# CRYSTAL CLEAR: TRANSPARENCY AT THE TOP OF THE LEGAL AGENDA

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Iberian Lawyer's 7th Annual International Bar Association (IBA) Master Class


Left to Right: Jason Fry, Luis M. Martínez, Félix Montero and Joan Roca Sagarra


Left to Right: Donald Francis Donovan, Claus Von Wobeser, Carolina Aguirre and José Antonio Cainzos

**Category:** In-house news

## Expert arbitrators agree that full disclosure and impartiality is key to an arbitrator's practice, but ethical standards in the profession are high

The increasingly complex network of relationships between parties, their legal counsel and arbitrators can overlap in a number of ways. Some experts suggest that more transparent and open disclosure guidelines are required, others that the current principles are workable, but would benefit from being reviewed and updated.

These issues were discussed at the recent Iberian Lawyer's 7th Annual International Bar Association (IBA) Master Class, in collaboration with Wolters Kluwer. This brought together a specially invited audience of 45 top international expert arbitrators attending the IBA Annual Conference in Boston, US.

The Master Class was an informal and interactive roundtable debate moderated by Donald Francis Donovan, Debevoise & Plimpton. The faculty included Carolyn Lamm, White & Case; Claus Von Wobeser, Von Wobeser y Sierra; David Arias, Arias SLP; and, J. William Rowley QC, 20 Essex Street Chambers.

Participants debated issues surrounding 'disclosure', the guidelines and guarantees available, and the cultural and jurisdictional differences they encounter.

### Guidelines and guarantees

An issue that was hotly debated was whether current guidelines and approaches offer the required independence `guarantees´ for the parties. Participants agreed that disclosure guidelines are of course open to abuse by parties playing a tactical game.

But several institutions have been trying to address the issues by developing their guidelines on conflicts of interest – the IBA recently published its Guidelines on Party Representation in International Arbitration and has appointed a taskforce chaired by David Arias, Partner at Arias SLP, to review its 2004 Guidelines on Conflicts of Interest (The Guidelines).

"But guidelines should be understood as such – recommendations are not a strict checklist. Particularly, people have to pay attention to the General Principles, and not only to the red, orange and red lists, which are not exhaustive. And with the Guidelines in the process of being reviewed,

any improvements are open to debate."

**Disclosure**

Participants discussed whether disclosure was actually just a form of showing the parties any information that might be conflicting, or to show just enough to ensure that the arbitrator will not be challenged later on. They also looked at whether the nature of an arbitrator´s disclosure should be affected by the arbitral seat, the place of likely enforcement or the administering institution.

"Disclosure is the rule in arbitration, but arbitrators should err on the side of full disclosure. In a New York Convention case, ultimately it may be the courts that will decide whether the disclosure was sufficient," explained Carolyn Lamm, a Partner at White & Case. The reality is that different courts establish different thresholds, and the attitude of the parties and the judge might also have an effect on the scope of full disclosure. "The key is to make sure that these issues are resolved from the beginning and they are not hanging over the arbitration and impact enforceability."

Avoiding any problems later on is key. "For example, pursuant to the Guidelines, under the orange list the arbitrator is only required to disclose potential conflicts that have occurred within the previous three years, and from an institutional perspective that is problematic," said Luis M. Martinez, Vice President at the International Centre for Dispute Resolution (ICDR). "The parties must always be given the opportunity to object to or waive any potential disclosures as it is their arbitration process."

Participants said that it can sometimes get to a point where disclosure regimes become extreme when compared between jurisdictions, and that arbitrators need to be sensitive to the differences. "Maybe we need to be clearer about the exact definition and expectation of 'disclosure'," said Marco Schnabl, a Litigation and Arbitration Partner at Skadden, Arps, Slate, Meagher & Flom. "Disclosure is no longer genuinely intended to 'disclose' anything, but to protect oneself against later challenges."

**Conduct of the arbitration**

Participants considered whether there were circumstances arising in the conduct of the arbitration that did not amount to denial of the chance to be heard, that might still give rise to arbitrator challenges. That discussion, in turn, considered the different hearing styles of arbitrators

Donald Francis Donovan, Co-Head of International Disputes at Debevoise & Plimpton emphasised the importance of a full exchange between the tribunal and counsel. "The point of the hearing is to make sure the tribunal has a full understanding of the parties' respective positions, and the parties should want the questioning at the hearing to be comprehensive and fully informed." But that doesn't mean that the parties are entitled to read into the vigorous questioning of the conclusion that an arbitrator has reached a conclusion, Donovan added, let alone that the questioning means that an arbitrator is not impartial and independent.

Indeed, the fact that questions are being asked should not presume pre-judging or taking sides. "The tribunal is testing opinions by asking questions, but the opinion is evolving throughout the process," said Nigel Blackaby, Head of US and Latin America international arbitration groups at Freshfields Bruckhaus Deringer. "It would be extraordinary questioning impartiality when these questions are part of being an arbitrator."

There does appear to be a difference in cultures, however, among the arbitrators themselves. "I feel that I am a courteous arbitrator," said Lord Peter Goldsmith, Chair of European and Asian Litigation at Debevoise & Plimpton, "but I would feel nervous if we cannot freely express questions."

Parties should and must raise their concerns, participants agreed, and it is good to allow them to do so as soon as possible. But participants pointed out that commercial arbitrations, objections can be raised at any time with waiver – the ability to question the arbitrator panel on independence at any stage in the process.

The IBA rules have a limit on disclosure by arbitrators that ranges between two to three years, which participants believed needs to be considered on a case-by-case. They agreed that it is impossible to control the arbitrators and their relationship with the parties, but the system works as it is so it should not require monitoring – the ethical standards are high.