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ARTICLES

Clash and Convergence on Ethical Issues in International Arbitration

John M. Townsend*

International arbitration brings together participants and legal advisors from many different cultures and legal systems. Although this is one of the strengths of international arbitration, it also gives rise to many conflicts, particularly concerning the rules of ethics to be applied. Nonetheless, great progress has recently been made in finding common ground on questions of ethics.

One of the most frequently used methods of constituting an international arbitral tribunal is for each party to name an arbitrator, with a third arbitrator chosen either by the two party-appointed arbitrators, by agreement of the parties, or by an arbitral institution. The prevailing rule in international arbitration for many years has been that the party-appointed arbitrators are to be independent and impartial, even though each is selected by one side or the other. In contrast, the prevailing American rule, until this year, was that a party-appointed arbitrator was expected to be predisposed to decide the dispute in favor of the party that appointed him with a state of mind generally described as "non-neutral." This divergence between the American and

* John M. Townsend is a partner at Hughes Hubbard & Reed LLP, Washington, D.C., where he chairs the firm's Arbitration and Alternative Dispute Resolution Group. Mr. Townsend also is Chairman of the Executive Committee and a member of the Board of Directors of the American Arbitration Association. This article was originally an oral presentation at the *University of Miami Inter-American Law Review Symposium on International Arbitration* on April 2, 2004, in Miami, Florida.

1. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (American Arbitration Association 1977), available at http://www.adr.org/index2.lisp?JSPssid=15707&JSPsrc=upload\LIVESITE\Rules_Procedures\Archives\Archived%20Rules\code.html. See also AMERICAN ARBITRATION ASSOCIATION, SIDE BY SIDE COMPARISON OF 1977 AND 2004 VERSIONS OF THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VII (2004), available at http://www.adr.org/upload/LIVESITE/Rules_Procedures\IEthics_Standards/code%20for%20arbitrators%20comparison.pdf (last visited Oct. 18, 2004); See also *Delta Mine Holding Co. v. AFC Coal Props.*, 280 F.3d 815 (8th Cir. 2001).

international practices has, for many years, prompted critical commentary, primarily directed at the American model.

Other issues involving similar ethical controversy in international arbitration have not given rise to a split as clear-cut as the party-appointed arbitrator divergence. These topics include: The disclosures an arbitrator should make in accepting an appointment, the types of disclosures that should lead to disqualification of the arbitrator, and when *ex parte* communications between an arbitrator and a party are permissible.

Many ethical considerations focus less on the arbitrator than on the parties and their lawyers. Such issues include: Whether members of a corporate party's in-house legal department are considered lawyers for purposes of participating in an arbitration, or for purposes of applying the protection of attorney-client privilege to communications between such lawyers and their clients; The proper role of lawyers in presenting witness testimony to an arbitral tribunal; May a lawyer interview an adverse witness; Whether a lawyer may help to prepare a friendly witness to testify, or assist in the drafting of a written witness statement; and Whether witnesses may be subjected to American-style cross-examination.

All of these questions have been debated among international arbitrators. Sometimes the difference in opinion reflects differences between the legal traditions that we refer to as common law systems, principally those of the English-speaking countries, and those we refer to as civil law systems, embracing most of the remainder of the world. Sometimes, as with the party-appointed arbitrator controversy, the divergence is between Americans and everyone else. Other differences, however, simply reflect differing practices and customs in particular parts of the world. Almost all of these divergent opinions have been given considerable attention, with results that are generally positive.

A number of converging practices have emerged to bridge or reconcile some of the differing opinions about ethical standards, and many have been embodied in sets of rules or ethical guidelines. This discussion focuses on four key documents, three of which are very new and seem likely to become milestones in reconciling clashes over arbitral ethical issues. The four documents are:

- The *IBA Rules on the Taking of Evidence in International Commercial Arbitration* ("IBA Rules"), which were issued by the International Bar Association
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- ("IBA") in 1999;²
- The *Code of Ethics for Arbitrators in Commercial Disputes*, usually referred to as the AAA/ABA Code of Ethics, which was originally jointly issued by the American Arbitration Association ("AAA") and the American Bar Association ("ABA") in 1977,³ but which was substantially revised effective March 1, 2004;⁴
- The new *Commercial Arbitration Rules & Mediation Procedures* ("Commercial Rules") of the AAA, which came into effect on July 1, 2003;⁵ and
- The *IBA Guidelines on Conflicts of Interest in International Arbitration* which have circulated in draft form since 2002, although the final version was not approved by the Council of the International Bar Association until May 22, 2004.⁶

Each of these documents and its contribution to reconciling one or more of the ethical divergences in international arbitration will be discussed in turn.

