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New Case Law From Austria, Switzerland and Germany Regarding the IBA Guidelines on Conflicts of Interest in International Arbitration by Matthias Scherer

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New Case Law From Austria, Switzerland and Germany Regarding the IBA Guidelines on Conflicts of Interest in International Arbitration

Matthias SCHERER¹

In 2004, the Arbitration Committee of the International Bar Association (IBA) issued a booklet that has since had an undeniable impact on the practice of international arbitration: the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”). These Guidelines were developed to respond to a need to provide for more uniformity in the standards applied in making decisions concerning disclosure, objections and challenges, and ultimately, to ensure that arbitration proceedings not be hindered by the growing conflict of interest issues. Indeed, laws and arbitration rules provide only limited guidance on these issues. In order to provide greater consistency in decision-making and prevent unnecessary challenges and arbitrator withdrawals and removals, the Guidelines notably contain three colour-coded lists (Red, Orange and Green) giving specific guidance on what circumstances should be disclosed. These lists do not purport to be exhaustive, and they do not override applicable national law. Rather, they are intended to help parties, practitioners, arbitrators, institutions and the courts in their decision-making process. The Red List consists of two parts: a ‘non-waivable Red List’ and a ‘waivable Red List’. Both these lists are enumerations of situations giving rise to justifiable doubts as to the arbitrator’s impartiality and independence. The Orange List is an enumeration of specific situations which may, depending on the facts of a case, give rise to justifiable doubts. Arbitrators therefore are advised to disclose such situations. Finally, the Green List enumerates situations which do not give rise to an appearance of conflict of interest, and therefore an arbitrator has no duty to disclose.

The IBA Arbitration Committee also established a Sub-committee the main objective of which is to monitor case law referring to the Guidelines and to gather feedback from practitioners which might assist the IBA in future revisions and improvements of the Guidelines. The Sub-committee is currently composed of Julie Bédard (Skadden, Arps, Slate,

¹ Partner with LALIVE (mscherer@lalive.ch). The author is chair of the IBA Conflicts Sub-committee (2008-2010). Opinions expressed in this paper and any errors it may contain are the author’s alone. Readers who become aware of new case law referring to the IBA Guidelines are kindly invited to inform the Sub-committee.

Meagher & Flom LLP, USA); Cesar Coronel (Coronel y Perez, Ecuador); Francisco Gonzalez de Cossio (Gonzalez de Cossio Abogados, S.C., Mexico); Villanúa Deva (Armesto & Asociados, Spain); Karim Hafez (Karim Hafez, Egypt); Shinji Kusakabe (Anderson Mori & Tomotsune, Japan); Christopher Lau (ATMD AlbanTay Mahtani & de Silva LLP, Singapore); Crenguta Leaua (Tanasescu Leaua Cadar & Asociatii, Romania); Ramon Mullerat (KPMG, Spain); Sophie Nappert (3 Verulam Buildings, UK); Piotr Nowaczyk (Salans D. Oleszczuk Kancelaria Prawnicza Sp.k., Poland); Ben Sheppard (University of Houston, USA); Matthias Scherer (chair, Lalive, Switzerland).

In addition, a number of observers from arbitration institutions follow the works of the Sub-committee on an informal basis. Currently, these include Eric Biesel (Swiss Chambers of Commerce/Geneva Chamber of Commerce and Industry, Switzerland); Lawrence Boo (SIAC - Singapore International Arbitration Centre, Singapore); Jens Bredow (DIS - Deutsche Institution für Schiedsgerichtsbarkeit, Germany); Ulf Franke (SCC - Arbitration Institute of the Stockholm Chamber of Commerce, Sweden); Simon Greenberg (International Court of Arbitration of the International Chamber of Commerce (ICC), UK); Michael J. Moser (HKIAC – Hongkong International Arbitration Centre, China); Adrian Winstanley (LCIA - London Court of International Arbitration, UK). Observers of further institutions are being added.

It is planned that the case law gathered by the Sub-committee will be made publicly accessible on the IBA website. In order to ensure that all relevant decisions are compiled, practitioners, whether IBA members or not, are kindly invited to communicate to the Sub-committee any judgments, awards or decisions from arbitral institutions that refer to the Guidelines.

This article will summarize four such judgments regarding the Orange and Green Lists which have recently been brought to the Sub-committee’s attention.

