation tribunal composed of Messrs Davis Robinson, Armand de Mestral and Albert Jan van den Berg.

After the appointment of the consolidated tribunal, Tembec, Canfor and Terminal requested that Mr Robinson withdraw due to alleged conflicts of interest. Mr Robinson, refused to step down. As a result, on 20 May 2005, Tembec formally instituted challenge proceedings against him before ICSID.

In the challenge, Tembec maintained that Mr Robinson's wife was a cousin of the President of the United States and that the President of the United States had been personally and directly involved in the softwood lumber actions against Canada. In addition, it was alleged that Mr Robinson had previously served as head of the legal office representing the United States in the dispute and that his selection by ICSID was made from a small list of arbitrators all officially appointed by the United States. In the investor's view, these circumstances raised justifiable doubts under Article 10 of the UNCITRAL Rules as to Mr Robinson's ability to remain impartial and independent in adjudicating Tembec's claims against the United States. All parties made numerous references to the IBA Guidelines in their correspondence and pleadings. The challenge was dismissed in an unpublished decision dated 15 June 2005 by the Secretary-General of ICSID.<sup>54</sup>

While the decision by ICSID on the challenge to Mr Robinson was still pending, the United States requested that the Consolidation Tribunal hear all three cases together – *Canfor*, *Tembec* and *Terminal*. On 10 June 2005, the three claimants filed separate submissions opposing the consolidation request, with Tembec relying on the IBA Guidelines in its arguments. (*Canfor Corporation v United States*; *Tembec et al v United States and Terminal Forest Products Ltd v United States*.)

The request for consolidation was decided by a Consolidation Order dated 7 September 2005<sup>55</sup> in which Tembec's arguments based on the IBA Guidelines were addressed and dismissed. Relying on section 1.3 of the IBA

<sup>54</sup> Some references to the arguments exchanged during the challenge application can be found in the ensuing litigation before US courts, see in particular *Tembec Inc, Tembec Investments Inc, Tembec Industries Inc v The United States of America*, Motion to Vacate Arbitration Award of 17 February 2006; Respondent's Memorandum of Law in Opposition to Petitioners' Motion to Vacate of 28 March 2006 and Petitioners' Reply Memorandum in Support of Motion to Vacate Arbitration Award of 25 April 2006, all available at: [www.state.gov/s/1/c17639.htm](http://www.state.gov/s/1/c17639.htm).

<sup>55</sup> UNCITRAL Case *Canfor Corporation v United States; Tembec et al v United States and Terminal Forest Products Ltd v United States*, Consolidated NAFTA Arbitration, Order of the Consolidation Tribunal of 7 September 2005, available at: [www.state.gov/s/1/c14432.htm](http://www.state.gov/s/1/c14432.htm).

Guidelines, Tembec had sought to persuade the Consolidation Tribunal that the consolidation requested by the United States placed the members of the Consolidation Tribunal in the position of deciding a question in which they personally had a financial interest. This was because the members of the Consolidation Tribunal would have an incentive to accept the consolidation so as to receive the remuneration stemming from serving on the Consolidation Tribunal.

The Consolidation Tribunal rejected this argument, reasoning that the same incentive could be said to exist whenever a tribunal is faced with an objection to its jurisdiction and that accepting Tembec's argument would lead to the conclusion that 'either no arbitral tribunal could decide on an objection to jurisdiction or every arbitral tribunal should always decide to decline jurisdiction'.<sup>56</sup> According to the Consolidation Tribunal, this conclusion was not acceptable since 'modern arbitration treaties, laws and rules require an arbitral tribunal to decide on any objection to jurisdiction'.<sup>57</sup>

Moreover, according to the Tribunal, section 1.3 of the IBA Guidelines was inapposite since the notion of 'significant financial interest' in the outcome of a case would not encompass the arbitrator's remuneration for serving as arbitrator: 'Tembec's reliance on section 1.3 of the IBA Guidelines on Conflicts of Interest in International Arbitration of 2004 is not correct. Under the caption "Non-Waivable Red List," the Guidelines include the instance where: "The arbitrator has a significant financial interest in one of the parties or the outcome of the case." A situation appearing on the Non-Waivable Red List means that a prospective arbitrator must always decline an appointment. However, the "financial interest in... the outcome of the case" does not apply to the arbitrator's remuneration as arbitrator, but applies to situations such as sharing in the amount awarded on the merits.'<sup>58</sup>

Finally, the parties presented several arguments based on the IBA Guidelines in the ensuing litigation before the United States District Court for the District of Columbia. However, no decision on Tembec's motion to vacate the Consolidation Order was rendered by the court as a result of a subsequent agreement between the parties.<sup>59</sup>

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56 UNCITRAL case *Canfor Corporation v United States; Tembec et al v United States and Terminal Forest Products Ltd v United States*, Consolidated NAFTA Arbitration, Order of the Consolidation Tribunal of 7 September 2005, paragraph 82.

