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# When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Published Challenges

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*L'éthique des arbitres est un domaine inexploré en matière d'arbitrage international. En effet, si les arbitres doivent respecter leur devoir d'impartialité et d'indépendance durant la procédure en divulguant tout conflit d'intérêt, cela n'est pas toujours mis en application. Les énoncés contenus dans les lignes directrices de l'International Bar Association (IBA) sur les conflits d'intérêts dans l'arbitrage international s'avèrent pertinents en cas de situation problématique. Dans cette optique, le présent article vise à élargir l'utilité des lignes directrices. Afin de fournir un cadre complet du devoir de divulgation, l'auteur se livre à une analyse des lignes directrices de l'IBA en comparant les décisions rendues dans des procédures de récusation par la London Court of International Arbitration et le Centre international pour le règlement des différends (CIRDI), afin d'établir si un conflit d'intérêt requiert d'être divulgué aux parties.*

*Arbitrator ethics is one of the most underdeveloped areas in international arbitration. Arbitrators are generally required to meet a baseline level of neutrality by disclosing any potential ethical conflicts and remaining independent and impartial throughout the arbitral process. Unfortunately, not all arbitral practice has met these ethical requirements. The "Application Lists" of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration provide a theoretical basis for considering such ethical conflicts. This paper takes the "Application Lists" one step further: by matching them with published records of arbitrator challenges from the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID), the author will provide a practical scheme to gauge whether an ethical conflict merits disclosure or disqualification.*

## INTRODUCTION

International arbitration is billed by many as a fair and efficient alternative to traditional state court litigation. Nevertheless, the international arbitral process is not without conflicts of its own. Perhaps the most fractured area of international arbitration is the ethical standards of arbitrators. Ethical standards vary across arbitral institutions and case law provides little guidance. Moreover, there has been growing criticism against international arbitration for biased outcomes, particularly with respect to repeat litigants. Meanwhile, the legitimacy of the international arbitral system is being questioned for its narrowing roster of active arbitrators. Empirical studies of main arbitral institutions have concluded that the “practice [of arbitrator challenges] has increased significantly and is at risk of affecting the efficiency and legitimacy of the [arbitral] process.”<sup>1</sup>

This paper seeks to provide some guidance to prospective arbitrators as well as arbitral institutions in evaluating potential conflicts of interest. This paper will use the generally accepted International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”)<sup>2</sup> “Application Lists” to identify sources of potential ethical conflicts. It will then match the Application Lists with examples of arbitrator challenges obtained from the London Court of International Arbitration (“LCIA”) and the International Centre for Settlement of Investment Disputes (“ICSID”).

By matching the theoretical lens of the IBA Guidelines with the practical experience of these published challenges, this paper will provide a scheme to gauge whether potential ethical conflicts merit arbitrator disqualification and/or conflict disclosure. Part I will discuss the current state of arbitrator ethical standards. Part II will address the relevant ethical standards of the IBA Guidelines, LCIA Arbitration Rules (LCIA Rules),<sup>3</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>4</sup> (ICSID Convention), and ICSID Arbitration Rules<sup>5</sup> (ICSID Rules). Part III will match the standards of the IBA Guidelines “Applications Lists” with the published LCIA and ICSID decisions on arbitrator challenges. Part IV will provide a framework for assessing potential arbitrator conflicts of interest.

## I. THE CONFLICT IN ARBITRATOR CONFLICTS OF INTEREST

Arbitrators are subject to some level of ethical scrutiny in order to ensure the neutrality of arbitration processes. The principle of neutrality requires that arbitrators be independent and impartial to both the parties and the attendant subject matter of the arbitral dispute. The requirements of independence and impartiality “represent core obligations of an arbitrator” and are “so widely recognized that they amount to general international principles and are therefore

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1 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (New York: Oxford University Press, 2009) at 272—273.

2 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, London: IBA, 2014 [*IBA Guidelines*].

3 London Court of International Arbitration, *LCIA Arbitration Rules* (2014) [*LCIA Rules*], online: <[www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx)>.

4 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159, 4 ILM 532 (entered into force 14 October 1966) [*ICSID Convention*].

5 International Centre for Settlement of Investment Disputes, *ICSID Arbitration Rules* (2006) [*ICSID Rules*], online: <[icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partf.htm](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partf.htm)> .

incumbent on any arbitrator in all circumstances.”<sup>6</sup>

Independence is measured by an arbitrator’s relationship with the parties. It looks at the proximity and duration of a relationship (past or present, direct or indirect) as well as the arbitrator’s economic position vis-à-vis the parties (e.g., not being employed by or having investment in a party).<sup>7</sup> Correspondingly, impartiality has generally been defined as a “more subjective notion and concerns an arbitrator’s state of mind with respect to the parties and the issues in dispute.”<sup>8</sup> The requirement of impartiality is a “subjective inquiry [which ensures that] the arbitrator is unbiased and fair-minded” based on external, objective facts and circumstances.<sup>9</sup>

As a corollary to the requirements of independence and impartiality, arbitral rules impose a duty of disclosure of all facts and circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence.<sup>10</sup> One type of information that might arouse suspicion is the arbitrator’s prior connections with one of the parties. Once a party becomes aware of such information, questions about the impartiality of the arbitrator may be raised and these need to be promptly addressed.<sup>11</sup> The arbitrators have an ongoing duty to disclose throughout the arbitral process.<sup>12</sup>

If a party is suspicious or dissatisfied with an arbitrator’s apparent lack of neutrality, the party may initiate a challenge to disqualify that arbitrator. Parties that wish to make an institutional challenge must do so within a short period of time from an arbitrator’s appointment or from having received knowledge of grounds for the challenge.<sup>13</sup> Institutional challenges are generally made in writing and are addressed to the “appointing authority (as well as the tribunal and opposing parties).”<sup>14</sup> The non-challenging party is often permitted to respond in writing to the challenge and the appointing authority “will also solicit outside views.”<sup>15</sup> However, challenges are streamlined and typically do not afford an opportunity for “discovery, evidence-taking, or oral submissions to the appointing authority.”<sup>16</sup>

While commentators have observed that an arbitrator’s duty to remain neutral and disclose information is a universally accepted expectation, there is considerable divergence as to what those duties require in practice.<sup>17</sup> For example, there is considerable variance as to what should be considered a question of independence. Several national courts have held that a board member

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6 Simon Greenberg et al, *International Commercial Arbitration: An Asia-Pacific Perspective* (New York: Cambridge University Press, 2011) at 270.

7 Lawrence W Newman & Richard D Hills, eds, *The Leading Arbitrators’ Guide to International Arbitration* (Huntington, NY: Juris Publishing, 2008) at 69.

