

Appendix

References to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases

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This document presents the results of research conducted into cases handled by the ICC International Court of Arbitration ('Court') between 1 July 2004 and 1 August 2009, in which the Court was called upon to decide on objections to the confirmation of arbitrators and on challenges brought against arbitrators. Most of these cases were administered under the ICC Rules of Arbitration ('Rules'), although some were cases administered under the Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings.

The main aims of the research were to examine (i) how often each article of the IBA Guidelines was referred to and (ii) what situations giving rise to the objections and challenges were not contemplated by the Guidelines. Particular note was taken of cases in which the Court decided not to confirm an arbitrator or accepted a challenge in situations not contemplated by the IBA Guidelines.

It should be noted that references to the IBA Guidelines in such situations are for information only. When an arbitrator's confirmation is subject to objection or an arbitrator is challenged in the course of a case, the Secretariat of the Court briefs the Court on the circumstances so that an informed decision can be made. In so doing, it usually refers to any article in the IBA Guidelines that in some way contemplates the situation in question. Such references are for information only and do not bind the Court. Nor do they mean that the Court is applying the IBA Guidelines.

A total of 187 challenges and contested confirmations were examined for the purpose of this research. In 106 of these, at least one article of the IBA Guidelines was referred to as potentially contemplating the situation in question. In the remaining 81 instances, no article of the IBA Guidelines was identified as being relevant. In addition, a number of situations were encountered which, while similar to certain situations mentioned in the IBA Guidelines, did not correspond exactly to those situations. Finally, a few situations were found which, while resembling those mentioned in the IBA Guidelines, led to a different result. Each of these four categories is presented below.

1. Situations contemplated by the IBA Guidelines

The table below shows the number of times each article of the IBA Guidelines¹ was referred to in the 106 instances contemplated by those Guidelines. More than

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¹ The IBA Guidelines are quoted with the kind permission of the International Bar Association. The IBA Guidelines are available in full and in various languages on the website of the International Bar Association: <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

106 references are listed because in some cases reference was made to more than one article of the IBA Guidelines. The vast majority of references related to the IBA's so-called 'Orange List'.

Article of IBA Guidelines to which reference was made	Number of times reference was made to that article
Waivable Red List ²	
2.1 Relationship of the arbitrator to the dispute	
2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.	5
2.1.2 The arbitrator has previous involvement in the case.	7
2.3 Arbitrator's relationship with the parties or counsel	1
2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.	3
2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.	1
2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.	3
2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.	4
2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.	3
2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.	1
Orange List ³	
3.1 Previous services for one of the parties or other involvement in the case	
3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.	13

2 '... situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence', IBA Guidelines, Part II, § 2.

3 '... situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence', IBA Guidelines, Part II, § 3.

3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.	8
3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.	5
3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.	14
3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.	18
3.2 Current services for one of the parties	
3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.	9
3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.	1
3.3 Relationship between an arbitrator and another arbitrator or counsel	
3.3.2. The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.	2
3.3.3. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.	2
3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.	1
3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.	4
3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.	1
3.4 Relationship between arbitrator and party and others involved in the arbitration	
3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.	2
3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.	1
3.5 Other circumstances	
3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.	1

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.	1
Green List ⁴	
4.1 Previously expressed legal opinions	
4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).	1
4.2 Previous services against one party	
4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.	2
4.3. Current services for one of the parties	
4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.	1
4.4. Contacts with another arbitrator or with counsel for one of the parties	
4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.	1
4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.	12
4.5 Contacts between the arbitrator and one of the parties	
4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.	7

2. Situations not contemplated by the IBA Guidelines

As noted above, 81 of the 187 challenges and contested confirmations studied were not exactly captured by the IBA Guidelines. The situations encountered are categorized below.

4 '... situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view', IBA Guidelines, Part II, § 6.

2.1 State as a party: indirect employees

One situation not foreseen in the Guidelines, but which is on the increase, is that of arbitrators who are indirectly employed, or whose salary is somehow paid, by a party, or who are in some other way dependent on a party. This situation arises particularly where the party on which the arbitrator indirectly depends is a State.

The cases that come before the Court are each very distinct. 'Dependence' on a State can be understood in broad terms. An arbitrator could be dependent because he or she is a professor at a State university, a civil servant of that State, or an employee of a company wholly or partially owned by the State.

Article 3.4.2 of the IBA Guidelines envisages the situation of an arbitrator having been employed by one of the parties within the past three years, but does not cover current indirect employment.

