

Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration

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1 Introduction

In response to the problems of conflicts of interest that increasingly challenge international arbitration, the International Bar Association (IBA) published the IBA Guidelines on Conflicts of Interest in International Arbitration (the 'Guidelines') in July 2004.¹ This article details the drafting history of the Guidelines and is intended to assist with the understanding and interpretation of the Guidelines.

1.1 Background, goals and main conclusions of the Working Group on Conflicts of Interest in International Commercial Arbitration

The IBA Working Group on Conflicts of Interest in International Arbitration began its deliberations in early 2002. The Working Group was formed from the IBA's Arbitration and ADR Committee (Committee D of the IBA Section on Business Law), which decided to address formally the problems of conflicts

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¹ The IBA Guidelines on Conflicts of Interest in International Arbitration can be found at www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf.

of interest.² From the outset, the Working Group aimed to consider the usefulness of the existing standards by which the impartiality and independence of arbitrators were assessed, and also to formulate new standards for situations that had not previously been addressed. The Working Group tried to set forth standards that could be accepted by different legal cultures.³

The Working Group first established General Standards setting forth the best international practice with regard to impartiality and independence. These are the core of the Guidelines. In addition, the Working Group proposed concrete examples of how to apply the General Standards, because such practical guidance was considered essential if the Guidelines were to be useful to practitioners.

In developing the practical application of the General Standards, members of the Working Group drew up a list of recurring situations based on the case law of different jurisdictions, as well as their own experiences. The Working Group then divided the practical situations into three lists: Red, Orange and Green.⁴

The Red List is an enumeration of specific situations giving rise to justifiable doubts as to an arbitrator's impartiality and independence. This list is divided into non-waivable and waivable situations. The Orange List is an enumeration of specific situations that in the eyes of the parties may give rise to justifiable doubts as to an arbitrator's impartiality or independence. The Green List is an enumeration of specific situations in which there is no appearance of a lack of impartiality and independence and so no conflict of interest exists.

The Working Group determined that the lists could fulfil their practical purpose in the daily work of an arbitrator only if they were linked to the disclosure requirement. In situations falling within the Red List that are not waivable, disclosure is not necessary because the arbitrator must decline his or her appointment. For situations on the waivable Red List and on the Orange List, however, disclosure must be made so that the parties can evaluate any potential conflict of interest. The difference between these lists is that the waivable Red List requires the parties to make an explicit waiver, whereas situations on the Orange List require parties to raise an objection within 30 days after disclosure. Whether or not these situations are conflicts depends on the circumstances of the case. Finally, for situations on the Green List, no

2 Members of the Working Group included those who, on a separate initiative taken by Arthur Marriott QC, had formed a small committee to formulate a general policy or standard for addressing conflicts of interest based on experience and practice.

3 See IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction.

4 The lists were initially labelled Black, Grey and White. See section 4, 'Practical application of the General Standards – the Lists', below.

disclosure is necessary, because the relationship does not raise any doubts as to the arbitrator's independence or impartiality.

The lists are an important aspect of the Guidelines because they put into practice the theory of the General Standards and provide examples of how the General Standards should be applied.

In drawing up these lists, the Working Group considered that:

- The lists represent a simplification of often complex situations – they are drafted to balance the need for specificity with general applicability.
- Some situations were controversial and members of the Working Group sometimes perceived similar situations differently. The final result is the best considered judgment of the Group.⁵
- The lists cannot be exhaustive and they were not meant to be.
- In all circumstances, the General Standards should prevail.
- Some open norms (eg a 'significant financial interest') are unavoidable.
- It is intended that the lists be monitored as they are used, which will result in periodic revisions to account for practical experience. The Working Group has made a proposal for the ongoing monitoring and updating of the lists to the Arbitration and ADR Committee of the IBA.

In drafting the Guidelines, the Working Group has attempted to balance the various interests of parties, their counsel, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration and arbitration procedures in general.

The Working Group acknowledges that national courts may have the last word on a challenge to an arbitrator, and also that the Guidelines cannot replace or supplant mandatory rules of applicable national law. Nevertheless, on the basis of its research in a number of important jurisdictions, the Working Group has concluded that there are no specific mandatory rules with regard to conflicts in most if not all of these jurisdictions. Even where such rules exist, or have been developed in case law, the Guidelines are not, in general, inconsistent with such rules, in the opinion of the Working Group.

While the Guidelines are not legal provisions, the Working Group hopes that they will find acceptance within the international arbitration community (as did the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they will help practitioners, arbitrators, institutions and the courts make decisions with regard to objections and challenges concerning these very important questions of impartiality, independence and disclosure.

⁵ Members of the Working Group sometimes had different perspectives regarding the issues raised by the Guidelines. The final Guidelines, however, have the full support of the Working Group as reflecting best international practice.

Throughout the process of drafting the Guidelines, the Working Group sought comments from arbitration institutions, practitioners and corporate general counsels. Valuable comments were received from ICC Germany/DIS, ASA, the LCIA, the Arbitration Institute of the Stockholm Chamber of Commerce, ACICA, CEPINA and CPR. The Chairman of the Working Group held meetings with ICC representatives who provided helpful comments regarding the development of the Guidelines. These comments led to numerous changes to the Guidelines and to a reconsideration of many principal areas.

1.2 Members of the Working Group

The Working Group consists of the following 19 members:

- (1) Henri Alvarez, Canada;
- (2) John Beechey, England;
- (3) Jim Carter, United States;
- (4) Emmanuel Gaillard, France;
- (5) Emilio Gonzales de Castilla, Mexico;
- (6) Bernard Hanotiau, Belgium;
- (7) Michael Hwang, Singapore;
- (8) Albert Jan van den Berg, Belgium;
- (9) Doug Jones, Australia;
- (10) Gabrielle Kaufmann-Kohler, Switzerland;
- (11) Arthur Marriott, England;
- (12) Tore Wiwen-Nilsson, Sweden;
- (13) Hilmar Raeschke-Kessler, Germany;
- (14) David W Rivkin, United States;
- (15) Klaus Sachs, Germany;
- (16) Nathalie Voser, Switzerland (Rapporteur);
- (17) David Williams, New Zealand;
- (18) Des Williams, South Africa;
- (19) Otto de Witt Wijnen, the Netherlands (Chair).