Par. 3.1.3 of the Orange List: Multiple appointments (Austria, Commercial Court Vienna, Decision of 24 July 2007 (16 No 2/07w))

Pursuant to the paragraph 3.1.3 of the Orange List, an arbitrator shall disclose if he or she has “*within the past three years been appointed as arbitrator on two or more occasions by one of*

the parties or an affiliate of one of the parties". The Guidelines do however carve out from the ambit of the general rule specialized arbitrations in which multiple appointments are common and in which parties should be familiar with these customs, such as maritime and commodity arbitrations.

A recent Austrian case, in which the claiming party in arbitration proceedings before the Vienna VIAC *Wirtschaftskammer Österreich* challenged the arbitrator nominated by the respondent, deals with the type of situation contemplated by paragraph 3.1.3 of the IBA Guidelines. According to the claimant, the arbitrator had been appointed on five occasions by the respondent, including in the ongoing case. This was not contested.² In essence, all the cases in which the arbitrator was appointed concerned the same matter. In the claimant's view, these frequent nominations raised justifiable doubts as to the arbitrator's independence. Moreover, as a result of his prior involvement in the matter, it had to be expected that he already formed an opinion on the questions to be decided in the case at hand, giving the appearance that he was not capable of acting impartially. In two of the proceedings in which the arbitrator had previously been appointed, the claimant was not a party. In those proceedings, he had, according to the claimant, acquired confidential information which he was not entitled to share with the co-arbitrators in the present case, but which would inevitably colour his determination. Therefore, there was an imbalance within the arbitral tribunal. Finally, the arbitrator had been named as a witness in a number of proceedings in relation to the one at hand, and it could not be excluded that he may have to testify in the ongoing case. This potential double role as witness and arbitrator amounted to a potential conflict of interest that raised doubts as to his independence and impartiality.

The claimant submitted that an objective test should apply to the question of whether or not an arbitrator is independent and impartial, and that the IBA Guidelines were to be taken into account. According to the claimant, the overall objective of the new Austrian arbitration law

² In this context a recent French decision is noteworthy: a party had alleged that the arbitrator nominated by its opponent had been appointed before on numerous occasions. It requested that the opponent disclose the exact number of prior appointments of the said arbitrator. The opponent refused. The party asked for an injunction from the « juge d'appui » which was granted. The opponent was ordered to disclose the number of previous appointments. Upon appeal, the highest French court confirmed that the judge had not overstepped his authority since an allegation of lack of independence had been made and the nominating party had without ground refused to disclose the information. Cour de Cassation, 20 June 2006, in *Revue de l'arbitrage* 3/2007, p. 463 (note Ortscheidt).

of 2006 (*Schiedsrechtsänderungsgesetz*) was to bring Austrian arbitration practice in line with international standards. The IBA Guidelines reflected such standards.

The Vienna Court dismissed the challenge.³ Regarding the relevance of the IBA Guidelines, the Court accepted that the new Austrian law intended to make Austria a more attractive seat for international arbitration proceedings. However, failing a clear statement of the legislator, the Court reasoned that it could not be admitted that Austrian law must, as a rule, be interpreted in light of international legal authorities and usages. In the circumstances, the Court found that there was no clear choice of the legislator as to the application of the IBA Guidelines.

In any event, the Court took no issue with the fact that an arbitrator may be appointed on multiple occasions. Referring to the practice in the Austrian court system, the Court recalled that it is quite common that the same judge deal with a number of disputes between the same parties. This was perceived as an advantage, not a disadvantage. Moreover, the Court noted that the arbitral tribunal's decision is taken by three arbitrators, and not by the challenged arbitrator alone. The other members of the tribunal are not obliged to follow the views of the arbitrator in question. The court also noted that the challenged arbitrator's prior experience would allow him to suggest further evidentiary measures in order to fully elucidate the factual and legal issues. Arbitrators who have no such experience would not necessarily be able to realize that such measures are warranted.⁴ The court clearly rejected the view taken by the claimant that an arbitrator who has already been involved in prior related proceedings is necessarily partial as he has already formed an opinion on the matter. Indeed, the court confirmed that there is no presumption that an arbitrator who has acted in similar legal disputes has a preset opinion on the matters before him.

³ Austria, Commercial Court Vienna, Decision of 24 July 2007 (16 No 2/07w).