8 Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* (Alphen aan den Rijn: Kluwer Law International, 2010) at 247.

9 Gary Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2009) at 1777.

10 *Ibid.*

11 Newman & Hills, *supra* note 7 at 69.

12 *Ibid* at 70.

13 Born, *supra* note 9 at 139.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 Greenberg et al, *supra* note 6 at 271.

may not act as an arbitrator in matters involving the company of which he is a member.<sup>18</sup> The English Court of Appeal, on the other hand, has stated that there is no risk of bias in such kind of situation.<sup>19</sup> While it is not, in of itself, unethical for an arbitrator to be “a member of several arbitral tribunals in disputes involving the same party,” his independence may be questioned if he is frequently appointed by the same party.<sup>20</sup> While arbitrators associated with law firms typically face scrutiny regarding their professional organizational links, English and French courts have declined to extend similar scrutiny to the barrister chambers system.<sup>21</sup>

The divergence in ethical standards is exemplified by differing views on the duty to disclose potential ethical conflicts, particularly with a challenge to an arbitrator’s lack of impartiality. As it stands, the duty to investigate and disclose ethical conflicts falls primarily on the arbitrator himself or herself. The identification of potential ethical conflicts may “differ widely depending upon the background and culture of the individual [and] many of the very remote situations disclosed by an arbitrator trained in the [United States] would not be considered disclosable by a lawyer trained in the civil law system.”<sup>22</sup> One anecdote recalls an arbitration where the “American co-arbitrator made three pages of disclosures...[including when] he had been present with counsel for one of the parties,” but on the other hand, the “European arbitrator did not consider it relevant to disclose that he spent most summer vacations with counsel to the party that appointed him.”<sup>23</sup>

## II. APPLICABLE STANDARDS FOR ARBITRATOR DISQUALIFICATION AND DISCLOSURE

In an attempt to increase uniformity in ethical standards, the International Bar Association released the IBA Guidelines as non-binding ethics guidelines for both commercial and investment arbitration. As a baseline principle, the IBA Guidelines mandate that “[e]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”<sup>24</sup> An arbitrator is required to “decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubt as to his or her ability to be impartial or independent.”<sup>25</sup>

Under the IBA Guidelines, an arbitrator must be disqualified from service if:

[F]acts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to *justifiable doubts as to the arbitrator’s impartiality or independence*, unless the parties have accepted the arbitrator in

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18 Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed (London: Sweet & Maxwell, 2007) at 350.

19 *Ibid.*

20 *Ibid.*

21 *Ibid* at 352.

22 Blackaby et al, *supra* note 1 at 270.

23 *Ibid.*

24 *IBA Guidelines*, *supra* note 2, pt I, general standard 1.

25 *IBA Guidelines*, *supra* note 2, pt I, general standard 2(a).

accordance with the requirements set out in General Standard 4 [waiver by the parties].

*Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case presented by the parties in reaching his or her decision.*<sup>26</sup>

Furthermore, an arbitrator is required to disclose to the parties, the arbitration institution or other appoint authority and the co-arbitrators those facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence.<sup>27</sup> In a corresponding duty, an arbitrator is required to make "reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence."<sup>28</sup>

The LCIA Rules establishes a similar ethical standard. The LCIA Rules provide that an arbitrator must "remain at all times impartial and independent of the parties" and may be challenged "if circumstances exist that give rise to *justifiable doubts* as to his [or her] impartiality or independence."<sup>29</sup> Once challenged, "[u]nless the challenged arbitrator withdraws or all other parties agree to the challenge," a Division of members of the LCIA Court decides whether the arbitrator should be disqualified.<sup>30</sup> Regarding disclosure requirements, before appointment, each arbitrator must sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration.<sup>31</sup>

However, the ICSID Convention and Rules provide for a conceivably different standard. Arbitrators are expected to be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.*"<sup>32</sup> Arbitrators may be disqualified for "any fact indicating a *manifest lack* of the qualities required by paragraph (1) of Article 14,"<sup>33</sup> namely a manifest lack of impartiality and independence. A proposal to disqualify an arbitrator is decided either by a "Deciding Authority" composed of either the unchallenged tribunal members or the Chairman of the ICSID Administrative Council. Regarding ethical disclosure, each arbitrator must indicate in a statement explaining any "past and present professional, business and other relationships...with the parties and...any other

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26 *IBA Guidelines*, *supra* note 2, pt I, general standard 2(b)—2(c) [emphasis added].

27 *IBA Guidelines*, *supra* note 2, pt I, general standard 3(a).

28 *IBA Guidelines*, *supra* note 2, pt I, general standard 7(d).

29 *LCIA Rules*, *supra* note 3, art 10.1 [emphasis added].

30 *Ibid*, art 10.6.

31 *Ibid*, art 5.4.

32 *ICSID Convention*, *supra* note 4, art 14(1) [emphasis added].

33 *Ibid*, art 57 [emphasis added].

circumstance that might cause...reliability for independent judgment to be questioned by a party.”<sup>34</sup>

Nevertheless, the application of these general ethical standards to fact specific situations is a peculiar challenge. In order to make the general standards practical, the IBA Guidelines contain three “Application Lists.” These lists provide a non-exhaustive, “specific guidance...as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed.”<sup>35</sup> The first list is the “Red List.” This is divided into two parts: a “Non-Waivable Red List” and a “Waivable Red List.”<sup>36</sup> The Non-Waivable Red List involves “situations deriving from the overriding principle that no person can be his or her own judge” and participation of the arbitrator in question should not be permitted, even with a waiver by the parties.<sup>37</sup> On the other hand, the Waivable Red List covers less severe situations where the arbitrator may still participate if the parties provide a knowledgeable waiver.<sup>38</sup> The second list is the “Orange List” that covers “specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence” as well as circumstances that the arbitrator should disclose.<sup>39</sup> Finally, the third list is the “Green List” which involves “specific situations where no appearance and no actual conflict of interest exists from an objective point of view” and the “arbitrator has no duty to disclose.”<sup>40</sup>

### III. ANALYSIS OF THE IBA GUIDELINES APPLICATION LISTS AND PUBLISHED CHALLENGES

Before providing a comparative analysis of the practical situations presented in the IBA Guidelines Application Lists to published decisions in arbitrator challenges, it remains necessary to review several important considerations as to the methodology. Most arbitral institutions do not publish reasoned decisions following ethical challenges of arbitrators. The LCIA is one of few institutions that have published digests of arbitrator challenges in commercial arbitration. These published digests have been edited to remove identifiable information. The ICSID has published unredacted decisions in investment arbitration cases when the disputing parties agree. The published decisions from these two institutions were selected as representative of challenges in both commercial and investment arbitration. Disqualification challenges for an arbitrator’s lack of independence or impartiality were matched with the relevant provisions of the Application Lists. When a case involved a subsidiary challenge that the arbitrator failed to disclose a conflict of interest, the failure to disclose challenge was placed under the relevant provision of the Application Lists where the underlying disqualification challenge arose.