THE INTERNATIONAL BAR ASSOCIATION RULES

The IBA Rules, the first of these documents to be adopted, is not principally directed at ethical issues. It aims at resolving, or at least bridging, differences between the common law and civil law systems of presenting factual evidence to a tribunal.⁷ The IBA Rules were developed by a committee of lawyers from both traditions, who were interested in developing a set of procedures that could be applied when parties to an international arbitration were

2. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION (International Bar Association 1999), available at <http://www.ibanet.org/pdf/resolutions/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20International%20Arbitration%201999.pdf> (last visited Oct. 18, 2004).

3. The 1977 CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES is available at http://www.adr.org/index2.1.jsp?JSPssid=15707&JSPsrc=upload\LIVESITE\Rules_Procedures\Archives\Archived%20Rules\code.html.

4. The 2004 Revision of the CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES is available at http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVE SITE\Rules_Procedures\Ethics-Standards\codeofethics2004.htm.

5. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES (American Arbitration Association 2003), available at http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National International\...\focusArea\commercial\AAA235current.htm (last visited Oct. 18, 2004).

6. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION (International Bar Association 2004), available at <http://www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf> (last visited Oct. 18, 2004).

7. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION, *supra* note 2.

from opposing traditions.' These rules have gained widespread acceptance for the purpose for which they were prepared, but that is beyond the scope of this paper.' The rules are of interest here because they also address a number of ethical issues.

The subject of witness preparation has been a touchy one in international arbitration, because the civil law system traditionally has put very little trust in witness testimony and therefore, developed few rules for how to present it." Such rules as existed tended to assume that witnesses were likely to lie, and that allowing lawyers to talk with a witness before the magistrate had a chance to examine him was only likely to help the witness lie more convincingly." In many countries, Argentina being a well-known example, it was and still is considered unethical for a lawyer to speak with a witness before the witness is examined. To a common law lawyer, or at least to an American lawyer, it would border on malpractice to allow a witness to testify without having been prepared by a lawyer. There have been cases involving an Argentine party on one side and a common law party on the other in which the Argentine party indignantly sought sanctions when it emerged that the opposing lawyer had prepared the witness to testify.

The solution adopted by the IBA Rules takes the form of a simple statement: "It shall not be improper for a Party, its officers, employees, legal advisors, or other representatives to interview its witnesses or potential witnesses." This provision helps avoid objections of the type just described, and now appears to have been generally accepted as the international ethical norm. Common law lawyers with civil law adversaries would still do well to proceed with caution when interviewing witnesses, especially hostile witnesses likely to report to the adversary on the interview. It may be prudent to raise this issue with the arbitrators in a preliminary conference to assure that all parties to the arbitration have a common understanding of what kind of advance contact with witnesses will be acceptable in that proceeding.

A related subject that is *not* addressed by the IBA Rules is whether it is ethically acceptable for a lawyer to help a witness

8. *Id.*

9. See Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L 59 (2002).

10. *Id.* at 62-63.

11. *Id.*

12. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION, *supra* note 2, at art. 4.3.

draft the written witness statement that frequently takes the place of direct testimony in international arbitration." Lawyers who become too involved in the drafting of such statements run the risk of embarrassment when the witness is asked at the hearing about who wrote his statement. Many lawyers consider it an ethical problem when a lawyer writes a statement and asks a witness to sign it. Whether an objection to a lawyer having done so would be taken seriously by the tribunal is, like many close ethical calls involving cultural differences, likely to depend heavily on who the arbitrators are, and especially on the background and predilections of the arbitrator in the chair. A lawyer concerned about an adverse reaction would probably do well to allow the witness to write the first draft of his statement, and to confine the lawyer's role to editing that statement, even if the edits turn out to be substantial.

The IBA Rules also have been helpful in resolving the long-standing civil lawyers' objection to cross-examination, at least as practiced by actors portraying American lawyers in the motion pictures. Cross-examination is not a form of advocacy that is well developed in most civil law countries, because commercial cases in civil law jurisdictions tend to be decided on the basis of documents, with relatively little live testimony.¹³ When witnesses do testify in civil law proceedings, they are questioned by the judge, and lawyers for the parties are generally confined to suggesting additional questions to the judge after he or she has finished. Many civil law practitioners are therefore uncomfortable conducting cross-examination in an arbitration hearing, and are even more uncomfortable with the idea of subjecting their clients to cross-examination by an American litigator or an English barrister.

