The IBA Conflicts Guidelines – Who's Using Them and How?

Judith Gill*

The 2004 IBA Guidelines on Conflicts of Interest in International Arbitration aimed to help manage conflicts of interest which arise in relation to international arbitration proceedings. In 2005 the IBA established a working group to monitor use of the Guidelines. A survey of working group members, institutions and individuals was carried out,[1] and responses were received from 19 key jurisdictions. The results were mixed. Encouragingly the Guidelines were used to various degrees in ten jurisdictions (mainly in Western Europe and North America) although in another seven jurisdictions the Guidelines were not used to any significant extent. This article considers the responses in more detail and invites further feedback on the use of the Guidelines.

Introduction

The purpose of this article is to report on the work to date of the Monitoring Subcommittee of the IBA's Taskforce on the Guidelines on Conflicts of Interest in International Arbitration ('the Guidelines') and to elicit further information and responses to assist the subcommittee in its work.

On 22 May 2004 the Council of the International Bar Association (IBA) approved the Guidelines in response to the increasing challenge of dealing with conflicts of interest arising in international arbitration. The difficulties

* Chair of the Recognition and Enforcement of Arbitral Awards Subcommittee of the IBA Legal Practice Division and Co-Chair of the Monitoring Section of the IBA Conflicts Guidelines Taskforce; Partner, Allen & Overy LLP, London. The author can be contacted at judith.gill@allenovery.com.

in dealing with such matters has resulted from a number of factors including the growth of international business and the manner in which it is conducted – with interlocking corporate relationships and ever larger international law firms. Given the international nature of the problem, the IBA seemed best placed to establish uniform standards with the aim of ensuring a consistent approach to conflicts of interest. The Guidelines were the product of a working group of 19 experts in international arbitration from 14 countries, and attempt to strike the delicate balance between the right of parties to select arbitrators of their own choosing, and the right to a fair hearing.

The aims of the Guidelines are to promote and assist disclosure by arbitrators of certain types of information, to enhance confidence in the integrity of international arbitration, and to assist institutions and courts to make consistent, clear and coherent decisions about disqualification. The Guidelines are not legal rules, and the intention for their application is set out at paragraph 6 of the Introduction to the IBA Guidelines on Conflicts of Interest:

> 'the Working Group hopes that these guidelines will find general acceptance within the international arbitration community … and that they thus will help parties, practitioners, arbitrators, institutions and courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection.'

Following the adoption of the Guidelines, a Task Force was set up whose role, among other things, was to monitor the extent to which the Guidelines were achieving their goal of 'general acceptance'. Feedback was sought on the extent to which the Guidelines were being used by arbitrators, counsel, parties, institutions and the courts in various jurisdictions. A survey was carried out of working group members, institutions and individuals in the targeted jurisdictions.[1] Responses were received in relation to 19 jurisdictions: Australia, Austria, Canada, China, Czech Republic, France, Germany, Hong Kong, India, Italy, Netherlands, New Zealand, Sweden, Singapore, Spain, Switzerland, Thailand, United Kingdom and United States.

In relation to two of the jurisdictions (Czech Republic and Spain) no specific information was received, perhaps suggesting that use of the

1 The author wishes to express her thanks to those who participated in the survey and to the various members of Allen & Overy LLP's International Arbitration Group who assisted with the collation and analysis of the responses. Particular thanks also to Matthew Hodgson for his assistance with the preparation of this article.

Guidelines in those jurisdictions is rather limited. Where substantive responses were received, the results were mixed. Based on the information provided it appears that the Guidelines are in use to varying degrees in ten jurisdictions (Austria, Canada, France, Germany, Hong Kong, Italy, Netherlands, Sweden, United Kingdom and United States). Less encouragingly, the Guidelines were not used to any significant extent in seven jurisdictions (Australia, China, India, New Zealand, Singapore, Switzerland and Thailand). Geographically speaking, the greatest uptake of the Guidelines has been in North America and Western Europe.