Nevertheless, some published challenge decisions were excluded from the comparative analysis. Challenge decisions that were not in English or where no decision was rendered (i.e., the challenged arbitrator resigned) were disregarded. In addition, challenge decisions that were dismissed for being untimely or involved the conduct of the arbitral proceedings were similarly

<sup>34</sup> *ICSID Rules*, *supra* note 5, rule 6.

<sup>35</sup> *IBA Guidelines*, *supra* note 2, pt II, para 1.

<sup>36</sup> *Ibid* at para 2.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* at para 3.

<sup>40</sup> *Ibid* at para 7.

disregarded because they fell outside the scope of the IBA Guidelines Application Lists.

As previously examined, it is important to recognize that the LCIA and ICSID differ in their disqualification and disclosure requirements for arbitrators. LCIA cases follow the “justifiable doubts” standard in deciding challenges to independence and impartiality, which is common in commercial arbitration. On the other hand, the ICSID utilizes the arguably higher standard of a “manifest lack” of independence and impartiality in evaluating challenges. In both systems, arbitrator challenges are evaluated on a case-by-case basis and prior decisions are persuasive but not binding. Nevertheless, by matching the IBA Guidelines Application Lists to published LCIA and ICSID cases, this paper will provide a greater practical understanding of arbitrator conflicts of interest.

### 1. Non-Waivable Red List

### 2. Waivable Red List

No relevant cases that fell under either the Non-Waivable Red List or the Waivable Red List.

### 3. Orange List

3.1.1 The arbitrator has...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.

A challenge to an arbitrator’s prior service to a party evaluates the closeness of the relationship and relatedness of the work to current dispute. In *LCIA Reference No. 97/X27 (October 23, 1997)*, a sole arbitrator was challenged because he had disclosed in his *curriculum vitae* that he had been consulted and served as an expert witness for the Claimant’s counsel in an unrelated state court case.<sup>41</sup> In rejecting the challenge, the Division considered that the arbitrator’s previous role was minor and consultation regarding an “unconnected case, several years earlier could not give rise to justifiable doubts.”<sup>42</sup>

Similarly, in *LCIA Reference No. UN 3476 (December 24, 2004)*, an arbitrator was challenged after he disclosed that he had worked for a “few weeks” on an oilfield engineering procurement and construction contract for the Respondent at a previous law firm.<sup>43</sup> There was recognition that “lawyers may develop personal relationships with their clients...[which can] be an obstacle to their impartiality.” The Division rejected the challenge after finding that the arbitrator’s role in the project was “limited to assisting the initial preparation of internal drafts of the contract” and that he had never contacted the Respondent since he had left the law firm.<sup>44</sup>

41 “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 97/X27, 23 October 1997” in William W Park, ed, *Arbitration International Special Edition on Arbitrator Challenges* (Alphen aan den Rijn: Kluwer Law International, 2011) 322 at 323 [*LCIA Reference No 97/X27*].

42 *Ibid* at 324.

43 “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No UN3476, 24 December 2004” in Park, *supra* note 41, 367 at 368.

44 *Ibid* at 367.

3.1.2 The arbitrator has...served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

A challenge to an arbitrator's prior service against a party evaluates the closeness of the relationship and relatedness of the work to the current dispute. *Saint-Gobain v. Venezuela* considers the attenuated challenge to Mr. Bottini for his prior service as a civil servant for the Argentinian government.<sup>45</sup> Mr. Bottini had served as "National Director of International Matters and Disputes for the Office of the Attorney General of Argentina" where he defended the Argentinian government in international courts and arbitral tribunals on issues of Public and Private International Law" and "foreign debt transactions."<sup>46</sup> Venezuela contended that Mr. Bottini lacked independence because he had acted as an Argentinian counsel against Venezuela's interests and his former government supervisor, Mr. Guglielmino, was acting as counsel for Venezuela.<sup>47</sup> The Deciding Authority flatly rejected the challenge because Mr. Bottini had "given up" completely his former role and had only "seen" Mr. Guglielmino no more than twice since leaving office three years prior.<sup>48</sup>

3.1.3 The arbitrator has...been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

A line of challenges indicates that the analysis for multiple party appointments considers the degree of financial dependence of the challenged arbitrator to the appointing party. *LCIA Reference No. 81160 (August, 28, 2009)* demonstrates a successful challenge on the basis of multiple party appointments. In the past, Respondent's arbitrator had practiced in favor and adverse to Respondents, had recently served as Chairman in an arbitration between Respondent's "syndicates," and had an on-going professional relationship advising the Respondent.<sup>49</sup> While the Division considered the general rule that "the mere fact that an arbitrator was regularly nominated" is insufficient to conclude disqualifying bias, it found that the "obvious professional importance to the arbitrator of his relationship with Respondents' Counsel, combined with his barrister/client relationship with one the Respondents" warranted his disqualification."<sup>50</sup>

On the other hand, in *Tidewater v. Venezuela*, the Deciding Authority rejected a challenge to Professor Stern for three prior arbitral appointments by Venezuela.<sup>51</sup> Reiterating the general rule that "the mere fact of holding three other arbitral appointments by the same party does not, without more, indicate a manifest lack of independence or impartiality," the Deciding Authority considered that Professor Stern "has held or currently holds arbitral appointments in many ICSID cases and so cannot be said to be dependent on any one party for her extensive practice as an

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45 See *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) at para 14, International Centre for Settlement of Investment Disputes (ICSID) Case no. ARB/12/13 [*Saint-Gobain Performance Plastics Europe*].

46 *Ibid* at para 44.

47 *Ibid* at paras 25-26.

48 *Ibid* at para 87.

49 "LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 81160, 28 August 2009" in Park, *supra* note 41, 442 at 447-448 [*LCIA Reference No 81160*].

50 *Ibid* at 451.

