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The IBA Guidelines on Conflicts of Interest in International Arbitration

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Contents

| | |
|--|-----------|
| I.PREFACE | 6 |
| II.INTRODUCTION..... | 7 |
| III.THE IBA GUIDELINES ON CONFLICTS OF INTEREST 2004..... | 9 |
| A. AN OVERVIEW | 9 |
| B. LEGAL STATUS | 11 |
| <i>a. A set of best practices</i> | <i>11</i> |
| <i>b. Non-binding nature</i> | <i>12</i> |
| C. INTERPRETATION ISSUES | 13 |
| <i>c. Standard of impartiality and independence.....</i> | <i>13</i> |
| <i>d. Conflicts of interest.....</i> | <i>17</i> |
| <i>e. Duty of disclosure</i> | <i>18</i> |
| <i>f. Practical application of the General Standards.....</i> | <i>19</i> |
| <i>i. Red List.....</i> | <i>19</i> |
| <i>ii. Orange List.....</i> | <i>20</i> |
| <i>iii. Green List</i> | <i>22</i> |
| D. APPLICATION IN PRACTICE | 22 |
| IV.THE REVISED IBA GUIDELINES ON CONFLICTS OF INTEREST 2014..... | 24 |
| E. KEY CHANGES ON THE IBA GUIDELINES ON CONFLICTS OF INTEREST 2014 | 24 |
| <i>a. Advance waivers.....</i> | <i>24</i> |
| <i>b. Arbitral secretaries</i> | <i>26</i> |
| <i>c. Arbitrator's law firm.....</i> | <i>27</i> |

| | |
|---|-----------|
| <i>d. Third-party funders.....</i> | <i>28</i> |
| <i>e. Identity of counsel.....</i> | <i>30</i> |
| <i>f. New entries in the lists.....</i> | <i>30</i> |
| V.CONCLUSIONS..... | 32 |
| VI.BIBLIOGRAPHY..... | 34 |

I.PREFACE

In this Dissertation Thesis, issues concerning the IBA Guidelines on Conflicts of Interest in International Arbitration 2004 and the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 will be examined and discussed.

Starting with an overview on the IBA Guidelines on Conflicts of Interest and their legal status, this Thesis continues with the interpretation of some occurring issues, like the standard of independence and impartiality and the duty of disclosure. Before proceeding with the topic regarding the amendments that derived from the revision process of 2012, the impact of the IBA Guidelines in practice is also presented.

Since the IBA Guidelines 2014 retain the core of the IBA Guidelines 2004, it is evident that the issues discussed on Chapter III, titled: The IBA Guidelines on Conflicts of Interest in International Arbitration 2004, concern at the same extent the new IBA Guidelines 2014. In this way repetitions are avoided.

II. INTRODUCTION

The judicial nature of the arbitration process and the judicial functions of the tribunal are linked to minimum standards which are considered to be indispensable characteristics of any fair trial. One of them is the fundamental and universally accepted principle of international arbitration that arbitrators have to be impartial and independent of the parties and remain so during the proceedings¹. In order compliance with these requirements to be ensured, arbitrators are usually under the duty to disclose all relevant facts.

This principle is firmly established in most national arbitration laws and rules. However, almost none of them provide a clear definition of impartiality and independence or guidelines for their interpretation, while there are few laws and rules that recognize only one of these standards². The vagueness of the concepts of independence and impartiality is the reason that different views as to their actual content have been expressed. This is an actual fact reflected in the inconsistency in national court's decisions and institutional appointing authorities. The lack of uniform standards for disclosures, objections and challenges caused an increase of disclosures and unnecessary challenges that delayed arbitrations, raised the costs and prevented the opposing party from choosing the arbitrator of its own preference.

The aim of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004 is to establish a common set of principles that would address concrete situations and thus avoid the aforementioned risks and problems³. Promoting clarity and uniformity the Guidelines set forth some 'General Standards and Explanatory Notes on the Standards'⁴ and they continue by listing specific situations indicating whether disclosure or disqualification are warranted for an arbitrator in the 'Red', 'Orange' and 'Green' lists. The General Stan-

¹ Article 6 of the European Convention on Human Rights grants everyone the fundamental right to a fair hearing by an impartial tribunal in the determination of rights and liabilities; see also Article 10 Universal Declaration of Human Rights.

² Lew J.D.M. and Mistelis L. A. (2003) Impartiality and Independence of Arbitrators. *Comparative International Commercial Arbitration*, pp. 255 – 273.

³ Blackaby N., Partatsides C. , Redfern A. and Hunter M. (5th ed.) (2009) Redfern and Hunter on International Arbitration. Oxford University Press.

⁴ Introduction of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014, International Bar Association, pp. 1 – 3.

dards and the Lists, together, provide a lengthy and circumstantial treatment of issues regarding arbitrator's impartiality and independence. In important respects, the IBA Guidelines' provisions depart⁵ from the approach taken by national arbitration laws and institutional arbitration rules.

In 2014, the revised IBA Guidelines on Conflicts of Interest were released as a result of the review process of the 2004 Guidelines by the "Subcommittee". The revisions were generally based upon statutes and case law in jurisdictions of Subcommittee members, and upon the judgment and expertise of Subcommittee members⁶. The main purpose of the revised Guidelines was to update the 2004 Guidelines and align them with the developments of the previous years. The previous structure composed by Part I: General Standards and Part II: Application Lists was retained, but key changes were also introduced. Advance declarations by arbitrators; third-party funding; increasing significance of arbitral secretaries; and the possibility that an arbitrator, and counsel to one of the parties, operate from the same chambers⁷ are the most significant issues addressed by the revised IBA Guidelines.

⁵ Born G.B. (2nd ed.) (2014) Challenge and Replacement of Arbitrators in International Arbitration. In the International Commercial Arbitration Selection, Kluwer Law International.

⁶ Voser N. and Petti A.M. (2015) The Revised IBA Guidelines on Conflicts of Interest in International Arbitration. *ASA Bulletin, Volume 33 Issue 1*, pp. 6 – 36.

⁷ Moyeed K., Montgomery C. and Palon N. (2015) A guide to the IBA's Revised Guidelines on conflicts of Interest. Clyde & Co. LLP, <http://www.clydeco.com> (accessed on 2016).

II. THE IBA GUIDELINES ON CONFLICTS OF INTEREST 2004

In this chapter main focus will be given on some of the most discussed issues concerning the IBA Guidelines. Specifically, the legal status, the standard of impartiality and independence, the application lists and the impact of the Guidelines are the issues which will be discussed.

A. AN OVERVIEW

In early 2002, in order to address formally the problems of conflicts of interest, the IBA's Working Group and ADR Committee formed the IBA Working Group, which was consisted of 19 members each of whom presented its National Report⁸. Led by chair Otto de Witt Wijnen from the Netherlands and Nathalie Voser from Switzerland, the Working Group started its deliberations with the participation of 19 experienced international arbitration practitioners and arbitrators, drawn from representative jurisdictions around the world. Public discussions lasted almost 2 years and the Guidelines were formally adopted by the IBA in May 2004.

Since the Guidelines are not legal provisions they lack of binding nature. They can become obligatory if adopted through sovereign action or when the parties agree so. Additionally, when the arbitral tribunal is empowered by the parties to decide whether or not to apply the Guidelines, they can also be binding. However, even when there are no provisions for the Guidelines, arbitrators often consult them in order to assess their independence or impartiality, requirements usually found in *leges arbitrii*.