The Working Group was assisted by Neomi Rao and Steven Friel.

1.3 Drafting history of the Guidelines

1.3.1 Reports submitted by the members of the Working Group

Several meetings of the Working Group took place in the spring and summer of 2002. Members discussed the law and practice with regard to conflicts of interest in their respective jurisdictions. It was agreed that each member of the Working Group should present a National Report. The members of the Working Group submitted 13 National Reports from the following

jurisdictions: Australia, Belgium, Canada, England, France, Germany, Mexico, the Netherlands, New Zealand, Singapore, Sweden, Switzerland and the United States.

The National Reports covered, *inter alia*, the following issues:

- *General policy*
 - How does the respective jurisdiction define the standard of bias? Is Article 12 of the UNCITRAL Model Law applicable?
 - If an ‘appearance’ test or something similar is applied, is there any rule which sets out whether this should be applied objectively (reasonable third party) or subjectively (specific party at stake)?
 - Is the standard the same for judges and arbitrators; chairpersons and co-arbitrators?
- *Disclosure*
 - Is there a standard of disclosure and, if so, what is it?
 - Is there a rule that in case of doubt an arbitrator should disclose?
 - Is there a continuing duty to disclose?
- *IBA Rules of Ethics*

Members of the Working Group were asked to compare the existing IBA Rules of Ethics with the standards and practice in their own jurisdictions.⁶
- *Policy of bias/list of situations*

Members were invited to provide their own definition of the policy of bias and disclosure. In view of their own practice and experience, members were requested to prepare a list of situations which the Working Group should be trying to deal with in the practical applications of the Guidelines (eventually the Red, Orange and Green Lists).
- *Article 6 of the European Convention on Human Rights*

European members were asked to include a discussion of Article 6 of the Convention in their national reports.⁷
- *Waiver of conflicts*

The Working Group discussed whether there were situations in which, after disclosure, the parties could not waive possible conflicts of interest. It was agreed that this issue should be addressed in an Additional Report to be submitted to the Working Group by the members.

1.3.2 Presentation of the First Draft Report

The First Draft Report, dated 7 and 15 October 2002, was presented at the IBA Conference in Durban, South Africa, in October 2002. In a meeting of

⁶ See section 5.1, ‘Comparison with requirements in the different jurisdictions’ below.

⁷ See section 2.4, ‘Applicability of Article 6 of the European Convention on Human Rights’, below.

the Arbitration and ADR Committee, members of the Working Group laid out the background to the project and the work culminating in the First Draft Report. The presentation was followed by a detailed discussion, which included such topics as: the role of significant financial interests in the Red and Green lists; the significance of a party to the arbitration being a client of the arbitrator's law firm; the considerations that apply when an arbitrator is a director of a party; the considerations that apply when an arbitrator has a personal relationship with a party or counsel for a party; the purpose of disclosure; and disclosure in cases of doubt.

There was excellent attendance at the Durban session and nearly everyone expressed their support for the Guidelines. Only one of the participants stated that attempts to formulate Guidelines were not useful.

1.3.3 Second Draft Report

The Working Group met in the spring and summer of 2003 to consider all of the various comments submitted by the institutions and other interested parties. At this time, separate taskforces were formed to address specific problems. These discussions eventually resulted in the completion of the Second Draft Guidelines.

The Second Draft was the subject of an Arbitration and ADR Committee meeting at the IBA Conference in San Francisco in September 2003. This meeting was also extremely well attended, and most participants expressed their support for the Guidelines. Presentations explained the structure of the Guidelines and highlighted difficult issues that had generated the most attention.

There were also a remarkable number of comments from the floor. Although many points had already been considered by the Working Group, a number of new points were raised. In particular, it was asked whether the Green List was compatible with the subjective test for disclosure,⁸ and whether the Guidelines would benefit from a 'hazardous operation review', modelled on peer review in construction and engineering industries, to consider the different ways in which the Guidelines might be used in later challenges to an arbitration.

1.3.4 Hazardous operation review

Taking up a suggestion from the IBA Conference, the Working Group decided to ask a prominent group of practitioners to review the Second Draft Guidelines. For this purpose, comments were solicited from Gerry

⁸ See section 3.1, 'Standard for disclosure – the subjective test', below.

Aksen (United States), Wolfgang Kuhn (Germany), Toby Landau (England), Fali Nariman (India) and Michael Schneider (Switzerland).

Many of the suggestions made during the review were incorporated into the Guidelines, as explained in the next section. Only two of the suggestions were not followed. The Working Group decided against including a General Standard on shifting the burden of proof, because such a provision was considered to be beyond the scope of the Guidelines. There was concern that such a provision would intrude inappropriately into national procedural law.

In response to the criticism that the Guidelines posed a potential hazard when they conflicted with applicable national laws, the Working Group determined that the Guidelines already made clear that they did not supplant national laws.⁹

The Guidelines are both descriptive and normative – they draw on existing local standards; however, the Guidelines also seek to suggest a general best international practice that might influence the approach of local courts and legislatures. In many, especially common law, jurisdictions where the judge-made law is unclear on a particular point, the Guidelines might be of use to arbitrators as well as to judges in exercising their discretion. The Guidelines can thus, where relied on, serve to influence courts and assist with filling in the gaps of national law, in the same way that they might assist arbitral institutions in evaluating conflicts under their own rules. The Working Group naturally recognises that arbitrators must always still defer to applicable national laws or arbitral rules when evaluating potential conflicts, but this should not detract from the importance or utility of the Guidelines which aim to provide greater detail and guidance on these important matters of independence and impartiality from an international perspective.