57 *Ibid.*

58 UNCITRAL case *Canfor Corporation v United States; Tembec et al v United States and Terminal Forest Products Ltd v United States*, Consolidated NAFTA Arbitration, Order of the Consolidation Tribunal of 7 September 2005, footnote 36.

59 *Tembec, et al v United States*, Proceedings on Motion to Vacate Consolidation Order, all documents available at: [www.state.gov/s/1/c17639.htm](http://www.state.gov/s/1/c17639.htm).

There is also evidence of parties' reliance on the IBA Guidelines in challenges filed at ICSID in two other NAFTA tribunals under the UNCITRAL Rules. The first is *Glamis Gold v United States*<sup>60</sup> and the second *Grand River Enterprises Six Nations, Ltd, et al v United States*.<sup>61</sup>

Whereas in the *Glamis* case no decision on the challenge filed against arbitrator Donald L Morgan by the United States on 10 August 2005 was rendered by ICSID, the arguments of the respondent reliant on the IBA Guidelines against Mr Morgan were recited as argument in respondent's challenge application in the *Grand River* case.<sup>62</sup>

In *Grand River*, the arbitrator appointed by the investor, Professor S James Anaya, had included in his Curriculum Vitae (which had been made available to the parties) that between 1997 and 2002 he had represented the claimants in a case against the United States before the Inter-American Commission on Human Rights (*Dann v United States* case). Upon learning that Professor Anaya had appeared in March 2007 at an informal meeting before the Commission on behalf of the same claimants, the United States required the arbitrator to make disclosures about any representation 'in any matter adverse to the United States' since 2002. Since Professor Anaya failed to respond within 15 days, the United States requested Professor Anaya to resign. Later, Professor Anaya refused to resign, though he made additional disclosures about his direct or indirect involvement in several past and current human rights cases against the United States, by a letter dated 16 April 2007. According to the arbitrator, these cases were unrelated to the claims put forward in the case where he was sitting as an arbitrator and they would not have any bearing on his impartiality.

The United States challenged Professor Anaya before the Secretary-General of ICSID. The challenge was based inter alia on arguments drawn from the IBA Guidelines. According to the United States, '[t]he conflict here plainly is more severe than either scenario contemplated by the IBA Guidelines' since on the one hand allegedly Professor Anaya's adverse

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60 UNCITRAL case *Glamis Gold v United States of America*, all documents available at: [www.state.gov/s/1/c10986.htm](http://www.state.gov/s/1/c10986.htm).

61 UNCITRAL case *Grand River Enterprises Six Nations, Ltd, et al v United States*, all documents available at: [www.state.gov/s/1/c11935.htm](http://www.state.gov/s/1/c11935.htm).

62 UNCITRAL case *Grand River Enterprises Six Nations, Ltd, et al v United States*, Respondent's First Submission Challenging Arbitrator Anaya, p 9: 'the *IBA Guidelines* expressly provide that an adverse matter need not be related to give rise to justifiable doubts as to the arbitrator's impartiality. ICSID's own past practice recognizes this. In the *Glamis Gold v United States of America* NAFTA Chapter Eleven arbitration, the United States raised an arbitrator challenge before the ICSID Secretary-General, premised on the grounds of concurrent adverse representation, which resulted in the resignation of the challenged arbitrator'. Available at: [www.naftaclaims.com](http://www.naftaclaims.com).

representation was not simply recent as provided in paragraph 3.1.2 of the Guidelines but actually ongoing and, on the other hand, it was Professor Anaya personally and not even a law firm – as under paragraph 3.4.1 – to which he was affiliated who was acting in several matters adverse to the United States.

By a letter dated 15 May 2007, Professor Anaya refused to withdraw from the tribunal, submitting that '[a]s the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)... make clear, there is no rule establishing that an adversary relationship, per se, give rise to justifiable doubts' and maintaining his argument that such human rights proceedings were entirely unrelated to the nature of dispute at hand.