51 See *Tidewater Inc et al v Bolivarian Republic of Venezuela*, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010) at 19, ICSID Case no. ARB/10/5 [*Tidewater*].



arbitrator in investment cases.<sup>52</sup> Further, the fact that Professor Stern sided against Venezuela in two of the three prior cases underscored her independence.<sup>53</sup>

In *Universal Compression v. Venezuela*,<sup>54</sup> the Deciding Authority dismissed yet again Venezuela's challenge to the appointment of Prof. Stern. The Deciding Authority found was challenged yet again for her multiple appointments by Venezuela. Again dismissing the ethical challenge, the Deciding Authority found dispositive the fact that she "[had] been appointed in more than twenty ICSID cases, evidencing that she is not dependent economically or in other ways upon the Respondent for her appointment."<sup>55</sup>

In *OPIC v. Venezuela*, the Deciding Authority dismissed the Claimant's challenge to Prof. Sands for her two appointments within the timeframe of three years by Venezuela.<sup>56</sup> The Deciding Authority indicated that these two appointments gave little evidence of Prof. Sands' alleged financial relationship with Venezuela, since the first appointment was for an arbitral tribunal that was never constituted and the second appointment was for a case that was dismissed for jurisdictional reasons.<sup>57</sup>

In addition to a valid challenge for multiple party appointments, the Division in *LCIA Reference No. 81160 (August, 28, 2009)* found an additional basis from which to disqualify the Respondent's arbitrator for failing to disclose the parameters of his professional services to the Respondent. Failing to be transparent, the Respondent's arbitrator refused to disclose his professional retainer agreement or "commit to not accepting any...[new] retainers" with the Respondent.<sup>58</sup> The Division noted that it might have ruled differently on the disqualification had the Respondent's arbitrator "indicated his intention to disclose, or had immediately disclosed, the conflict, or had indicated his intention not to accept future retainers from parties to the arbitration pending its completion."<sup>59</sup>

*Tidewater v. Venezuela* considered an additional challenge to Prof. Stern for failing to disclose her prior arbitral appointments by Venezuela.<sup>60</sup> The Deciding Authority first provided that an inquiry into an arbitrator's failure to disclose a conflict of interest seeks to assess whether the failure was the "result of an honest exercise of discretion."<sup>61</sup> The assessment is a case-by-case balancing that decides whether the failure was "inadvertent or intentional" and whether the non-disclosure was an "aberration...or part of a pattern of circumstances raising doubts as to impartiality."<sup>62</sup> Arguing against the challenge, Prof. Stern believed that those arbitral appointments

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52 *Ibid* at para 64.

53 *Ibid*.

54 *Universal Compression Int'l Holdings, SLU v Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011) at para 77, ICSID Case no. ARB/10/9 [*Universal Compression Int'l Holdings*].

55 *Ibid*.

56 *OPIC Karimum Corp v Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at para 58, ICSID Case no. ARB/10/14 [*OPIC Karimum Corp*].

57 *Ibid* at para 51.

58 *LCIA Reference No 81160*, *supra* note 49 at 453.

59 *Ibid*.

60 *Tidewater*, *supra* note 51 at para 16.

61 *Ibid* at para 47.

62 *Ibid*.

did not require specific disclosure because information regarding the appointments was “readily accessible on the ICSID website” along with the “name of the appointing party.”<sup>63</sup> Endorsing Prof. Stern’s rationale, the Deciding Authority rejected the non-disclosure challenge, reasoning that the “belief that publicly available information did not require specific disclosure [was an] honest exercise of judgment on [Prof. Stern’s] part.”<sup>64</sup>

3.1.4 The arbitrator’s law firm has...acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

Any former relationship between the arbitrator’s law firm and one of the parties may be a source for challenge against the arbitrator himself. *LCIA Reference No. 9147 (January 27, 2000)* upheld a challenge to the Respondent’s arbitrator because he was a partner in a law firm that had previously represented the Respondent.<sup>65</sup> Since the arbitrator’s law firm “[had] apparently advised the Respondent in respect of precisely those contractual agreements with which the present arbitration was concerned,” the Division found that there were justifiable doubts to the Respondent arbitrator’s independence.<sup>66</sup>

On the other hand, in *LCIA Reference No. 81132 (November 15, 2008)*, a challenge against the Claimant’s arbitrator was dismissed even though his law firm had advised the Claimant twice in the past.<sup>67</sup> The Division recognized the general overlap of arbitrators as advocates as well as the specific fact that the prior representations had involved “entirely unrelated matters.”<sup>68</sup> Following similar logic, the Deciding Authority in *Compania de Aguas del Aconquija v. Argentina* held that an arbitrator’s law firm’s prior legal advice on “taxation under Quebec law”<sup>69</sup> that was unrelated to the current arbitration was insufficient to sustain a challenge.<sup>70</sup>

*LCIA Reference No. UN96/X15 (May 29, 1996)* is a case outlier, but the challenge decision lacks clear reasoning on its disparate outcome. Without any detailed explanation, the Division disqualified the Respondent’s arbitrator simply because he was a partner in a law firm that had previously represented the “Respondent’s associate companies.”<sup>71</sup> The challenge decision does not clearly mention whether the prior representation involved issues relevant to the specific case.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers’ chambers.

*LCIA Reference No. UN97/X11 (June 5, 1997)* dismissed a challenge to the Respondent’s arbitrator on the basis that he “shared the same Chambers, and common premises and administrative

<sup>63</sup> *Ibid* at para 54.

<sup>64</sup> *Ibid* at para 55.

<sup>65</sup> “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 9147, 27 January 2000” in Park, *supra* note 41, 334 at 335 [*LCIA Reference No 9147*].

<sup>66</sup> *Ibid*.

<sup>67</sup> See “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 81132, 15 November 2008” in Park, *supra* note 41, 439 at 439–441 [*LCIA Reference No 81132*].

<sup>68</sup> See *ibid* at 441.

<sup>69</sup> *Compania de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic*, Decision on the Challenge to the President of the Committee (3 October 2001) at para 15, ICSID Case no. ARB/97/3.

<sup>70</sup> *Ibid* at para 26.

<sup>71</sup> “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No UN96/X15, 29 May 1996” in Park, *supra* note 41, 317 at 317–319 [*LCIA Reference No UN96/X15*].

and clerical services” as the Respondent’s counsel.<sup>72</sup> The Division underscored that the Claimant was “considered to be familiar with the organisation of barristers Chambers in England” and no justifiable doubts as to the independence of Respondent’s arbitrator were raised.<sup>73</sup>

### 3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

*LCIA Reference No. 1303 (November 22, 2001)* upheld a challenge on the basis of enmity between a sole arbitrator and a counsel.<sup>74</sup> The Claimant challenged the sole arbitrator on the basis of the arbitrator’s membership to a Trade Court.<sup>75</sup> The sole arbitrator returned a very hostile reaction to the challenge and characterized the Claimant’s submissions as “fictitious, false[,] and malevolent.”<sup>76</sup> Although it found no underlying lack of independence by virtue of the arbitrator’s membership to the Trade Court, the Division disqualified the sole arbitrator because of the “self-evident tension and ill-feeling that had arisen as a result of [the] challenge.”<sup>77</sup>