The IBA Rules put to rest any concern about cross-examination being considered unethical, which was the view of some opponents of the practice, although the rules respect the sensibilities of those opponents enough to avoid using the term "cross-examination."¹⁴ Section 8.2 of the IBA Rules provides: "Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal." Preserving civil law ideas about the prerogatives of the judge, the same section of the

13. *Id.* at arts. 4.4.-4.9

14. See Elsing & Townsend, *supra* note 9, at 62-63.

15. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION, *supra* note 2, at art. 8.9.

IBA Rules provides that the arbitral tribunal may put questions to a witness at any time.

The IBA Rules again wrap a common law ethical rule in civil law language in addressing the problem of privilege. The civil law does not provide the same evidentiary privileges as most common law jurisdictions, largely because the civil law provides for very little discovery in commercial cases, with correspondingly less need for protection from that sort of intrusion." Most civil law countries protect communications between a client and a lawyer from disclosure, principally under the rubric of professional secrecy, but with some extremely significant reservations." Under the laws of some civil law countries, such as France, Italy, and Switzerland, and also under European Union law, communications between a corporate client and its in-house lawyers are not protected, because such employee lawyers are not considered to be sufficiently independent to merit the protection of professional secrecy."

The IBA Rules address the problem of privilege by urging arbitrators to respect legal privileges, but without any explicit reference to the touchy problem of inside counsel. The IBA Rules provide, in Section 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

16. See Elsing & Townsend, *supra* note 9, at 60-61.

17. Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575 (1982). See J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E. U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT'L LAW. 35 (2004).

18. See, e.g., Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575 (1982); Order of the President of the Court of First Instance of 30 October 2003 in Joined Cases T-125/03 and T-253/03 R: *Akzo Nobel Chems., Ltd. & Akcros Chems., Ltd. v. Comm'n of the European Communities*, 2003 O.J. (C 35) 10. See also Macintosh & Angus, *supra* note 17.

19. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION, *supra* note 2, at arts. 9.2(b), (g).

By placing considerations of fairness and equality on an equal footing with legal and ethical rules, Section 9.2(g) provides arbitrators with the tool they need to deal with divergent legal and ethical rules.²⁰ The in-house counsel problem, for example, may arise in an arbitration with a Swiss corporate party on one side and an American party on the other. The American party may seek disclosure of communications between the Swiss party and its in-house counsel, arguing that such communications are not privileged under the law of Switzerland, where the communications took place. The American party would, at the same time, vehemently resist disclosure of its communications with its own in-house lawyer, arguing that Section 9.2(b) of the IBA Rules requires the tribunal to respect the American rules of privilege that protect such communications." Most international arbitrators would now resolve such a dispute by reference to Section 9.2(g), and would decide either that the communications between *both* parties and their in-house lawyers should be protected, as a matter of fairness and equality, or that *neither* set of communications should be protected, on the same basis.²² The mandate to conduct the proceedings with fairness and equality would be interpreted to trump any invocation of privilege under²³ Section 9.2(b) that would result in unfair or unequal treatment.

THE REVISED CODE OF ETHICS FOR ARBITRATORS

The revised Code of Ethics became effective on March 1, 2004, after extensive study by several sections of the American Bar Association and a committee formed by the American Arbitration Association regarding how the 1977 code should be adapted to encompass the developments in arbitration law since its adoption.²⁴ The most dramatic change made in the 2004 revision to the Code of Ethics was the abandonment of the traditional American assumption that party-appointed arbitrators would be considered non-neutral. This assumption had been codified in Canon VII of the 1977 code: "In all arbitrations in which there are two or more party-appointed arbitrators ... the two party-appointed arbitrators should be considered non-neutrals unless both parties inform

20. *Id.* at 9.2(g).

21. *Id.* at 9.2(b).

22. *Id.* at 9.2(g).

23. *Id.* at 9.2(b), (g).

24. Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, 59 Disp. RESOL. J. 10 (2004) (describing the revision process and principal changes to the 1977 code).

the arbitrators that all three arbitrators are to be neutral²⁵ This provision of the 1977 code accurately reflected American practice at the time, and has since been widely accepted by the courts as stating the norm for American arbitration." It had, nevertheless, been widely criticized as inconsistent with international standards and identified as one of the reasons that parties were likely to avoid the United States as a venue for arbitrations.²⁷

This presumption of the non-neutrality of party-appointed arbitrators was not merely abandoned in the 2004 revision of the Code of Ethics, it was reversed. The revised Code of Ethics, in the words of its Note on Neutrality: "[E]stablishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise."²⁸ The revised presumption is codified in Canon IX.A of the revised Code of Ethics: "In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator."²⁹ By neutral, the 2004 revision means that an arbitrator should be "independent and impartial."³⁰ As that is the prevailing international standard, this 180-degree reversal of the presumption of non-neutrality effectively brings American arbitration into line with international practice."