Before going into further detail on the responses, it should be pointed out that this article, like the survey on which it is based, is intended to be indicative of trends rather than exhaustive, and the task of monitoring use of the Guidelines is an ongoing one. The information provided varied greatly in terms of detail and specificity, and necessarily reflected in part at least the views and experiences of individual reporters. Furthermore, some of the responses provided significantly differing views on the use of the Guidelines within a single jurisdiction. Accordingly the Task Force would very much welcome additional views on the matters reported in this article, as well as any other comments regarding use of the Guidelines.

Two further preliminary points should be made. First, the information gathered in relation to arbitration institutions has come both directly and indirectly. For the purposes of this article the indirect feedback on institutions located in particular jurisdictions is set out in the reports from specific jurisdictions, while the direct feedback is collated separately in the section on institutions. It should of course be remembered that most of the institutions in question have users from around the world and accordingly the comments from specific jurisdictions may not represent the views of the wider user group of the particular institution. Secondly, this report is intended to record the substance of the feedback received. It does not necessarily reflect the views of the author, other members of the Task Force or the IBA.

The main themes to have emerged from those jurisdictions where the Guidelines have managed to gain a foot- or at least a toe-hold are that they have had more success in encouraging disclosure and promoting debate than in actually resolving conflicts. They are more likely to be used on an informal basis by arbitrators and counsel than by courts determining challenges to arbitrators. They have been applied by parties and counsel in both institutional and ad hoc cases but have not generally been relied upon by institutions determining challenges – at least not expressly. The Guidelines have also attracted a significant amount of academic discussion. In addition to the articles discussed in respect of each jurisdiction below, newcomers to

the topic may be interested to read Philip Landlolt's helpful overview and explanation of the Guidelines.[2]

Reports from specific jurisdictions

In Australia, feedback suggests that the Guidelines have not been referred to in the courts, during arbitration proceedings or even in legal journals. Use of the Guidelines was raised by Sally Fitzgerald at the Australasian Forum for International Arbitration (AFIA) Conference in 2006. None of those attending the Conference had expressly used the Guidelines in arbitration.

In Austria, a reference was made to the Guidelines in an ad hoc arbitration pursuant to the UNCITRAL rules. The chairman of the tribunal was a partner at a large law firm and during the course of the arbitration one of his partners accepted a mandate from a subsidiary of one of the parties. After disclosure by the chairman, the respondent referred to items 1.1.1, 2.3.6 and 3.2.1 (Red and Orange Lists) from the Guidelines in making a challenge. The claimant ultimately agreed that the chairman should be replaced. The Guidelines were considered to be extremely helpful because they offered much more detail than was available under Austrian case law. There have been no references to the Guidelines by the Austrian courts. Those court decisions relating to challenges to arbitrators have referred only to Austrian statutory law.[3]

In Canada, parties frequently consult the Guidelines in selecting party-appointed arbitrators. In an arbitration under the UNCITRAL rules, one of the parties attempted to rely on Non-Waivable Red List item 1.3 to argue that an appointment should be declined as remuneration of the arbitrator would constitute a 'significant financial interest in one of the parties or the outcome of the case'.[4] The attempt to rely on the Guidelines was held to be incorrect as 'financial interest in item 1.3 does not apply to the arbitrator's remuneration as arbitrator, but rather to such situations as sharing in the amount awarded on the merits'. There were no reported references to the Guidelines in court cases, even in a case concerning arbitrators' conflicts

2 'The IBA Guidelines on Conflicts of Interest in International Arbitration', 22(5) *Journal of International Arbitration* 409-18.

3 Decision of the Oberlandesgericht (Austrian High Court) of 15.9.2004, 9 Ob A 94/04w, and Decision of the Oberste Gerichtshof (Austrian Supreme Court) of 26.1.2005, 7 Ob 314/04h.