In three indirect employment cases submitted to the Court, the nomination was confirmed or the challenge was rejected.

2.2 Family ties

The Court decided not to confirm an arbitrator whose brother had professional relationships with a party.

A nomination was not confirmed where an arbitrator and the spouse of the counsel who nominated him worked in the same law firm.

2.3 Nominee serving as co-arbitrator in another case involving opponent

The IBA Guidelines obviously contemplate the situation where the nominated co-arbitrator has previously been nominated by the same party. Yet they do not contemplate the situation where the arbitrator is sitting in another case involving the party that did not nominate him or her in the present case. A challenge was raised on this basis where the arbitrator in question was sitting in an unrelated arbitration as the co-arbitrator nominated by the opponent of a party to the present arbitration. The challenge was rejected.

In another, similar case the Court decided not to confirm an arbitrator, after one of the parties objected that the arbitrator was already serving as the co-arbitrator nominated by its opponent in another arbitration. The objecting party also maintained that there were similarities between certain issues in the two arbitrations.

2.4 Miscellaneous

2.4.1 The Court confirmed an arbitrator who had previously chaired an arbitration involving one of the parties and was currently chairing another arbitration involving that same party. The Court noted that the IBA Guidelines do not appear to cover this situation, although Article 3.1.3 provides for the situation of an arbitrator having been appointed within the past three years as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

2.4.2 The Court did not confirm an arbitrator who was previously the director of a company that had been advised by counsel.

2.4.3 The Court did not confirm an arbitrator who at the time was a board member of a competitor of a party to the arbitration and the competitor was involved in three litigations against that party.

2.4.4 The Court did not confirm an arbitrator who had a bad social relationship with the counsel acting for the party opposing the nominating party.

2.4.5 The Court did not confirm an arbitrator whose former law firm had been represented by respondents' counsel on many occasions. The arbitrator had also previously acted as co-counsel alongside a partner from the law firm of respondents' counsel.

2.4.6 The Court did not confirm an arbitrator who was regularly referring clients to the counsel responsible for the arbitrator's nomination.

2.4.7 An arbitrator was successfully challenged on the following grounds: (i) he was an employee of a major shareholder of one of the parties and (ii) a member of the legal council of the State that was a party to the arbitration. The Court rejected other grounds raised in the same case. When the case came before the Court, there was discussion on whether the fact that a lawyer has acted for or against a company forming part of a group of companies, where one group member has an unrelated contractual relationship with a party to the arbitration, should disqualify that lawyer from acting as arbitrator. The Court noted that the situation is not foreseen by the IBA Guidelines.

2.4.8 The Court accepted the challenge of an arbitrator who was acting as counsel to a third party that was seeking to take over one of the parties to the arbitration.

2.4.9 The Court rejected a challenge against a tribunal chair where the law firm acting for the challenging party had previously challenged the same individual, unsuccessfully, in an unrelated case. The challenging party considered that the prior challenge undermined the arbitrator's impartiality.

2.4.10 The Court rejected a challenge against an arbitrator who had a close connection with, and acted as legal counsel to, an academic institution with which one of the parties in the arbitration had an ongoing lender-borrower relationship.

3. Situations similar but not identical to those contemplated by the IBA Guidelines

The Court has encountered situations which, while closely related to certain situations listed in the IBA Guidelines, lie beyond the strict scope of the definitions found therein. They include the following:

3.1 Current relationship between the arbitrator and a counsel

The most common situation not foreseen in the Guidelines is that of an arbitrator and a counsel currently serving as co-counsel in an unrelated matter. Article 4.4.2 covers situations of this kind but only in relation to the past.

In five of the cases examined for the purpose of this report, a party objected that the arbitrator was currently acting as a co-counsel with the counsel of one of the parties. In four of those cases, the Court decided to accept the challenge or not to confirm the arbitrator. The remaining case, in which the Court rejected the challenge, was borderline due to special circumstances.

Nor do the Guidelines foresee the situation of an arbitrator and a counsel currently serving as co-arbitrators in another case, although they do foresee past situations of this kind, again in Article 4.4.2. During the period studied, two such situations were submitted to the Court. The Court decided to confirm the arbitrator in one of the cases, where the arbitrator was serving as co-arbitrator in another case where the counsel to one of the parties was also an arbitrator. Additionally, the arbitrator's firm and the aforementioned counsel's firm had referred clients to each other in the past. The circumstances showed that none of these grounds was sufficient to disqualify the arbitrator. In the other case, the arbitrator was not confirmed for a combination of reasons (see section 4 below, paragraph 3).

