

# CASE IN BRIEF:

W LIMITED V M SDN BHD [2016]

EWHC 422 (COMM)

A recent case concerning the relationship between English Law and the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). The claimant sought to challenge two awards for “serious irregularity” under s68 (2) of the Arbitration Act 1996. The challenge was founded on an argument of apparent bias on the part of the arbitrator due to an alleged conflict of interest. The claimant also relied on the IBA Guidelines to substantiate its position.

## Background

A dispute arose between the parties, culminating in the commencement of an LCIA arbitration in 2012. Mr David Haigh QC, a Canadian lawyer, was appointed sole arbitrator (the Arbitrator). The Arbitrator made two awards, both of which were challenged under s68 of the Arbitration Act 1996 on the grounds of “serious irregularity”, with the claimant alleging apparent bias based on an alleged conflict of interest.

Although the governing law of the arbitration was English law, and therefore, the relevant test for apparent bias was whether *a fair*

*minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased,*<sup>1</sup> the case is of wider importance as the claimant also relied on paragraph 1.4 of the Non-Waivable Red List in the IBA Guidelines, which reads:

*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.*

The Arbitrator was a partner in a Canadian Law firm. The law firm did work for a company (Q) which was bought by a parent company (P). The defendant was a subsidiary of company P. There was no question of actual bias. The Arbitrator conducted conflict checks and provided disclosure on other immaterial matters, however the conflict checks did not alert the Arbitrator to the fact that Q was a client of the firm.

On consenting to appointment as arbitrator, the Arbitrator also made a statement of independence such that he worked almost exclusively as an international arbitrator, was not involved in any partnership matters or meetings, and only used the law firm for administrative and secretarial services.

## Decision

On applying the common law test for apparent bias: whether *a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*, Justice Knowles determined *without hesitation* that there was no apparent bias on the facts.

## Author Profile

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Justice Knowles considered such an observer would have concluded that this was an arbitrator who simply did not know about the issue, rather than one whose credibility was to be doubted, and that such an observer would not conclude that there was a real possibility of bias or lack of independence or impartiality.

Despite reaching his conclusion *without hesitation*, Justice Knowles went on to consider the IBA Guidelines, which were of assistance, but ultimately not binding on the Court. Justice Knowles suggested two apparent weaknesses in the IBA Guidelines identified by the present case. First, that it was difficult to understand why a situation in which advice is being given to an affiliate, and the arbitrator is not involved in that advice (particularly without reference to that arbitrator's awareness or lack of awareness of the advice) should automatically be categorised under the Non-Waivable Red List. The Court considered determining whether there is a conflict required *case-specific judgment*. Second, it was also suggested that should such a situation arise, and a disclosure is made by the arbitrator, it should be open to the parties themselves to consider a waiver.

The Court also considered situations categorised under the 'Waivable Red List', which included situations where the arbitrator had given legal advice on the dispute to a party. Justice Knowles' observed, *these situations would seem potentially more serious than the circumstances of the present case; again suggesting that the circumstances of the present case do not sit well within a "Non-Waivable Red List*.

The Court concluded that the claimant's challenges to the awards must fail, as examination of the IBA Guidelines did not alter Justice Knowles' determination under English common law that there was no apparent bias and that a fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility the Arbitrator was biased or lacked independence or impartiality.

### Comment

This is an important decision, confirming that the English Court will not consider itself bound by the IBA Guidelines. The decision identifies potential weaknesses in the IBA Guidelines, particularly the absence of case-specific judgment in conflict situations currently categorised under the 'Non-Waivable Red List'. The decision may also give arbitrators some encouragement to consider challenging any assertion that they would automatically be conflicted out in a case falling within the 'Non-Waivable Red List', where they did not consider that the situation had any real impact on their actual or perceived independence or impartiality. The decision also confirms the limited ability of parties to challenge arbitration awards. Challenges on the grounds of serious irregularity and bias will likely be difficult to uphold, despite purported support by international guidelines such as the IBA Guidelines.

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<sup>1</sup> *Porter v Magill* [2002 AC 357 at [103] per Lord Hope.