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Arbitration in Practice: a close look at the IBA Guidelines on Conflicts of Interest in International Arbitration

3 July 2020 at 0930-1100 BST

#IBAWebinars





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Contents

- **The Role of the IBA Guidelines**
- **Introduction to the IBA's Seven General Standards**
- **Red Lists**
- **Challenges under Different Standards**
- **Orange Lists**
- **Green Lists**
- **Statutory Recognition and Implementation in India**
- **Comments**
- **Polling on Cases**
- **Q&A**



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Introduction to the IBA's Seven General Standards

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The Role of the IBA Guidelines

- “Soft law”: no independent legal effect
- Do not override applicable law or arbitral rules chosen by the parties
- Rarely if ever incorporated in the parties’ arbitration agreements
- Not adopted by arbitral institutions’ rules
- Yet, very widely referred to by parties, arbitral institutions and domestic courts – perhaps because they provide a much more detailed guide to the issues than national arbitration legislation or institutional rules

Introduction to the IBA's Seven General Standards

1. The general principle of ongoing impartiality and independence
2. Conflicts of Interest
3. Disclosure by the Arbitrator
4. Waiver by the parties
5. Scope
6. Relationships
7. Duty of the Parties and the Arbitrator

1. The General Principle of Ongoing Impartiality and Independence

- *Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.*
- Critical aspect of due process
- Very similar to standards in the UNCITRAL Model Law and many arbitral institutions' rules

1. The General Principle of Ongoing Impartiality and Independence

- Focus on the duration of impartiality and independence:
 - Generally includes the time for correction / interpretation of a final award, if that period is known or readily ascertainable
 - Does not extend to the expiry of the period for a challenge to the award before relevant courts, unless the award can be referred back to the original Tribunal (at which point, a separate round of disclosure and review of conflicts may be necessary)
 - Ends on settlement
- Given practical significance by General Standard 2 – the arbitrator’s obligation to decline or refuse to continue

2. Conflicts of Interest

- In summary:
 - Two separate tests: subjective and objective
 - If the arbitrator has any doubt as to her or his ability to be impartial or independent (either at the outset or during the arbitration), she or he should decline or refuse to continue
 - If facts or circumstances exist which, from the perspective of a reasonable third person would give rise to “justifiable doubts” as to the arbitrator’s impartiality or independence, then the arbitrator should decline / refuse to continue, unless the parties have accepted the arbitrator as per General Standard 4

2. Conflicts of Interest

- In summary:
 - Doubts are justifiable if a reasonable third person would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits in reaching her or his decision
 - In situations described on the Non-Waivable Red List (to be discussed Colin), justifiable doubts exist.

2. Conflicts of Interest

- Many factors may influence the assessment of whether there is an impermissible conflict, and the IBA's lists assist with considering these. Factors include:
 - Is the arbitrator a party (or effectively so)? Judge in own cause
 - Personal or familial relationship with a party
 - Financial interest in the dispute
 - Prior involvement in the dispute
 - Employment, representation, or other business dealings with a party (whether by arbitrator or her or his firm)
 - Relationship with counsel to a party

3. Disclosure by the Arbitrator

- In summary:
 - If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, these should be disclosed to the parties, co-arbitrators, and appointing authority prior to the arbitrator accepting the appointment or, if arising thereafter, as soon as the arbitrator learns of them
 - An advance waiver of possible conflicts does not discharge this duty
 - Because disclosure presumes that the arbitrator is pursuing the appointment, it follows that the arbitrator must consider herself or himself impartial and independent despite the disclosed facts (otherwise she or he would have declined as per the previous principles)
 - Any doubt as to whether to disclose should be resolved in favour of disclosure
 - In considering whether certain facts or circumstances should be disclosed, the arbitrator should not have regard to how far progressed the arbitration is

3. Disclosure by the Arbitrator

- Disclosure allows the parties to make an informed assessment
- The obligation to make disclosure is ongoing
- Arbitral institutions support disclosure requirements – they provide forms for proposed arbitrators to complete which require disclosures to be made
- A failure to disclose does not *necessarily* mean a conflict exists or that disqualification should ensue



Speaker

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Introduction to the IBA's Seven General Standards Cont'd

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4. Waiver by the Parties

Arbitrator / (potential) conflict of interest

(Not include facts/circumstances exemplified in Non-Waivable Red List)

| Explicit waiver | Deemed waiver | Arbitrator's involvement in the settlement process (mediation/conciliation) |
|---|--|---|
| <ul style="list-style-type: none"> all parties, all arbitrators and the arbitration institution have full Knowledge of the conflict of interest all parties expressly agree | <ul style="list-style-type: none"> no express objection is raised within 30 days after the party receives the disclosure by the arbitrator or otherwise learns of facts/circumstances for a potential conflict of interest the party is deemed to have waived the potential conflict of interest | <ul style="list-style-type: none"> Informed express consent/agreement by the parties prior to beginning of the process should be regarded as an effective waiver of a potential conflict of interest waiver should remain effective if settlement/mediation is unsuccessful |