25. 1977 CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VII (1977), *supra* note 3.

26. E.g., *Delta Mine Holding Co. v. AFC Coal Props.*, 280 F.3d 815 (8th Cir. 2001).

27. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at pmbl.

28. *Id.*

29. *Id.* at Canon IX.A.

30. *Id.* at pmbl.

31. The *International Arbitration Rules* of the American Arbitration Association, available at www.adr.org, already followed the international norm: "Arbitrators acting under these rules shall be impartial and independent." (Art. 7.1). Similarly, the *London Court of International Arbitration Rules* provides that, "All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties" ARBITRATION; RULES, CLAUSES, & COSTS art. 5.2 (London Court of Int'l Arb. 2004), available at <http://www.lcia-arbitration.com/arb/uk.htm#e> (last visited Oct. 18, 2004). The International Chamber of Commerce considers impartiality to be a state of mind that cannot be legislated, but requires in its *Rules of Arbitration* that, "Every arbitrator must be and remain independent of the parties involved in the arbitration." RULES OF ARBITRATION art. 7.1 (Int'l Chamber of Commerce 1998), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Oct. 18, 2004).

THE NEW AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL RULES

As the committees working on revising the Code of Ethics began to realize that they were in general agreement on reversing the presumption of non-neutrality of party-appointed arbitrators in the 1977 code, the American Arbitration Association realized that reversal of that presumption would require significant changes in its flagship *Commercial Arbitration Rules & Mediation Procedures*.³² The version of the Commercial Rules in effect prior to July 2003 had the presumption on non-neutrality built into it in a number of places.³³ The AAA therefore began the process of revising its Commercial Rules while the discussions concerning the Code of Ethics were underway, and actually completed and issued its revised Commercial Rules on July 1, 2003, several months before the revised Code of Ethics became effective.

The new Commercial Rules adopted, in Section R-12(b), the same presumption of neutrality as the revised Code of Ethics:

Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards."

This presumption is elaborated in Section R-17:

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence . . .³⁶

COMMON PROVISIONS OF THE CODE OF ETHICS AND THE
AMERICAN ARBITRATION ASSOCIATION RULES

Both the July 1, 2003, *Commercial Arbitration Rules* and the

32. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at *Summary of Changes*.

33. *Id.*

34. Paul D. Friedland & John M. Townsend, *Commentary on the July 2003 Revisions to the AAA Commercial Arbitration Rules*, 58 Disc. RESOL. J. 8-13 (2004) (describing changes to the AAA rules).

35. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-12(b).

36. *Id.* at R-17(a).

March 1, 2004 revision of the Code of Ethics contain deliberately parallel provisions designed to adjust both documents to the new ethical landscape resulting from the reversal of the presumption of non-neutrality.

One of these parallel provisions is that the parties to arbitration may agree to opt out of the reversal of the presumption of non-neutrality. Both sets of revisions took into account, as the preamble to the revised Code of Ethics phrases it, that "parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral."³⁷ In order to respect the right of parties to arbitration to decide for themselves in what type of proceeding they wish to engage, both the Code of Ethics, in Canon IX.B,³⁸ and the revised Commercial Rules, in Section R-17(a)(iii),³⁹ permit the parties to decide if they prefer to conduct their arbitration under the old system. Canon X of the revised Code of Ethics details the specific ethical obligations of non-neutral arbitrators, those arbitrators referred to in the Code of Ethics as "Canon X Arbitrators."

The revised Code of Ethics also contains a new provision making it an ethical obligation of an arbitrator to ascertain and to advise the parties whether he or she is serving as a neutral arbitrator or a Canon X Arbitrator." Canon IX.C of the Code of Ethics provides:

A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X⁴²

The Commercial Rules have no parallel to this provision."

Both the revised Code of Ethics and the new Commercial Rules make it clear that a primary consequence following from the service of all arbitrators as neutrals is that no *ex parte* contacts

37. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), *supra* note 4, at pmb1.

38. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon IX.B.

39. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-17(a)(iii).

40. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon X.

41. *Id.* at Canon IX.C.

42. *Id.*

43. *See* Commercial Arbitration Rules & Mediation Procedures, *supra* note 5.

are to be permitted between any party and any arbitrator once the tribunal is constituted.⁴⁴ These rules on *ex parte* contacts follow logically from the reversal of the presumption of non-neutrality, and represent an additional point upon which American practice has now conformed to international standards.