As far as the application of the Guidelines it is concerned, they apply not only to international commercial arbitrations but to other types of arbitration, such as investment arbitration, as well⁹. The period of their application is limited to the first instance, from the time an arbitrator accepts an appointment until "the final award has been rendered or the proceeding has otherwise finally terminated." The Guidelines do not apply during any challenge to the award, because according to the Working Group's opinion, the arbitrator's duty ends when the first instance is concluded. If the dispute is returned back to the same arbitra-

⁸ For more details see: Background information on the IBA Guidelines on Conflicts of Interest in International Arbitration, <http://www.ibanet.org> (accessed on 2016).

⁹ Introduction of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, para. (5).

tor, then a new round of disclosure may be necessary¹⁰. Last, about the personal scope, the Guidelines envisage their application “equally to tribunal chairs, sole arbitrators and party-appointed arbitrators.¹¹” As it will be noted below, after the revision, the Guidelines apply today to arbitral or administrative secretaries and assistants¹², as well.

The IBA Guidelines are divided into two basic parts; a set of “General Standards” and a set of “Practical Applications” or “Lists.” The “General Standards”, seven in total, are further divided into two sub-levels. The first sub-level consists of the General Principle which sets out the requirement of impartiality and independence, while the second articulates a series of general principles including disclosure obligations and the role of waiver¹³. The second part of the Guidelines is the practical application of the General Standards. Recurring situations based on the case law of different jurisdictions are enumerated in three lists: Red, Orange and Green. The aim of these Lists is to identify occasions in which doubts about an arbitrator’s impartiality and independence may arise.

Situations giving rise to justifiable doubts as to an arbitrator’s impartiality and independence are classified in the Red List, which is further divided into non-waivable and waivable situations. The Orange List includes situations that in the eyes of the parties may give rise to justifiable doubts about an arbitrator’s impartiality or independence, while the Green List is an enumeration of situations in which impartiality and independence undoubtedly exist and no conflict of interest arise.

Concerning the disclosure requirement, there is no necessity of disclosure for the non-waivable Red List, as the arbitrator must decline his appointment. On the other hand, the waivable Red List and the Orange List require disclosure by the arbitrator in order parties to assess any potential conflict of interest. The difference between them lies on the way that the parties can raise an objection. For the waivable Red List explicit waiver is necessary, whereas the Orange List requires an objection to be raised by the parties within 30 days af-

¹⁰ General Standard 1 and its Explanatory Note of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004.

¹¹ General Standard 5 of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004.

¹² General Standard 5 of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014, para. (5).

¹³ Landolt P. (2005) The IBA Guidelines on Conflicts of Interest in International Arbitration: An Overview. *Journal of International Arbitration, Volume 22 Issue 5*, pp.409 – 418.

ter disclosure. Finally, for situations in the Green List there is no need for disclosure due to the lack of doubts raised about arbitrator's independence or impartiality¹⁴.

B. LEGAL STATUS

a. A set of best practices

The development of global arbitration practice requires different procedural cultures to be merged and the gap between civil law and common law procedural thinking to be bridged. While, almost without exception, the legal duty of being "impartial" or "independent" is imposed to the arbitrators by the law of the seat and the institutional rules, the parameters of this duty are rarely defined by them. The requirements are formulated in different ways among the national jurisdictions. Some of them require only independence or impartiality and others both. Additionally, there are no uniform rules as to when an arbitrator should disclose a potential conflict or decline an appointment on the grounds of lack of authority.

In order to provide more predictability and legal certainty for the conduct of the arbitral procedure, the IBA Working Group invited arbitration practitioners from different jurisdictions to contribute in the drafting of the Guidelines. Comparative and highly practical know how lead to the extraction of common features and their codification to general principles. The Guidelines represent a set of best practices, as these are perceived from the established practitioners' point of view and sensitivity. This means that the chosen best practices are more enabling than restricting¹⁵, because the majority of the subcommittee members who drafted the Guidelines are actually the arbitration practitioners who are to be regulated. This, however, can also raise doubts as to the practitioners' intentions to ensure their own convenience and interests rather than the ones of the parties.

This kind of self-regulation through best practice standards keeps external regulation outside the arbitration community and sustains the private governance that characterizes

¹⁴ For more details see: Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, <http://www.ibanet.org> (accessed on 2016).

¹⁵ Ziade N. G. (2015) How Should Arbitral Institutions Address Issues of Conflicts of Interest? <http://kluwerarbitration.com> (accessed on 2016).

the arbitral procedure. However, the lack of IBA's power to legislate on the conduct of counsels or parties does not make the Guidelines binding upon them.

b. Non-binding nature

The terminology used to denote these best practice standards (Guidelines) reveals the nature of the IBA Guidelines as practice made rules. Not promulgated by national legislators nor model laws or conventions the Guidelines do not have a statutory nature¹⁶. Nonetheless, the standards provided by them can be adopted and achieve a perceptible legal status, while having no binding effect per se.

According to the Introduction¹⁷ of the IBA Guidelines on Conflicts of Interest, the Guidelines: "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, ..., will find broad acceptance within the international arbitration community and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence....the Guidelines will be applied with robust common sense and without unduly formalistic interpretation".

Apart from the lack of independent legal effect, as stated above, the Guidelines also do not apply as binding legal rules in institutional arbitrations. None leading arbitral institution has, so far, adopted them as binding institutional rules or advisory guidelines.

However, the fact that the Guidelines, as soft law, cannot be enforced by public force does not mean that they lack normativity¹⁸. Even if they are not enforceable, the addressees of them can perceive them as binding, and if they do not, they may decide to abide by them on their own accord. It is up to parties' willingness whether to adopt the IBA Guidelines as binding legal instrument or not.

Nevertheless, the non mandatory nature of the Guidelines has caused discussions in the arbitration community and there are voices claiming that there is danger of inconsistent

¹⁶ Berger K. P. (3rd ed.) (2015) *The Commencement of the Arbitration, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*. Kluwer Law International.

¹⁷ Introduction of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, para. (6).

¹⁸ Kaufmann-Kohler G. (2010) Soft Law in International Arbitration: Codification and Normativity. *Journal of International Dispute Settlement*, pp. 1 – 17.

application. Their wide acceptance by the arbitration practitioners and the status of soft law which have attained, in both normative and persuasive ways, are not enough to remedy their problematic nature. The gaps should be filled by leading arbitration institutions. Being neutral and in position to seek opinions between practitioners, arbitration institutions can provide guidance and a sense of authority.

According to this opinion¹⁹, they should regulate not only the conflicts of interest between counsel and arbitrators but also develop and publish internal codes of conduct applicable to their staffs and organizational practices. Additionally, in the rules of the arbitration institutions should also be included sanctions for the counsel who knowingly will breach ethical rules or abuse arbitration proceedings. By regulating the issues on conflicts of interests, arbitration institutions will eliminate the problems arising from the nature of the IBA Guidelines on Conflicts of Interest, while at the same time they will enhance their credibility and legitimacy.