### 3.3.8 The arbitrator has...been appointed on more than three occasions by the same counsel, or the same law firm.

Similar to multiple appointments by the same party, a challenge to multiple appointments by the same counsel evaluates the extent of the arbitrator’s financial dependence on those appointments. With *Tidewater v. Venezuela*, *OPIC v. Venezuela*, and *Universal Compression v. Venezuela*, the respective Claimants challenged the Respondent’s arbitrators for multiple appointments by Curtis Mallet-Prevost, Colt & Mosle LLP.<sup>78</sup> As with the challenges for multiple appointments by the same party, each respective Deciding Authority held that multiple appointments by the same law firm, absent financial dependence, was insufficient to sustain an arbitrator challenge.<sup>79</sup>

More recently in *Caratube International v. Kazakhstan*, the Deciding Authority addressed a challenge on the basis of Mr. Boesch’s three prior arbitral appointments by Curtis Mallet-Prevost, Colt & Mosle LLP.<sup>80</sup> The Deciding Authority rejected the challenge and reiterated that the “mere fact of Mr. Boesch’s prior appointments as arbitrator by Curtis, Mallet-Prevost, Colt

<sup>72</sup> “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No UN97/X11, 5 June 1997” in Park, *supra* note 41, 320 at 320—321 [*LCIA Reference No UN97/X11*].

<sup>73</sup> *Ibid* at 321.

<sup>74</sup> “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 1303, 22 November 2001” in Park, *supra* note 41, 342 at 344 [*LCIA Reference No 1303*].

<sup>75</sup> *Ibid* at 343.

<sup>76</sup> *Ibid* at 344.

<sup>77</sup> *Ibid*.

<sup>78</sup> See *Tidewater*, *supra* note 51 at para 14; *OPIC Karimum Corp*, *supra* note 56 at para 20; *Universal Compression Int’l Holdings*, *supra* note 54 at para 12.

<sup>79</sup> *Tidewater*, *supra* note 51 (“the mere fact of holding three other appointments...does not, without more, indicate a manifest lack of independence or impartiality” at para 64); *OPIC Karimum Corp*, *supra* note 56 (“the material provided does not establish any significant dependence by [Prof. Sands] upon income derived from those appointments” at para 55); *Universal Compression Int’l Holdings*, *supra* note 54 (“[Prof. Stern] has been appointed multiple times by various law firms, but that a relationship of dependence, which could endanger her independence or impartiality, does not exist here or elsewhere” at para 87).

<sup>80</sup> *Caratube Int’l Oil Co & Mr. Devincci Salah Hourani v Republic of Kazakhstan*, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014) at para 31, ICSID Case no. ARB/13/13 [*Caratube Int’l Oil Co*].

& Mosle LLP... does not, without more, indicate a manifest lack of independence or impartiality.”<sup>81</sup>

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together... as co-counsel.

A challenge based on an arbitrator’s prior professional relationship with a counsel for one of the parties considers whether the relationship is on-going as well as the depth of the cooperative work. In *Universal Compression v. Venezuela*, the Respondent challenged Prof. Tawil claiming that he had maintained a “long professional relationship” with King & Spalding LLP, Claimant’s counsel, that “lasted for at least ten years and which has basically consisted in joint representation in investor-state arbitrations, always arguing in favor of investors.”<sup>82</sup>

The Deciding Authority dismissed the challenge by finding that Prof. Tawil did not maintain an on-going relationship with King & Spalding LLP and had not acted as “co-counsel in an investor-state arbitration” with the law firm in over a year.<sup>83</sup> To the extent that Prof. Tawil and King & Spalding LLP were connected, it was as “joint representatives of different parties to those involves in the [current] case.”<sup>84</sup> Furthermore, those cases involved “different fact patterns” and different legal issues from the current arbitration.<sup>85</sup>

3.4.1 The arbitrator’s law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

*Blue Bank v. Venezuela* establishes the important precedent that current adversity of an arbitrator’s law firm towards one of the parties can be grounds for disqualification.<sup>86</sup> Venezuela challenged Mr. Alonso after he disclosed that he was a partner at Baker & McKenzie Madrid, S.L.P., which belongs to Baker & McKenzie International (Swiss Verein).<sup>87</sup> All associated firms of Baker & McKenzie International were “independent and the remuneration of [p]artners therefore depend[ed] mainly on the turnover of each particular firm.”<sup>88</sup> At the same time as the current arbitration, the Caracas Office of Baker & McKenzie was representing complainants in administrative proceedings against Venezuela.<sup>89</sup>

Since “Baker & McKenzie is structured and publicized as a global legal practice... [and] each office cannot be considered as a separate legal person,” Venezuela argued that there were “reasonable doubts as to Mr. Alonso’s independence and impartiality” because he had “direct economic interests in the outcome of [other] cases against Venezuela.”<sup>90</sup> The Deciding Authority upheld the ethical challenge against Mr. Alonso on the basis of the parallel proceedings against Venezuela by the Caracas Office of Baker & McKenzie. The Deciding Authority was persuaded by

<sup>81</sup> *Ibid* at para 107.

<sup>82</sup> *Universal Compression Int’l Holdings, supra* note 54 at para 50.

<sup>83</sup> *Ibid* at paras 101, 107.

<sup>84</sup> *Ibid* at para 102.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Blue Bank Int’l & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (12 November 2013) at paras 66—69, ICSID Case no. ARB/12/20 [*Blue Bank Int’l & Trust (Barbados) Ltd*].

<sup>87</sup> *Ibid* at para 5.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* at para 24.

<sup>90</sup> *Ibid* at paras 25—26.

the “sharing of a corporate name, the existence of an international arbitration steering committee at a global level,” and the degree of connection or overall coordination” between different Baker & McKenzie offices created a sufficient conflict of interest.<sup>91</sup>

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

A challenge involving an arbitrator’s financial holdings considers whether the holdings provide the arbitrator with a financial incentive in the outcome of the dispute. *Suez II* addresses the conflict of an arbitrator’s holdings in a publicly listed party. Prof. Kaufmann-Kohler was an elected, non-executive member of UBS group’s Board of Directors.<sup>92</sup> She exercised a supervisory function and was “not involved in the management of the bank’s business.”<sup>93</sup> UBS held 2.38% of the shares and voting rights in Vivendi Universal, a Claimant, and 2.13% of the share capital in Suez, another Claimant.<sup>94</sup> UBS’s General Counsel advised that these holdings were “fairly small, if not fractional” and “do not have a strategic meaning of any kind.”<sup>95</sup> Argentina challenged Prof. Kaufmann-Kohler given UBS’s holdings in the Claimants.