The parties and Professor Anaya have exchanged extensive correspondence with ICSID in which they discussed inter alia the relevance of the IBA Guidelines for the decision on the challenge. Before taking a decision on the challenge, on 23 October 2007, ICSID's Deputy-Secretary General informed Professor Anaya that 'we have, in view of their basic similarity concluded that representing or assisting parties in the first set of procedures would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding'. In the letter, ICSID cited a previous decision that a challenged arbitrator lobbying of the respondent state would be incompatible with his simultaneous service as arbitrator, though no reference was made to the IBA Guidelines.

Later, Professor Anaya informed the centre that he was ceasing his involvement in the cases before the Inter-American Commission though he would keep working as an instructor in a clinical course on human rights at the university. Despite the United States continued insistence that even such activity as a university instructor in a clinical workshop where students were involved in human rights cases against the United States would

be incompatible with serving as an arbitrator in the *NAFTA* case, ICSID nonetheless accepted that such fact would not alone warrant a removal of Professor Anaya from the tribunal and dismissed the challenge on 28 November 2007 without any reference to the IBA Guidelines.

Besides these cases where the IBA Guidelines have played an important role in parties pleadings, there are at least six other publicly known investment arbitrations where either an ICSID tribunal, an ICSID annulment committee or ICSID's Administrative Council rendered decisions dealing with an arbitrator's independence and impartiality in which reference was made to the IBA Guidelines.<sup>63</sup>

In *Hrvatska Elektroprivreda, d d v Republic of Slovenia*,<sup>64</sup> the arbitral tribunal composed of Charles Brower, Jan Paulsson and David Williams (chairman) sought guidance in the text of the IBA Guidelines when confronted with an allegation of conflict of interest between one of the respondent's new counsel – Mr David Mildon QC – and the chairman of the tribunal. The claimant's counsel had objected to the participation of Mr David Mildon QC in a hearing in Paris in May 2008, since Mr Mildon was a door tenant of Essex Court Chambers in London. Counsel for the respondent had put forward the name of Mr Mildon as a member of its team only ten days prior to the hearing. The claimant expressed concerns about a conflict of interest on the ground that the chairman of the tribunal was also a door tenant at the Chambers of Mr Mildon.

In its ruling, the tribunal noted that 'the Respondent has sought to announce the augmentation of its legal team at a very late stage by the listing as one of its counsel Mr David Mildon QC, who is affiliated with the same barristers' Chambers as the President of the Tribunal. The Claimant is deeply troubled by this development and seeks an order from the Tribunal that the Respondent refrain from using the services of Mr Mildon QC. This

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63 ICSID Case No ARB/05/24, *Hrvatska Elektroprivreda, d d v Republic of Slovenia*, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008; ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas S A v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008; ICSID Case No ARB/01/12, *Azurix v Argentine Republic*, Annulment Proceeding, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009; UNCITRAL case *Vito G Gallo v Government of Canada*, Decision on the Challenge to Mr J Christopher Thomas, QC of 14 October 2009; ICSID Case No ARB/08/17, *Participaciones Inversiones Portuarias SARL v Gabonese Republic*, Decision on the Proposal to Disqualify an Arbitrator of 12 November 2009; ICSID Case No ARB/06/3, *The Rompetrol Group N V v Romania*, Decision on the Participation of a Counsel of 14 January 2010.

64 ICSID Case No ARB/05/24, *Hrvatska Elektroprivreda, d d v Republic of Slovenia*, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, available at: <http://ita.law.uvic.ca/>.

raises two central issues: does the Tribunal have the power to make such an order, and, if so, should it do so in the circumstances of this case?’<sup>65</sup>

As to the second question, the tribunal acknowledged the claimant’s concern, stating that the chambers in modern times display a ‘collective connotation’ and that some parties may not accept that a member of the same chambers ‘would not be affected by any favouritism when considering submissions made by a fellow member’.<sup>66</sup>

The tribunal referred to the IBA Guidelines to confirm that chambers’ membership may give rise to conflicts of interest just as in other types of organisations offering legal services such as law firms: ‘It is, however, equally true that this practice is not universally understood let alone universally agreed, and that chambers themselves have evolved in the modern market place for professional services with the consequence that they often present themselves with a collective connotation. Essex Court Chambers’ elaborate website, obviously serving marketing purposes, contains special sections entitled “about us” and “how we operate” and quotes with apparent approval a Law Directory which states that the chambers are recognised as “a premier commercial operator...”. This evolution has been observed in the Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration.’<sup>67</sup> As a result, the tribunal decided that Mr Mildon, whose role in the respondent’s team had been described as focusing principally on matters of quantum, would not be permitted to further participate in the proceedings.

In ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas S A v Argentine Republic*, the IBA Guidelines played a central role in parties’ pleadings as well as in the ruling of the two members of the tribunal deciding the challenge of the third member.<sup>68</sup>

On 29 November 2007, Professor Kaufmann-Kohler, one of the two co-arbitrators sitting on a panel chaired by Professor William Park was

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65 ICSID Case No ARB/05/24, *Hrvatska Elektroprivreda, d d v Republic of Slovenia*, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, paragraph 12.

66 ICSID Case No ARB/05/24, *Hrvatska Elektroprivreda, d d v Republic of Slovenia*, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, paragraph 20.

67 ICSID Case No ARB/05/24, *Hrvatska Elektroprivreda, d d v Republic of Slovenia*, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, paragraph 19.

68 ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas S A v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, available at:

<http://ita.law.uvic.ca/>.

challenged by Argentina. Argentina argued that since 19 April 2006, she had been serving as member of the board of directors of the Swiss bank UBS. According to Argentina, UBS recommended that its customers invest in Electricité de France (EDF), the parent corporation of EDF International, and that UBS and EDF therefore had a common interest. Other connections between UBS and EDF alleged by Argentina included a placement of a share offer in the French financial market.

Argentina submitted that Professor Kaufmann-Kohler did not disclose the existence of facts which raised doubts about her impartiality and independence. According to Argentina, Professor Kaufmann-Kohler and the claimant had a duty of disclosure, as confirmed in General Standards 3 and 7 of the IBA Guidelines. The claimants resisting the challenge however asserted that the IBA Guidelines did not apply in the ICSID arbitration at hand and even if they did apply, they would provide no basis for removing Professor Kaufmann-Kohler from the tribunal.

The decision of 25 June 2008 discussed at length several of the standards of the IBA Guidelines and their relevance to the case,<sup>69</sup> implicitly dismissing the claimant's argument that the IBA Guidelines played no role in ICSID arbitration: '[w]e have taken note of the other sources discussed by the parties, including inter alia the relevant portions of the IBA Guidelines on Conflicts, the UNCITRAL Arbitration Rules and the relevant case law. In all instances, these authorities have been given the weight that they deserve.'<sup>70</sup> The decision also discussed case law from US courts that had relied on the IBA Guidelines (*Aimcor v Ovalar* and *New Regency Productions Ind, v Nippon Herald Films*).<sup>71</sup>

Ultimately, the challenge to Professor Kaufmann-Kohler was rejected. The tribunal held that the links between UBS and EDF should be considered minor links. Moreover, the tribunal agreed with Argentina that 'arbitrators must disclose circumstances likely to give rise to justifiable doubts about impartiality or independence', but did not find this duty to have emerged in the case before it because no justifiable doubts existed: '[t]he question is not whether doubts exist, but whether they are "justifiable" doubts. On the facts of this case, we cannot find any such doubts to be justified'.<sup>72</sup>

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69 ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas SA v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, paragraphs 100-133.

70 ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas SA v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, paragraph 69.

71 See above discussion of these two cases in section III, h), reporting case law from the United States' courts.

72 ICSID Case No ARB/03/23, *EDF International S A, SAUR International S A and León Participaciones Argentinas SA v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, paragraph 43.

In another case involving Argentina, the IBA Guidelines have played a role in parties' pleadings and the committee decision. This decision dated 1 September 2009 rendered by an ad hoc committee in the annulment proceedings in ICSID Case No ARB/01/12, *Azurix v Argentine Republic*, also made reference to the IBA Guidelines.<sup>73</sup>

In that case, Argentina had applied for annulment of an award rendered on 14 July 2006, arguing inter alia that the constitution of the tribunal had been improper (Article 52(1)(a) of the ICSID Convention) as a result of the lack of impartiality and independence of the chairman of the tribunal.