⁴ While true in an inquisitorial court system, this statement may be too general to apply to arbitration, and to adversarial systems. Arbitrators' requests for evidence might be problematic if they appear to support a party's position. Most arbitrators will consider that adducing evidence is the task of the parties, under the supervision of the arbitral tribunal. Arguably, the possibility that an arbitrator with prior knowledge might call for evidence based on his private knowledge is a matter of concern, rather than reassurance, for the parties in the arbitration. On the other hand, if both parties were also involved in the prior proceedings, both of them will be aware of the issues previously discussed. In the subsequent proceedings, they can adjust their case accordingly. Moreover, they could both nominate the same arbitrators. It is a fact of life, however, that the party who has lost the first arbitration will sometimes be reluctant to again nominate the arbitrator from the first proceedings.

The court also did not accept the claimant's concern regarding the possibility that the arbitrator might have to testify on his involvements in prior proceedings. On the one hand, the claimant had failed to establish concretely that there was such a risk. On the other hand, the court found that it is not unusual for arbitrators to be called to give testimony before state courts on prior arbitration proceedings. As a result, this did not constitute a ground for challenge.

The court added that it was quite natural that a party would nominate an arbitrator who had special knowledge of its needs, which includes knowledge of the factual matrix of prior proceedings. However, the court recognised that it is not the task of the arbitrator to push the position of the nominating party with the benefit of a better knowledge of the facts in a case. Rather the arbitrator's task is that of an independent and impartial judge, who is liable to the parties for any violation of his professional duties.⁵

Par. 4.4.1 of the Green List: Membership of professional organizations (Switzerland, Federal Supreme Court, Decisions of 20 March and 4 April 2008)

In a case dealing with a situation contemplated by paragraph 4.4.1 of the Green List, the Swiss Federal Supreme Court took a strikingly different stance from that adopted by the Austrian court on the consideration to be given by courts to the IBA Guidelines.

The dispute in question arose out of a contract concluded between a Swiss marketing executive and the Turkish Football Federation in relation to the organisation of, and TV rights to, five friendlies which were to take place prior to the 2006 Football World Cup in Germany. The contract contained an arbitration clause to submit any dispute to the Court of Arbitration for Sport (CAS). The games were played but attracted a far smaller audience than had been expected by the Swiss organizer. According to the organizer, the Turkish Football Federation had breached the contract by allowing a TV network to broadcast the games live.

⁵ The German original of the relevant passage of the court's decision reads: "...naturgemäss, [werden nominiert] Erfahrene, die eben in den Bedürfnissen der entsendenden Partei besondere Kenntnisse haben, wozu eben auch Kenntnis der Sachverhalte aus Vorprozessen zählen wird. Allerdings ist es nicht die Aufgabe des Schiedsrichters [...] den Standpunkt der entsendenden Partei wider besseres Wissen auszudrücken im Schiedsgericht. Vielmehr ist seine Aufgabe unabhängig von der entsendenden Partei die eines unabhängigen und unparteilichen Richters, der bei Pflichtverletzung [...] den Parteien schadenersatzpflichtig wird."

The organizer initiated arbitration proceedings against the Federation before the CAS. The Turkish Football Federation designated Mr B. as its party-appointed arbitrator and subsequently appointed external counsel, Mr C., to represent it before the CAS. The two party-appointed arbitrators nominated Mr P. as chairman of the arbitral tribunal.⁶

Following the dismissal of his claims by the CAS, the Swiss organizer filed an appeal with the Swiss Federal Supreme Court requesting the annulment of the award on the grounds, *inter alia*, of the irregular composition of the arbitral tribunal. The Swiss organizer (claimant) submitted that after the issuance of the award he had discovered by chance that the arbitrator appointed by the Turkish Football Federation (Mr B.), the Chairman, (Mr P.), and the Turkish Football Federation's counsel, Mr C, all belonged to a professional organization called "Rex Sport",⁷ which was composed of 26 members and the website of which was protected by a secret access code. Yet the arbitrators in question had not disclosed this information in their declaration of independence. The claimant requested that the Federal Supreme Court annul the award and appoint two other independent arbitrators.