1.3.5 Finalising the Guidelines

During the beginning of 2004, the Working Group finalised a variety of issues raised during and since the IBA Conference in San Francisco, including suggestions arising out of the hazardous operation review. A variety of substantive and structural decisions were taken. In terms of substantive decisions, the Working Group decided:

⁹ See IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction, para 6 ('These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties.'). See also section 1.1, 'Background, goals and main conclusions of the Working Group on Conflicts of Interest in International Commercial Arbitration', above.

- not to propose a model clause for incorporating the Guidelines because of the possibility of a negative inference against using the Guidelines when such a clause was not included;
- that the Guidelines should apply to all arbitrations, not just commercial cases;
- to include a footnote proposing that the Guidelines should apply by analogy to civil servants and government officers who are appointed as arbitrators by states or state entities that are parties to arbitration proceedings;
- to include language in General Standard 1 to the effect that an arbitrator's duty to remain impartial and independent ends when the final award is rendered;
- to include reference to cultural subjectivity for disclosure in the explanation to General Standard 3;
- to expand to 30 days (from 15 days) the time period for evaluating potential conflicts in General Standard 4;
- to soften General Standard 6 by emphasising that, in considering potential conflicts with an arbitrator's law firm or within a group of companies, attention must be given to the facts and circumstances of the individual case;
- to add General Standard 7(c), explaining that an arbitrator also has a duty to make reasonable enquiries with regard to potential conflicts;
- to explain that the Green List serves as a limit on the subjective test for disclosure and that accordingly the two provisions of the Guidelines can be reconciled.

Among the important structural and editorial decisions:

- the title was finalised as 'IBA Guidelines on Conflicts of Interest in International Arbitration';
- a flow chart was included in order to provide a schematic overview of how the Guidelines would be used to evaluate potential conflicts of interest, taking into account, as always, relevant individual circumstances;
- finally, in response to numerous comments, the Guidelines define 'close family member' to include 'life partners'.

2 Standard of impartiality and independence

2.1 General definition of impartiality and independence

Starting from the widely accepted premise that an arbitrator must be independent and impartial, that is, without bias, the Working Group has sought to articulate General Standards and the grounds on which the impartiality and independence of an arbitrator may be questioned or challenged.

The UNCITRAL Model Law has put forth a standard for challenging the impartiality and independence of an arbitration that has been very influential in the 13 jurisdictions represented in the Working Group. Article 12(2) of the Model Law provides: ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.’

Seven jurisdictions (Australia, Canada, Germany, Mexico, the Netherlands, New Zealand and Singapore) have adopted this language in full.

The jurisdictions that have not adopted the UNCITRAL Model Law nonetheless reflect a similar standard as the Model Law for challenging the impartiality and independence of an arbitrator. For instance:

- In England, the standard refers to facts leading a fair-minded, fully informed observer to conclude that there is a ‘real danger (ie real possibility) of bias’.
- In Sweden, the law depends on circumstances that ‘may diminish confidence in the arbitrator’s impartiality’. The Swedish Arbitration Act of 1999 provides a non-exhaustive list of such circumstances.
- In Switzerland the law is similar to the Model Law, although Swiss law does not refer to ‘impartiality’ in its standard of bias.
- The United States has adopted a standard of ‘evident partiality’, which has been defined by federal courts as something beyond ‘remote and speculative claims’ of bias, but falling short of ‘actual bias’. Generally, ‘evident partiality’ requires a ‘direct and substantial’ relationship or interest between the arbitrator and a party, or between the arbitrator and the subject matter of the dispute.
- France has not adopted a statutory duty of independence or impartiality for arbitrators, and instead focuses on ‘grounds for challenge’ as specifically enumerated in the New Code of Civil Procedure. French courts have created a general duty of independence, which can give rise to a challenge if material or intellectual links create a ‘definite risk of bias’.

All of the jurisdictions agree that a challenge to the impartiality and independence of an arbitrator depends on the *appearance* of bias and not actual bias.

The Working Group has decided to accept the wording ‘impartiality or independence’ as understood in the application of Article 12 of the Model Law in recognition of the fact that any new definition of the General Standard might only give rise to confusion. Some commentators suggested that the terms should be reversed, because independence logically precedes impartiality. The Working Group determined that for ease of use it made sense to retain the order of the Model Law.

2.2 Standard for impartiality and independence – the objective test

Most of the jurisdictions reviewed take the view that a challenge to the impartiality and independence of an arbitrator must be determined objectively, ie from the viewpoint of a reasonable third person who has knowledge of the relevant facts. For instance, a ‘fair-minded lay observer with knowledge of the material objective facts,’ as articulated by Australian courts.¹⁰

The Netherlands Report raised the question of whether there is a meaningful difference between the viewpoint of a reasonable third party and the objective viewpoint of the challenging party. Swedish law in a sense applies both a subjective and an objective test. The subjective test is whether the arbitrator is actually biased and the objective test is whether from the perspective of the general public there is any circumstance that could diminish confidence in the arbitrator’s impartiality.

Based on the virtual consensus of the national reports and the discussions of national law, the Working Group decided that the proper standard for a challenge is an ‘objective’ appearance of bias, so that an arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist 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 (General Standard 2(b)). If an arbitrator chooses to accept or to continue with an appointment once such bias has been brought to light, disqualification is appropriate and a challenge to the appointment should succeed.

While this objective standard is widely recognised, the Working Group considered it important to give some substance to the ‘justifiable doubts’ standard in order to provide a rationale for the underlying problems that the Guidelines are designed to avoid. Impartiality and independence depend on 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. In accordance with this view, General Standard 2(c) provides: ‘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.’

The Working Group has also determined that in evaluating whether or not a conflict exists, the stage of the arbitral proceeding should make no difference. This is implicit in General Standard 2(a) and (b). While there are recognised practical concerns if an arbitrator must withdraw after an

¹⁰ *Webb v The Queen* (1996) 181 CLR 41 (HCA).

arbitration has commenced, a distinction based on the stage of arbitration is methodologically not justifiable since in order to determine whether the arbitrator should be disqualified, the circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. Nonetheless, because an arbitrator must step down whenever an actual conflict exists, it is particularly important to ascertain as far as possible any potential conflicts at the beginning of an arbitration.