On the other hand, the legal status of the Guidelines does not seem in practice to impede their application. The provided set of parameters helps arbitrators and counsels to identify issues which may tangle an arbitrator's impartiality and thus, have obtained significant force and weight. Their broad acceptance by the arbitration community and the national courts, as it is shown through the case law, implies that the "soft law" status of the Guidelines could "harden" over time²⁰.

C. INTERPRETATION ISSUES

c. Standard of impartiality and independence

Before setting the grounds on which the impartiality and independence of an arbitrator may be questioned or challenged, the Guidelines establish the General Principle regarding impartiality and independence, according to which:" Every arbitrator shall be impartial and independent to the parties at the time of accepting an appointment to serve and shall remain so

¹⁹ For more details see: Ziade N. G. (2015) How Should Arbitral Institutions Address Issues of Conflicts of Interest? <http://kluwerarbitration.com> (accessed on 2016).

²⁰ Hodges P. (2015) The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line? *In the Austrian Yearbook on International Arbitration, Volume 2015*, pp. 205 – 229.

until the final award has been rendered or the proceedings have otherwise finally terminated²¹". The Working Group was inspired by the similar standard for challenging the impartiality and independence of an arbitrator found on Article 12(2) of the UNCITRAL Model Law. This Article has been adopted by seven jurisdictions represented in the Working Group and has influenced the rest²². However, neither the General Standard nor its Explanatory Note provides a definition of impartiality and independence. The ambiguity surrounding the content of these requirements becomes even greater due to the lack of definition in national legislation, as well.

The main concept around which impartiality and independence have been structured is the avoidance of bias. While in national adjudicatory systems there is danger of systemic bias, meaning that the whole system could be procedurally designed in a way to favour systematically certain legal interpretations or certain groups of parties, in arbitration focus is given on individual bias²³. Since the synthesis of arbitral tribunal is parties' responsibility and there is no financial or other dependency on state, arbitral procedure becomes automatically pluralistic and democratic. Even if the legal concept of bias includes only apparent bias, which we can say that is covered by the requirement of arbitrator's independency, an objective standard that can be proven with evidence, as mentioned below, IBA Guidelines seems also to cover implicit bias through the requirement of arbitrator's impartiality.

Impartiality, in general, requires that an arbitrator neither favours one party nor is predisposed as to the question in dispute²⁴. It is a subjective requirement, more a "state of mind" situation rather than an actual fact. Having to do with subconscious, cognitive or cultural bias, it is hard to be proven. Thus, sometimes it is not the actual impartiality that we are looking for but the appearance of it. Impartiality should also not be confused with neutrality, which means that in some types of arbitration party-appointed arbitrators do not have to be neutral; meaning that they should not be biased but they can be from any legal, social or cultural aspect favourably disposed towards the appointing party.

²¹ General Principle 1 of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004.

²² For more details see: Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, <http://www.ibanet.org> (accessed on 2016).

²³ Brekoulakis S. (2013) Systemic Bias and the Institution of International Arbitration: a New Approach to Arbitral Decision-Making. *Journal of International Dispute Settlement*, pp. 1-33.

²⁴ Smith (1990) The Impartiality of the Party-Appointed Arbitrators. *Arbitral International*, pp. 320 – 323.

In practice, cases of actual partiality are rare phenomenon. It is seldom for an arbitrator to express in a clear way his favour for a party or his predisposition in relation to the dispute. Earlier publications regarding the legal issue in question do not impair the arbitrator's impartiality. Additionally, the interviewing of the arbitrator before appointment, as long as the dispute is not discussed in detail and arbitrator's opinion in a previous or preliminary award do not create sufficient doubts as to his impartiality²⁵. Nonetheless, an expressed opinion on the concrete legal question or the fact that the arbitrator acted as counsel for a party in the matter are enough to lead to the challenge and the disqualification of the arbitrator.

Independence, on the other hand, is an objective standard, as it requires no actual present or past dependant relationship between the parties and the arbitrators which may, or at least appear to, affect the arbitrator's freedom of judgment. While impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done²⁶. The standard of independence should be the same during the whole arbitration process and stricter at the time of arbitrator's appointment in order not only later challenges to be avoided but also any retrial of considerable parts of the proceedings.

Following the principle "no one should be judge in his own case" the standard of independence requires that there is no financial or other interest in the outcome of the case for the arbitrator. Furthermore, the arbitrator should not have any actual or important relationship with either party such as being the party's usual lawyer, if he wants to avoid being disqualified as dependent. Also arbitrators from law firms that are affiliated to or have an alliance with a firm representing one of the parties may not be considered independent, as well. As far as the prior appointments it is concerned, they are not sufficient to raise doubts as to the arbitrator's independence, but there is the danger that the other party will raise a challenge fearing that the independence of the arbitrator will be affected by the wish to receive future appointments. The aforementioned situations are indicative while the list of the

²⁵ Lew J.D.M. and Mistelis L. A. (2003) Impartiality and Independence of Arbitrators. *Comparative International Commercial Arbitration*, pp. 255 – 273.

²⁶ Lew J.D.M. and Mistelis L. A. (2003) Impartiality and Independence of Arbitrators. *Comparative International Commercial Arbitration*, pp. 255 – 273.

issues that in practice raise doubts about the arbitrator's independence or impartiality do not have a clear answer every time, as the solution depends on the mere facts of the case.

Relevant to the definition of impartiality and independence is party's autonomy and more specific, whether parties can affect or alter those standards in their agreement. Taking into consideration that parties are free to agree that their arbitrators will have specific qualifications, it should not be prohibitive for them to require their arbitrators to be entirely detached from the dispute and litigants. Heightened standard of impartiality and independence based on the parties' agreement seems to be permitted, while the issue of an agreement on reduced standard is more complex.

It is not very clear whether parties may agree to partial or biased arbitrators, despite the contractual nature of arbitration and party's autonomy to choose the arbitrator of its own preference. Few jurisdictions²⁷ consider an agreement that allows partial or biased arbitrators valid, while in few others there are mandatory prohibitions imposed against agreements on partial co-arbitrators²⁸. The majority of the jurisdictions do not explicitly address the parties' ability to agree to less demanding standards of impartiality and independence, while there is, also, no relevant provision in the UNCITRAL Model Law.

On balance, it would be better to recognize parties' ability to agree upon non-neutral or predisposed arbitrators but under certain limitations. The approach that allows such an agreement between the parties is consistent not only with the principle of party autonomy established in the New York Convention²⁹ but also with the parties' right to unilaterally select a co-arbitrator of its own preference. Since a party may agree to a partial or dependent arbitrator through an objection's waiver or a statement, there is not a good enough explanation why a party is not able to agree upon such an arbitrator through an express and affirmative agreement³⁰.

Considering that the adjudicatory process of international arbitration needs to be maintained, party's autonomy to bring dependent or partial arbitrators should not be with-

²⁷ For example in the United States, under both the FAA and state law.

²⁸ For example para 4(1) and 33 (1) (a) of the English Arbitration Act.

²⁹ Articles II (3) and V(1)(d) of the New York Convention 1958.

³⁰ Born G. B. (2nd ed.) (2014) Selection, Challenge and Replacement of Arbitrators in International Arbitration. In the International Commercial Arbitration Selection, Kluwer Law International.

out limits. In case of a sole or presiding arbitrator, for example, no partiality should be accepted, because this is in contrary to the adjudicatory function of the tribunal, which presupposes an adversarial process in which the parties are treated equally. Parties should have the autonomy to agree upon partial co-arbitrators, provided that they are aware and consent to this sort of arrangement, which needs to be expressed explicitly in order to ensure equality of treatment. This kind of agreement should be reached in equal terms for both parties and not as a result of one party's predominance. And as far as the non-neutral or pre-disposed arbitrators it is concerned, they should fulfill their obligations of fairness, honesty and integrity during the adjudicatory process.