In the decision, the ad hoc committee composed of Gavan Griffith QC (president), Judge Bola Ajibola and Michael Hwang SC, addressed the main arguments put forward by Argentina in support of its allegation of improper constitution of the tribunal. The committee recalled that before the proceedings were closed, Argentina had already unsuccessfully sought to challenge the president of the tribunal, Dr Rigo Sureda, under Article 57 of the ICSID Convention.<sup>74</sup> Argentina had filed a challenge to Dr Sureda mainly grounded on the allegation that Dr Sureda would not be impartial as a result of the fact that he was employed as a consultant by Fulbright & Jaworski LLP, the firm which was representing the claimant in *Duke Energy International Peru Investments Ltd v Republic of Peru* (ICSID Case No ARB/03/28), in which Fulbright & Jaworski appointed as arbitrator Dr Guido Santiago Tawil, one of the counsel for Azurix in the present case.

In its decision dismissing the Argentina's request for annulment on the basis of improper constitution of the tribunal, the annulment committee rejected Argentina's arguments and endorsed the IBA Guidelines as a source supporting the conclusions of the two members of the tribunal which had rejected Argentina's application for disqualification of Dr Sureda: '[a]lthough not legally binding on Argentina and Azurix, and although not yet even adopted at the time of Dr Rigo Sureda's appointment as President of the Tribunal in this case, the IBA Guidelines on Conflicts of Interest

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73 ICSID Case No ARB/01/12, *Azurix v Argentine Republic*, Annulment Proceeding, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, available at: <http://ita.law.uvic.ca/>.

74 The same arbitrator had also been subject of a disqualification application by Argentina pursuant to Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 9 in ICSID Case No ARB/02/8, *Siemens v Argentina*. Arbitrators Domingo Bello Janeiro and Charles N Brower were unable to reach a consensus on the merits of Argentina's challenge and have referred the matter to the chairman of ICSID's Administrative Council who ultimately rejected the application, ICSID Case No ARB/01/12, *Azurix Corp v Argentine Republic*, Decision on the Challenge to the President of the Tribunal of 25 February 2005, unpublished.

provide additional support for the Disqualification Decision'.<sup>75</sup>

Also in a recent NAFTA case administered by the PCA under the UNCITRAL Rules, *Vito G Gallo v Government of Canada*,<sup>76</sup> the Deputy Secretary-General of ICSID, Mr Nassib Ziadé was invited to take a decision on the challenge filed against one of the party-appointed arbitrators.

After the constitution of the tribunal, the arbitrator appointed by Mexico, Mr J Christopher Thomas, had started collaborating with a new law firm as an independent counsel. Mr Thomas informed the parties of this change of firm as well as of the fact that the Government of Mexico had retained this firm – him included – to provide legal services. The letter disclosing this fact was not received by the parties at the time it was sent due to a technical problem. When the problem was noticed, Mr Thomas forwarded to the parties a copy of his previous letter whereby the disclosure had been made.

After questioning the arbitrator about the scope of the services provided to the Government of Mexico and being informed that the advice related to issues of trade and investment, the claimant requested Mr Thomas to resign. Mr Thomas refused to withdraw and the claimant filed a challenge against Mr Thomas with the ICSID Secretariat.<sup>77</sup>

Mr Ziadé relied in his decision on the IBA Guidelines, concluding that '[i]n the instant case, from the point of view of a "reasonable and informed third party" (General Standard 2( c) of the IBA Guidelines on Conflicts of Interest in International Arbitration), ie, a "fair minded, rational, objective observer" (Challenge Decision of 11 January 1995, op cit at 236), there would be justifiable doubts about Mr Thomas' impartiality and independence as an arbitrator if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration. Mr Thomas must therefore now choose whether he will continue to advise Mexico, or continue to serve as an arbitrator in this case.'<sup>78</sup> By a letter dated 21 October 2009, Mr Thomas stepped down from the tribunal.

In ICSID Case No ARB/08/17, *Participaciones Inversiones Portuarias SARL*

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75 ICSID Case No ARB/01/12, *Azurix v Argentine Republic*, Annulment Proceeding, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, paragraph 263, n).

76 UNCITRAL Case *Vito G Gallo v Government of Canada*, Decision on the Challenge to Mr J Christopher Thomas, QC of 14 October 2009, available at: <http://ita.law.uvic.ca/>.

77 NAFTA Article 1124(1) provides that the ICSID Secretary-General shall serve as appointing authority for arbitration under section B of NAFTA Chapter 11 and Article 12(1) of the UNCITRAL Arbitration Rules provides that the decision on a challenge shall be made by the appointing authority.