The Second Draft stated that an arbitrator who refuses to continue to act after the arbitral procedure has commenced must carefully consider the impact that this will have on the proceedings. This caveat was included because the Working Group was concerned that some arbitrators might raise a conflict after the arbitration had commenced in order to end his or her involvement with the case. It was removed in the final draft because of concerns that such a provision might raise claims of liability against an arbitrator who withdraws after an arbitration has commenced. The Guidelines emphasise that an arbitrator must carefully ascertain conflicts at the outset in order not to disrupt the proceedings once the arbitration has begun; however, such disruption might be inevitable when a conflict later arises or becomes known.

2.3 Standard of impartiality and independence for judges and arbitrators, sole arbitrators, party-appointed arbitrators, tribunal chairpersons and secretaries

The standard of impartiality and independence for judges was a natural starting place for considering the standard for arbitrators. Most of the jurisdictions surveyed apply the same standard of impartiality and independence for judges and arbitrators. This includes Australia, Canada, England, France, Mexico, the Netherlands, New Zealand, Singapore, Switzerland and the United States. There are, however, different approaches taken to this question. For instance, in Sweden, a slightly stricter standard of impartiality and independence applies to arbitrators than to judges, because, *inter alia*, the arbitration process does not allow for an appeal on the merits.

On the other hand, in Germany the standard of impartiality and independence is more stringent for judges than for arbitrators, on the grounds that parties choose their arbitrators, but not their judge. In the United States, there are separate and distinct canons of ethics and related case law governing judges and arbitrators. Furthermore, the United States has a tradition of non-neutral party-appointed arbitrators that had previously necessitated a stricter standard for chairpersons than for non-neutral co-arbitrators. As this tradition has begun to disappear, so have the differences in the standards of bias. While initially the Guidelines referred to some of

these national differences, the Working Group has determined that the Guidelines should reflect best international practice without reference to particular national practices.

Whatever the treatment of arbitrators in relation to judges, most jurisdictions provide that the same standard should be applied to sole arbitrators, party-appointed arbitrators and tribunal chairpersons. There are, however, a few exceptions. In Switzerland, the current case law and legal commentators agree that the standard should be less strict for party-appointed arbitrators than for a chairperson. A German court has held that a chairperson of an arbitral tribunal would be subject to a stricter standard than the co-arbitrators.¹¹ This decision seems to be an isolated one.

Accordingly, after reconsideration of this issue based on the discussion in Durban, and taking into account the prevailing situation in the vast majority of the jurisdictions under review, the Working Group proposed that there should be no difference in the standard applied to the chairperson of a tribunal and a party-appointed arbitrator. Requiring the highest standard from all arbitrators should also further public confidence in the arbitral procedure.

The Second Draft stated that the Guidelines apply by analogy to secretaries of arbitral tribunals. The inclusion of secretaries generated criticism during the meeting in San Francisco as well as during the hazardous operation review. It was noted that such recognition of secretaries goes beyond the scope of Guidelines for arbitrators and might be thought to legitimise the use of what still may be a controversial procedure in some situations. Furthermore, it was noted that if the Guidelines were applicable to secretaries they would have an obligation to disclose potential conflicts and parties would have to make formal objections to these secretaries. Finally, it was suggested that secretaries should not be subject to express duties in the Guidelines, but that arbitrators should assume responsibility for ensuring that the secretaries they appoint are independent and impartial.¹² This suggestion was adopted by the Working Group, and included in the explanation to General Standard 5.

2.4 Applicability of Article 6 of the European Convention on Human Rights

Article 6 of the European Convention on Human Rights provides the right to a fair trial 'by an independent and impartial tribunal established by law'.

¹¹ BGHZ 54, 392.

¹² In this context, see Constantine Partasides, 'The False Arbitrator? The Role of Secretaries to Arbitral Tribunals in International Arbitration' [2002] 18 *Arbitration International* 147-263.

Based on the direct or indirect impact of Article 6 for all states subject to the Convention, the Working Group initially proposed that this provision should be considered the minimum standard with regard to the impartiality and independence of the arbitrator. In practice, this standard should not differ substantially from Article 12 of the UNCITRAL Model Law.

The European jurisdictions are divided as to whether this provision applies directly to arbitral tribunals. For instance, Switzerland, Sweden and France agree that Article 6 does not apply directly to arbitral tribunals, because they are not ‘established by law’, but rather are private institutions governing rights between private parties. The Netherlands takes the view that the principles of Article 6 apply to the requirements of impartiality and independence for international arbitrators. The differences, however, are not as great as they might seem. Both the Swiss and French Reports submitted to the Working Group noted that even if Article 6 were not directly applicable to arbitration, under national constitutional principles, Article 6 would be applicable to any ancillary proceeding brought in national courts in support of arbitration.

Although Article 6 is a common reference point among Convention member states, the Working Group eventually decided to omit reference to the European Convention on Human Rights from the Guidelines because the reference might be unfamiliar outside Europe.

2.5 Arbitrator as member of a law firm

From the outset, the Working Group has been aware of the need to address the particular conflict of interest issues that arise for arbitrators who are members of large, often international, law firms. The traditional rule regarding arbitrators as members of law firms is that the interests of an arbitrator would be considered identical to those of his or her law firm and that all conflicts of the firm are attributed to the arbitrator. Under this rule, parties were often unable to appoint their preferred arbitrator because of conflicts attributable to the arbitrator’s law firm. In order to address this concern, the First Draft Joint Report reversed the traditional rule and proposed as a general standard: ‘When considering the relevance of facts or circumstance to determine a potential conflict of interest, the arbitrator’s activities shall not be considered to be an equivalent to his or her firm’s activities.’

This provision was severely criticised by various institutions and individuals. For instance, the ICC Germany/DIS Report found this standard unacceptable, because it could be viewed as an attempt by the large international law firms to ameliorate their position and improve their market

share. They suggested that the arbitrator and the firm should be considered one and the same entity for conflict issues, and argued that the Guidelines should not 'white-wash' arbitrators who are members of large law firms. The Mexican Bar Association noted that the arbitrator should be considered equivalent to his or her law firm because the focus of international arbitration should be the parties, not the arbitrators. Several Working Group members also thought that the initial formulation of the General Standard went too far, and noted that such a broad rule must at least have some limits, otherwise it would do a disservice to international arbitration.