Finally, despite the aforementioned limitations, there are types of partiality or dependence that according to the IBA Guidelines cannot be accepted for co-arbitrators even with the parties' agreement. Financial interest in the case, payment of separate compensation to an arbitrator by one party and not the other or the rendering and acceptance of instructions should not be permitted in international arbitrations, as they are incompatible with the character of the arbitration process and the standards of the New York Convention.

d. Conflicts of Interest

The Guidelines provide guidance for the different stages when conflicts of interest may arise. First, General Standard (2) introduces the disqualification stage, and then, General Standard (3) elaborates on the disclosure stage.

According to General Standard (2)(a), an arbitrator shall decline to accept nomination if he has any doubts as to his ability to be impartial and independent. In order to check whether he has to decline or not, the Guidelines provide the objective test in General Standard (2)(b). More specific, the arbitrator must withdraw or resign 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."³¹ In other words, from the point of view of a 'fair-minded lay observer with knowledge of the material objective facts,' as articulated by Aus-

³¹General Standard 2 and its Explanatory Note of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004. Same in Guidelines 2014.

tralian courts.³² The arbitrator should proceed if he eventually is impartial and independent and there are no circumstances giving rise to justifiable doubts from a reasonable third person's point of view. In case that bias has been brought to the light, then disqualification is appropriate and a challenge to the appointment should succeed.

Impartiality and independence should be assessed by the arbitrator considering only the merits of the case, without regard to the consequences of the outcome for himself or herself or any third party. The Working Group decided to provide a definition for the objective standard of the third person in order to avoid future problems, despite the fact that this objective test is widely recognized.³³ So, General Standard (2)(c) says: "Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by facts other than the merits of the case as presented by the parties in reaching his or her decision." However, this formula of the justifiable doubts, departing from the existing standard of impartiality and independence, does not include external factors, like the personal background and legal training of the arbitrator, that inevitably influence him³⁴ and can lead to implicit bias.

e. Duty of disclosure

In case the arbitrator has passed the disqualification stage described above, or even if he has not accepted his nomination yet, there might be circumstances giving rise to doubts as to his impartiality or independence, which will probably lead him to disclose this information to the parties.

General Standard (3)(a) provides: "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties (...)."³⁵ In contrary to the objective test of General Standard (2)(a), here a subjective test is introduced, that of

³² *Webb v The Queen* (1996) 181 CLR 41 (HCA).

³³ For more details see: Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, <http://www.ibanet.org> (accessed on 2016).

³⁴ Born G. B. (2nd ed.) (2014) Selection, Challenge and Replacement of Arbitrators in International Arbitration. In the International Commercial Arbitration Selection, Kluwer Law International.

³⁵ See General Standard (3) and its Explanatory Note, IBA Guidelines on Conflicts of Interest in International Arbitration 2004. Same in Guidelines 2014.

“the eyes of the parties.” This means that the arbitrator has, first, to identify the viewpoint of each party and then proceed to the disclosure of circumstances which, in the eyes of parties having a given culture or nationality, may give rise to justifiable doubts as to his impartiality or independence. The subjective test does not seem very practical, though, and it creates uncertainties and problems, because it applies to any facts likely to give rise to justifiable doubts whereas the objective test for disqualification requires the existence of actual doubts as to the independence and impartiality of the arbitrator.³⁶

If eventually the arbitrator decides to make a disclosure based on the subjective test, then the parties have to face another problem³⁷. They have to decide whether to challenge the arbitrator or not, and this decision has to be based on the objective test, which, by definition, the arbitrator already considered that he had met. Purpose of the disclosure is to allow parties to judge whether or not they agree with the evaluation of the arbitrator, and if so, wish to explore the situation further. However, it is not clear how this can be done, as there is no guidance provided by the Guidelines on the issue and the existing tests are of a different nature. Another relevant issue here is that the parties have the right to know some circumstances, but it is not clear if they have the right to challenge on the basis of these circumstances.

In any case, the Guidelines emphasize that disclosure does not necessarily lead to disqualification. The evaluation of whether or not a conflict exists takes place in any stage of the arbitral proceeding and the arbitrator is under the duty to disclose all information which could be relevant. However, the arbitrator should act in accordance with common sense³⁸ and disclose those factors which objectively could be relevant, rather than remote or distant factors. In this way, the subjective test could reconcile with the objective one.

³⁶ Mourre A. (2015) The Arbitrator and the Arbitration Procedure, Conflicts, Disclosures: The IBA Guidelines and Beyond. *Austrian Yearbook on International Arbitration, Volume 2015*, pp. 291 – 300.

³⁷ Shore L. and Cabrol E. (2004) A Comment on the IBA Guidelines on Conflicts of Interest: The Fragile Balance between Principles and Illustrations, and the Mystery of the “Subjective Test”. *15 Am. Rev. Int’l Arb.* 599.

³⁸ Lew J.D.M. and Mistelis L. A. (2003) Impartiality and Independence of Arbitrators. *Comparative International Commercial Arbitration*, pp. 255 – 273.

f. Practical application of the General Standards

i. Red List

The Red List is a non-exhaustive enumeration of specific situations that give rise to justifiable doubts as to the arbitrator's impartiality and independence. It is divided into two subcategories; the Non-Waivable Red List and the Waivable Red List, which reflects the Working Group's decision that some situations on the Red List should be waivable.

The Non-Waivable Red List includes four situations that derive from the overriding principle that no person can be his or her own judge. In these circumstances an objective lack of independence exists from the point of view of a reasonable third person having knowledge of the relevant facts. Practically the Red List applies the objective standard of General Standard (2). There are absolute prohibitions which are not subject to waiver, including waiver by an express, after the fact, agreement. However, the absolute nature of the Non-Waiver Red List is not compatible with the principle of party autonomy that applies in the arbitration procedure, while the non binding nature of the Guidelines does not explain what basis there might be for the mandatory rule forbidding waivers of particular conflicts³⁹.

In order to balance party autonomy with the common principle that a party cannot waive an actual conflict of interest, the Working Group⁴⁰ put serious, but not as severe as in the Non-Waivable List, conflicts in the Waivable Red List. The Waivable Red List encompasses three subcategories: (i) relationship of the arbitrator to the dispute; (ii) arbitrator's direct or indirect interest in the dispute; and (iii) arbitrator's relationship with the parties or counsel^{41,42}. The fourteen items included in the aforementioned subcategories provide grounds for disqualification based on the objective standard prescribed by General Standard (2) and they must be disclosed. Nevertheless, they can be waived by an express agreement between the parties, and not by silence or acquiescence, as long as the parties have full

³⁹ Born G. B. (2nd ed.) (2014) Selection, Challenge and Replacement of Arbitrators in International Arbitration. In the International Commercial Arbitration Selection, Kluwer Law International.

⁴⁰ For more details see: Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, <http://www.ibanet.org> (accessed on 2016).