The Swiss Federal Supreme Court rejected the challenge.⁸ It held that the claimant had foregone its right to challenge the independence and impartiality of the two arbitrators. Indeed, the jurisprudence of the Court clearly provides that any challenge to arbitrators must be made forthwith, as soon as a party has learnt of the relevant facts, or could reasonably have been expected to be aware of them. The Court found that had the claimant performed a proper due diligence when he was informed of the identities of the arbitrators, the existence of the link between the chairman and the arbitrator appointed by the other party would easily have been discovered. Indeed, on the chairman's profile on his law firm's website, his position as president of Rex Sport was clearly mentioned.

"In the circumstances, and given the size of the claim, which was in excess of €1 million, the importance of the choice of the arbitrators could not reasonably have escaped the claimant. The most basic prudence therefore dictated that the claimant had to make enquiries to ensure that the arbitrators who were called to decide his claim offered sufficient guarantees of independence and impartiality. He could not limit his enquiries to

⁶ According to the summary of the judgment in Global Arbitration Review GAR of 23 May 2008, the arbitrator appointed by the Turkish Football Federation was Mr Efram Barak, and the chairman Mr José Juan Pintó Sala. The publication of the judgment on the Supreme Court's webpage www.bger.ch does not identify the names of the arbitrators and parties.

⁷ According to the summary in GAR, see above.

⁸ Switzerland, Federal Supreme Court, 1st Civil Chamber, Decision of 20 March 2008, 4A_506/2007.

the general statement of independence that every arbitrator provides on an ad hoc disclosure form. The publicly available information on [Mr. P's] webpage clearly mentions that he was the president of [Rex Sport]. In light of this information, the claimant at the very least could have been expected to conduct further enquiries into the nature and membership of the organisation, and in particular to ask himself if other members of the panel, and even the counsel to the opponent, were also members. Such an investigation would not have been overly time-consuming. This is borne out by the fact that the claimant was able to perform the investigation in the 30 days that followed his receipt of the tribunal's award. The password protecting the webpage of [Rex Sport] did not prevent him from accessing the association's website. Even if he had been prevented from accessing the site, he could have made enquiries directly with the arbitrators regarding their possible affiliation with the association. The claimant also had access to other, unprotected sources, including the website of the law firm of which [Mr P.] was a partner. The claimant had even produced a newsletter printed from that website, which reported on the general assembly of Rex Sport, presided over by [Mr P.] and conducted in the presence of other persons including Mr C. [counsel to the Turkish Federation]. In the circumstances, the claimant has lost his right to argue that the arbitral tribunal was not properly constituted, either because he knew already shortly after the appointments of the arbitrators of the ground for challenge he then invoked before the Federal Supreme Court, or because he should have known about it by exercising the diligence that could be expected of him in the circumstances.”⁹

The Federal Supreme Court could have stopped its reasoning at that point, but went one step further. Indeed, it explained that even if the claimant had not foregone his right to challenge the impartiality and independence of the arbitrators, the challenge would have been dismissed for lack of merits.

The claimant had argued that the 26 members of Rex Sport systematically appointed each other as arbitrators in the cases in which they were involved. Moreover, the claimant had asserted that Mr P. was also the founder of a company which was in competition with the claimant's own company. This latter argument was flatly rejected by the Court since the claimant failed to establish the purported competition between the activities of the two companies.

With regard to the affiliation of the two arbitrators and the Turkish Federation's counsel, the Court ruled that they did not need to be disclosed. In its reasoning on this point, it referred to the IBA Guidelines, and stated that, in line with **paragraph 4.1.1**, such a social and professional relationship between the arbitrators and the party's counsel was not likely to

⁹ Decision of 20 March 2008, 4A_506/2007. Par. 3.2, working translation. Original in French.

give rise to an objective doubt with respect to the impartiality of the arbitral tribunal.¹⁰ The Court noted in particular that this guideline reflects the “*principles set forth by the case law of the Federal Supreme Court in consideration of the peculiarities of international arbitration in the area of sport.*”

In this respect, the Federal Supreme Court referred to, but did not defer to the IBA Guidelines:

“In order to verify the independence of their arbitrators, the parties can also refer to the **IBA Guidelines on Conflicts of Interest in International Arbitration**, approved on 22 May 2004 [citations omitted]. Certainly, the Guidelines do not have force of law, yet constitute a valuable working tool to contribute to the uniformization of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions administering arbitration proceedings. The Guidelines state general principles. They also contain a non-exhaustive list of particular circumstances. A red list, divided in two parts (circumstances where a legitimate doubt as to the independence and impartiality exists and where the parties cannot waive the most serious among them); an orange list (intermediate situations of circumstances that have to be disclosed but do not necessarily justify a challenge); a green list (situations that objectively do not constitute conflicts and that do not need to be disclosed by the arbitrators). It goes without saying that irrespective of the existence of such lists, the circumstances of each case will always be decisive in order to determine whether there is a conflict of interest.¹¹

The Court noted that the circumstances in the case at hand, in other words the relationship between an arbitrator and another arbitrator or counsel in the framework of a professional association or socially, is precisely akin to the situation described in paragraph 4.1.1 of the Green List. The Court found that “[a]s a result, this [professional relationship] was not in itself sufficient to ground a request for challenge of the independence of the arbitrators, and it did not oblige the arbitrators who are a member of the association [Rex Sport] to mention their membership in their respective declarations of independence.” On this point, the Guidelines reflect the case law of the Federal Supreme Court addressing the particularities of international sport arbitration (Federal Supreme Court Decisions 129 III 445 Par. 3.3.3 and 4.2.2.2, confirmed in SCD 4P.105/2006 of 4 August 2006, par. 4).

¹⁰ Par. 4.4.1 of the Green List reads: “The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.”

¹¹ Switzerland, Federal Supreme Court, 1st Civil Chamber, Decision of 20 March 2008, 4A_506/2007, working translation, Par. 3.3.2.2.

Therefore, only additional circumstances could have led to a different appreciation of the situation before the Federal Supreme Court. The claimant argued that there were indeed such circumstances, namely the secretive and opaque nature of the association, the aim of which was the furtherance of its members' interests in international sport arbitration, especially in the framework of CAS proceedings. The claimant also referred to the data he had compiled purportedly showing that members of Rex Sport systematically appointed co-members as arbitrators.

The Court found that there was insufficient data to allow for any conclusions to be arrived at on that question. It also noted that in the case at hand, the arbitrator had been nominated before counsel was appointed. Moreover, even if the members were indeed designating each other, this would not necessarily be a relevant factor to judge their independence and impartiality as arbitrators. The Court referred to its precedent, 129 III 445 par. 4.2.2.2., and cases quoted therein. It ruled that there is a presumption that the members of an arbitral tribunal are capable of seeing past the circumstances of their designation when they are called to render a specific decision in the exercise of their mandate.

In an *obiter dictum*, the Court hinted that the outcome may have been different if the data the claimant produced had shown systematic cross-appointments among the association's members and that arbitral tribunals comprising a member of the association systematically decided in favour of the party represented by another member. Had this been the case, there may indeed have been objective doubts as to the independence of the arbitrators.

As to the purportedly secretive nature of the association, the Federal Supreme Court once again noted that the claimant's own evidence showed that the challenged arbitrator had no intention of keeping his affiliation secret. The requirement of a password to visit the association's webpage did not prevent the claimant to gain access to it, and was by no means a peculiarity, since many other organisations, such as the Swiss Arbitration Association (ASA), restrict access to certain content on their websites to their members.

In a decision handed down only a few days after its decision in the case involving the Swiss marketing executive and the Turkish Football Federation, the Federal Supreme Court dealt

with another challenge that was based on the same ground, i.e. membership in the sport association Rex Sport.¹²

In this case, unlike what occurred in 4A_506/2007, the period for filing a request to set aside the award had lapsed by the time the claimant had become aware of the relevant memberships. The only remedy left was therefore an application for review,¹³ raising the question of whether the alleged improper composition of the arbitral tribunal was a ground for review. The Court left the latter question open. It found that the application could in any event not be admitted.

The Federal Court held that parties to arbitration proceedings have to take reasonable steps to identify possible conflicts of the arbitrators („*Es obliegt ihnen, die ihnen zumutbaren Abklärungen zeitgerecht vorzunehmen, um allfällige Ausstandsgründe zu erkennen*”). A party that fails to undertake such reasonable verifications cannot argue that it has discovered an arbitrator conflict, a ground that might justify a challenge of an arbitrator, once the time limit for challenging the award has expired. At this stage the Court refers to the above-mentioned judgment of 20 March 2008 in 4A_506/2007, dealing with Par. 4.4.1 of the IBA Guidelines. The ground for challenging an arbitrator could only form the basis of a request for review if it could not have been discovered in the arbitration. The Federal Court found that even minimal diligence would have permitted the claimant to become aware that both of the counsel to the respondent and the respondent’s arbitrator were members of Rex Sport. Indeed, the letterhead of the Brazilian counsel and each page of every submission to the arbitral tribunal carried the association’s logo and the word “member”. The arbitrator’s affiliation and presidency of the association was mentioned on the easily accessible webpage of the CAS (<http://www.tas-cas.org/arbitreslistegen>). Had the claimant really not been aware of these circumstances already during the arbitration, it was due to its own negligence.