The Deciding Authority flatly dismissed Argentina’s challenge. An arbitrator’s financial connections to a party must be “evaluated *qualitatively* in order to decide whether it constitutes a fact indicating a manifest lack of the quality of independence of judgment and impartiality.”<sup>96</sup> In making that assessment, it emphasized the reality that “[a]rbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another.”<sup>97</sup> In rejecting the challenge, the Deciding Authority considered that Prof. Kaufmann-Kohler never had any direct relationship or interaction with the Claimants by way of her UBS directorship.<sup>98</sup> In addition, UBS was a “passive, portfolio investor” in Claimants and the holdings did not form any financial dependence on the part of UBS.<sup>99</sup> Even if the holdings were significant, Prof. Kaufmann-Kohler would still be independent because any award rendered would only have a “negligible effect on [the Claimants’] share price[s].”<sup>100</sup>

In *EDF International v. Argentina*, Argentina raised a subsequent challenge to Prof. Kaufmann-Kohler based on UBS’s holdings and business dealings with EDF International, a Claimant in that dispute.<sup>101</sup> Following *Suez v. Argentina*, the Deciding Authority dismissed the

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91 *Ibid* at para 67.

92 *Suez et al v Argentine Republic*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) at para 11, ICSID Case no. ARB/03/19 [*Suez II*].

93 *Ibid* at para 18.

94 *Ibid* at para 14.

95 *Ibid*.

96 *Ibid* at para 33 [emphasis in original].

97 *Ibid* at para 32.

98 *Ibid* at para 40.

99 *Ibid* at para 36.

100 *Ibid*.

101 *EDF Int’l S.A. et al v Argentine Republic*, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) at para 12, ICSID Case no. ARB/03/32 [*EDF Int’l*].

challenge concluding that Prof. Kaufmann-Kohler would not receive any “financial interest in the claimant’s companies or benefit from an award in favor of the claimants.”<sup>102</sup> Any conflict of interest was “trivial and *de minimis*.”<sup>103</sup>

In both *Suez II* and *EDF International v. Argentina*, Argentina raised a subsidiary challenge that Prof. Kaufmann-Kohler failed to disclose conflicts of interest stemming from her financial holdings.<sup>104</sup> In *Suez II*, the Deciding Authority rejected the non-disclosure challenge finding that Prof. Kaufmann-Kohler did not know about the financial holdings and “cannot be required to disclose that which she does not know.”<sup>105</sup> Furthermore, Prof. Kaufmann-Kohler was shielded by reasonable reliance on a UBS “conflicts check” that advised her that she had no ethical conflicts with any upcoming arbitrations.<sup>106</sup> Regarding *EDF International v. Argentina*, the Deciding Authority dismissed the failure to disclose challenge repeating the general rule that “[n]on-disclosure itself cannot be a ground for disqualification” and any disqualification must arise from the underlying facts of an ethical conflict.<sup>107</sup>

#### 4. Green List

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

An impartiality challenge on the basis of a prior legal opinion evaluates how closely the opinion matches the underlying facts and legal issues of the case at issue. In *Suez I*, Argentina challenged Prof. Kaufmann-Kohler, citing a prior \$105 million award against Argentina in a water and sewage privatization case involving the Argentinian province of Tucuman.<sup>108</sup> Argentina claimed that the previous award was “so flawed, particularly in its findings of fact and its appraisal of the evidence” that it demonstrated Prof. Kaufmann-Kohler’s lack of impartiality.<sup>109</sup> The Deciding Authority dismissed the challenge because the subsequent case dealt with different underlying facts, the 2001 Argentinian financial crisis rather than water and sewage privatization; and different legal standards, namely a different bilateral investment treaty from the previous case.<sup>110</sup>

In *Tidewater v. Venezuela* and *Universal Compression v. Venezuela*, the respective Deciding Authorities dismissed impartiality challenges to Prof. Stern’s prior awards because the challenges were “premature,” given that no other pleadings had been filed aside from the Request for Arbitration.<sup>111</sup> This decision indicates that in order to lodge a successful impartiality challenge based on a prior award, the case at issue must include pleadings that sufficiently put forward the

<sup>102</sup> *Ibid* at para 71.

<sup>103</sup> *Ibid* at para 133.

<sup>104</sup> *Suez II*, *supra* note 92 at para 9; *EDF Int’l*, *supra* note 101 at para 25.

<sup>105</sup> *Suez II*, *supra* note 92 at 46.

<sup>106</sup> *Ibid* at 27.

<sup>107</sup> *EDF Int’l*, *supra* note 101 at para 123.

<sup>108</sup> *Suez et al v Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007) at para 13. ICSID Case no. ARB/03/17 [*Suez I*].

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* at paras 36—37.

<sup>111</sup> See *Tidewater*, *supra* note 51 at para 69; *Universal Compression Int’l Holdings*, *supra* note 54 at para 82.

relevant legal issues.

*Urbaser v. Argentina* considered a challenge to Prof. McLachlan on the basis of his prior academic writings.<sup>112</sup> In his book titled “International Investment Arbitration, Substantive Principles,” co-written with two other scholars, Prof. McLachlan criticizes the “heretical decision” of the Tribunal in *Maffezini v. Spain*, which held that the Most Favored Nation (MFN) Clause of the Argentine-Spain bilateral investment treaty permitted the Tribunal to circumvent a jurisdictional bar and apply the “more liberal provisions” of the Chile-Spain bilateral investment treaty dispute resolution clause.<sup>113</sup> Taking an opposite position, he argued that “MFN protection” should not apply to treaty “dispute settlement provisions, unless the parties expressly so provide.”<sup>114</sup> On the basis of this prior academic work, the Claimants claimed Prof. McLachlan lacked impartiality because he had “prejudged an essential element of the conflict that is the object of [the] arbitration” as well as “the jurisdiction of [the] Tribunal.”<sup>115</sup>

In assessing the challenge, the Deciding Authority stated the general rule that the “mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge.”<sup>116</sup> The critical inquiry was whether the “opinions expressed” were so “specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceeding.”<sup>117</sup> The Deciding Authority dismissed Claimant’s challenge finding that Prof. McLachlan’s opinions were expressed in his “capacity as a scholar and not in a decision that could have some kind of binding effect upon him.”<sup>118</sup> Beyond that, the Deciding Authority observed that Prof. McLachlan’s statements were flexible general interpretations of MFN protections that “seem[ed] to leave open a more in-depth analysis of each MFN clause at issue in a particular arbitral dispute.”<sup>119</sup>

By contrast, the Deciding Authority in *Caratube International v. Kazakhstan* disqualified Mr. Boesch on the basis of his service as an arbitrator in a prior, albeit similar, case.<sup>120</sup> In the prior arbitration, Mr. Boesch decided an expropriation claim where various Claimants contended that Kazakhstan had illegally seized their companies after criminal proceedings in “violation of due process.”<sup>121</sup> Subsequently, in *Caratube International v. Kazakhstan*, a different set of Claimants brought an expropriation action against Kazakhstan based on the same underlying facts and raising the same legal claims.<sup>122</sup> These new Claimants challenged Mr. Boesch on the grounds that he had already “prejudged” their claims because his award in the prior arbitration had evaluated the same

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112 *Urbaser S.A. et al v Argentine Republic*, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010) at paras 21—22, ICSID Case no. ARB/07/26 [*Urbaser*].

