IBA UPDATED 2024 GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

29 APRIL 2024 • ARTICLE

In February 2024, the International Bar Association ("IBA") published its updated Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines") following broad public consultation. The Guidelines, whilst non-binding, are widely adopted internationally and assist in unifying approaches to assessing conflicts of interest and disclosures in international arbitration. Whilst the updates do not provide an overhaul of the previous 2014 Guidelines, important changes have been introduced to modernise and clarify the 2014 Guidelines, to address current challenges and practices in international arbitration, including recent topics of interest such as third-party funding and social media. We summarise the key changes below.

> ""justifiable doubts" should be considered by reference to the objective test set out in Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration."

The IBA also released a comparison document showing the changes made to the existing guidelines.

KEY CHANGES TO PART I – GENERAL STANDARDS

General Standard 2 – Determining Conflicts of Interest

General Standard 2 addresses the circumstances in which an arbitrator should decline an appointment or resign if already appointed. Under General Standard 2, if: (i) an arbitrator has doubts as to his or her own independence; or (ii) facts or circumstances exist which, from a reasonable third person's point of view, would give rise to justifiable doubts as to the arbitrator's independence, the arbitrator should decline or resign the appointment.

The explanatory guidance in the Guidelines has now been updated to clarify that "justifiable doubts" should be considered by reference to the objective test set out in Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration, offering a clearer benchmark for determination of this issue. Further, the amended Guidelines also seek to draw a distinction between circumstances that are described in the Non-Waivable Red List in Part II of the Guidelines (where an arbitrator should decline or refuse to act) and circumstances falling within the Waivable Red List (where an arbitrator can make a disclosure under General Standard 3 instead).

General Standard 3 – Disclosure by the Arbitrator

Arbitrator disclosure is a frequently discussed and debated topic. Key changes to the updated Guidelines include the following:

- General Standard 3(a) clarifies that an arbitrator's duty to disclose is determined applying a subjective test. Arbitrators should take account of all facts and circumstances known to them when considering whether to make a disclosure;
- General Standard 3(e) clarifies that if an arbitrator should make a disclosure but is prevented from doing so by professional secrecy rules, or other practice or conduct rules, the arbitrator should not accept the appointment or should resign; and
- General Standard 3(g) recognises that a failure to disclose does not automatically imply a conflict of interest. However, it is worth noting that national courts could reach a different conclusion. Under English law, for example, a failure to disclose can give rise to justifiable doubts as to an arbitrator's impartiality.

"General Standard 3(a) clarifies that an arbitrator's duty to disclose is determined applying a subjective test."

General Standard 4 – Waiver by the Parties

General Standard 4(a) has been amended to include a presumption of knowledge in relation to any fact or circumstance which the parties could have uncovered at the outset or during proceedings through a "reasonable enquiry". Following the updated Guidelines, if relevant facts and circumstances are readily ascertainable and not on the Non-Waivable Red List, then parties may be deemed to have waived a right to object to them after 30 days from the date when reasonable enquiries would have yielded the relevant facts and circumstances. This update provides a clear incentive for parties to conduct their own inquiries into any potential conflicts of interest concerning potential or current arbitrators.

"General Standard 4(a) has been amended to include a presumption of knowledge in relation to any fact or circumstance which the parties could have uncovered."

General Standard 6 – Relationships

General Standard 6 concerns relationships which may constitute a conflict of interest or require disclosure and contains the following clarifications:

- the organisational structure and mode of practice of an arbitrator's law firm or employer should be taken into account when considering conflicts;
- any legal entity or natural person over which a party has a "controlling influence" may be considered to bear the identity of that party;
- third-party funders and insurers may be considered to have the same identity as a party for the purposes of assessing an arbitrator's independence, when the funder or insurer exercises a "controlling influence" over the party, or has influence over the conduct of proceedings, including the selection of arbitrators; and
- in arbitrations involving states, the explanatory notes encourage arbitrators to consider disclosing relationships with potentially related entities, such as regional authorities or autonomous agencies, regardless of whether those entities are private, or legally and politically independent from the central government.

General Standard 7 – Duty of the Parties and the Arbitrator

General Standard 7 has been amended to expand the parties' obligations to inform arbitrators of any direct or indirect relationships between arbitrators and a party, to include persons or entities over which a party has a "controlling interest". The updates also make clear that parties are obliged to disclose the identity of all their counsel advising on the dispute, not just those appearing in the arbitration.

KEY REVISIONS TO PART II – "TRAFFIC LIGHT" SYSTEM

Part II of the IBA Guidelines contains the "Traffic Light" system which lists issues that may be taken into consideration by parties and arbitrators facing a potential conflict of interest.

The key revisions to Part II primarily relate to new additions to the Orange List. The Orange List is 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 an arbitrator's impartiality or independence. The significant new additions to the list of circumstances which require disclosure include the following:

- **arbitrators acting as an expert**: arbitrator currently serves, or has acted within the past three years, as expert for a party (or an affiliate) in unrelated matters, or appointed as an expert by the same counsel or law firm (sections 3.1.6 and 3.2.9);
- **co-arbitrators:** arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (section 3.2.12), or an arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration (section 3.2.13);
- **mock trials**: arbitrator appointed to assist in mock-trials or hearing preparations on two or more occasions within the past three years by one of the parties (or an affiliate) in unrelated matters (section 3.1.4); arbitrator appointed by the same counsel or law firm more than three occasions within the past three years (section 3.2.10); and
- **publicly advocating an opinion on the case:** an arbitrator has publicly advocated a position on the case on social media or on online professional platforms (section 3.4.2).

COMMENT

The updated Guidelines provide helpful clarifications reflecting changes to modern practice. It is welcome to see additions reflecting the increased involvement of third-party funders/insurers and social media usage. The Guidelines will continue to provide useful guidance and direction to arbitrators, counsel and institutions navigating conflicts of interest and disclosures.

If you have any questions concerning the updated Guidelines, please do not hesitate to contact a member of our team, or your usual WFW contact.

KEY CONTACTS

ANDREW RAYMOND
PARTNER • SINGAPORE

T: +65 6551 9203

araymond@wfw.com

MILLIE GRAY
ASSOCIATE • LONDON

T: +44 20 3314 6538

mgray@wfw.com