4 *Canfor Corporation v USA*, *Tembec et al. v USA*, and *Terminal Forest Products Ltd v USA* Order of the Consolidation Tribunal, dated 7 September 2005.

of interest.[5] There has been some academic acknowledgment of the Guidelines. In J Brian Casey's book, *Arbitration Law of Canada: Practice and Procedure*[6] the Guidelines are reproduced as an appendix. The Guidelines were also referenced in a seminar entitled 'An Introduction to International Commercial Arbitration' given by Henri C Alvarez and Tina Cicchetti at the Faculty of Law of the University of British Columbia.

The China International Economic and Trade Arbitration Commission (CIETAC) considered the Guidelines internally. It found the Guidelines to be too detailed, and in some instances not relevant to arbitration in China. The Guidelines were considered during CIETAC's preparation of its own arbitration ethics rules, however. The Beijing Arbitration Commission (BAC) holds the same viewpoint as CIETAC. BAC translated the Guidelines into Chinese and published the Chinese version in its journal, *Beijing Arbitration*.[7] There were no reported references to the Guidelines in arbitration or court cases in China.

In France, the Guidelines are frequently used by challenging or defending parties where a challenge to an arbitrator is made. They have found less acceptance from institutions and appointing authorities, however. In at least two ad hoc UNCITRAL cases where the ICC was the appointing authority, the ICC determined a challenge without express reference to the Guidelines even though these were said to be on point. The respondent in both cases had made reference to the Guidelines. Jan Paulsson discusses the draft Guidelines concerning impartiality, independence and disclosure in 'Ethics and Codes of Conduct for a Multi-Disciplinary Institute'[8] and comments that there is a division over the usefulness of the Guidelines. Nevertheless, the author finds them useful in imposing some conceptual order given the scarcity of reasoned decisions published.

In Germany, the Guidelines have been referred to by parties in institutional arbitrations. There was a simultaneous nomination of the same arbitrator in two arbitrations involving partially but not wholly overlapping parties. This was objected to and reference was made to the Guidelines on the grounds that the first arbitration was likely to proceed at a different pace which would inevitably result in impermissible prejudging of the second case. The Guidelines have not been referred to or cited in any court cases.

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5 *Simcoe Condominium Corporation No 78 v Simcoe Condominium Corporation No 50*, 2006 CanLII 4510 (ON SC).

6 (New York: Juris Publishing, 2005).

7 Volumes 51 and 52.

8 70(3) *Arbitration* 193-200.

There are a number of articles which refer to the Guidelines.[9] Professor Pfeiffer's article 'Impartiality of Arbitrators – the International Perspective'[10] welcomed the new Guidelines on the basis that they provide a much stricter standard of impartiality than the current German law provided for. Anne Hoffmann's article 'Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach'[11] discusses the subjective and objective tests for disclosure and disqualification respectively under General Standards 2 and 3. The author takes the view that these tests strike the right balance in that the test for disclosure takes into consideration the overriding interests of the parties to know the background of the arbitrator but ensures that disclosure does not automatically lead to a challenge. The author is persuaded that the Guidelines provide a better balance than German law on conflicts of interest. Schlosser[12] comments that neither the Guidelines nor German law distinguish(es) between the arbitrator elected by one of the parties and the arbitrator selected by a different method. In both cases the arbitrator must be impartial and independent. It is the author's opinion that this is incorrect and should be changed as an arbitrator elected by one party necessarily feels a certain solidarity with that party. The author also points out a difference between the Guidelines and German law in that the latter specifically guarantees the equal influence of all the parties on the constitution of the arbitral tribunal. A number of suggestions for improvements in relation to conflicts were received from Germany, including greater uniformity among leading arbitral institutions with respect to:

(1) who decides a challenge on the grounds of conflict of interest;
(2) to what extent, if at all, the challenged arbitrator is made aware of the challenge;
(3) to what extent, if at all, the arbitrator is invited to comment on the challenge;
(4) to what extent reasons for the decision on the challenge are required;
(5) to what extent the decision on the challenge is communicated to the recused or confirmed arbitrator; and

9 Including Professor Dr Peter Mankowski, 'Die Ablehnung von Schiedsrichtern' (2004) 6 *SchiedsVZ*; Nathalie Vose, 'Interessenkonflikte in der internationalen Schiedsgerichtsbarkeit – die Initiative der IBA' (2003) 2 *SchiedsVZ*; IBA Committee D on Arbitration and ADR, 'IBA Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration' (2003) 6 *SchiedsVZ*.