113 *Ibid* at para 21.

114 *Ibid*.

115 *Ibid* at para 23.

116 *Ibid* at para 45.

117 *Ibid* at para 44.

118 *Ibid* at para 51.

119 *Ibid* at para 56.

120 *Caratube Int’l Oil Co*, *supra* note 80 at paras 88-90.

121 *Ibid* at para 87.

122 *Ibid*.

“factual and legal arguments.”<sup>123</sup>

The Deciding Authority upheld the challenge because Mr. Boesch’s service in the prior arbitration would “possibly permit a judgment on elements not in the record in the present arbitration.”<sup>124</sup> In addition, even if Mr. Boesch could maintain an impartial judgment, the Deciding Authority feared that he would be on unequal footing because he would “[benefit] from the knowledge of facts on the record in that case which may not be available to the other arbitrators in the present arbitration.”<sup>125</sup>

*LCIA Reference No. 5660 (August 5, 2005)* considered an impartiality challenge on the basis of a sole arbitrator’s prior legal training.<sup>126</sup> In a dispute between an American Claimant and Kuwaiti Respondents, a specialist in Arab and Islamic law was selected as sole arbitrator.<sup>127</sup> The sole arbitrator had written his thesis on the development of the Egyptian legal system in the 1980’s and had given expert advice on both Iraqi and Kuwaiti law.<sup>128</sup> The Claimant argued that the sole arbitrator’s “long-standing commitment to Arab studies and Arab culture might prevent him from being...objective and impartial.”<sup>129</sup>

The Division reaffirmed the general rule that “professional writings relating to legal or commercial issues arising in an arbitration may not lead to the disqualification of an arbitrator.”<sup>130</sup> Rejecting the challenge, the Division concluded that there was no evidence that the sole arbitrator’s “technical expertise in Arab and Islamic law” exposed him so much to “Arab and Islamic culture as to become biased or more receptive to the case of the [Kuwaiti] Respondent[s].”<sup>131</sup>

4.3.1 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 or charitable organisation, or through a social media network.

Precedent from the published LCIA and ICSID challenges demonstrates that a mutual professional association between an arbitrator and counsel, without more, is insufficient to warrant the arbitrator’s disqualification. In *LCIA Reference No. 1303 (November 22, 2001)*, the Division rejected the claimant’s challenge to a sole arbitrator who shared membership in a Chamber of Commerce with Respondent’s counsel.<sup>132</sup> Similarly, the Division in *LCIA Reference No. 81132 (November 15, 2008)* dismissed the Respondent’s challenge to the claimant’s arbitrator for sharing membership in a Commercial Fraud Lawyers Association with Claimant’s counsel.<sup>133</sup>

Finally, in *Alpha v. Ukraine*, the Deciding Authority rejected the Respondent’s challenge that Dr. Turbowicz lacked independence and impartiality because he was a classmate with the

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123 *Ibid* at para 27.

124 *Ibid* at para 89.

125 *Ibid* at para 93.

126 “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 5660, 5 August 2005” in Park, *supra* note 41, 371 at 372—373 [*LCIA Reference No 5660*].

127 *Ibid*.

128 *Ibid*.

129 *Ibid* at 371.

130 *Ibid* at 372.

131 *Ibid*.

132 *LCIA Reference No 1303, supra* note 74 at 344.

133 *LCIA Reference No 81132, supra* note 67 at 441.



claimant's counsel at Harvard Law School.<sup>134</sup> It held that there were “no grounds or authority on which to determine that...shared educational experience and resulting acquaintance...in and of themselves evidence a relationship that might influence Dr. Turbowicz's freedom of decision-making.”<sup>135</sup>

In addition to the underlying disqualification challenge, the Respondent raised a non-disclosure challenge against Dr. Turbowicz for failing to disclose his academic relationship with the claimant's counsel.<sup>136</sup> The Deciding Authority rejected that challenge outright stating that a “long-ago acquaintanceship at an educational institution” was not adequate grounds for disclosure, much less disqualification.<sup>137</sup> Beyond that, it provided the general rule that a personal or social relationship does not need to be disclosed.<sup>138</sup>

#### Other Situations

There were two published cases that fell within the scope of this paper's inquiry, but presented situations that were not listed in the IBA Guidelines Application Lists. *LCIA Reference No. 8086 (September 30, 1998)* considers a challenge to the nationality requirement of a sole arbitrator.<sup>139</sup> Under the LCIA Rules, a sole arbitrator may “not have the same nationality as any party” unless the parties agree otherwise.<sup>140</sup> In that case, the Respondent challenged the sole arbitrator claiming that he was a “*de facto* British national” and held the same nationality as the Claimant in violation of the LCIA Rules.<sup>141</sup> The Division rejected the nationality challenge by evaluating the sole arbitrator's affiliations. The sole arbitrator was actually connected with an American company and held legal qualifications in the United States.<sup>142</sup>

In addition, the sole arbitrator was challenged for failing to disclose his “*de facto*” British nationality.<sup>143</sup> The Division rejected the challenge because the sole arbitrator had sufficiently disclosed all relevant facts and an arbitrator is not required to disclose a subjective evaluation of whether or not they arise to the level of disqualification.<sup>144</sup>

*ConocoPhillips v. Venezuela* dealt with an independence challenge to Mr. Fortier on the basis of an announced merger of his law firm with another law firm adverse to Venezuela.<sup>145</sup> Mr. Fortier was a partner of Norton Rose OR LLP, which had announced a merger with Macleod

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134 *Alpha Projektholding GmbH v Ukraine*, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) at paras 10, 63, ICSID Case no. ARB/07/16.

135 *Ibid* at para 45.

136 *Ibid* at para 19.

137 *Ibid* at para 61.

138 *Ibid* at para 63.

139 “LCIA Court Decision on Challenge to Arbitrator, LCIA Reference No 8086, 20 September 1998” in Park, *supra* note 41, 328 at 328 [*LCIA Reference No 8086*].

140 *Supra* note 3, art 6.1.

141 *LCIA Reference No 8086*, *supra* note 139 at 328.

142 *Ibid* at 330.