⁴¹ Landolt P. (2005) The IBA Guidelines on Conflicts of Interest in International Arbitration: An Overview. *Journal of International Arbitration, Volume 22 Issue 5*, pp.409 – 418.

⁴² For an extensive analysis on the cases enlisted in the Red List see: Mullerat Obe R. (2012) The IBA Guidelines on Conflicts of Interest revisited Another Contribution to the Revision of an Excellent Instrument, which Needs a Slight Daltonism Treatment. *Spain Arbitration Review, Volume 2012, Issue 14*, pp. 61 – 99.

knowledge of these circumstances. In other words, the Waivable Red List is the practical application of the General Standard (4) about Waiver by the Parties.

ii. Orange List

The Orange List is a non-exhaustive list of twenty-three specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence⁴³. For example, there are cases where an arbitrator served as counsel for or provided advice to a party in the past three years, an arbitrator served as counsel adverse to a party, an arbitrator was appointed as arbitrator by a party on two or more occasions in the past three years, etc⁴⁴.

In practice, the Orange List corresponds to cases under the subjective standard of General Standard (3). It identifies a number of potential conflicts which should be fully and frankly disclosed by arbitrators or prospective arbitrators to the parties when they arise. According to the Working Group it should be viewed as a 'disclosure list'⁴⁵. However, any disclosure by the arbitrator does not automatically lead to his disqualification, but it simply gives parties the right to decide whether objectively a justifiable doubt exists and whether the arbitrator can act independently and impartially. Besides, the purpose of disclosure is to serve party autonomy and allow parties to choose how to deal with specific circumstances.

After the disclosure, parties have 30 days to make their decision and challenge the arbitrator. If the conclusion is negative, the arbitrator can act. He can also act if there is no timely objection by the parties. In case the arbitrator did not make any disclosure of such facts, it does not mean that he is partial or lacks independence. Any later challenge should result to disqualification based on the facts or the circumstances the arbitrator failed to disclose and not to the failure of disclosure itself⁴⁶.

⁴³ Introductory explanatory note of the IBA Guidelines on Conflicts of Interest 2004.

⁴⁴ For an extensive analysis on the cases enlisted in the Orange List see: : Mullerat Obe R. (2012) The IBA Guidelines on Conflicts of Interest revisited Another Contribution to the Revision of an Excellent Instrument, which Needs a Slight Daltonism Treatment. *Spain Arbitration Review, Volume 2012, Issue 14*, pp. 61 – 99.

⁴⁵ For more details see: Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration 2004, <http://www.ibanet.org> (accessed on 2016).

⁴⁶ Introductory explanatory note of the IBA Guidelines on Conflicts of Interest 2004.

The Orange List is the most significant as it encompasses possible conflicts that cover a wide range of issues frequently arising in practice. There are situations though, that are not mentioned in the Orange List or cases which fall outside the time limits imposed by some items included in the List. Under these circumstances, the arbitrator is under the duty to assess on a case-by-case basis if a situation gives rise to justifiable doubts as to his impartiality and independence. The arbitrator has to reason his conclusions based on the General Standards whose importance remains always unaffected by any future expansion of the list, since it will never be possible all the circumstances to be covered.

iii. Green List

Previous publications of “general opinion” concerning an issue that may arise in arbitration, an arbitrator’s previous service as arbitrator or co-counsel with another arbitrator or counsel for a party and other eight similar circumstances⁴⁷ are enlisted in the Green List. It is a non-exhaustive list of situations “where no appearance of lack of independence or impartiality exists from the relevant objective point of view.”⁴⁸ As a result, the arbitrator has no duty to disclose circumstances falling in the Green List. The Green List is the limit of the General Standard for disclosure, since from an objective point of view no conflict of interest appears in these situations.⁴⁹

In general, the Lists reflect international principles and best practices to the extent possible. Each of them includes situations close related to one of the General Standards, but it is also evident that there is no specific guidance in none of them as to the corollaries of a failure to make a disclosure, a standard that appears in every List.

⁴⁷ For an extensive analysis on the cases enlisted in the Green List see: Mullerat Obe R. (2012) The IBA Guidelines on Conflicts of Interest revisited Another Contribution to the Revision of an Excellent Instrument, which Needs a Slight Daltonism Treatment. *Spain Arbitration Review, Volume 2012, Issue 14*, pp. 61 – 99.

⁴⁸ Introductory explanatory note of the IBA Guidelines on Conflicts of Interest 2004.

⁴⁹ Freyer D. and Bedard J. (21st ed.) (2004) The Concept of Ethical Rules or The New IBA Guidelines on Conflicts of Interest in International Arbitration. ADR & the Law.

D. APPLICATION IN PRACTICE

The IBA Guidelines are created in order to promote uniformity in the standards applied in making decisions related to disclosure, objections and challenges of arbitrators. Their aim is to ensure that arbitration procedure will not be obstructed by ever-increasing conflict of interest issues. Years after their dissemination, the way that the Guidelines are treated by national courts and arbitral institutions is not uniform and does not seem to fulfill their goal.

According to a survey conducted by Judith Gill⁵⁰ on 2006, only three court cases, one in England and two in the United States, out of the 19 jurisdictions explored, referred to the IBA Guidelines. This result can be explained by the fact that the state courts perceive the national legislation concerning arbitrator's independence and impartiality enough to make a judgment and they do not need to make a reference to foreign rules or guidelines.

Since the aforementioned survey though, more court cases mentioning the IBA Guidelines, from jurisdictions that historically host international arbitration proceedings, have become known to the public. Judgments from Austria, Switzerland, The Netherlands, Sweden, Germany, England and the United States, dealing with prior arbitrator's appointments or repeated appointments, publication of an arbitrator's opinion and other challenges concerning arbitrator's independence and impartiality, referred more or less to the IBA Guidelines on Conflicts of Interest.

Some courts consulted the Guidelines before reaching a decision but did not rely on them in, while others did. For instance, the Court of Appeal of Brussels deciding whether to overturn a lower court decision⁵¹ rejecting a challenge filed on the grounds that an arbitrator had failed to disclose to the parties facts which would give rise to doubts as to his impartiality, relied in part on the IBA Guidelines, and finally dismissed the appeal⁵². Additionally, in Switzerland the IBA Guidelines were first used by the Swiss Supreme Court in 2007 on the decisions 4A_506/2007 and 4_528/2007 concerning a Swiss marketing executive and the

⁵⁰ Gill J. The IBA Conflicts Guidelines – Who's Using Them and How? <http://ibanet.org> (accessed on 2016).

⁵¹ Court of First Instance of Brussels, Case No R G 2006/1542/A (22 December 2006). Available at: <http://ita.law.uvic.ca> (accessed on 2016).

⁵² Brussels Court of Appeal, Case No R G 2007/AR/70 (29 October 2007) , *Republique de Pologne c/ Eureko BV et al*, 26 ASA Bulletin 565 (2008).

Turkish Football Federation⁵³. On the other hand, the US courts generally refuse to rely on the IBA Guidelines, even if the parties have explicitly mentioned them. Nonetheless, recently exceptions show that there are margins for a change, as US courts start to accept the Guidelines and ask guidance from them.