Other members of the arbitration community commented that the formulation of the Guidelines amounted to an effort to protect arbitrators in large law firms. There was considerable concern that the whole Guidelines exercise might be an attempt by large international law firms to advance their position and their market share of international arbitration. Some stated that large law firms should not be able to gain double advantage by offering worldwide service under one brand name and then claiming that their partners who served as arbitrators acted only as individual lawyers.

Although the Working Group did not share the view that the Guidelines were merely an effort to protect arbitrators in large law firms, it took account of all of these concerns and noted that the traditional rule equating an arbitrator with his or her law firm had to be balanced against the realities of global law firm practice. In large, international law firms, an individual arbitrator might have no knowledge of or relation to a matter that created a conflict with a proposed arbitration. In such circumstances, disclosure and consultation with the parties would be preferable to automatic disqualification. Individualised consideration would also further the interests of parties in appointing the arbitrator of their choice. If such disclosure and consultation were not possible, the arbitrator should not accept the appointment.

Based on the recommendations of a taskforce set up to consider this issue, the Working Group eventually decided to adopt in the Second Draft Guidelines a General Standard stating that the activities of an arbitrator's law firm would not *per se* constitute a conflict of interest, but that such facts and circumstances should be disclosed and their relevance evaluated in each individual case.

Concerns regarding the place of large law firms in the Guidelines were again raised at the Arbitration and ADR Committee meeting in San Francisco and in the hazardous operation review. In response, the Working Group changed the '*per se*' language in the Second Draft. In the final draft, General Standard 6 states that the activities of an arbitrator's law firm should be reasonably considered in each individual case.

2.6 *Potential conflicts within a group of companies*

Similarly, the Working Group recognised the need to address the potential conflicts that arise when a party that is a legal entity is part of a group of companies. The situation arises more frequently with the globalisation and consolidation of many industries. In order to give parties greater flexibility, the First Draft Report provided the General Standard: ‘If one of the parties is a legal entity, this legal entity shall not be considered as being an equivalent to those of a whole group of companies of which it is a member.’

This met with various objections. For instance, the ICC Germany/DIS Report suggested that the activities of the entire group of companies should be considered for the purpose of ascertaining conflicts. This issue was addressed by the taskforce in tandem with that of the arbitrator as a member of a law firm and a similar solution was proposed. The Working Group concluded that the fact of being a member of a group of companies would not constitute *per se* a conflict of interest, but that the facts and circumstances should be disclosed and reasonably considered in each individual case.

This issue was eventually given the same treatment as when an arbitrator is a member of a law firm. The ‘*per se*’ language was changed and the Guidelines state that the activities of a group of companies should be reasonably considered in each individual case.

3 Disclosure

3.1 *Standard for disclosure – the subjective test*

In all of the jurisdictions surveyed, there is some duty of disclosure. In the majority of countries, this duty is provided for in the relevant statute. In others it has been adopted through the courts or through professional codes of ethics.¹³

The UNCITRAL Model Law again serves as the underlying standard. Many jurisdictions have adopted verbatim the language of Article 12(1), which provides:

‘When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.’

¹³ For instance, in Belgium, disclosure is based on a ‘common consideration’; in Switzerland, the duty to disclose has been recognised as a contractual duty by the Federal Supreme Court; in England, the courts have not conclusively decided whether disclosure is a matter of good practice or legal obligation; and in the United States, the disclosure duty has been imposed by judicial decisions and the AAA/ABA Code of Ethics.

Under the Model Law, the only difference between the standard of disclosure and the standard for a successful challenge is that with regard to disclosure, the facts and circumstances are only *likely* to give rise to justifiable doubts, whereas for a successful challenge, the circumstances do actually give rise to such doubts. Australia, Canada, Mexico, the Netherlands, New Zealand and Singapore have adopted the Model Law by statute. Switzerland has adopted a virtually identical rule with exclusion of the word 'impartiality'. Germany's standard is similar, with the exclusion of the word 'justifiable'.

Other jurisdictions have also adopted a general objective standard, but with slightly different formulations:

- Sweden requires disclosure of any facts that 'may be deemed' to prevent service in accordance with that jurisdiction's arbitration rules (for instance, any facts that 'may diminish confidence in impartiality').
- The United States requires the disclosure of any interest or relationship that 'might create an appearance of partiality or other bias' or that is 'likely to [actually] affect impartiality or independence'.

At least two jurisdictions depart from a generalised or abstract objective standard:

- France requires the disclosure of any facts encompassed by the statutory grounds for challenge, provided that the facts involved are not common knowledge and that they raise reasonable doubts as to the arbitrator's independence. The duty to disclose is restricted by the statutory list of grounds for challenge. In France, it is not settled whether the rule of disclosure should be applied objectively or subjectively, and the prevailing opinion seems to be that the subjective approach is preferred.
- Under English case law, an arbitrator should disclose any facts that could arguably 'give rise to a real danger of bias'. This exceeds a purely objective disclosure requirement and comes close to a subjective test with regard to the arbitrator.

The First Draft Joint Report proposed an objective standard for disclosure because this corresponds to the UNCITRAL Model Law and to the law in many jurisdictions.

Several institutions criticised this proposal. For instance, the ICC Germany/DIS Report suggested that the test should be a subjective one, because the duty to disclose should satisfy the subjective views of the parties. Robert Briner of the ICC noted that the ICC Rules provide that the relevant viewpoint for disclosure is that of the challenging party.¹⁴ Adrian Winstanley in the *LCIA*

¹⁴ International Court of Arbitration, Rules of Arbitration, Article 7.2 ('Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.').