¹² Decision of 4 April 2008, 4A_528/2007 /en. According to Global Arbitration Review GAR of 23 May 2008, the parties were Saudi Arabian football club Al Ittihad (claimant), which had lost a CAS arbitration over a failed transfer bid for a player, and the Brazilian team Vitória (respondent). The CAS tribunal was composed of Jan Paulsson (France) (President) , Luigi Fumagalli (Italy) (appointed by the Claimant), and José Juan Pintó Sala (Spain) (appointed by the respondent). The claimant took issue with the fact that both José Juan Pintó Sala and respondent’s counsel were members of Rex Sport.

¹³ In addition to the statutory remedy of a request to set aside an arbitral award on the limited grounds of Art. 190 PIL Act, the Federal Supreme Court’s case law affords another, even more extraordinary remedy: the review or revision (révision) of an award can be requested in case of crimes having had an impact on the outcome of the proceedings, or new evidence not yet available at the time of the proceedings. An application for review can be filed even after the time limit for lodging a request to set aside the award (30 days from notification) has expired.

Consequently, the claimant forfeited its right to rely on the circumstances to request a review of the award.

Par. 3.5.2 of the Orange List: Arbitrator having publicly advocated a specific position (Germany – OLG Frankfurt, Decision of 4 October 2007)

According to paragraph 3.5.2 of the Orange List, the fact that an “*arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper, a speech or otherwise*” may give raise to justifiable doubts as to his or her impartiality or independence. In the above case, an arbitration involving competition law issues conducted under the auspices of the German Institution of Arbitration (DIS), a party challenged the chairman of the arbitral tribunal before a Frankfurt court because he had allegedly given the respondent’s counsel an opportunity to publish a paper discussing the case under review in a scholarly publication.

The facts were the following: the respondent’s counsel was a speaker at a convention organized by DIS during which he expounded on the issue of arbitrators’ powers under Articles 81 and 82 of the EU Treaty, in particular on the question of whether arbitral tribunals are required to investigate alleged violations of EU competition law, possibly with the assistance of the EU Commission. A few months later, in September 2006, the proceeds of the conference were published in a volume of the DIS arbitration series. In January 2007, the arbitral tribunal informed the parties that it intended to close the evidentiary proceedings without ordering further investigations on the parties’ compliance with EU competition law. The claimant alleged that shortly thereafter it became aware of the respondent’s counsel’s speech and of its subsequent publication. In both the speech and the publication, the author advocated that arbitral tribunals are not required to investigate alleged EU competition law violations. In the claimant’s view, the respondent’s counsel had addressed the very facts that were contentious in the arbitration. The crux of the challenge was that the chairman of the arbitral tribunal was a member of the board of DIS and one of three co-editors of the DIS series. Furthermore, he had co-signed the preface of the volume of the DIS series in which the speech in question was published. The claimant submitted that these circumstances showed that the chairman had authorised the content of the article. It therefore argued that the situation was similar to that contemplated by paragraph 3.5.2 of the Guidelines, which requires an arbitrator faced with such circumstances to step down.

The Higher Regional Court of Frankfurt found that there was no evidence whatsoever that the chairman had publicly advocated a specific position.¹⁴ He had not attended the conference where the speech was delivered and had affirmed that he had not even read the paper before it was published. The court found that it was not unusual that one of several editors of a scientific journal had no knowledge of all the contributions to a given volume, even if, as was the case here, he co-signed the preface. In any event, the mere fact that an academic journal published an article did not mean that the editor(s) condoned the views expressed in it. A reasonable party could not draw the conclusion that the arbitrator lacked impartiality in these circumstances, even if the article discussed an ongoing case. Whether the published speech did or did not discuss the case was therefore irrelevant. Moreover, the Court noted that the claimant had not established that the chairman had decided to put an end to the evidentiary proceedings after having read the article in question. The claimant had also failed to establish that the chairman had knowledge at all of the speech delivered by the respondent's counsel or of its subsequent publication.