The revised Code of Ethics, in Canon IILB, states that "[a]n arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party"⁴⁵ Similarly, the new AAA Rules provide, in Section R-18(a): "No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration"⁴⁶ The 1977 code, in Canon VII.C(2), in contrast, had permitted non-neutral party-appointed arbitrators to "communicate with the party who appointed them concerning any ... aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so."⁴⁷ Both the revised Code of Ethics, in Canon X.C, and the new AAA Rules, in Section R-18(b), make it clear that the general prohibition on *ex parte* contacts does not apply to Canon X arbitrators, although even they are subjected to more restrictions on their ability to communicate with the parties than they were under the 1977 Code.⁴⁸ The most notable of these restrictions is that even Canon X arbitrators may not, under Canon X.C(4), disclose deliberations of the tribunal or decisions of the tribunal before they are announced, or communicate about any particular subject once the record is closed and the subject is submitted for decision."

Both the revised Code of Ethics, in Canon III.B(2)-(4), and the new Commercial Rules, at Section R-18-A, contain exceptions to the rule against *ex parte* contacts that apply to all party-appointed

44. *See id.*; CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4.

45. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon III.B.

46. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-18(a).

47. 1977 CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 3, at Canon VII.C.2.

48. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon X.C.; COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-18(b); SIDE BY SIDE COMPARISON OF 1977 AND 2004 VERSIONS OF THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon VII.C.

49. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon X.C.4.

arbitrators.⁵¹ However, the exceptions are very narrowly drawn. *Ex parte* contacts between a party-appointed arbitrator and the party that appointed him are permitted, after the arbitrator's appointment, for only three purposes:

- To discuss the appointment of the third arbitrator,
- To discuss the party-appointed arbitrator's compensation, and
- To discuss whether the party-appointed arbitrator is to serve as a neutral.

The exception for discussion of compensation is not found in the Commercial Rules, because such conversations are handled by the AAA administrator under Section R-51(c) of those rules.

Finally, both the revised Code of Ethics and the new Commercial Rules tackle the sensitive subject of what a prospective arbitrator should disclose in accepting an appointment as an arbitrator.⁵³ Disclosure is a sensitive matter for at least two reasons. First, the *failure of* an arbitrator to disclose an interest in the proceedings or circumstances that might indicate a bias in favor *of* or against one *of* the parties has been frequently asserted as a basis for a court to set aside an arbitration award." Second, the arbitration community is divided, both in the United States and internationally, between those who believe that a disclosure should generally be treated as a precaution by an arbitrator who believes that he or she will be independent and impartial, and those who believe that a disclosure should be presumptively treated as a basis for disqualification.

The revised Code of Ethics, in dealing with disclosure, first makes it clear in its preamble that the same standards of disclosure now apply to all arbitrators, whether party-appointed or not

50. *Id.* at Canon III.B.2-4; COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-18(a).

51. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at Canon III.B.2-4.

52. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-51(c).

53. *See id.*: CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4.

54. *E.g.*, Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968), *reh'g denied*, 393 U.S. 1112 (1969); ANR Coal Co., Inc. v. Cogentrix of N.C., Inc., 173 F.3d 493, 498-99 (4th Cir. 1999); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983); *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 441 (Del. Ch. 1999); Judge Scheindlin, *Decision of Interest; Arbitrator's Prior Business Relationship Does Not Warrant Vacating Arbitration Award*, N.Y.L.J., October 29, 2004 (Skyview Owners Corp. v. Service Employees Int'l Union, Local 32BJ, AFL-CIO, S.D.N.Y., Oct. 5, 2004).

and whether they are neutral or are serving under Canon X: "This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality."⁵⁵ This is echoed in the new Commercial Rules, at Section R-16(a), which requires "[a]ny person appointed or to be appointed as an arbitrator" to make the same disclosures." The previous version of the Commercial Rules, at Section R-19(a), had required only neutral arbitrators to make full disclosures,⁵⁷ and the 1977 code, in Canon VILB, had similarly required less in the way of disclosure by party-appointed arbitrators than by neutral arbitrators."

The revised Code of Ethics, in Canon ILA, specifies what a prospective arbitrator has an ethical duty to disclose. The key items are:

- any known direct or indirect financial or personal interest in the outcome of the arbitration;
- any known existing or past financial, business, professional or personal relationships which might reasonably *affect* impartiality or lack of independence in the eyes of any of the parties ... ; and
- the nature and extent of any prior knowledge they may have of the dispute⁵⁸

The new Commercial Rules, in Section 16(a), adopt essentially the same rule of disclosure, in a more general form:

Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives⁶⁰

55. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at pmbl.

56. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-16(a).

57. *Id.* at R-16; See also SIDE BY SIDE COMPARISON OF 1977 AND 2004 VERSIONS OF THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 1, at Summary of Recent Changes.