News noted that while an objective test was proper for a successful challenge, a lesser, more subjective, standard from the viewpoint of the arbitrator might be appropriate for disclosure. He proposed perhaps no more than circumstances which, in the mind of the arbitrator ‘may give rise to doubts as to his or her independence or impartiality’.¹⁵

After much discussion, the Working Group determined that there should be a subjective test for disclosure, ie that facts or circumstances shall be disclosed if, from the parties’ perspective, they give rise to doubts about the arbitrator’s impartiality or independence. Some members of the Working Group remained concerned that an ‘eyes of the parties’ test would encourage capricious challenges or unnecessary disclosure. It was further noted that the different grounds for disclosure and disqualification should be clarified, because in some major institutions, once any doubt was raised, an arbitrator was often passed over for appointment. For example, the ICC has a practice of requiring a ‘clean statement’ from the national committee.

The Working Group eventually concluded that certain of the dangers inherent in the application of a subjective test could be avoided by emphasising that disclosure based on subjective grounds would not lead to automatic disqualification.

In addition, the Working Group determined that the duty to disclose should continue throughout all stages of the arbitration. As with disqualification, the arbitrator should not take into account whether the arbitral procedure was at the beginning or at a later stage. The circumstances alone are relevant, not the current stage of the proceedings or the consequences of the withdrawal.

The use of the subjective test was again questioned at the Arbitration and ADR Committee meeting in San Francisco. Several participants noted that if disclosure depended on the perspective of the parties, then it was inconsistent to have a Green List of situations for which disclosure was never required. Some argued that the subjective test rendered the Green List redundant because if an arbitrator must make a disclosure based on an ‘eyes of the parties’ test, then it made no sense to have a list of situations beyond the disclosure requirement. Acknowledging this inconsistency, the Working Group first decided to keep the Green List as it was an important goal of the Guidelines to set forth some situations in which no conflicts of interest were deemed to arise. The Working Group then reconsidered an objective test for disclosure, which would have eliminated the inconsistency.

15 Adrian Winstanley, ‘International Bar Association Conference 2002, Durban: A view from an administering institution’, *LCIA News* (Vol 7, Issue 4, December 2002), p 24.

Ultimately, the subjective test was retained, primarily because various arbitral institutions had previously expressed strong opposition to an objective test. The final conclusion was to keep the subjective test for disclosure, but to explain that the Green List placed a limitation on this test. Disclosure should generally be viewed from the eyes of the parties; however, there are some situations which will virtually never lead to disqualification under the subjective test and, accordingly, these situations need not be disclosed, regardless of the parties' perspective.

3.2 Disclosure in case of doubt

In certain cases, an arbitrator may be unsure whether or not to disclose particular circumstances, ie he or she has doubts as to whether the circumstances are relevant in the eyes of the parties. The majority of jurisdictions do not impose an affirmative duty to disclose in situations where the arbitrator has doubts as to whether or not disclosure is required. Such a duty, however, does exist in Germany as well as in the United States (under the AAA-ABA Code of Ethics), and Canadian case law expresses a preference for disclosure in cases of doubt.

In the First Draft Joint Report, the Working Group questioned whether the Guidelines should contain a default disclosure rule stating that, in any doubtful situations, disclosure should be made. On the one hand, a duty to disclose in case of doubt could help eliminate possible grounds for challenging arbitral awards. On the other hand, such duty might encourage the existing situation of 'over-disclosure'. In addition, excessive disclosure could raise an implication of bias and might unnecessarily undermine the parties' confidence in the arbitrator or provoke an opportunistic and unmeritorious challenge.¹⁶

After weighing these factors, the Working Group initially decided that, as it is the purpose of the Guidelines to provide greater certainty to arbitrators, it was better not to formulate a rule for disclosure in cases of doubt. There were concerns about over-disclosure leading to unnecessary challenges and perhaps even disqualification. It was hoped that the General Standard, together with the examples of situations in the lists, would help a prospective arbitrator to determine whether the circumstances raised sufficient concern regarding his impartiality and independence that they should be disclosed.

Several arbitral institutions, however, considered it very important to include a rule for disclosure in cases of doubt.¹⁷ In light of these concerns,

¹⁶ See *Taylor v Lawrence* [2002] 2 All ER 353 at 370 (Singapore Additional Report).

¹⁷ This was reflected in comments from the ASA, LCIA and ICC Germany.

the Working Group decided that disclosure should be made in cases of doubt. It was emphasised, however, that the Guidelines should take into account the concerns of over-disclosure.¹⁸

3.3 Issue of waiver

Based on the well-accepted principle of party autonomy in international arbitration, the Working Group concluded that potential conflicts may often be accepted or waived by the parties. Once disclosure has been made, if the parties do not make a timely objection to a potential conflict of interest, this will constitute an effective waiver of most potential conflicts and the parties will not be permitted to raise such an objection at a later stage.

Despite this general principle of party autonomy, the members of the Working Group decided that there should be some limitations to the waiver of actual conflicts.

In most common law countries, when a disclosure demonstrates evidence of bias, such conflict of interest cannot be waived. In England and Singapore this principle derives from cases that hold that an arbitrator who ‘doubts his ability to be impartial’ should not accept the case. Similar principles obtain in New Zealand and Canada. In the United States and Australia there is no clear case law on the issue. By contrast, in Sweden and Switzerland, there are no limits to waivers of conflicts with respect to known circumstances.

Following the opinion expressed in the common law countries, the First Draft Report specified that all of the situations on the Red List were non-waivable. It was thought that this rule would help to create confidence in the impartiality and independence of arbitrators. Placing some limitations on waiver also seemed consistent with the recent trend away from the view that arbitration is purely a matter of contract. Many institutions, however, raised the point that the Red List impeded party autonomy by disallowing waiver. Eventually the Working Group decided to divide the Red List into waivable and non-waivable situations.¹⁹

3.4 Arbitrator as settlement facilitator

The waiver and acceptance of conflicts has particular relevance when the arbitrator attempts to assist the parties with settlement, a process that is quite common in some jurisdictions. During such settlement discussions the arbitrator may well obtain sensitive information regarding the parties, after

¹⁸ See IBA Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 3(c).