5. Scope

Guidelines Impartiality , Independence and Disclosure apply to

Arbitral tribunal

Sole arbitrators, co-arbitrators, tribunal chairs, party-appointed arbitrators, arbitrators appointed by an institution

arbitral or administrative secretaries
assistants

6. Relationships

Whether a conflict of interest exists

Whether disclosure should be made

| | |
|---------------------------------|--|
| the arbitrator's law firm | <ul style="list-style-type: none">• relationship of the arbitrator with the firm• the firm's activities involve the parties (nature, timing, scope of the work)• not limited to representation on a legal matter• to be assessed case by case |
| legal entity/party | <ul style="list-style-type: none">• controlling influence on the legal entity• direct economic interest in the award• duty to indemnify the party for the award |
| third-party funders insurers | <ul style="list-style-type: none">• direct economic interest in the award• duty to indemnify a party for the award |

7. Duty of the Parties and the Arbitrator

The parties

The arbitrator

**make reasonable enquiries
disclose/identify**

- * any relationship between the arbitrator and the party
- * any relationship between the arbitrator and any person/entity having a direct economic interest in the award or a duty to indemnify the party for the award
- * the identity of counsel team as well as any relationship with the arbitrator

- * (potential) conflict of interest
- * facts/circumstances that may reasonably give rise to doubts as to the arbitrator's impartiality or independence



Speaker

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Red Lists and Challenges under Different Standards

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Non-Waivable and Waivable Red Lists

- **A. & party= same identity; A. is legal rep/of a party; A. director/ direct econ interest. A's significant interest in a party/outcome. A./firm regularly advises party/affiliate + significant income.**
- A. advised on dispute/prior involvement; A's interest or holds shares in party/affiliate; close family of A. signif financial interest; A./family close to non-party who may be liable; A's relationship with parties/ counsel; A's firm currently counsel for a party; A. is in same law firm as counsel; A/s influence in affiliate directly involved in case; A. regularly advises a party/affiliate but no significant Income. A's close family with a party or director/controlling influence in party/affiliate.

(1) IBA Red List challenges under different standards *W Limited v M SDN BHD* [2016] EWHC 422 (Comm)

- I shall focus on 2 recent case decisions on challenges.
- *W*. challenged awards before English High Ct on apparent bias of arb alleged conflicts. No actual bias was alleged.
- **Para 1.4 of NWR List-** *“The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom..”*
- *English law test on apparent bias - Porter v Magill [2002] AC 357 whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Ct held that the arbitrator passed the test.*

(1) IBA Red List challenges under different standards *W Limited v M SDN BHD* [2016] EWHC 422 (Comm)

- Arb used secretarial facilities of firm. It did not act for Def or parent company. Arb did not work for affiliate. Ct. held that Guidelines contained a number of "weaknesses".
- *Inability to apply "case-specific judgment" to N-W RL situation.*
- *Internal inconsistency between Gen Stan (2)(d) & Gen Stan 6(a).*
- GS(6)(a) *"fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict"*
- GS(2)(d)- *"justifiable doubts necessarily exist as to the arb[s] impartiality or indep. in any of the situations described in the N-W Red List." "necessarily exist" – prevents case-specific judgment.*

(1) IBA **Red List** challenges under different standards *W Limited v M SDN BHD* [2016] EWHC 422 (Comm)

- *Problematic to treat compendiously (a) arbitrator and his firm & (b) party and affiliate, in context of provision of regular advice from which “significant financial income is derived.”*
- *Lessons:*
 - (i) *A robotic reliance on **Red-Orange-Green** system without looking at circumstances may attract court criticism.*
 - (ii) *Law firm conflicts systems to indicate affiliates of clients.*
 - (iii) *Even if there is no actual conflict, err on side of caution.*
 - (iv) *The lack of case-specific judgment in conflict situations currently listed in the **NW-R** List needs to be re-examined.*

(2) Eiser v. Spain, ICSID Case No. ARB/13/36 – Annulment of €128 million award against Spain