143 *Ibid* at 328.

144 *Ibid* at 330.

145 *ConocoPhillips Co et al v Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012) at para 24, ICSID Case no. ARB/07/30.

Dixon LLP.<sup>146</sup> Meanwhile, the Caracas Office of Macleod Dixon LLP had been providing “legal services” to one of the Claimants and had been “acting adverse” to Venezuela.<sup>147</sup> Once the merger was announced, formal screening mechanisms were installed to prevent any disqualifying “communication or information” from reaching Mr. Fortier.<sup>148</sup> Venezuela challenged Mr. Fortier on the basis that he lacked independence from the Claimants because his law firm was proposing a merger with a law firm acting adversely to Venezuela.<sup>149</sup> The Deciding Authority dismissed the challenge finding that Mr. Fortier had been sufficiently screened from the possible ethical conflict and recognizing that the merger had not yet occurred.<sup>150</sup>

In addition, Venezuela challenged Mr. Fortier on the basis that he failed to promptly disclose the merger negotiations of Norton Rose OR LLP.<sup>151</sup> Considering that Mr. Fortier had no knowledge of the planned merger negotiations, the Deciding Authority rejected the challenge on the principle that an arbitrator is not required to disclose more than the arbitrator knew or should have known.<sup>152</sup>

#### IV. ARBITRATOR ETHICS GUIDANCE

The comparative analysis of the IBA Guidelines Application Lists and published challenges reveal several important parameters to guide evaluations of future ethical challenges to arbitrators. The touchstone inquiry into a challenge for an arbitrator’s lack of independence evaluates whether the arbitrator has a substantial financial stake in the outcome of the case. Multiple appointments by a single party or counsel are not a disqualifying circumstance, so long as the arbitrator maintains diversified sources of appointments.<sup>153</sup> Indeed, the general rule is that multiple appointments, without more, are insufficient to sustain an ethical challenge.<sup>154</sup> Nevertheless, multiple appointments by a party or counsel can disqualify an arbitrator if he or she demonstrates a financial dependence on that particular party or counsel.<sup>155</sup>

Challenges involving an arbitrator’s relationships evaluates whether accepting the arbitral appointment creates any substantial financial incentives. The financial holdings cases indicate that merely owning shares in a party is unlikely to be a disqualifying circumstance so long as the award to be rendered does not have a significant effect on that party’s share price.<sup>156</sup> Along similar lines, the cases involving challenges to the legal services provided by the arbitrator’s law firm turn on the relatedness of the work to the current arbitration. If the work done by the arbitrator’s law firm involves a benign and specific transaction unrelated to the current arbitration, it would not be a disqualifying cause.<sup>157</sup> However, if an arbitrator’s law firm is currently acting adversely

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146 *Ibid* at para 1.

147 *Ibid* at para 2.

148 *Ibid* at para 4.

149 See *ibid* at para 25.

150 See *ibid* at para 65.

151 *Ibid* at para 29.

152 *Ibid* at paras 65—68.

153 See *OPIC Karimum Corp*, *supra* note 56 at para 55.

154 See *Caratube Int’l Oil Co*, *supra* note 80 at para 31.

155 See *LCIA Reference No 81160*, *supra* note 49.

156 See *Suez II*, *supra* note 92; *EDF Int’l*, *supra* note 101.

157 See *Suez II*, *supra* note 92; *LCIA Reference No 97/X27*, *supra* note 41; *LCIA Reference No UN3476*, *supra* note

to a party, even if the matter is unrelated, that adversity can be grounds for challenge because the arbitrator may benefit financially from an unfavorable award against that party.<sup>158</sup>

In an arbitrator challenge for a lack of impartiality, the touchstone inquiry is whether the arbitrator's prior opinions are so inflexible that he or she is deemed to have prejudged the issues arising in the current arbitration. An impartiality challenge must be based on specific facts and cannot be sustained by general conjectures.<sup>159</sup> Mere disagreement with an arbitrator's prior opinions is insufficient for disqualification.<sup>160</sup> An analysis for a lack of impartiality considers whether the arbitrator had issued pointed statements or decisions of "binding" effect on his or her judgment.<sup>161</sup> The prior opinion must have been the determinative factor in the outcome.<sup>162</sup>

Finally, an evaluation of a non-disclosure challenge assesses whether the arbitrator has taken reasonable steps to be transparent. As a general rule, mere non-disclosure, without more, is insufficient for disqualification.<sup>163</sup> A non-disclosure challenge gives fundamental consideration to the underlying facts and circumstances of the arbitrator's ethical conflict.<sup>164</sup> However, an arbitrator's willingness to be transparent and make additional disclosures will also be considered.<sup>165</sup> Even if an arbitrator is found to have failed to disclose a conflict of interest, there is no violation of duty if he or she made reasonably diligent efforts to comply with the duty to disclose.<sup>166</sup>

## CONCLUSION

This paper began with a discussion of the divergence in the area of arbitrator ethics and ends with a concerted attempt to provide consistency. As previously examined, arbitrator ethics is an undeveloped field that lacks a cohesive scheme to both predict and evaluate conflicts of interest. By engaging in a comparative analysis of the IBA Guidelines Application Lists and published LCIA and ICSID challenges, this paper sought to offer a single source to assess ethical challenges in current practice. This paper's findings will help arbitrators consider what information to disclose and how to determine what facts and circumstances constitute a conflict of interest. Moreover, the findings will aid a Deciding Authority in concluding whether an ethical conflict merits disqualification. In the end, this paper hopes to thread consistency through arbitrator challenge decisions in international arbitration.

Nevertheless, this paper as well as the field of arbitrator ethics remains a work in progress. As previously noted, most international arbitral institutions do not publish reasoned challenge decisions. This lack of information and experience sharing has stifled the development of uniform standards and consistent outcomes. More challenge decisions should be published. Additional

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158 See *Blue Bank Int'l & Trust (Barbados) Ltd*, *supra* note 86.

159 See *Saint-Gobain Performance Plastics Europe*, *supra* note 45.

160 See *Suez I*, *supra* note 108.

161 See *Tidewater*, *supra* note 51; *Urbaser*, *supra* note 112.

162 See *Caratube Int'l Oil Co*, *supra* note 80 at para 47.

163 See *EDF Int'l*, *supra* note 101.

164 See *LCIA Reference No 8086*, *supra* note 139.

165 See *LCIA Reference No 81160*, *supra* note 49; *LCIA Reference No 1303*, *supra* note 74.

166 See *Suez I*, *supra* note 108.

challenge decisions will surely add valuable content to the framework laid out in this paper. Ultimately, the publication of more challenge decisions will facilitate greater global uniformity of arbitrator ethics in international arbitration.