78 UNCITRAL case *Vito G Gallo v Government of Canada*, Decision on the Challenge to Mr J Christopher Thomas, QC of 14 October 2009, paragraph 36.

*v Gabonese Republic*,<sup>79</sup> the Republic of Gabon filed for disqualification of the co-arbitrator nominated by the claimant, Professor Fadlallah, arguing inter alia that ‘Professor Fadlallah has already taken a position on the issues to be decided in the instant case, ie, whether the withdrawal of a concession amounts to expropriation, giving rise to a conflict of interest which justifies a challenge, according to the orange list of the IBA Guidelines on Conflicts in International Arbitration.’<sup>80</sup>

The respondent had argued that, because of these facts, Professor Fadlallah was not impartial or independent since an objective assessment by a third party would give rise to justifiable and reasonable doubts as to his independence. Professor Fadlallah had chaired a tribunal, in which an unpublished award had been rendered finding for the claimants, in which an expropriation claim had been put forward as a result of a withdrawal of a concession by Gabon (ICSID Case No ARB/04/5).

The chairman of ICSID’s Administrative Council was seized with the application under Article 58 of the Convention. In the decision, the chairman considered that the IBA Guidelines were helpful in reaching its decision, holding that ‘the instant decision is taken under the Washington Convention. The IBA Guidelines on Conflicts in International Arbitration relied on by the Respondent have only an indicative value, despite being accepted that they can possibly provide a useful indication.’<sup>81</sup>

The proposal for disqualification was rejected by the chairman holding that the applicant had not put forward sufficient evidence regarding the connections between ICSID Case No ARB/04/5 and the instant case and was unable to establish the manifest lack of impartiality of Professor Fadlallah. It was held that even if it would be the case that Professor Fadlallah had decided similar legal issues in a different case, such would not warrant his disqualification under the Washington Convention.

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79 ICSID Case No ARB/08/17, *Participaciones Inversiones Portuarias SARL v Gabonese Republic*, Decision on the Proposal to Disqualify an Arbitrator of 12 November 2009, available at: <http://ita.law.uvic.ca/>.

80 ICSID Case No ARB/08/17, *Participaciones Inversiones Portuarias SARL v Gabonese Republic*, Decision on the Proposal to Disqualify an Arbitrator of 12 November 2009, paragraph 15: ‘En outre, la défenderesse estime que le Professeur Fadlallah a déjà pris position sur les questions à trancher dans la présente instance, à savoir si le retrait d’une concession est constitutif d’une expropriation, créant un conflit d’intérêt justifiant sa récusation, selon la liste orange des IBA Guidelines on Conflicts in International Arbitration’.

81 ICSID Case No ARB/08/17, *Participaciones Inversiones Portuarias SARL v Gabonese Republic*, Decision on the Proposal to Disqualify an Arbitrator of 12 November 2009, paragraph 34: ‘Enfin, il est rappelé que la présente décision est prise dans le cadre de la Convention de Washington. Les IBA Guidelines on Conflicts in International Arbitration invoquées par la défenderesse n’ont qu’une valeur indicative, même s’il est entendu qu’elles peuvent éventuellement fournir une indication utile.’

Finally, in ICSID Case No ARB/06/3, *The Rompetrol Group N V v Romania*, the tribunal rendered a decision regarding the participation of the claimant's counsel, Mr Barton Legum, in the proceedings. The IBA Guidelines were cited as authority by both parties as well as by the tribunal in its decision.<sup>82</sup>

The respondent relied on the IBA Guidelines in support of its argument that Mr Legum, who had joined the firm representing the investor and started to act as lead counsel while the proceedings were ongoing should be barred from participating in the case as a result of his relationship with as the arbitrator appointed by the claimant (Mr Donald F Donovan). Mr Legum had been employed in Mr Donovan's firm until 31 December 2008 and worked with him personally on various matters. The respondent requested that Mr Legum make a full disclosure of all relations, past and present of Mr Legum with members of the tribunal. Mr Legum denied the existence of any disclosure obligation. Subsequently, he made a disclosure, which the respondent considered to be incomplete. The respondent argued that Mr Legum's removal was necessary to safeguard the integrity of the tribunal and the arbitral process, as well as its total independence.

The tribunal dismissed the respondent's argument that the IBA Guidelines could be relied on in challenging a party's counsel. Instead, it observed that 'that the IBA Guidelines direct themselves to the position of an arbitrator, and say nothing about a power on the part of a tribunal to intervene over the nomination of counsel.'<sup>83</sup> The tribunal found that *Hrvatska* was not a binding precedent, not applicable anyway, and dismissed the respondent's application.