A related situation is that of a direct professional relationship between an arbitrator and a counsel, where the arbitrator was or is acting as counsel against that counsel in another matter. Two situations of this kind were submitted to the Court and in both the arbitrators were confirmed despite objections. This situation is again not contemplated by the IBA Guidelines, Article 3.1.2 of which only refers to an arbitrator who has acted against a party or an affiliate of a party within the past three years.

3.2 Family ties

There are certain family ties missing from the IBA Guidelines. They include the situation of a partner or employee of the arbitrator's law firm being married to a counsel in the case. Article 3.3.5 contemplates the opposite situation of a close member of the arbitrator's family being an employee in the law firm to which a counsel in the case belongs.

The Court rejected a challenge where the arbitrator's spouse was working at the law firm to which a counsel belonged (Article 3.3.5), and confirmed two nominations where a partner of the arbitrator's law firm was married to the lawyer of one of the parties. The Court also rejected a challenge against an arbitrator who had close or private relations with a family related to one of the parties.

3.3 Arbitrator counsel to the parent company of an entity that is currently opposing one of the parties in an unrelated arbitration

The Court rejected a challenge against an arbitrator who, in the past, had acted in an unrelated matter for the parent company of an entity currently opposed to the respondent in an unrelated arbitration. The IBA Guidelines do not appear to provide specifically for this situation insofar as apparently: (i) the arbitrator had not served as counsel for one of the parties or an affiliate of one of the parties in an unrelated matter in the past three years (Article 3.1.1), (2) had not served as counsel against one of the parties or an affiliate of one of the parties in the past three years (Article 3.1.2), and (3) the arbitrator's law firm was not currently acting against one of the parties or an affiliate of one of the parties (Article 3.4.1).

3.4 Arbitrator in-house counsel of company with commercial relations with both parties

The Court decided not to confirm an arbitrator who was employed as head of the legal department of a company that had commercial relations with both parties. Although this situation has a resemblance to those described in Articles 2.3.6, 3.2.3 and 4.5.3 of the IBA Guidelines, none of those articles was directly applicable.

3.5 Arbitrator former counsel to subsidiaries in the group of companies to which a party belongs

The Court confirmed an arbitrator who, more than ten years previously, had for five years acted as counsel to subsidiaries in the group of companies to which one of the parties belonged. Although not a perfect match, Article 3.1.1 of the IBA Guidelines appears to be the closest situation.

3.6 Arbitrator's law firm hired the legal services of the counsel to one of the parties

The Court accepted a challenge against an arbitrator whose law firm was represented by the counsel to one of the parties two years earlier in an unrelated matter. The situation closest to this would appear to be found in Article 4.4.2 of the IBA Guidelines, although again it is not a perfect match.

3.7 Miscellaneous

3.7.1 The Court accepted the challenge of an arbitrator who was previously counsel to a director of the party that nominated him (arguably covered by using General Standard 6(c) to interpret specific provisions of the IBA Guidelines).

3.7.2 The Court confirmed an arbitrator who had co-authored an article with one of the counsel for a professional publication. Article 4.4.1 of the IBA Guidelines, which relates to membership of the same professional organization, could be considered as analogous to publishing an article together.

3.7.3 The Court accepted the challenge of an arbitrator who was currently acting as counsel against one of the parties in litigation. A situation like this is contemplated in Article 3.1.2 of the IBA Guidelines, but for previous services within the past three years.

4. Situations contemplated by the IBA Guidelines but treated differently

The situations discussed here fall technically within the scope of the IBA Guidelines and could thus be thought to trigger the corresponding disclosure obligation. However, given the relevant circumstances of the case, the Court reached a different result from that suggested by the Lists in the Guidelines, e.g. a situation falling within the scope of the Green List where the arbitrator was not confirmed.

Also, the question arises as to whether two or more situations which, if analyzed separately, would not seem to lead to disqualification, might call the arbitrator's independence into question in the eyes of the parties when considered as a whole.

This happened in a case where the Court refused to confirm an arbitrator due to a combination of factors: (1) the arbitrator was serving as co-arbitrator with a party's counsel in another case (non-confirmation was not based on this ground); (2) the arbitrator had met the managing director of one of the parties on a number of occasions in informal settings (Article 3.3.6 seems to provide for a similar situation); and (3) the arbitrator had been in contact with the representatives of one of the parties with a view to identifying consulting projects on which the arbitrator's law firm might cooperate (the projects were merely potential, no concrete project had been investigated or conducted).