¹⁹ See section 4.2, ‘The Red List’, below.

which one or both of the parties may wish to choose a new arbitrator. The taskforce on waiver assessed the implications of this and concluded that arbitrators should be allowed to encourage mediation and settlement. Considering the sensitive position of the arbitrator as potential settlement facilitator, however, the taskforce and the Working Group determined that the parties must give their express agreement prior to the commencement of such a process. This express agreement will be considered an effective waiver of any potential conflict of interest that might arise from the arbitrator's participation in settlement or from any information that the arbitrator may learn in the process. After some debate and consideration of the issue, the Working Group agreed that the express agreement need not be in writing, but could be, for instance, an oral agreement reflected in the minutes of a hearing.

Members of the Working Group were also concerned that settlement discussions should not be used as a means of disqualifying an arbitrator. Accordingly, the waiver remains effective even if the mediation is unsuccessful, subject to the general principle that an arbitrator shall resign if he develops doubts as to his or her ability to remain impartial and independent for the remainder of the proceedings.

3.5 Duty of arbitrators and parties

The first two drafts of the Guidelines specified that the parties should have some obligation to disclose to a prospective arbitrator any relevant relationship between the arbitrator and the parties or any company affiliated with the party. Parties to an arbitration should make an effort to disclose promptly any findings made when researching arbitrators and their affiliations, in order to bring any potential conflicts to light and to reduce the risk of using a challenge to the arbitrator's independence to obstruct an arbitrator's decision. In the *LCIA News*, Adrian Winstanley called this proposal 'innovative' and 'constructive'.²⁰

Several people commented that this placed an uneven burden on the parties and that the arbitrator must assume some responsibility for uncovering obvious conflicts. In response to these concerns, General Standard 7(c) clarifies that the parties and the arbitrators share the obligation to make reasonable enquiries to uncover any potential conflicts of interest at the outset of the arbitration.

²⁰ Adrian Winstanley, 'International Bar Association Conference 2002, Durban: A view from an administering institution', *LCIA News* (Vol 7, Issue 4, December 2002), p 24.

4 Practical application of the General Standards – the Lists

In developing Guidelines for impartiality and independence, the Working Group considered that, in addition to the General Standards, it was important to provide specific, practical guidance to arbitrators, parties and institutions. This practical guidance took the form of three lists, originally called: Black, Grey and White. After discussion with various individuals and institutions, the Working Group eventually decided to designate the lists as Red, Orange and Green, in accordance with the well-recognised colours of the traffic light.

4.1 First Draft Report

The First Draft Report considered a variety of situations derived from the case law of numerous jurisdictions, as well as the experience of Working Group members. The Report then categorised the situations according to the type of challenge they posed to the impartiality and independence of arbitrators. The Red List contained serious conflict of interest situations. The Orange List gave examples of situations in which a conflict of interest may arise, and so disclosure was necessary to allow the parties to make a fully informed decision regarding the decision to appoint or to retain an arbitrator. The Green List enumerated situations in which there was no basis for challenging the arbitrator's impartiality and independence and, accordingly, no need for disclosure.

4.2 The 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. Initially all of the situations on the Red List were designated as non-waivable. This proposal met with a great deal of criticism and commentary. The ICC Germany/DIS Report noted that the draft constituted an 'unacceptable inroad to party autonomy'. This was also the predominant concern among those who thought that parties should be able to waive even some serious conflicts. The taskforce considering this issue concluded that there are some situations of evident or apparent bias that cannot be effectively waived. Nonetheless, even under common law principles, the parties should have the capacity to waive certain serious conflict of interest situations. The taskforce thus proposed that some situations on the Red List should be waivable; however, waiver should be considered an exception, rather than a regular solution to the Red List situations. This approach would balance party autonomy with the common law principle that a party cannot waive an actual conflict of interest.

The Working Group eventually decided to separate the Red List into waivable and non-waivable situations. Severe conflicts, such as when the party and arbitrator are identical or when the arbitrator has a significant financial interest in the outcome of the dispute, cannot be waived. Other serious conflicts that appear in the Red List, however, might be waived in exceptional circumstances, so long as several conditions are met. When considering what situations should be waivable, the Working Group tried to balance the interests of party autonomy while also promoting confidence in the independence of the institution of international arbitration.

4.3 The Green and Orange Lists

The structure and contents of the Green and Orange Lists – which straddle the line between situations to be disclosed and those situations beyond the disclosure requirement – generated many comments and provoked substantial debate, not only about the particular situations, but also about the basic principles governing disclosure under the Guidelines. A taskforce considered the global issue of how the Green and Orange Lists should be defined. The taskforce attempted to balance the desire of the parties and the institutions that prospective arbitrators make full and frank disclosure, along with the equally understandable concern on the part of prospective arbitrators and the parties appointing them that any such disclosure, no matter how peripheral it may be, might result in automatic disqualification. This taskforce concluded that the Orange List should be viewed as a ‘disclosure’ list, but that any disclosure of such situations would not automatically disqualify the prospective arbitrator. This would remove any suggestion that disclosure raises a rebuttable presumption of disqualification. The purpose of disclosure is to reveal information that can begin a dialogue about whether a conflict exists and whether an arbitrator can act independently and impartially. Disclosure of the situations respects party autonomy by giving parties relevant information so that they may decide how to deal with specific circumstances relating to the potential conflicts of prospective arbitrators.

4.4 Time limits

The taskforce also considered that with some situations on the Orange List, a potential conflict of interest situation might not exist after the passage of a period of time. It was proposed that no disclosure of such circumstances should be required after a lapse of three years. Accordingly, those same situations or relationships that occurred more than three years ago would generally not require disclosure. (In effect, they would be considered to be on the Green List.)