58. SIDE BY SIDE COMPARISON OF 1977 AND 2004 VERSIONS OF THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 1, at Canon VILB.

59. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, at II.A.

60. COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5, at R-16(a).

There are subtle differences between the two standards. The Code of Ethics only requires a prospective arbitrator to disclose *known* interests in the outcome or relationships,⁶¹ while the Commercial Rules contain no such explicit limitation." The Code of Ethics also applies a subjective test to disclosures of relationships, requiring the disclosure of those that might reasonably affect impartiality or independence in the eyes of the parties, but an objective test to the disclosure of interests which are to be disclosed without any such limitation." The Commercial Rules apply the same subjective test, "likely to give rise to justifiable doubt," both to interests and to relationships." The Commercial Rules do not explicitly require disclosure of prior knowledge of the dispute, although such knowledge could well come within the general umbrella of "any circumstance."⁶⁵ These are minor variations, however. Both documents take a clear stand in favor of full disclosure of relevant information by all arbitrators."

The new Commercial Rules include a very useful addition to the ongoing development of rules about disclosure." They include for the first time, in Section R-16(c), a statement designed as an antidote to the view that disclosure should generally result in disqualification. The new provision reads: "In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to

61. See CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4.

62. See COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5.

63. See CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4.

64. See *supra* text accompanying note 60.

65. See COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5.

66. American disclosure rules have to some extent been affected by the *California Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, which create an extremely burdensome set of disclosure requirements for arbitrators. International arbitrations are currently exempted from the California standards, so those standards will not be discussed here, but those standards have nevertheless caused widespread concern among international arbitrators. ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (Judicial Council of Cal. 2002), available at www.arbitrationworks.com/pdfforms/NewArbEthicsCA.pdf (last visited Oct. 18, 2004); See also CAL. CIV. CODE § 1281.85 (2004); AMERICAN ARBITRATION ASSOCIATION, ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION IN CALIFORNIA FACT SHEET (2004), available at <http://www.adr.org/index2.1.jsp?JSPssid=15753&JSPsrc=upload \ LIVESITE \ Forms \ stateSpecific \ . . \ . . \ focusArea \ consumer \ CA %020-%20Ethical%20Standards%20Fact%20Sheet%20-%2012-30-02%20draft.htm> (last visited Oct. 18, 2004). See also *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 2004 EL 1895135 (Cal. App. 3d) for an interesting application of the California disclosure rules.

67. See COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 5.

affect impartiality or independence."⁶⁸ That statement should give considerable comfort to arbitrators who feel the pressure from sources such as court decisions and the California Ethics Standards to make every disclosure they can think of, but who might be reluctant to jeopardize an appointment by disclosing information that seems essentially trivial. The Commercial Rules provide a framework within which disclosures can be made without appearing to invite disqualification. This is a healthy approach to resolving the tension between the need to build confidence in the arbitration process by assuring that appropriate disclosures are made, and the risk of making the process unworkable if frivolous challenges to the appointment of arbitrators are encouraged.

THE INTERNATIONAL BAR ASSOCIATION GUIDELINES

The most recent contribution to the development of a body of common ethical standards for international commercial arbitration is the *IBA Guidelines on Conflicts of Interest in International Arbitration*, issued in final form on May 22, 2004.⁶⁹ The IBA Guidelines represent an attempt to build upon the success of the IBA Rules as a statement of converging solutions to procedural problems, by attempting to craft converging solutions to some of the ethical problems that arise in international arbitration.

The IBA Guidelines focus on the problem of disclosure, which is just as serious a concern in the international arena as it is in the United States. One of the reasons for concern about disclosure, perhaps inevitably, is that the American attitude toward the subject differs from that of much of the rest of the world. The American approach is generally that as much as possible should be disclosed, so that the parties, the arbitrators, the arbitral institution, and any reviewing court have all the potentially relevant information available to sort out, on a case-by-case basis, the information that makes a difference. Indeed, the revised Code of Ethics, in Canon I.D., counsels prospective arbitrators that "Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."⁷⁰ Continental European practice, in contrast, has historically been that only conflicts perceived to

68. *Id.* at R-16(c).

69. See IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6.

70. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, Canon I.D.

be serious need to be disclosed, largely to minimize frivolous challenges. The problem with that approach is that it tends to lead to the assumption that every disclosure is a ground for disqualification.