10 Professor Dr Thomas Pfeiffer, 'Befangenheit von Schiedsrichtern international gesehen' (March 2004) *IDR* editorial.

11 21(3) *Journal of International Arbitration*.

12 Peter Schlosser, 'L'impartialité et l'indépendance de l'arbitre en droit allemande' (2005) 15(1) *Rivista dell'Arbitrato*.

(6) to what extent the decision, whether in sanitised form or otherwise, is made available to the public.

It is suggested by the German responses that greater uniformity in these areas will assist the ability to monitor the application of the IBA Guidelines and to apply them consistently.

In Hong Kong, parties are increasingly referring to the Guidelines when a conflicts issue arises. The Hong Kong International Arbitration Centre (HKIAC) actively promotes the Guidelines to its Panel of Arbitrators and provides a link to them on its website (www.hkiac.org).[13] There are no reported cases in which the courts have made reference to the Guidelines. In a recent construction arbitration case, the parties were debating whether the Guidelines are concerned purely with the issue of 'conflicts of interest' or whether they also cover issues of 'appearance of partiality'. The HKIAC is of the view that there is some uncertainty on this point. Some criticisms of the Guidelines that the HKIAC has received from parties are that they are rigid, difficult to understand and create further issues. In particular, in smaller jurisdictions such as Hong Kong, conflicts are likely to occur and there is thought to be a risk that all experienced arbitrators could be ruled out due to conflicts, thus leaving parties with an arbitrator they would not have chosen but for the conflict restrictions. It is feared this has led to some parties opting to use the courts instead.

In India, the sole response commented that the rules on conflicts of interest are 'shrouded in secrecy'. Perhaps surprisingly, therefore, there is no evidence of the Guidelines being relied on to provide clarification as to how conflicts issues should be resolved. An arbitrator declined his appointment in connection with an interlocutory application on behalf of the respondent in an ICC Case, *MS Drager Medical AG & Co KGAA (Germany) v UshaDrager Private Limited (India)*[14] when he had previously appeared against that party in another case. The arbitrator relied on the 'Rules of Independence and Impartiality for Arbitrators' and Rule 7 of the ICC Rules. There have been no court cases citing the IBA Guidelines. In *State of Rajasthan v Nav Bharat Construction Company*[15] the Supreme Court of India relied on Section 11 of the Arbitration Act 1940 for the removal of an umpire on the ground of bias but made no reference to the Guidelines. The only academic mention of the Guidelines reported was at the ICC India ICA Conference (21 October 2004) in a seminar entitled 'Is This the Time to Review Arbitration Law in India?'

13 Under 'Reference – Further Reading'.

14 ICC Case No 13588.

15 Civil Appeal Nos 2500 and 2501 of 2001 [AIR2005SC4430].

In Italy, the Chamber of National and International Arbitration of Milan ('the Chamber') uses the Guidelines even in purely domestic arbitrations. The Guidelines are often found useful by the Chamber in reaching decisions, even where they are not expressly relied upon. The three-year period set out in item 3 of the Guidelines has become a standard test on which the arbitral council of the Chamber relies when deciding on confirmation of the appointment of arbitrators. The Guidelines are not relied upon by the Italian courts, however, and conflicts of interest cases have arisen where the Guidelines have not been relied upon.[16] In the *Fondaz* case[17] a challenge was made to an arbitrator on the grounds that his office was located in the same building and on the same floor as the offices of the counsel to one of the parties. Without referencing the Guidelines, the Supreme Court rejected the challenge and stated that unless from a personal and economic perspective such a situation gave rise to a close relationship between an arbitrator and the counsel, it could not constitute grounds for a successful challenge. As for academic writing, Cecilia Carrara[18] has discussed the issues of conflicts of interest of arbitrators. Her view is that the Guidelines have provided useful guidance in case of challenges and for arbitrators themselves in determining whether to accept appointments. However, the author points out that the Guidelines represent only examples of the situations where conflicts of interest may arise and thinks it necessary also to consider other rules. A training course organised by the Chamber between March and July 2006 included presentations on the Guidelines from Professor Chiara Giovannucci Orlandi and Professor Anna Maria Bernini.

