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Newsletter
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The IBA has released revised Guidelines on Conflicts of Interest in International Arbitration

Ten years after the last revision, the IBA Arbitration Committee has published a revised version of its well-known and used Guidelines on Conflicts of Interest in International Arbitration (the "**Guidelines on Conflict of Interest**" or "**Guidelines**"). The Guidelines are notably famous for their user-friendly traffic-light system (red, orange, green) which flags situations that may raise a conflict of interest with arbitrators. The revision brings the Guidelines up to date to face current trends, while not changing fundamentally what has been a successful tool widely used.

The origin of the Guidelines on Conflict of Interest

The Guidelines on Conflict of Interest are used every day by arbitrators and counsel across the world to determine whether to accept or decline an appointment, or what disclosures to make. The Guidelines have gained such a wide recognition that local courts also refer to them when called to rule upon issues of potential conflicts of interest, for instance when faced with challenges against arbitrators or challenges against arbitral awards.

The Guidelines on Conflict of Interest were first issued in 2004 and later revised in 2014. It was therefore time, as per the IBA Arbitration Committee's practice, to revisit this landmark document and bring it up to date to reflect the current world and the more recent trends in international arbitration that may trigger a conflict of interest.

This second revision of the Guidelines on Conflict of Interest does not constitute a massive shift in the way conflicts should be addressed, but brings helpful improvements and clarity where needed in the Guidelines.

"Each arbitrator must be impartial and independent of the parties."

The General Standards regarding Impartiality, Independence and Disclosure

The core principal in arbitration remains that each arbitrator must be impartial and independent of the parties (General Standard 1). This is true when an arbitrator is appointed, but must remain the case throughout the entire proceedings, until the issuance of the final award and even thereafter in case of a correction or interpretation of the award.

As a result, an arbitrator who has a doubt about his/her own impartiality or independence should refuse to serve or resign if already appointed (General Standard 2).

The same conclusion shall apply if facts or circumstances, when considered from the view of a reasonable third party, would give rise to justifiable doubts as to the impartiality or independence of the arbitrator, unless the parties have accepted this situation in full knowledge. Doubts are justifiable where one would consider that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case. The Guidelines set out in the Non-Waivable Red List situations where justifiable doubts necessarily exist.

One of the key tool allowing for a proper assessment of potential conflicts of interest remains the disclosure made by the arbitrators. This has long occupied local courts around the world to determine what facts or circumstances should be disclosed by arbitrators and conversely what investigations parties (and their counsel) should carry out on their own when selecting and appointing an arbitrator, but also throughout the proceedings.

The starting point is set out in the General Standard 3:

> *"[i]f facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority".*

Importantly, where the arbitrator has a doubt whether he/she should disclose certain facts or circumstances, this should be resolved by a disclosure.

"In case of doubt, disclose."

The revision has now added that, where an arbitrator considers that he/she is barred from making a disclosure for whatever reasons (including professional secrecy rules or other rules of practice or professional conduct), the arbitrator should not accept the appointment or should resign (General Standard 3(e)).

The revised Guidelines also specify that a failure of an arbitrator to disclose certain facts or circumstances that may, in the eyes of the parties, give rise to doubts does not *per se* mean that there is a conflict of interest or that the arbitrator should be disqualified. The situation must be assessed on a case by case basis.

It must be highlighted that arbitrators who make a disclosure confirm in doing so that they consider themselves to be impartial and independent, despite the facts or circumstances disclosed. This is sometimes overlooked by some arbitral institutions who will, as a rule and for reasons of efficiency, disregard prospective arbitrators making disclosures, instead of inviting parties to comment on such disclosures.

The modern approach to the assessment of the arbitrator's relationships

The revised Guidelines have tried to catch the way law firms are organised nowadays and give indications on how to assess potential conflicts of interest emanating from the relationship between an arbitrator and his law firm or employer. As a rule, the arbitrator should bear identity with his/her law firm or employer. However, due consideration should be given to the specific

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activities of the arbitrator's law firm or employer, their organisational structure and mode of practice, on a case by case basis.

The revised Guidelines have also brought some further clarification as to when a legal entity or natural person should bear identity with a party to the arbitration (such as affiliates, third party funders, insurers).

The Guidelines also addresses the "*controlling influence*" exercised on or by parties, such as with subsidiaries, or companies held or controlled by natural persons. The Guidelines now provide that "[a]*ny legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party*" (General Standard 6(c)).

Similarly, when a State or State entity is involved, the view of the commentary of the revised Guidelines is that an arbitrator should consider disclosing any relationships with regional / local authorities, state-owned agencies or autonomous agencies, irrespective of their status.

"Don't lay back, inquire."

The parties and the arbitrator have an inquiry duty

The parties have a duty to inform the arbitrator, the arbitral tribunal, the other parties and the arbitration institution of any relationship between the arbitrator and the party, another company of the same group, a person or entity having a controlling influence on the party, a person or entity over which the party has a controlling influence, or any person or entity with a direct economic interest in, or a duty to indemnify a party (General Standard 7(a)).

The party's duty goes further with the revised Guidelines and includes now the duty to inform of any other person or entity it believes an arbitrator should take into consideration when making disclosures. A party shall make reasonable enquiries to comply with such duty (General Standard 7(a)(ii)).

The Guidelines also include the parties' duty to conduct reasonable enquiry on the arbitrators at the outset and during the proceedings. Parties who do not express an objection with regard to an arbitrator within 30 days from receipt of any disclosure or from learning otherwise facts or circumstances that could constitute a potential conflict of interest are deemed to have waived that potential conflict of interest. Facts or circumstances that a party could have known had it perform such reasonable inquiry may be held against it (General Standard 4(a)).

The Red, Orange and Green Lists

The Guidelines' application lists describe situations that occur commonly in the international arbitration scenery. As such they give an indication on how the General Standards should be applied. However, they remain non-exhaustive and a mere illustration of the General Standards. Hence, other situations not expressly described may also trigger conflicts of interest or a duty of disclosure.

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The second revision has not changed the traffic-light system: the Red List still identifies situations where a conflict of interest is understood to exist; the Green List identifies situations where no conflict of interest or appearance thereof exists; and the Orange List identifies situations which, depending on the given facts, may give rise to a doubt in the eyes of the parties and must therefore be disclosed.

"The traffic-light system is a tool, not the rule."

The Orange List now also includes the following situations:

- the arbitrator serves or has acted within the past three years as an expert appointed by one of the parties or by the same counsel, in the latter case on more than three occasions (3.1.6 and 3.2.9);

- the arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel (3.3.6);

- the arbitrator has been appointed within the past three years by a party (or and affiliate), or by a counsel , to assist in mock-trials (3.1.4 and 3.2.10);

- the arbitrator and counsel for one of the parties (3.2.12) or their fellow arbitrator(s)(3.2.13) currently serve together as co-arbitrators in another arbitration;

- the arbitrator holds an executive or other decision-making position with the administering institution or appointing authority with respect to the dispute and in that position has participated in decisions with respect to the arbitration (3.4.3).

All the above situations may, depending on the specific facts of the case, give rise to doubts as to the arbitrator's impartiality or independence in the eyes of the parties and must therefore be disclosed by the arbitrator.

The Commentary also specifies that, while there is no presumption that a disclosure should be made for situations falling outside the time limits used in the Orange List, the arbitrator will nonetheless need to assess on a case by case basis whether a given situation may give rise to justifiable doubts in the eyes of the parties and therefore require a disclosure.

Finally, no major changes were made to the Red List or the Green List.

Please reach out to us should you have any question on potential conflicts of interest in the appointment of an arbitrator.

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