IBA publishes updated guidelines on conflicts of interest in arbitration

The International Bar Association (**IBA**) has released updated guidelines on Conflicts on Interest in International Arbitration.

The Guidelines are a "soft law" instrument intended to assist in unifying the approach to conflicts of interest relating to arbitrators in international arbitration. Whilst they are not binding without party agreement, they are considered to promote best practice and are widely adopted internationally for assessing conflicts of interest and disclosures.

Whilst the spirit of the updated 2024 Guidelines remains unchanged, this update introduces some important changes to both the "General Standards" and the list of practical application of those standards set out in the second half of the Guidelines. In particular, additional examples of circumstances which would require disclosure by arbitrators are now included in the "Orange list". We have summarised the significant changes below.

Changes to "General Standards"

Duration of obligation of independence and impartiality

The guidance has been amended to clarify that the obligation of impartiality and independence in General Standard 1 does not extend to the time period during which the award may be challenged before any relevant courts or other bodies. The reference to "bodies" may include, for example, the ICSID ad hoc committee. This amendment promotes certainty, as arbitrators and parties can be comfortable that this obligation ends once the tribunal has rendered its final award (although it is worth noting that the obligation does extend to include the time permitted for any correction or interpretation under the relevant rules).

Objective versus subjective conflicts of interest

The amendments to General Standard 2 seek to draw a distinction between circumstances on the non-waivable red list (in which cases the arbitrator should decline or refuse to act) and circumstances that fall within the waivable red list, for which an arbitrator can make a disclosure instead. The changes to the waivable and non-waivable red list clarify that an arbitrator who advises one of the parties but does not derive significant financial income from that engagement may make a disclosure under the waivable red list.

Disclosures by arbitrators

There are a number of additions to General Standard 3, some of which are "elevations" of wording that was originally in the explanatory guidance. In particular:

- to note in 3(a) that an arbitrator should take into account all facts and circumstances known to them when considering whether to make a disclosure. In other words, theirs is a subjective rather than objective assessment of the facts and circumstances.
- to clarify that if an arbitrator should make a disclosure but is prevented from doing so by professional secrecy rules or other practice or conduct rules,

then they should not accept the appointment or resign. This has been elevated from the guidance to the general standard 2(e).

- to note that a failure to make a disclosure does not necessarily mean that a conflict of interest exists or that a disqualification should ensue 3(g). On this last point, it is worth noting that national courts could reach an opposite conclusion on this point. For example, as a matter of English law, a failure to disclose can give rise to justifiable doubts as to an arbitrator's impartiality, and so expose them to removal under section 24 of the Arbitration Act 1996 (see for example, paragraph 3.72 of the Law Commission's final report on reforms to the English Arbitration Act).

Parties' duty to enquire

General Standard 4 contains new wording to clarify that a party shall be deemed to have learned any facts or circumstances that could constitute a potential conflict of interest if reasonable enquiry would have uncovered them. This provision essentially introduces the concept of constructive knowledge in the context of party waiver of potential conflicts of interest.

Relationships

General Standard 6 looks at what relationships may constitute a conflict of interest or require disclosure. The explanatory guidance confirms that a catch-all rule is not considered appropriate but that the particular circumstances of each relationship and relevance to the subject matter of the dispute must be considered on a case-by-case basis. The updated guidelines include the following significant clarifications and/or changes:

- that an arbitrator is considered to bear the identity not just of their law firm but also their employer. This acknowledges that many arbitrators may not work for law firms and might be employees of companies.
- it notes the need to take into account the organisational structure and mode of practice of the law firm or employer in considering whether a potential conflict of interest exists.
- a new 6(c) has also been added to confirm that any legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party.

The explanatory guidance confirms that the Rules Committee had in mind third-party funders and insurers who might be considered to bear the identity of a party, and parent companies, states and state entities who may be considered to be controlling influences. With respect to States, the explanatory note recognises that their organisation 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.

Duty of the parties and the arbitrator

The changes to General Standard 7 extend the obligation to inform an arbitrator of any relationship between the arbitrator and a party to include persons or entities over which a party has a controlling interest. This change is therefore consistent with the changes to General Standard 6. There is also a new catch-all provision to extend the duty to inform to include any other person or entity that a party believes an arbitrator should take into consideration.

Expansion of the Orange list

There are some significant new additions to the list of circumstances which require disclosure in the Orange List. Disclosure is now required where:

- Two arbitrators have the same employer. This seeks to cover situations where arbitrators do not work in law firms (see 3.2.1).
- An arbitrator has been appointed by one of the parties or an affiliate or by the same counsel or law firm, to assist in mock-trials or hearing preparations on two or more occasions within the past three years. This amendment is also repeated in the context of an arbitrator who has been appointed to do so by the same counsel or law firm (although in that context it is on three or more occasions) (see 3.1.4 and 3.2.10).
- An arbitrator currently serves or has acted within the past three years as expert for one of the parties or appointed by counsel in unrelated matters (see 3.1.6 and 3.2.9, the latter providing for appointment as an expert on more than three occasions).
- An arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (see 3.2.12).

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- An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration (see 3.2.13).
- An arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel (3.3.6). However, an addition to the Green List confirms that there is no need for disclosure where an arbitrator has previously heard testimony from an expert who appears in the proceedings.
- Where an arbitrator has publicly advocated a position on the case on social media or on online professional networking platforms (the guidance already referred to positions advocated in a published paper or speech) (see 3.4.2).
- Where an arbitrator holds a position in an administering institution and participates in decisions relating to that arbitration (3.4.3).

Comment

Given the widespread acceptance of the IBA Guidelines in international arbitration, this is a welcome development. The update is particularly topical in the UK given the English Law Commission's recent proposal to codify the arbitrator's continuing duty of disclosure in the new Arbitration Bill which is currently before parliament.

The updates reflect changes to modern legal practice, including the fact that arbitrators may not always work at law firms and may in fact be employees. They also reflect the fact that third parties play an increasingly role in arbitration whether owing to company structure, funding or insurance.

For more information, please contact Christian Leathley, Partner, Liz Kantor, Professional Support Lawyer, or your usual Herbert Smith Freehills contact.

About the authors

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