#### *The Permanent Court of Arbitration (PCA)*

In ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*,<sup>84</sup> the claimant and respondents had agreed in October 2008 that any arbitrator challenges in this case were to be decided by the Secretary-General of the Permanent Court of Arbitration applying the IBA Guidelines.

Eventually, the respondents seized the Secretary-General with a challenge to Mr Charles Brower, the arbitrator appointed by the claimant. The respondents argued that they had become aware of an interview by

82 ICSID Case No ARB/06/3, *The Rompetrol Group N V v Romania*, Decision on the Participation of a Counsel of 14 January 2010, available at: <http://ita.law.uvic.ca/>.

83 ICSID Case No ARB/06/3, *The Rompetrol Group N V v Romania*, Decision on the Participation of a Counsel of 14 January 2010, footnote 3.

84 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, Decision on Challenge to Arbitrator of 8 December 2009, available at: <http://ita.law.uvic.ca/>.

Mr Brower, in which he allegedly made comments about the respondents and about the pending ICSID proceedings. Those comments grounded respondents' request that Mr Brower be disqualified.

In the interview, entitled 'A World-Class Arbitrator Speaks!', and published in the August 2009 issue of *The Metropolitan Corporate Counsel*, Mr Brower was asked about a variety of topics of international arbitration. In particular, Mr Brower was questioned about what he saw as the most pressing issues in international arbitration and had answered that '[t]here is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don't make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc, the politics may change. After a certain point, no one will invest without having something to rely on.'<sup>85</sup>

The respondents argued that Mr Brower's interview gave rise to a 'strong appearance of bias'<sup>86</sup> whereas the claimant took the view that the interview contained an 'innocuous summary of publicly known facts'.<sup>87</sup> The respondents objected that Mr Brower's opinion showed justifiable doubts that he had prejudged the case in two ways: as to whether provisional measures under Article 47 of the ICSID Convention are legally binding and as to whether Ecuador should be held liable for having expropriated claimant's investment. The respondents also contended that Mr Brower's interview breached the confidentiality of the arbitration, therefore warranting his removal.

The Secretary-General accepted the challenge, holding that '[t]he relevant question in resolving this challenge under the IBA Guidelines is whether the interview comments constitute circumstances that, "from a reasonable third person's point of view having knowledge of the relevant facts, give rise to

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85 Recited at ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 27.

86 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 48.

87 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 48.

justifiable doubts as to the arbitrator's impartiality or independence".<sup>88</sup>

As to the decision's findings, it was held that from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by Mr Brower in the interview amounted to circumstances giving rise to justifiable doubts as to Mr Brower's impartiality or independence, as had been argued by the respondents. In the decision's words: 'the combination of the words chosen by Judge Brower and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality.'<sup>89</sup>

The Secretary-General further ruled that '[t]here is no general or absolute prohibition in the IBA Guidelines against international arbitrators speaking with the press or making public statements about pending cases. The IBA Guidelines instead focus on an inquiry into justifiable doubts brought about by particular "facts or circumstances" in any given challenge. Obviously, if an arbitrator chooses to discuss a pending case with the press, he or she risks opening up the possibility of making statements that could give rise to justifiable doubts about his or her impartiality. But there is no basis in the IBA Guidelines on which to accept Respondents' argument that Judge Brower's decision to give the interview in and of itself should lead to his disqualification.'<sup>90</sup>

The IBA Guidelines have also played a role in a challenge filed in an UNCITRAL case dealing with claims under the United Kingdom/Argentina BIT – *ICS Inspection and Control Services Limited v The Republic of Argentina*. In this case, the Permanent Court of Arbitration was seized with a challenge filed by Argentina against Mr Stanimir Alexandrov, the arbitrator appointed by the claimant. On 17 December 2009, a decision was rendered by the appointing authority indicated by the PCA, Mr Jernej Sekolec.<sup>91</sup>

In this case, Mr Alexandrov had disclosed to the parties that his law firm, Sidley Austin LLP, had in the past represented an affiliate or a parent of the claimant but that he had not been personally involved in any way in this

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88 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 4.

89 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 48.