Mixed, also, are the results coming from widely known arbitral institutions. According to ICC's reports, from a total of 187 cases, either under the ICC Rules or not, 106 of them refer to at least one article of the Guidelines. Same, the LCIA reported that numerous challenge divisions of the LCIA Court have referred to the IBA Guidelines⁵⁴. On the contrary, the JCAA has not, so far, consulted the IBA Guidelines for challenging an arbitrator, while the Special Committee of the Swiss Chambers of Commerce, even if it verifies whether the Guidelines, often mentioned by the parties, address the circumstances on which the challenge is based, it does not apply them⁵⁵.

Besides the statistics indicating who and for what the Guidelines have been used, there are also substantial issues concerning their application. First, it is doubtful whether the Guidelines approached their stated goal and contributed to the reduction of challenges⁵⁶. On the opposite, an increase is observed in the challenges and disqualifications of the arbitrators which might result from the broader standards of disclosure that the Guidelines have introduced compared to national laws and other rules. Moreover, the Guidelines did not actually contribute in the content of the standards of impartiality and independence and under which circumstances these principles could be grounds for disqualifying an arbitrator. This, in conjunction with the admonition "all doubts must be resolved in favor of disclosure", has led to expansive disclosure which imposes material costs on the arbitral process without producing proportionate results. The fact that disclosure results to challenge, because it is still equate to disqualification, has also affect the standards for annulment and non-

⁵³ Scherer M. (2008) First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration, Case Note on Swiss Supreme Court Decisions 4A_506/2007 & 4A_528/2007. *ASA Bulletin, Volume 26 Issue 3*, pp. 588 – 595.

⁵⁴ For instance: UNCITRAL Case National Grid Plc v The Republic of Argentina, LCIA Case No Un 7949, Available at: http://iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf (accessed on 2016).

⁵⁵ For details see: The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004 – 2009, <http://ibanet.org> (accessed on 2016).

⁵⁶ Born G. B. (2nd ed.) (2014) Selection, Challenge and Replacement of Arbitrators in International Arbitration. In the International Commercial Arbitration Selection, Kluwer Law International.

recognition of arbitral awards. Last but not least, the Guidelines do not address real cases of bias and partiality, which was a catalyst for the opening of discussions on their revision.

III. THE REVISED IBA GUIDELINES ON CONFLICTS OF INTEREST 2014

E. KEY CHANGES ON THE IBA GUIDELINES ON CONFLICTS OF INTEREST 2014

The approved changes of the review process, started in 2012, will be the issue of this capital. All the revisions that occupied the arbitration community will be described and discussed.

a. Advance waivers

Advance waiver is a phenomenon that derives from arbitrators who work at larger law firms⁵⁷. According to this practice, such arbitrators ask from the parties to sign in “advance” a waiver to the arising of potential conflict of interest, before the arbitrator accepts his appointment.

If the parties agree and submit the advance waiver, then the appointment of the arbitrator will not be an obstacle for other lawyers from the same law firm to be involved in the arbitration. In this way the parties will be benefited, as they will have the chance to access highly competent arbitrators, who may otherwise be excluded from the pool of available arbitrators due to their affiliation with a larger law firm. Additionally, it will help parties to avoid last minute challenges, especially when they will have already spent considerable time and money on advancing proceedings towards a hearing. However, such a waiver constitutes also a “blanket approval” for future conflicts of interest. Parties waive their rights to bring challenges against the arbitrator, when circumstances arise between one of them and arbitrator’s law firm if the arbitrator is not personally involved with them. This makes the practice of advance waivers a controversial issue, as it is not clear whether the parties are actually benefited.

The 2014 Guidelines do not clearly address the issue of advance waivers, since there is no guidance provided as to when such waivers should be considered valid or enforceable.

⁵⁷ Voser N. and Petti A.M. (2015) The Revised IBA Guidelines on Conflicts of Interest in International Arbitration. *ASA Bulletin, Volume 33 Issue 1*, pp. 6 – 36.

Instead, in General Standard (3)(b) it is stated that advance waivers “do not discharge the arbitrator’s ongoing duty to disclosure under General Standard (3)(a)”. The validity and effect of advance declarations or waivers should be assessed according to the factual situation in a given case, and the applicable law. What the 2014 Guidelines make clear is their impact on the arbitrator’s duty of disclosure. The arbitrator cannot rely on them to prevent future challenges, but he is obliged to disclose facts and circumstances which, in the eyes of the parties, give rise to doubts as to his impartiality and independence. Considering also that arbitrator’s law firm is included in his identity, the arbitrator is also under the continuing obligation to review the activities of his own law firm⁵⁸. This clarification is very important because it leaves no doubt that while parties can agree on advance waivers, the independent nature of arbitration remains safe, and they are still under the duty to decide on the arbitrator’s bias based on the disclosed facts.

Another change worth mentioning here is related to the right of the parties to waive objections to full neutrality. The 2004 Guidelines did not prohibit such arrangements by providing that the Guidelines did not apply at all to “non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws”⁵⁹. The revised Guidelines following a different approach on the issue delete the aforementioned provision from General Standard (5) and state that they apply “equally to tribunal chairs, sole arbitrators and co-arbitrators howsoever appointed”⁶⁰. Now the only informed waivers of “serious” conflicts of issues permitted are those on the Waivable Red List.

b. Arbitral secretaries

Taking into consideration the increasing appointment of tribunal secretaries by arbitral tribunal and their significance over the last ten years since the Guidelines were first issued, the new Guidelines extend the duty of independence and impartiality to tribunal secretaries, as

⁵⁸Hodges P., Leathley C., Greenaway J. and MacKinnon J.(2014) Publication of New IBA Guidelines on Conflict of Interests in International Arbitration – the key changes. Available at: <http://hsfnotes.com/arbitration/2014> (accessed on 2016).

⁵⁹ General Standard 5 of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004.

⁶⁰ General Standard 5 (a) of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

well. What had previously only been discussed in the explanatory note of General Standard (5) of the 2004 Guidelines now has been upgraded to a new paragraph of the Standard.

General Standard (5)(b) expressly provides that “arbitral or administrative secretaries and assistants,..., are bound by the same duty of independence and impartiality as arbitrators (...).” Thus, arbitral secretaries should apply the Guidelines in the same ways as they are applied to the arbitrators themselves. The responsibility to ensure that the administrative secretaries uphold their duties has been placed to the arbitral tribunal, meaning that the arbitrators need to carefully scrutinize their prospective secretaries. Further, as the explanatory note of General Standard (5)(b) states, this duty applies to arbitral or administrative secretaries and assistants to either the arbitral tribunal or individual members of the arbitral tribunal and it should be respected at all stages of the arbitration. This amendment seems to share the opinion of those who argue in favor of the establishment of internal codes in the arbitral institutions and highlights the role of the staff and secretaries in the arbitral tribunal.

The same standard for arbitral secretaries appears also in the Young ICCA’s Guide on Arbitral Secretaries, according to which:” The arbitral tribunal shall confirm to the parties that the proposed candidate for arbitral secretary is independent, impartial and free of any conflicts of interest.”⁶¹ It seems that the Young ICCA’s Guide acknowledges that arbitral secretaries’ role may go beyond purely administrative matters to drafting orders and appropriate parts of the award, which also explains the entirely new provision in 2014 Guidelines⁶².

c. Arbitrator’s law firm

In modern arbitral practice, an increasing number of arbitrators also work as lawyers in law firms which may have acted for one of the parties before the arbitration. Even if the firm is involved in a totally unrelated matter, arbitrator’s collective responsibility to firm’s clients can give rise to objective justifiable doubts as to his independence or impartiality in the arbitration process.

