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The IBA Guidelines on Conflicts of Interest in International Arbitration

Improvements from the 2024 Version.

Independence and impartiality of an arbitrator are the hallmarks of any arbitration. For this reason, arbitrators are required to make disclosures to allow parties to identify and assess potential conflicts of interest, and institutions and national courts to address challenges properly. However, identifying conflicts of interest is a difficult task, as conflict questions are often nuanced, and answers are case-specific.

For this reason, in 2004, the IBA Arbitration Committee published the first version of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"), after having considered a variety of factors, including the principle of party autonomy, the timing, nature, scope, burden, and other practicalities of disclosures, and the consequences and costs that could stem from frivolous challenges.

The main purpose of the IBA Guidelines is to provide uniformity in the approach of stakeholders when faced with a conflict, or potential conflict, with a focus on when an arbitrator should disclose potential conflicts, as well as when the arbitrator should simply not accept an appointment.

The IBA Guidelines are indicative and not binding but have persuasive authority. Despite their nature, they have become quite influential and provide relevant criteria for assessing the impartiality and independence of a challenged arbitrator.

Since their first issuance, the IBA Guidelines have gained increasing recognition among arbitrators and practitioners and are now a standard soft law instrument in the field. Parties often specifically refer to the IBA Guidelines thereby making them binding, and even when this is not the case the IBA Guidelines frequently serve as a reference in case of conflicts of interest.

THE IBA GUIDELINES REVIEW

In February 2024, the International Bar Association (the "IBA") released the most recent version of the IBA Guidelines (the "2024

Photo taken during the workshop 'Ethical standards for International Arbitrators' organised by LCA with Macchi di Cellere Gangemi

IBA Guidelines"), based on the recommendations of a special IBA Task Force and the results of a survey carried out by its Subcommittee in 2022. Indeed, consistent with a well-established practice, the IBA Arbitration Committee assesses every ten years whether its rules and guidelines should be adapted.

Whether and how the IBA Guidelines should be revised requires careful consideration, determining through empirical analysis whether their practical application has raised the need for clarification or improvement. Deciding on the extent of the amendments is a sensitive exercise: possible tensions as to how strict the IBA Guidelines should be may arise from their wide application, covering commercial and investment arbitration, as well as specialized arbitration schemes (*e.g.*, maritime, sports, commodities), legal and non-legal professionals serving as arbitrators, different legal systems and sensitivities etc.

After the IBA Arbitration Guidelines and Rules Subcommittee carried out the survey among arbitration practitioners in 2022, it became clear that the IBA Guidelines remain a useful and effective tool and that a complete overhaul was not warranted, but that they might need to be modernized or finetuned. In particular, the survey revealed the need to redefine the IBA Guidelines on arbitrator disclosures, third-party funding, issue conflicts, organizational models for legal professionals in different jurisdictions (*e.g.*, barristers' chambers, vereins, etc.), expert witnesses, sovereigns or their agencies and instrumentalities, non-lawyer arbitrators, and social media.

In the wake of this survey, and on a series of other surveys, studies, and insights, the IBA Arbitration Committee was able to

reshape and make the IBA Guidelines more suitable for today's socio-political-cultural context.

MAIN CHANGES TO THE IBA GUIDELINES

The 2024 IBA Guidelines retain the same structure as the previous 2014 version. The Guidelines are split into three sections:

- the Introduction, describing the overreaching goals of the Guidelines and their latest revision;
- Part I: General Standards Regarding Impartiality, Independence and Disclosure, containing the general principles setting the framework for assessments of conflicts of interest and disclosure; and
- Part II: Practical Application of the General Standards, containing four Application Lists that address situations that are likely to occur in day-to-day arbitration practice and provide specific guidance as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed.