90 ICSID Case No ARB/08/16, *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator of 8 December 2009, paragraph 61.

91 UNCITRAL Case *ICS Inspection and Control Services Limited v The Republic of Argentina*, Decision on challenge to Mr Stanimir A Alexandrov of 17 December 2009, available at: <http://ita.law.uvic.ca/>.

mandate. In its letter, Mr Alexandrov added that his law firm and himself had also been and continued to be involved in ICSID Case No ARB/97/3 (the *Vivendi* case) as counsel for the investor. The respondent in the latter case is also Argentina. Despite these facts, in Mr Alexandrov's opinion, the subject matter of that dispute was not related to the subject matter of the *ICS* case, adding that he did not believe that these facts would affect his impartiality or independence to continue to serve as an arbitrator.

Argentina filed a challenge pursuant to Article 10(1) of the UNCITRAL Rules on the basis of the facts disclosed by Mr Alexandrov. Mr Sekolec accepted the challenge, holding that 'the conflict in question is sufficiently serious to give rise to objectively justifiable doubts as to Mr Alexandrov's impartiality and independence'.<sup>92</sup>

To reach this conclusion, Mr Sekolec discussed the IBA Guidelines since both parties had relied on them in their pleadings: 'in their submissions on the challenge, both Parties have referred to the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines")'.<sup>93</sup> Thus, the decision first addressed the relevance of the IBA Guidelines. Mr Sekolec held that '[a]lthough the IBA Guidelines have no binding status in the present proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence'.<sup>94</sup> Mr Sekolec then turned to discussing section 3.4.1 and 3.1.2 of the Guidelines' Orange List.

Two arguments had been put forward by ICS in support of the dismissal of the challenge. First, it had been argued that the annulment proceedings in the *Vivendi* case were to be completed soon and that no more action by Mr Alexandrov would be required with regard to that mandate. Secondly, it was alleged that despite Argentina's assertion to the contrary, there were technical differences between the claims put forward by the investor in the *Vivendi* case and, as a result, the latter had to be considered unrelated to the *ICS* case.

Relying on the IBA Guidelines, Mr Sekolec held that the facts put forward by ICS in support of the dismissal of the challenge were insufficient to dissipate all justifiable doubts as to Mr Alexandrov's impartiality and independence. As to the first argument of ICS, Mr Sekolec rejected that the potential non-involvement in the future of Mr Alexandrov in the *Vivendi* case could lead to entirely negate 'Mr Alexandrov's conflict as envisaged in section 3.4.1 of the IBA Guidelines inasmuch as the possibility exists that

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92 UNCITRAL Case *ICS Inspection and Control Services Limited v The Republic of Argentina*, Decision on challenge to Mr Stanimir A Alexandrov of 17 December 2009, paragraph 2.

93 *Ibid.*

94 *Ibid.*

the case may continue in some form and engage Mr Alexandrov's firm's continued representation.<sup>95</sup>

Turning to the second argument, Mr Sekolec did not follow ICS either. It considered that while there could be differences between the two cases, this fact could not offer sufficient support to dismiss of the challenge: 'while the Claimant has argued that the cases are unrelated and there are technical differences between the issues raised in the two cases, they are not entirely dissimilar. Both matters are investment protection actions of considerable magnitude which raise broadly similar concerns against the same State party in a manner that reinforces any justifiable doubts as to the arbitrator's impartiality or independence.'<sup>96</sup>

To reach this conclusion, once again Mr Sekolec sought guidance in the IBA Guidelines, this time in section 3.1.2: 'this is not merely a case in which the arbitrator's law firm is acting adversely to one of the parties in the dispute, but rather a case where the arbitrator has personally and recently acted adversely to one of the parties to the dispute. The scenario set forth in section 3.1.2 of the IBA Guidelines provides that past, personal representation against one of the parties "in an unrelated matter" can be sufficient to give rise to justifiable doubts'.<sup>97</sup>

#### *Other institutions*

The subcommittee has contacted other institutions who have failed to answer in time for inclusion in the present report. To the extent available, information from further institutions will be covered in future reports which will be made available on the IBA Arbitration Committee website.

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95 UNCITRAL Case *ICS Inspection and Control Services Limited v The Republic of Argentina*, Decision on challenge to Mr Stanimir A Alexandrov of 17 December 2009, paragraph 3.

96 UNCITRAL Case *ICS Inspection and Control Services Limited v The Republic of Argentina*, Decision on challenge to Mr Stanimir A Alexandrov of 17 December 2009, paragraph 4.

97 *Ibid.*