- 11 June 2020 ICSID com annulled award. 1st case in ICSID history where award annulled for (i) improper constitution of tribunal (ii) serious departure from fundamental rule of procedure
- Arbitrator failed to disclose previous and current relationship with claimant's expert witness from Brattle Group.
- In 8 cases Alexandrov was counsel + Brattle Group was expert for same party. 2 were pending when he sat as arb in the Spain matter.
- “*..insidious effects of association*” with Expert. Independent observer would “*conclude that there was a **manifest appearance of bias***”.
- ICSID legal standard is an “***objective standard based on a reasonable evaluation of the evidence by a third party.***”

(2) Eiser v. Spain, ICSID Case No. ARB/13/36 – Annulment of €128 million award against Spain

- [Para 233]: “As the IBA Guidelines state, “[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.” [General Standard 3(d)].
- [Para 288]: “duty to disclose was warranted due to.. roles of a damages expert and counsel in an arbitration. ..warranted not only because of the existence of such a relationship but also by the extent of the past and present interactions, at issue.”
- [Para 253]: “undisclosed relationship could have had a material effect on the Award.was, therefore, serious and warrants annulment both under clauses (a) and (d) of paragraph (1) of Article 52.”



Speaker

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Orange Lists and Green Lists

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Ready, Steady, Go!

- **Orange List:**

- *“a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence.”*
 - Results in a duty to disclose.

- **Green List:**

- *“a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view”*.
- No duty to disclose.

Orange List

- Situations dealing with services rendered and relationship:
 - Previous services for one of the parties or other involvement in the case
 - Current Services for one of the parties
 - Relationship between an arbitrator and another arbitrator or counsel
 - Relationship between arbitrator and party and others involved in the arbitration
- Other (miscellaneous) circumstances
- If objection not raised within 30 days by a party, the potential conflict of interest is deemed to have been waived

Green List

- Previously expressed legal opinions
- Current services for one of the parties
- Contacts with another arbitrator, or with counsel for one of the parties
- Contacts between the arbitrator and one of the parties
- These could never lead to disqualification and so need not be disclosed

Statutory Recognition and Implementation in India

- **Red** and **Orange** Lists recognised and incorporated into the Arbitration and Conciliation Act, 1996 (through amendments in 2015).
- Section 12: Grounds for challenge to an arbitrator
- Duty of disclosure (in form set out in 6th Schedule
- The grounds stated in the 5th Schedule (**Red** and **Orange** Lists) shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
- Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the 7th Schedule (**Red** List) shall be ineligible to be appointed as an arbitrator:
Provided that parties may, subsequent to disputes having arisen between them, waive the ineligibility (including non-waivable items), by an express agreement in writing.



Commentators

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Comments

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W limited v M SDN BHD[2016] EWHC 422 (Comm)

- Time for a rethink?
 - ✓ Scrutiny of the conflict guidelines could also result in some of the situations in green and orange being rethought
 - ✓ Orange List
 - 3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration*
 - 3.1.3 The arbitrator 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.*
 - 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties*

- The guidelines do not require enough disclosure?
 - ✓ Green List
 - Arbitrator has expressed an opinion on a matter at issue in the case in an academic article
 - Social relationship?
- 2016 IBA survey report: in the interest of party autonomy, the distinction between the WRL and NWRL be done away with?

Eiser Infrastructure Limited v. Spain, ICSID case No.ARB/13/36

- Tethyan Copper v. Pakistan
 - ✓ Challenge rejected
 - ✓ Could be distinguished from the Eiser case since the co-arbitrators were aware of the connections
- When an arbitrator also acts or has acted as counsel
 - ✓ the risks of conflict “inherent in double-hatting, dictating caution”
- Such relationship not listed as mandatory disclosure in the IBA guidelines?
 - ✓ not exhaustive, not binding and not mention such a relationship on their green list either



Moderator

Sae Youn Kim

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Co-Chair, IBA Asia
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Group*

Live Polling



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Case 1

The co-arbitrator had recently (within the past two years) acted as co-counsel in an unrelated case with counsel from the appointing party (for 6 months) where both were personally involved in the other case. Should the co-arbitrator accept the appointment?

Case 2

The sole arbitrator acted as co-counsel in two unrelated cases for a total 8 years with a party's counsel. The co-counsel relationship ended 5 years before the appointment. Should the sole arbitrator accept the appointment?

Case 3

The nominated arbitrator sits on a professional committee (eg, an IBA committee) with the counsel who nominated them. Should they disclose the connection?

Case 4

Two co-arbitrators nominated a presiding arbitrator. Respondent's challenge is made on the sole ground that Respondent's counsel had, in the past 2 years, worked closely in other cases with a different lawyer from the same law firm as the challenged arbitrator. The arbitrator's firm is not involved at all in the current arbitration. The arbitrator does not know the associate lawyer in his firm. Is there a conflict?