The new 2024 IBA Guidelines introduce several notable updates to the previous 2014 version. The amendments to the IBA Guidelines have sought to emphasize the importance of the General Standards contained in Part I, which must always be taken into consideration and cannot be considered subordinate to the Application Lists contained in Part II for evaluating conflicts of interest and the need for arbitrator disclosures. Also, major changes were made in particular to one of the Application Lists, the Orange List, as will be explained in more detail below.

1. Changes to General Standards

Part I: General Standards Regarding Impartiality, Independence and Disclosure contains the principles that rule the assessment of conflicts of interest and disclosure.

The amendments to the IBA Guidelines have sought to emphasize the importance of the General Standards contained in Part I, which must always be considered as indispensable evaluation criteria, useful for examining any potential conflict situation, and for applying the Application Lists to the case at hand. Following these amendments, the 2024 IBA Guidelines now provide a more uniform standard for assessing conflicts of interest.

General Standard 1 (General Principle) on the impartiality and independence obligation of the arbitrators now clarifies that this obligation does not extend to the period of time during which the award may be challenged before any relevant courts or other bodies (like, *e.g.,* the ICSID ad hoc committee). Thus, the obligation ends when the arbitral tribunal has rendered its final award.

General Standard 2 (Conflicts of Interest) governs the issue of when an arbitrator should decline an appointment or may otherwise be disqualified for lack of impartiality or independence. Explanation to General Standard 2 requires that in deciding whether to decline an appointment or refuse to continue to act, the arbitrator should bear in mind the objective standard to evaluate the relevant facts or circumstances. When justifiable doubts exist, an arbitrator should decline the appointment or refuse to continue to act (*i.e.,* in the circumstances described in the Non-Waivable Red List). However, the existence of justifiable doubts may instead lead the arbitrator to make a disclosure (in accordance with General Standard 3, such as in the circumstances described in the Waivable Red List).

General Standard 3 (Disclosure by the Arbitrator) is about the arbitrator's duty to disclose. This Standard now highlights the importance of disclosure even when impeded by secrecy rules or other practice or conduct rules (otherwise, if prevented, the arbitrator should not accept the appointment or resign). Moreover, this Standard recognizes that a failure to disclose certain circumstances does not always automatically imply a conflict of interest.

Additionally, General Standard 4 (Waiver by the Parties) introduces the concept of constructive knowledge in the context of party waiver of potential conflicts of interest clarifying that a party shall be deemed to have learned of any facts or circumstances that could constitute a potential conflict of interest if reasonable inquiry would have uncovered them.

General Standard 5 (Scope) requires applying the IBA Guidelines equally to tribunal chairs, sole arbitrators and co-arbitrators, individual arbitrators, and administrative secretaries, and it remains unchanged.

The new General Standard 6 (Relationships) delves into the relationships that must be disclosed, specifying that arbitrators are considered to bear the identity of their law firm or employer and that the organizational structure and mode of practice of the law firm or employer must be taken into account in considering whether a potential conflict of interest exists. Moreover, according to this Standard, any legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party. In addition, the Explanation to General Standard 6 states that third-party funders and insurers might be considered to bear the identity of a party, and that where a parent company is a party to the proceeding, its subsidiary may be considered to bear the identity of the parent company when the parent company has a controlling influence over it (the same result is obtained for natural persons). Also, the organization of States typically comprises separate legal entities such as regional or local authorities or autonomous agencies, which may be independent and therefore not necessarily covered by the "controlling influence" criteria. In this case, a catch-all rule is not considered appropriate. Instead, the particular circumstances of the relationship and their relevance to the subject matter of the dispute should be considered in each individual case.

Finally, the new General Standard 7 (Duty of the Parties and the Arbitrator) better explains parties' duties to disclose. This Standard adds to the list of information that the parties shall disclose any relationship, direct or indirect, between the arbitrator and any legal or natural person over which a party has a controlling influence. Also, they shall disclose the identity of the Counsel not

only appearing but also advising in the arbitration. As a new catch-all rule, the parties' duty to inform now includes any other person or entity they believe an arbitrator should take into consideration when making disclosures in accordance with General Standard 3. Furthermore, the Standard sets up a new timing requirement, stating that the parties shall inform on their own initiative at the earliest opportunity.