These approaches to disclosure can clash seriously. For example, an arbitration with its seat in the United States but that is administered by a European arbitral institution may prove problematic. An arbitrator appointed to sit on the case would be well advised to make the broad disclosure that an American court reviewing an ultimate arbitral award would likely expect, even if the arbitrator does not believe that the matter disclosed has any bearing on his or her independence or impartiality, and even if the rules of the administering institution do not require it. The failure to make such a disclosure could expose the ultimate award to challenge in an American court. However, such a disclosure may also easily lead to that arbitrator being challenged by a party and disqualified by the institution administering the arbitration, if that institution has a predisposition not to appoint an arbitrator who has made any disclosure, no matter how trivial. This is the acknowledged position of the International Chamber of Commerce ("ICC") in appointing chairs and sole arbitrators."

The new IBA Guidelines attempt to define what a prospective arbitrator must disclose." In doing so, the IBA Guidelines open with a series of general ethical standards. The first of these, described as a "General Principle," is that: "Every arbitrator shall be impartial and independent of the parties."⁷³ In codifying impartiality, in addition to independence, as an essential attribute of an arbitrator, this First General Principle goes beyond the Article 7.1 of the ICC Rules, which require only that, "Every arbitrator must be and remain independent of the parties involved in the arbitration."⁷⁴ It is, however, consistent with the approach of the revised Code of Ethics, as well as that of the *LCIA Rules*, the AAA's *International Arbitration Rules*, and the new Commercial Arbitration Rules.⁷⁵

The most interesting additions to the ethical norms of international arbitration under the IBA Guidelines are contained in the second and third General Standards. The second General

71. RULES OF ARBITRATION, *supra* note 31, at art. 9.

72. See IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6.

73. *Id.* at I(1).

74. RULES OF ARBITRATION, *supra* note 31, at art. 7.1.

75. See *supra* note 31.

Standard, captioned "Conflicts of Interest," recognizes, in effect, an ethical obligation of a prospective arbitrator to decline an appointment if he or she has any doubts about his or her ability to satisfy the first principle:

(a) An arbitrator shall 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 doubts as to his or her ability to be impartial or independent."

The same standard adopts an objective standard for when an arbitrator should decline an appointment or withdraw:

(b) [I]f facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have [waived the concern]."

This Second General Principle is consistent with the revised Code of Ethics, although, in the IBA Guidelines, the directive is framed as an obligation to decline an appointment rather than as a condition of accepting one. The revised Code of Ethics states, in Canon 1.13, that "one should accept appointment as an arbitrator only if fully satisfied: (1) that he or she can serve impartially; [and] (2) that he or she can serve independently"⁷⁸

The third General Standard of the IBA Guidelines deals with disclosure. The provision adopts a subjective test for what a prospective arbitrator should disclose, namely that, "facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence"⁷⁹ This General Standard specifically counsels that: "Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure."⁸⁰ This last provision is nearly identical to Canon I.D. of the revised Code of Ethics."

76. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6, at I(2)(a).

77. *Id.* at I(2)(a)-(d) (Subsections (c) and (d) of General Standard 2 define and illustrate "justifiable doubt").

78. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, Canon 1.13 (The revised Code of Ethics adds two additional requirements: "(3) that he or she is competent to serve; and (4) that he or she can be available").

79. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6, at I(3)(a).

80. *Id.* at I(3)(c).

81. See CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, Canon I.D.

The really interesting feature of the third General Standard is contained in subsection (b), which provides a framework for reconciling the objective standard for disqualification with the subjective standard for disclosure:

It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise he or she would have declined the nomination or appointment at the outset or resigned⁸²

This recognition that disclosure is a means of providing comfort to parties who might be concerned if they learned of the circumstance disclosed from other sources, rather than an invitation to disqualification, will do more to promote appropriate disclosures by arbitrators than all of the provisions detailing their obligations to make disclosures. At least, it will do so if it is accepted by the institutions that have hereto tended to apply the contrary presumption.

While this may be the most welcome statement in the IBA Guidelines, their most conspicuous feature is not the General Standards, but three color-coded lists grouped under the heading "Practical Application of the General Standards."⁸³ These lists, relating to the Fourth General Standard, which deals with waivers of disclosed conflicts by the parties,⁸⁴ are designed both to help arbitrators decide what must be disclosed and what need not be, and to guide parties about what may be waived and what may not be waived.

The first color-coded list is a "Red List" of circumstances that will normally prevent an arbitrator from serving. This list is divided into a "non-waivable Red List" and a "waivable Red List." The "non-waivable Red List" is a catalog of circumstances that will always prevent an arbitrator from serving. The "non-waivable list" includes situations in which:

- The arbitrator is a party or an officer, director, or representative of a party;
- The arbitrator has a significant financial interest in one of the parties or in the outcome of the case; or

⁸² IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6, at 1(3)(b).

⁸³ See *id.*, at II.

⁸⁴ *Id.* at 1(4).