Many comments regarding the proposed time limits were made in response to the Second Draft at the Arbitration and ADR Committee meeting in San Francisco. Some commentators suggested that three years was somewhat arbitrary and did not account for the range of individual circumstances. Some thought three years was too short. Others thought it too long. This issue had already been considered by the Working Group, which decided to retain the three-year limits in order to indicate that some potential conflicts would recede with the passage of time. While any specific time limit must be somewhat arbitrary, three years was thought to provide a realistic benchmark for most situations. The Working Group recognises that the three-year limit, however, is only a guideline. It does not provide a bright line cut-off because it cannot capture individual circumstances that might make disclosure proper even after a lapse of time. Accordingly, reference must always be made to the General Standards when determining whether disclosure would be appropriate.

4.5 Barristers who practise as arbitrators

The First Draft of the Guidelines required disclosure of the situation in which the arbitrator and another arbitrator or counsel for one of the parties were in the same barristers' chambers. In effect, this meant that barristers were treated the same way as partners in a law firm. Numerous barristers expressed concern over this provision because they wished to distinguish the unique independence of members of the Bar. In response to comments from the LCIA as well as individual barristers who practise as arbitrators, the taskforce for the Green and Orange Lists considered the position of members of the English Bar and that of practitioners from other common law jurisdictions, who maintain what are known as 'door tenancies' in London.

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

Nonetheless, it is useful to explain generally how barristers' chambers function, as this might affect the ultimate consideration of whether a conflict

exists. The vast majority of English barristers practise as individual sole practitioners, within what are known as 'Chambers'. The working expenses (salaries of clerks, rent and other outgoings) are shared among the members of the chambers in question. ('Door tenants' will typically make a small contribution to chambers out of such fees as they may earn.) The share of these outgoings attributable to a particular barrister generally reflects the seniority and the earnings of the barrister concerned relative to other members of chambers, but income is not shared among the members of chambers, as it would be in the case of a partnership. It is right to point out that in other common law jurisdictions (eg New Zealand) such operational arrangements do not obtain: barristers in those jurisdictions may well enter into separate arrangements for the leasing of premises; they do not typically share office facilities or operate a clerk system; and there are no chambers promotional materials. There is a clear and obvious distinction to be drawn between barristers and law firms operating in these jurisdictions.

Moreover, most sets of chambers, members of which practise as international arbitrators, maintain procedures that make it impossible to undertake general conflict searches of those members' individual current or concluded case lists. As well as separate clerking facilities, these chambers also provide secure dedicated fax and direct line telephone facilities for international arbitration practitioners, so as to ensure that communication of sensitive information remains confidential.

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

5 IBA Rules of Ethics

In 1987, the IBA published Rules of Ethics for International Arbitrators (the 'IBA Rules of Ethics'). According to the Introductory Note, the IBA Rules of Ethics seek to establish internationally acceptable guidelines for the manner in which impartiality and independence may be assessed. The IBA Rules of Ethics are brief and contain nine basic rules. Rule 3 (Elements of Bias) and Rule 4 (Duty of Disclosure) concern the matters considered by the Working Group. With the IBA's adoption of new Guidelines, Rules 3 and 4 of the IBA Rules of Ethics are no longer applicable. Nevertheless, it is worth comparing the Guidelines with those Rules, which often had a stricter standard:

For instance, Rule 3.3 provides:

‘Any current direct or indirect business relationship between an arbitrator and a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator’s impartiality or independence. He should decline to accept an appointment in such circumstances unless the parties agree in writing that he may proceed. Examples of indirect relationships are where a member of the prospective arbitrator’s family, his firm, or any business partner has a business relationship with one of the parties.’

Rule 3.5 states:

‘Continuous and substantial social or professional relationships between a prospective arbitrator and a party, or with a person who is known to be a potentially important witness in the arbitration, will normally give rise to justifiable doubts as to the impartiality or independence of a prospective arbitrator.’

The duty of disclosure is also quite rigid and ‘failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification’. Rule 4 also lists specific facts and circumstances that must be disclosed, including any past or present business relationship, whether direct or indirect with the parties or any representative of a party; the nature and duration of any substantial social relationships with any party or any person known to be likely to be an important witness in the arbitration; and the nature of any previous relationship with any fellow arbitrator including prior joint service as an arbitrator.

5.1 Comparison with requirements in the different jurisdictions

Almost every National Report noted that the IBA Rules of Ethics define the elements of bias more broadly and/or present more stringent disclosure requirements than do the relevant principles of the individual jurisdictions.

The National Reports identified a number of specific instances of differences between the IBA Rules of Ethics and the standards applied in the individual jurisdictions:

- The National Reports for Switzerland and the United States stated that Rule 3.3 creates a more restrictive standard of impartiality and independence by classifying ‘any direct or indirect’ business relationship as giving rise to an appearance of bias.
- The assumption that any ‘continuous and substantial social or professional relationship’ in Rule 3.5 would create an appearance of bias also goes further than the case law of the United States.

- Under French law, the traditional rule was that non-disclosure did not automatically constitute an appearance of bias, and arbitrators were not required to make inquiries into any possible appearance of bias. A recent decision, however, takes a stricter position against an arbitrator's failure to disclose, although it is still unclear whether the failure to disclose would alone constitute a ground for annulment of an award.²¹
- The IBA Rules of Ethics go far beyond case law in Singapore, which has traditionally assumed bias only where the tribunal has a pecuniary or proprietary interest in the subject matter of the dispute.
- The IBA Rules of Ethics surpass Canadian standards by requiring disclosure of any prior appointment as an arbitrator and any present relationships with counsel 'regardless of magnitude'.

5.2 Conclusion of the Working Group

From a survey of the National Reports, it appeared that the IBA Rules of Ethics are generally more stringent than the standard practice in most jurisdictions. The Working Group therefore concluded that the IBA Rules of Ethics should not be treated as a minimum standard for these Guidelines.

These Guidelines strive to set forth the best practice with regard to preserving the impartiality and independence of international arbitrators. As the landscape of international arbitration has evolved since the publication of the 1987 IBA Rules of Ethics, the Working Group recommends that, in situations in which the Rules of Ethics and the Guidelines may conflict, the Guidelines serve as the basis for the conduct of arbitrators and parties.

21 Rev arb 2003, No 4, p 1231 (Fremarc c/ITM Entreprises).