2. Changes to the Application Lists

Part II: Practical Application of the General Standards contains four Application Lists that cover many of the varied situations that commonly arise in practice and guide arbitrators, parties, and institutions in identifying and addressing potential conflicts of interest in international arbitration proceedings. These Lists do not purport to be exhaustive, nor could they be.

The *Non-Waivable Red List* contains situations deriving from the overriding principle that no person can be their own judge and enumerates specific relationships that are generally considered incompatible with serving as an arbitrator. These circumstances objectively present a conflict of interest, and in which an arbitrator cannot act, even with the consent of all parties. The *Waivable Red List* includes situations that are serious but not severe, and that could be waived only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person acting as arbitrator. The *Orange List* consists of relationships that may give rise to justifiable doubts about an arbitrator's impartiality and independence. The *Green List* comprises relationships that are unlikely to give rise to justifiable doubts about an arbitrator's impartiality and independence, and therefore do not imply any duty to disclose.

The amendments to Part II mainly affect the Orange List. The latter now includes the following new conflicts:

- The arbitrator currently serves, or has acted within the past three years, as an expert for one of the parties or an affiliate of one of the parties in an unrelated matter (Item 3.1.6);
- An arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (Item 3.2.12);
- An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration (Item 3.2.13);
- The arbitrator has, within the past three years, been appointed to assist in mock trials or hearing preparations on more than three occasions by the same counsel or the same law firm (Item 3.2.10); the arbitrator has in the past three years been appointed to assist in mock trials or hearing preparation on two or more occasions by one of the parties (Item 3.1.4);
- The arbitrator is instructing an expert appearing in arbitration proceedings for another matter where the arbitrator acts as counsel (Item 3.3.6);
- The arbitrator has publicly advocated a position on the case, either in a published paper, or speech, or through social media or online professional networking platforms, or otherwise (Item 3.4.2);
- The arbitrator participated in decisions regarding the arbitration in an institution/appointing authority (Item 3.4.3).

Concerning the Green List, there is just one notable addition, *i.e.,* the case of contacts between the arbitrator and one of the experts, whereby the arbitrator, when acting as arbitrator in another matter, has already heard testimony from the expert appearing in the current proceedings (Item 4.5).

Conclusion

In conclusion, when the updates to the Application Lists in Part II are read in light of the reinforced General Standards in Part I, the 2024 IBA Guidelines now reflect the degree of disclosure currently expected from arbitrators by users and the arbitration community at large. Indeed, it is precisely by using tools such as the IBA Guidelines that arbitration maintains its reputation as a trustworthy alternative dispute resolution mechanism. As a matter of fact, ensuring that arbitrators, albeit chosen by the parties, are independent and impartial is a fundamental requirement of arbitration, and it is the only way for arbitration to compete with the austerity of national courts.

The latest amendments to the IBA Guidelines – especially, among many others, in the areas of third-party funding, organizational models for legal professionals in different jurisdictions, sovereigns or their agencies and instrumentalities, and social media usage – demonstrate a willingness to constantly adapt to the changes, nowadays increasingly rapid, affecting the arbitration practice. Thanks to the improvements put in place by the IBA Arbitration Committee, the 2024 IBA Guidelines are once again confirmed as a soft law tool of the highest order and a very helpful instrument for arbitrators, institutions, parties, and courts that face on a daily basis problems related to possible conflicts of interest of the adjudicative body.

Footnotes

- The new IBA Guidelines are available here;
- LCA, together with Macchi di Cellere Gangemi, has organized on 12 April 2024 a workshop on "Ethical standards for International Arbitrators" covering the new IBA Guidelines. A report about the workshop is available at the following links: Leaders League, LCA Studio legale

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