- The arbitrator regularly advises the appointing party or one of its affiliates.⁸⁵

This creation of a "non-waivable list" of conflicts puts the IBA Guidelines at odds with the revised Code of Ethics. The Code of Ethics does not seek to impose any limit on the freedom of the parties to waive a disclosure, but rather provides, in Canon ILF, that "When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve."⁸⁶

The "waivable Red List" in the IBA Guidelines is a catalog of circumstances that will prevent an arbitrator from serving unless they are waived by the parties. The two Red Lists, therefore, differentiate circumstances that may not in any circumstances be waived and circumstances that, as long as the arbitrator has disclosed them, the parties are free to waive. The "waivable Red List" is quite lengthy, and it includes circumstances one has difficulty imagining the parties would waive, as well as others that seem likely to be waived. They include, for example:

- The arbitrator has given advice or an opinion to a party about the dispute;
- The arbitrator owns shares in a party or an affiliate of a party; and
- The arbitrator represents or advises one of the parties or is a lawyer in the same firm as one of the counsel to the parties."

Probably the least controversial of the color-coded lists in the IBA Guidelines is the "Orange List," which is described as: "[A] non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence."⁸⁸ An arbitrator has a duty to disclose any circumstance on the "Orange List," but the parties are deemed to have waived the disclosure if they do not object once it is made. The "Orange List" includes such circumstances as:

- The arbitrator has in the last three years acted as counsel for or against a party;

85. *Id.* at 11(2).

86. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 4, Canon ILK

87. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION, *supra* note 6, at 11(9).

88. *Id.* at II(3).

- The arbitrator serves as an arbitrator in a related case involving the same or related parties; and
- The arbitrator and another arbitrator or counsel for one of the parties are in the same barristers' chambers."

The last circumstance listed is an attempt to tackle another of the touchy subjects in international arbitration. English barristers do not consider that membership in the same chambers should be confused with membership in the same law firm. It is not uncommon for barristers from the same chambers to appear on opposite sides of a case in English court, and they have difficulty understanding why it should raise any question to have two of them involved in the same arbitration, even if the role of one of them requires impartiality and independence. Putting the situation on the "Orange List" may well have been a compromise between those who might have put it on the "waivable Red List" and those who might have put it on the "Green List."

The "Green List," the most controversial of the three, is described in the IBA Guidelines as: "a non-exhaustive list of specific situations where no appearance of, and no actual, conflict of interest exists from the objective point of view."⁹⁰ There is, consequently, no obligation under the IBA Guidelines to disclose situations on the "Green List," which includes circumstances such as:

- The arbitrator has written an article on the same subject as involved in the arbitration;
- The arbitrator has previously served with another arbitrator; and
- The arbitrator's firm has previously acted against one of the parties."

What makes the "Green List" controversial are not the specific circumstances on that list, or even the circumstances on the other color-coded lists. One could quibble with the placement of some items and make a good case for moving many of them from one list to another, but this challenge is inevitable in any document representing efforts to reconcile differing viewpoints. Also, there is no fundamental conceptual problem with attempting to define a safe harbor of circumstances that no reasonable person could consider problematic, especially in a world in which frivolous challenges to arbitrators are too frequently made.

The controversial element of the "Green List" is that it pur-

89. *Id.* at II(9)(3).

90. *Id.* at II(6).

91. *Id.* at II(9)(4).

ports to enumerate circumstances that not only should not result in a challenge, but also that need not be disclosed. By doing so in a document that lacks the force of law in any jurisdiction, the IBA Guidelines risk creating a trap. For example, an arbitrator in an international case may well decide, once the IBA Guidelines gain acceptance, that he or she is not obligated to disclose a circumstance on the "Green List." That arbitrator would do well to check the law of the jurisdiction in which the arbitration is sited, especially if it is within the United States. An American court is unlikely to recognize the "Green List" as providing immunity from the obligation to disclose any circumstance, however trivial, that the court believes "might create an impression of possible bias."⁹² If the effect of the "Green List" is to lull an arbitrator into neglecting a disclosure requirement that law applicable to the particular proceeding may impose, that list will have achieved exactly the opposite of what its drafters intended.

CONCLUSION

None of the four documents discussed in this paper will either eliminate ethical problems in international arbitration or differences of opinion about how to deal with them. But, taken together, they represent a significant set of advances in reconciling differing points of view and in devising converging standards and practices. Their combined effect should be to provide valuable guidance to parties, arbitrators, and arbitral institutions in resolving many differences between cultures and legal systems that otherwise lead to ethical conflicts. The documents also represent, collectively, a significant advance in bringing American and international ethical standards into harmony.

⁹² *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968); *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973).