The court left open the question of whether a failure to disclose a relevant circumstance could give rise to legitimate doubts about an arbitrator's impartiality. In the present case, there was no disclosure requirement since it had not been established that the arbitrator had publicly advocated a specific position. A violation of paragraph 3.5.2 of the IBA Guidelines was therefore not demonstrated.

Interestingly the Frankfurt court does not discuss or question the relevance of the IBA Guidelines when it takes them into consideration. Its approach therefore is in contrast to that of the Austrian court, which in the decision reported above, rejected the notion that the Guidelines should be considered when applying domestic law. It however must be noted that the German court had no reason to confront German *lex arbitri* and IBA Guidelines as they did not lead to a different result.

Albeit it does not refer to the IBA Guidelines, a recent Swiss case where **an arbitrator was challenged based on certain publications** (which he had authored himself) merits to be briefly mentioned.

¹⁴ Germany – OLG Frankfurt, Decision of 4 October 2007, Az: 26 Sch 8/07 – OLG Stuttgart, reported in SchiedsVZ 2/2008, p. 96.

The relevant arbitration was the third in a row opposing Swiss International Air Lines ('Swiss') and the Swiss Pilots Association. A first dispute was decided by a three member arbitral tribunal on 15 July 2002. A second dispute was dealt with in a second arbitration by the same tribunal. The award was rendered on 17 June 2003. In April 2005 the Swiss Pilots Association filed a new request for arbitration. The arbitrator nominated by Swiss was no longer available and had to be replaced.

Swiss nominated an arbitrator who was challenged successfully by the Swiss Pilots Association. The ground for the challenge was the following: the arbitrator had previously published a scholarly article on the first award rendered by the arbitral tribunal and had qualified the award as being totally wrong ('grob falsch'). This was a sufficient ground, given the particular circumstances, to disqualify the arbitrator.

The litmus test applied by the lower courts and the Swiss Federal Supreme Court (in a judgment handed down on 7 November 2006¹⁵) was the following:

- (i) Is the question before the arbitral tribunal identical to the question the (future) arbitrator addressed in his paper? (this was the case).
- (ii) Does the publication show that the writer had made his mind up in an irrevocable way? The Court confirmed that scholarly articles, comments on a case made in public by somebody who is not yet an arbitrator, are unproblematic as long as an objective analyse of the comments does not lead the observer to the conclusion that the writer had taken an irrevocable stance. The arbitrator nominated by Swiss had gone too far in the Court's view to remain impartial. He had severely criticized an earlier award among the same parties hinging on essentially the same issues.¹⁶

¹⁵ Decision 4P.247/2006, ASA Bull. 1/2007, p. 166.

¹⁶ Original text of the decision: 'Der designierte Schiedsrichter hat in der publizierten Besprechung ... in einer Weise Stellung bezogen, die bei objektiver Betrachtungsweise befürchten lässt, er habe sich seine Meinung dazu abschliessend gebildet'.

CONCLUSIONS

The Working Group which elaborated the IBA Guidelines on Conflicts of Interest in International Arbitration has expressed the wish that they “will find general acceptance within the international arbitration community”.¹⁷

Four years after the dissemination of the Guidelines, it is safe to say that, whatever their personal views on them, most international arbitrators consult the Guidelines whenever they have to exercise their judgment on whether to disclose circumstances that might be viewed as conflicts. Counsel examining the possibility and merits of a challenge do likewise. As for the courts, when deciding on challenges to arbitrators, they increasingly refer to the IBA Guidelines, as is illustrated by the three cases reported above. However, the courts have not directly applied the IBA Guidelines in any of these cases, and rightly so, as this was not the objective of the Working Group in elaborating the Guidelines.¹⁸ As stated by the Swiss Federal Supreme Court, any decision on a challenge is, and will always remain, a case-by-case exercise.¹⁹

¹⁷ Introduction, par. 6.

¹⁸ Introduction, par. 6.

¹⁹ Switzerland, Federal Supreme Court, 1st Civil Chamber, Decision of 20 March 2008, 4A_506/2007, Par. 3.3.2.2, quoted above.