In the Netherlands, the Guidelines are used rather informally both in the case of a conflict and at the stage of appointment of arbitrators. The Guidelines have been referred to in both ad hoc and institutional arbitrations and used informally by the institutions themselves. The Guidelines have not been referred to in court decisions.

In New Zealand, no references to the Guidelines have been reported in any published court or arbitral decision. However, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) formally adopted the Guidelines for use in relation to its responsibilities as an appointing authority by resolution on 6 December 2004.

16 See *Fondaz Enpam v Soc Sogess* (Corte di Cassazione) 28 August 2004, No 17192.
17 *Ibid.*
18 'Il conflitto di interessi degli arbitri' (2005) 61(2) *Il foro padano* 40-8.

In Singapore, the feedback suggests that the Guidelines have not been referred to in any arbitrations, court cases or legal journals. Michael Hwang has made several presentations on the Guidelines, however.[19]

In Sweden, a Stockholm Chamber of Commerce (SCC) case referred to the Guidelines.[20] In the previous two years an arbitrator had been appointed by: (1) a lawyer at the firm now representing the claimant in eight different arbitration proceedings, and (2) companies in the same group as the claimant in six different arbitration proceedings. Furthermore the chairman had acted as counsel in a court case where the claimant's lawyer had acted as opposing counsel. The respondent invoked the (draft) Guidelines and stressed the objective nature of the test of the arbitrator's impartiality and independence. The arbitrator was removed and the challenge to the chairman was dismissed but reasons for the decision were not published. In another SCC case[21] in the same year, however, a challenge based on the perceived bias of an arbitrator was determined without any reference to the Guidelines and it seems that this is in accordance with the majority of such arbitration cases. No references to the Guidelines have been reported in the Swedish courts. Indeed, the Svea Court of Appeal in Stockholm decided a conflicts case on 5 May 2006 without making reference to the Guidelines.[22] Several academic articles have been written on the subject of the Guidelines in Sweden, including by Estelle Dougier[23] analysing the scope of the Guidelines and recommending improvements. Lars Heumann[24] has criticised the SCC decision in Case 14/2004[25] for failing to provide reasons for the decision.

A number of recommendations have been made in Sweden for improving the Guidelines including:

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19 'The IBA Guidelines on Conflicts of Interest in International Arbitration/Communications with Arbitrators' at IPBA Conference in Bali, Indonesia, May 2005. 'The IBA Guidelines and the Common Law' presented at the IFCAI & ICSID Conference in Washington DC, June 2005. 'The IBA Guidelines on Conflict of Interest and the ICC', presented at the ICC Conference, 'Maximising the Benefits of the ICC System', in Charlottesville, June 2005.

20 Case 14/2004.

21 Case 46/2004. See other arbitration cases referenced in Annette Magnusson and Hanna Larsson, 'Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce: Prima Facie Decisions on Jurisdiction and Challenge of Arbitrators' (2004) 2 *Stockholm Arbitration Report*.

22 *Anders Jilkén v Ericsson AB*, Case T 6876/04.

23 'The Neutrality of Arbitrators in International Commercial Arbitration' (2004) 2 *Stockholm Arbitration Report*.

24 'Skiljedomsrätt' (2004-05) 16 *Juridisk Tidskrift*.