⁶¹ Article 2 para. (3) of Young ICCA Guide on Arbitral Secretaries.

⁶² Moyeed K., Montgomery C. and Palon N. (2015) A guide to the IBA’s Revised Guidelines on conflicts of Interest. Clyde & Co. LLP, <http://clydeco.com> (accessed on 2016).

The revised Guidelines deal with that contemporary problem of international multi-office law firms in General Standard (6)(a). First, they make clear that: “the arbitrator is in principle considered to bear the identity of his or her law firm” and then, in the explanatory note of the standard, they clarify that the work undertaken by the arbitrator’s law firm should not automatically create a conflict of interest⁶³. Any potential conflicts that the arbitrator might have should be examined on a case-by-case basis⁶⁴.

In an attempt to determine when disclosure should be made, the Guidelines say that the fact that the arbitrator’s law firm has been associated with one of the parties does not necessarily amount to a conflict or something requiring disclosure. Each situation must be considered on its own facts, while disqualification occurs only when it is objectively justified under General Standard (2).

The explanatory note to General Standard (6)(a) draw also a distinction between barrister’s chambers and law firms for the purposes of dealing with conflicts⁶⁵. Although barristers’ chambers should not be equated with law firms, disclosure may be warranted in view of the relationship among barristers, parties or counsel. If the relationship is comparable to those of members of law firms, then the same rules may apply, despite the lack of general standard for barristers’ chambers.

d. Third-party funders

Third-party funding in arbitration has increased since the issuance of the first IBA Guidelines. It is a scheme where a party unconnected to a claim finances all or part of one of the parties’ arbitration costs. In general, funding towards fees and expenses of counsel, as well as funding for arbitrator fees, costs of investigation, document production and review as well as hearing expenses are included. The funder, usually specialized firms, banks and insurance companies, is remunerated by an agreed percentage of the proceeds of the award or a suc-

⁶³ Explanatory Note of General Standard (6)(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

⁶⁴ Moyeed K., Montgomery C. and Palon N. (2015) A guide to the IBA’s Revised Guidelines on conflicts of Interest. Clyde & Co. LLP, <http://clydeco.com> (accessed on 2016).

⁶⁵ Smith M.D. (2015) IBA Guidelines on Conflicts of Interest in International Arbitration 2014. Available at: <http://kwm.com> (accessed on 2016).

cess fee or a combination of the two⁶⁶. Third-party funding is not part of the arbitration process and there is no general obligation to disclose the presence of it in arbitration. However, an undisclosed relationship between the arbitrator and the funder may give rise to conflicts of interest and interrupt the arbitration proceedings. Before the 2014 Guidelines there were no rules or laws dealing with the issue.

General Standard (6)(b) has been amended so that a “legal or physical person having a controlling influence on the legal entity or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration may be considered to bear the identity of the legal entity”. The explanation⁶⁷ to this amendment clarified that “third party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such, may be considered to be the equivalent of that party”. In addition, General Standard (7)(a) requires parties to disclose any relationship between an arbitrator and “any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.

The revision means that parties who are third-party funded are now expected to disclose the existence of such funding both to the Tribunal and the other parties. They have to disclose any direct or indirect relationship between the arbitrator and the third-party funder “at the earliest opportunity”. However, they are not obliged to disclose the terms of the funding arrangement. This is explained by the fact that the third-party funding and its terms are not the reason that a conflict may arise. Instead, the involvement of a third person with a direct financial interest in the outcome of the dispute is the issue. His presence can influence arbitrator’s decision making, because the potential concerns regarding the relationships between the arbitrator and counsel extend now to this third party as well⁶⁸.

⁶⁶ For more details see: Osmanoglu B. (2015) Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest. *Journal of International Arbitration, Volume 32 Issue 3*, pp. 325 – 350. Park W. and Rogers C. (2015) The Arbitration Agreement and Arbitrability, Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force. *Austrian Yearbook on International Arbitration, Volume 2015*, pp. 113 – 123.

⁶⁷ Explanatory note of General Standard (6)(b) of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

⁶⁸ Voser N. and Petti A.M. (2015) The Revised IBA Guidelines on Conflicts of Interest in International Arbitration. *ASA Bulletin, Volume 33 Issue 1*, pp. 6 – 36.

The result of this amendment is that it allows parties to explore the financial abilities of each other in the arbitration, and as such let them to change their strategy as to how they conduct the arbitration. Additionally, it is expected that a direct involvement of these third-party funders will be soon observed. Since now the third-party funder bears the identity of the party, there is a likelihood that security for costs orders will appear early in the arbitration and costs awards will be enforced against both the third-party funder and the party to the arbitration⁶⁹.

e. Identity of counsel

The new Guidelines clarify that they are not limited entirely to guidance for arbitrators but also for parties and their counsels. They extended the parties' duty of disclosure not only to the third-party funding but also to the counsel's identity.

General Standard (7)(b) describes a scenario that was previously covered under Article 3.3.2 of the Orange List⁷⁰. The parties are required to inform all relevant persons involved in the arbitration of "the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator". This should be done at the outset of the proceedings and upon any change in the counsel team. In order to fulfill this duty parties have to investigate any relevant information that is reasonably available to them, as it is stated in the explanatory note of General Standard (7)(c). Here, there is also another amendment, as previously the parties were only under the duty to search for publicly available information.

This entirely new provision reflects an attempt to avoid a situation where late disclosure of the relationship between the arbitrator and the counsel gives rise to a challenge by the other party as to the arbitrator's impartiality. The obligation of the party to disclose counsel's identity remains the same during the arbitration proceedings, and thus, the party has to disclose on its own initiative any new members added in its legal team. The reason for

⁶⁹ Hodges P., Leathley C., Greenaway J. and MacKinnon J. (2014) Publication of New IBA Guidelines on Conflict of Interests in International Arbitration – the key changes. Available at: <http://hsfnotes.com/arbitration/2014> (accessed on 2016).

⁷⁰ Hodges P., Leathley C., Greenaway J. and MacKinnon J. (2014) Publication of New IBA Guidelines on Conflict of Interests in International Arbitration – the key changes. Available at: <http://hsfnotes.com/arbitration/2014> (accessed on 2016).

this continuing obligation is that it was common phenomenon new counsels to be added on a later stage in an effort to create a conflict with the already composed arbitral tribunal⁷¹, especially in investment treaty cases⁷².

f. New entries in the lists

In the Red List minor changes are observed after the revision of the Guidelines. More specific, the Non-Waivable Red List keeping up with the amendments in the General Standards clarifies that the arbitrator cannot have a controlling interest in a third-party funder or his law firm regularly advise a party or be an employee of a party. In the Waivable Red List the definition of an arbitrator's "close family member" has now been widened. "Any other family member with whom a close relationship exists" is added to the spouse, sibling, child, parent or life partner of an arbitrator. Additionally, it is clarified that when the arbitrator provides in a regular basis advice to any party or affiliate but he does not derive significant income from this, then the situation belongs to the Waivable Red List. If, on the contrary, he receives significant financial income, then this is dealt with in the Non-Waivable Red List⁷³.