25 Above at note 20.

(1) providing a questionnaire for each arbitrator to answer before eligibility and requiring the arbitrator to sign a declaration of impartiality and independence;
(2) making the Guidelines part of the arbitration rules and thereby making them contractual requirements;
(3) establishing a general requirement for reasons for awards in national arbitration laws as well as arbitration rules and specifying how detailed the reasons should be;
(4) protecting confidentiality by not identifying the parties – only the name of the arbitrator; and
(5) permitting actions for damages against the arbitrator.[26]

In Switzerland, no examples were reported where the Guidelines had been relied upon in either court cases or arbitrations. Counsel did use the Guidelines at the stage of appointment of arbitrators, however. In particular, they have been used to check whether the fact that an arbitrator and counsel work in firms that are part of the same informal, non-exclusive network of law firms is a ground for challenge. A paper by Justus Wilke on conflict of interest in commercial arbitration, 'Interessenkonflikte in der Internationalen Schiedsgerichtsbarkeit: Unparteilichkeit, Unabhangigkeit und Offenlegungspflichten'[27] contains extensive coverage of the Guidelines.

In Thailand, the Guidelines have not been referred to in arbitrations or court cases or in journals. Section 19 of the Thai Arbitration Act 2002 incorporates the substance of Article 12 of the UNCITRAL Model Law 1985. The Guidelines have not been adopted by the Thai Arbitration Institute (TAI) which follows the TAI Code of Ethics for Arbitrators.

In the United Kingdom use of the Guidelines appears to be varied. A majority of practitioners report no mention of the Guidelines in relation to the appointment or challenge of arbitrators in their recent cases. Among those who have had practical experience of the Guidelines, they are thought by both arbitrators and counsel to provide a useful compendium of the views of international practitioners and internationally accepted practices. The Guidelines are frequently referred to when considering arbitrator candidates, as a useful starting-point. They are generally approached with a clear understanding that they do not constitute an exhaustive set of circumstances and that a flexible approach must be taken in all cases. Despite the ICC's and LCIA's distance from the Guidelines (see below), they have been referred to in both institutional and ad hoc proceedings. The English courts have not relied on the Guidelines. In *ASM Shipping Limited of India v*

26 See Estelle Dougier above at note 23.
27 Available in German at (www.dissertationen.de).

TTMI Limited of England,[28] the IBA Guidelines were considered in connection with a challenge to an arbitral award based on the apparent bias of one of the arbitrators. The court referred to the Guidelines but decided the case on English law principles:

> 'The IBA Guidelines do not purport to be comprehensive and, as the Working Party added, "nor could they be". The Guidelines are to be "applied with robust common sense and without pedantic and unduly formalistic interpretation". I am not impressed by the points [the claimant's counsel] made on these lists. The question at issue is not whether what happened fell within the red list or not. Barristers who take up part-time judicial appointments are not, as [counsel] submitted, mentioned in the list at all. But that says nothing about the true answer to the questions in this case.'[29]

Markham Ball's 'Probity Deconstructed: How Helpful Really Are the New IBA Guidelines on Conflicts of Interest in International Arbitration?'[30] suggests that the Guidelines have no place in the legal framework as they do not displace governing arbitration laws or rules. He argues that in light of the fact that the Guidelines are not binding, their success in attempting to bring certainty and international uniformity to treatment of arbitrator conflicts of interest is somewhat limited. The author concludes that the Guidelines cannot go beyond providing helpful analysis and valuable suggestions. Salim A H Moollan's article[31] provides an overview of the *ASM Shipping* case (above). The Guidelines are described as a valiant attempt to set out guidance for the issues of disclosure, bias and recusal. In 'Conflict of Interest'[32] Khawar Qureshi outlines the impartiality tests used in English law and summarises the reaction to the Guidelines in the international arbitration community in England. The author observes that the verdict upon the Guidelines from some practitioners has been negative, with 'unrealistic', 'likely to lead to unwarranted challenges to arbitrators', and 'will make arranging arbitration more difficult' just some of the views expressed.

In the United States, the Guidelines were relied upon by the court in *Applied Industrial Materials Corp v Ovalar Makine Ticaret VE Sanayi*.[33] In that case, more than a year after his appointment, the chairman of a tribunal

28 [2006] 1 Lloyd's Rep 375.
29 *Ibid*. at 387.
30 (2005) 21(3) *Arbitration International* 323-41.
31 'Arbitration' (2005) 19 *All England Annual Review*.
32 *New Law Journal* (154 NLJ 1400).
33 Case No 05 CV 10540 (RPP), 2006 WL 18163 (SDNY).

discovered that a commercial relationship existed between his company and that of the claimant. The chairman disclosed the existence but not the detail of the relationship and refused to step down. The validity of the award was then challenged. When considering the extent of the duty of disclosure upon the chairman, the court considered General Standards 3 and 7 of the Guidelines, in addition to the AAA Code of Ethics. However, in *HSN Capital LLC (USA) v Productora y Comercializador de Television SA de CV (Mexico)*[34] the Court did not accept the respondent's invitation to rely on the Guidelines, but instead relied on US case law in dismissing the challenge based on an arbitrator's previous professional relationship with counsel for the respondent.[35] Feedback was not received as to use of the Guidelines in arbitration proceedings but given their acceptance in at least one court case it would be surprising if they had not been so referred to. John M Townsend's editorial 'Arbitrator Neutrality and Disclosure: The End of the "American Problem"'[36] compares the 2004 AAA/ABA Code of Ethics and the Guidelines. In relation to disclosure obligations, it comments that European practice has been to disclose less information than in America but expresses the concern that this encourages the assumption that a disclosure should lead to disqualification. In contrast he considers the Guidelines as using disclosure as a means of qualifying arbitrators rather than disqualifying them.

Institutions

Feedback was also received directly from several arbitration institutions. Many of the institutions do not provide reasons for their decisions on challenges to arbitrators, which makes it difficult to assess the impact of the parties' submissions that make reference to the Guidelines.

The American Arbitration Association (AAA) believes that the main impact and value of the Guidelines is in ad hoc cases where parties and arbitrators lack institutional guidance and monitoring and where the Guidelines provide a framework for dealing with such questions. They are increasingly referred to by advocates in support of their position concerning removal or confirmation of an arbitrator but have had a fairly minimal impact on decision-making or policy of the International Centre for Dispute

34 Case No 8:05-CV-1769-T-30TBM, 2006 WL 1876941 (MD Fla).

35 The Guidelines were not referred to at all in the recent 5th Circuit Court of Appeals decision in *Positive Software Solutions Ltd v New Century Mortgage Corporation* Case No 04 11432 relating to challenging an arbitrator for bias.

36 (June 2005) *Journal of International Dispute Resolution – IDR.*

Resolution (ICDR) or the AAA. The reason for this is that the ICDR and AAA encourage a greater degree of disclosure than that required in the Guidelines. Their position is that where there is any doubt, the issue should be resolved in favour of disclosure. In return, there is a commitment that a subsequent challenge will not necessarily result in automatic removal of an arbitrator. In addition, decisions on a particular case are thought to require individual attention to evaluate the merits of the issues. As the Guidelines are necessarily general in nature, the extent to which they can assist in the making of a decision is limited. This belief in a case-by-case approach also explains the lack of publication of decisions. As the majority of cases are considered to be unique and therefore incapable of establishing precedent for later matters, the benefits of publication are thought to be outweighed by an increase in the cost and time incurred.

The Board of the International Arbitral Centre (IAC), based in Vienna, does not apply the Guidelines when deciding upon challenges. The Board applies its own criteria, which have been developed throughout the last two decades. However, the IAC has observed that arbitrators sometimes refer to the Guidelines when they disclose a possible conflict of interest before they accept the mandate, though this is not common.

The International Chamber of Commerce (ICC) Court does not refer to the Guidelines in any formal way as it has stated that it is not bound by the Guidelines and will take decisions in accordance with its own Rules of Arbitration. The ICC has experienced some instances of specific references by parties to the Guidelines. While the ICC is not aware that any arbitrators may be considering the Guidelines when deciding what to disclose, in the ICC's view many of the facts and circumstances that have led to objections to appointments and challenges of arbitrators in ICC cases are not covered by the Guidelines.