As far as the Orange List it is concerned, its non-exhaustive character is now stated in the updated explanatory note. There are situations that fall outside the Orange List or the time limits therein and they should be assessed on a case-by-case basis as to whether they need to be disclosed. This changes the previous scene, according to which, circumstances not covered by the Orange List were automatically fallen under the Green List and need not to be disclosed. Several examples of such situations are given, including an arbitrator concurrently acting as counsel in an unrelated case that involves similar legal issues; an appointment made by the same party or the same counsel while the case is ongoing and the repeat past appointments by the same party or the same counsel beyond the normal three-year period. Although there was much discussion on the extension of the envisaged period

⁷¹ Squire Patton Boggs (2014) New IBA Guidelines on Conflicts of Interest in International Arbitration: An overview of the Main Changes. Available at: <http://squirepattonboggs.com> (accessed on 2016).

⁷² For instance: *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia* (ICSID Case No. AR/05/124).

⁷³ Moyeed K., Montgomery C. and Palon N. (2015) A guide to the IBA's Revised Guidelines on conflicts of Interest. Clyde & Co. LLP, <http://clydeco.com> (accessed on 2016).

of three years⁷⁴ to five, finally the three year time limitation relevant to measure the repeat appointments or engagements of the 2004 Guidelines was retained.

Further, there are two entirely new provisions introduced in the Orange List. Article 3.3.7 includes the scenario where “enmity exists between an arbitrator and counsel appearing in the same arbitration”; meaning that the arbitrator has to take into consideration whether there are negative feelings against the counsel due to previous dealings with him, or any other reason. This new circumstance however, is not expected to have a high practical impact, as a release of such information in the small arbitration community would be difficult to be retrieved.

The other new scenario in Article 3.3.8 of the Orange List requires disclosure to take place whether the arbitrator and another arbitrator on the Tribunal, or the arbitrator and counsel for one of the parties, currently act or have acted together as co-counsel within the past three years. This provision addresses the increasingly common instance of co-counsel relationship. Even if it does not seem very reasonable that the Guidelines require disclosure of past co-counsel relationship, as the access to information or ex parte communication among the members of the arbitration ceased by the time the co-counsel relationship ends, it is still important, because what must be disclosed is the financial interest that an arbitrator derives from acting as co-counsel with the arbitrator or counsel involved in the proceedings⁷⁵.

Last, the Green List has been expanded after the revision, since three new circumstances have been enlisted in it. According to Article 4.3.3., no disclosure is required when “The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organization with another arbitrator or counsel for one of the parties”. Also as Green List item is described in Article 4.3.4 the case where “The arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties”.

⁷⁴ Article 3.3.1 of the Orange List of the IBA Guidelines on Conflicts of Interest in International Arbitration 2004. Same in the Guidelines 2014.

⁷⁵ Voser N. and Petti A.M. (2015) The Revised IBA Guidelines on Conflicts of Interest in International Arbitration. *ASA Bulletin, Volume 33 Issue 1*, pp. 6 – 36.

Finally, there is a new entry in the event where “The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association or social or charitable organization, or through a social media network”⁷⁶. In this case, the revisers addressed a circumstance that in the last decade was used a lot in order to challenge an arbitrator’s impartiality or independence. Similarly, there is no need for disclosure if the arbitrator has a relationship with one of the parties or its affiliates through a social media network⁷⁷, which has become increasingly common through websites like LinkedIn.

In few words, the New IBA Guidelines retained the structure of their predecessors and did not introduce revolutionary amendments. They have been simply adapted to include recent developments and norms in an attempt to correct anomalies that have arisen over the last decade. Clarifications, additional obligations on arbitrators, more duties on parties and new duties on Tribunal Secretaries as well new scenarios in the application lists respond to market trends and practice. The IBA Committee intends to continually monitor the use of the Guidelines in order to improve them further⁷⁸.

V.CONCLUSIONS

The previous Capitals attempted to analyze the most debated issues of the 2004 Guidelines as well the amendments introduced by the 2014 Guidelines. The main core of the Guidelines is not affected at all, while new provisions and clarifications are the result of the revision process.

Regarding the legal nature of the Guidelines, it was, and still is, non-binding. The set of best practices represented in the Guidelines cannot be enforced. It depends on the willingness of the parties to abide by them, while no arbitral institution has adopted them as institutional rules, yet. This lack of independent legal effect has been accused by some practitioners as the reason for the inconsistent application of the Guidelines.

⁷⁶ Article 4.3.1 Green List of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

⁷⁷ Article 4.4.4 Green List of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.

⁷⁸ Hodges P., Leathley C., Greenaway J. and MacKinnon J.(2014) Publication of New IBA Guidelines on Conflict of Interests in International Arbitration – the key changes. Available at: <http://hsfnotes.com/arbitration/2014> (accessed on 2016).

The standard of impartiality and independence, the very essence of arbitration, is the cornerstone around which the Guidelines have been structured. No definition of these requirements is provided, but in the application lists can someone find recurring situations that often put arbitrator's impartiality and independence in question. A much debated issue is whether the parties can upon their agreement increase or reduce this standard. Even if it is accepted that they are free to customize it, always with respect to the adjudicatory process, the IBA Guidelines insist that there are still situations where partiality and dependence cannot be accepted, despite the parties' agreement.

Concerning the disqualification of the arbitrator, the Guidelines require the objective test of General Standard (2)(b) to be applied. If the arbitrator finds that he is impartial and independent from a reasonable third person's point of view, then he should accept his appointment. In case the arbitrator believes that there are no justifiable doubts concerning his impartiality and independence, but there are some situations that in the eyes of the parties could give rise to relevant doubts, then he is obligated to disclose them to the parties. The parties are then responsible to decide whether to challenge the arbitrator or not, as the Guidelines make it totally clear that disclosure does not automatically lead to disqualification.

The practical application of the General Standards follows the traffic light system and is separated in the Red, Orange and Green List. The Non-Waivable Red List regards situations that objectively lack of arbitrator's independence and thus, they are not subject to waiver. On the contrary, the Green List does not require any disclosure, since it encompasses circumstances that do not give any rise to justifiable doubts as to the arbitrator's independence and impartiality. Last, the Waivable Red List and the Orange List include situations that should be disclosed in order the parties to assess any potential conflict of interest. Both of them can be waived; the former with an express waiver, while the Orange List requires a parties' objection within 30 days of the disclosure.

As to practical application of the Guidelines, the results are mixed. There are some jurisdictions that have tentatively used them and based their decisions on them, while others still refuse to do so, even when the parties have already mentioned them. Moreover, doubts have been raised as to whether the Guidelines actually fulfill their goal to reduce dis-

closures. Statistics show an increase of them, which might result from the broader standard of disclosure that the Guidelines introduced in.

In relation to the amendments of the revision, they have been criticized as evolutionary rather than revolutionary. The changes reflect the current trends in the arbitration field and they attempt to correct some irregularities observed during the last decade. The revision is limited to clarifications, new duties and new situations enlisted in the Lists.

In general, the IBA Guidelines on Conflicts of Interest are considered to be a useful tool in the arbitration practice. They provide guidance to issues surrounded by ambiguity, like the standard of impartiality and independence, and they are a unique example of legal instrument that includes lists addressing reoccurring circumstances. Since the IBA Committee continuously checks the use of the Guidelines and their impact in practice, only further improvements can be expected.

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