At the time of the survey, challenges to arbitrators had been made on seven occasions before the International Centre for Settlement of Investment Disputes (ICSID). A challenge is normally ruled on by the remaining members of the tribunal or exceptionally by the Chairman of the Administrative Council of ICSID.[37] The parties in their observations, and the arbitrators in their decisions, have generally referred to the Guidelines, noting that they, for the most part, are to be taken into account alongside the AAA/ABA Code of Ethics and provisions specific to the instrument and rules under which the proceedings are being conducted. In the cases that ICSID are familiar with, these instruments and rules would include the ICSID

37 See ICSID Arbitration Rule 9.

Convention and Arbitration Rules, NAFTA, the Additional Facility and the UNCITRAL Rules. ICSID recently amended its Arbitration Rule 6(2) to expand the scope of a declaration to be signed by ICSID arbitrators (see (www.worldbank.org/icsid)). In making the amendment ICSID reviewed, among other rules and guidance, the Guidelines. The revised rule now includes a more detailed and extensive declaration of disclosure.

The LCIA has indicated that the Guidelines are referred to by the secretariat to see how the LCIA court's decisions on matters disclosed align with those in the Guidelines. The LCIA has witnessed the Guidelines gaining currency with both parties' counsel and with arbitrators and it is expected that the Guidelines will increasingly be referred to by parties bringing challenges before the LCIA. The LCIA will shortly be publishing information relating to the decisions of its court on challenges.

Conclusions

The results from the monitoring exercise are clearly mixed. Many differing views are taken as to the correct role for the Guidelines and of their usefulness in resolving conflicts of interest in international arbitration. The Guidelines range from being used almost conclusively by tribunals or the courts in some jurisdictions, to being cited in submissions in others, to not being referred to at all in still others. It is worth reiterating that the information set out above merely represents the picture so far and is based on the information received. The survey does not, for example, reveal how often arbitrators refer to the Guidelines, either when deciding whether to accept an appointment or in determining what information they should disclose. The Guidelines may therefore be being used more often than is apparent from the survey. The IBA Taskforce welcomes any further evidence, whether supporting or refuting the views from the survey described above, as part of the ongoing process of monitoring use of its Guidelines.[38]

There are, however, some encouraging signs, particularly from Western Europe and North America, that the guidelines are finding acceptance within the international arbitration community, and it should be remembered that when the review was carried out the Guidelines were just some two-and-a-half years old. Perhaps some of the regional discrepancies are unsurprising and complete uniformity of application may be as undesirable as it is unachievable. Smaller jurisdictions with a lesser pool of arbitrators, for

38 A specific IBA web address will be set up shortly for this purpose but in the meantime please direct any comments to judith.gill@allenovery.com, using the subject line 'Comments on the IBA Guidelines'.

example, may not consider it desirable or feasible to adopt the same approach as larger arbitration centres with respect to conflicts. As has been seen from some of the academic commentary referred to above, there have been a number of suggestions for improvement of the Guidelines and as their use by practitioners, institutions and courts increases, the more their provisions will be contested and perhaps issues with their formulation brought to light. The IBA Taskforce is eager that suggestions for improvements should also be brought to its attention.

A number of initiatives have been taken with the aim of increasing awareness of and use the Guidelines, ranging from seminars to teleconferences involving participants from a wide range of jurisdictions. Furthermore, progress has been made in the form of translations of the Guidelines into Chinese, Spanish and Japanese (though the latter has not yet received official approval) and translations into French and German are under way. There is still, however, much to be done. The focus of the survey undertaken was on jurisdictional variations but we should not lose sight of the main objective of the Guidelines. Ensuring fairness to the parties, and thus their confidence in the process of international arbitration, is at the heart of the Guidelines and is crucial to the continued success of international arbitration as a method of dispute resolution. Any assessment of progress made has to be measured against that challenging yardstick.