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The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges

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The IBA Guidelines on Conflicts of Interest focus on when an arbitrator should disclose potential conflicts, as well as when he or she should simply not accept appointment. For the most part, they do not specifically address the potential disqualification of an arbitrator. Nonetheless, the Guidelines, even though non-binding, have become quite influential in the face of increasing challenges to international arbitrators and awards on the basis of arbitrator conflicts. The Guidelines are frequently viewed by courts and arbitral institutions as providing relevant criteria for assessing the impartiality and independence of a challenged arbitrator.

Recent surveys indicate that the Guidelines generally are held in high regard by the members of the arbitration community. A Kluwer Arbitration Blog survey on soft law instruments in 2014 found that the Guidelines, although less well-accepted than the IBA Rules on the Taking of Evidence, constituted the second most popular instrument in the survey, with 44.4% of respondents stating that they use them always or regularly.[1)] The Guidelines were particularly well-accepted in North America, with 71.4 % of respondents saying they use them always or regularly.

Another survey, the 2015 International Arbitration Survey (White & Case and Queen Mary University), noted that most users perceive the Guidelines as effective. This survey found that the Rules on Taking of Evidence and the Guidelines on Conflicts of Interest were the two most highly-rated soft law instruments, with the Rules being rated effective by 69% of respondents, and the Guidelines being rated effective by 60%.[2)]

Arbitral institutions, however, have tended to view the Guidelines with a certain agnosticism. The ICC International Court of Arbitration is perhaps the institution that has provided the most extensive discussion of the Guidelines. The ICC has made clear that when an arbitrator's confirmation is subject to objection, or when an arbitrator is challenged, any reference by the Secretariat of the ICC Court of Arbitration to the ICC Court as to an article in the Guidelines does not bind the Court, and does not mean the Court is applying the Guidelines.[3)] Rather, such references are for information only. In an examination of cases handled between 2004 and 2009, the ICC considered how often a particular article in the Guidelines was referred to, and how often the situations at issue were not covered by the Guidelines. It found that out of 187 challenges and contested confirmations, at least one article of the Guidelines was referred to in 106 cases. In the remainder of cases, no article of the Guidelines was referred to as being relevant. Even though the

ICC has asserted that it is not applying the Guidelines, the mention of a Guideline with reference to approximately 57% of the ICC cases suggests that the Guidelines provide an important baseline in many confirmation and challenge decisions.[4)]

Issues of an arbitrator's conflicts of interest can also surface at the award enforcement stage. The Guidelines influenced a decision by the Supreme Court of Colombia when it was asked to enforce an ICC award rendered in *Tampico Beverages Inc. v. Productos Naturales de la Sabana S.A. Alqueria*, SC9909-2017, Case N° 11001-02-03-000-2014-01927-00. The Respondent, Alqueria, opposed enforcement of the award, arguing that enforcement would violate public policy because Tampico's party-appointed arbitrator had not disclosed that it had previously served as counsel in a case in which Tampico's current counsel was an arbitrator. Although the court acknowledged that enforcement under these circumstances might violate Colombia's domestic public policy, it concluded that the country's international public policy was different, and that the court should look to international authorities to determine if there was a violation. The court then turned to the 2014 IBA Guidelines as representative of international practices, and specifically mentioned as evidence of broad international usage the ICC survey showing references to the Guidelines in 106 out of 187 ICC cases. The Court rejected Alqueria's position, finding that the non-disclosure objected to by Alqueria did not demonstrate lack of independence or lack of impartiality under any of the Guidelines.

Thus, despite the ICC's careful language about not actually applying the Guidelines, the frequency of the mention of the Guidelines in ICC cases was enough to persuade the Supreme Court in Colombia that the Guidelines are widely accepted in international practice, and are to be considered in determining whether enforcement of an arbitration award would violate a country's international public policy.

In the case of *W Ltd v M SDN BHD* ([2016] EWHC 422) the English Commercial Court also closely considered the Guidelines. Like the Colombian court, the English court rejected a challenge to award enforcement on the grounds of arbitrator conflict. However, the English court did so by rejecting a Guideline rather than relying upon it. The English case involved a challenge to the enforcement of an award based on a "serious irregularity" under section 68(2) of the English Arbitration Act. Claimant objected to enforcement on the grounds that the alleged conflict of interest was covered by paragraph 1.4 of the Non-Waivable Red List. That list sets forth situations where the conflict is so grave that the arbitrator should simply not accept appointment, and so grave that even with knowledge of the conflict, parties cannot waive it. Paragraph 1.4 provides that an arbitrator must not accept appointment in this situation:

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.

In this case, a challenge was brought asserting apparent bias based on an alleged conflict of interest. Claimant learned after two awards had been made that the law firm of the sole arbitrator had provided legal services to a company affiliated with the Defendant, and had derived significant income from these services. However, the arbitrator had operated as a sole practitioner within the firm and was treated for compensation purposes as a separate department within the firm, relying on the firm for secretarial and administrative assistance. At the time of the arbitrator's appointment, there was no conflict, but a few months later, an affiliate of Defendant acquired the company served by the arbitrator's law firm. The law firm's conflict check system did not show this conflict and the arbitrator had not been alerted to it.

Although in this case, Mr. Justice Knowles commended the 2014 IBA Guidelines for a distinguished contribution in international arbitration, he considered that the situation described in Paragraph1.4 was "classically appropriate for a case-specific judgment."[5] He took issue with the "categoric position" in General Standard (2)(d) that states that "justifiable doubts 'necessarily exist' as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List."[6]

Applying the test for apparent bias under English law, Mr. Justice Knowles concluded that a fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the tribunal was biased. He also stated, however, that even though the decision was made under English law, he had considered the IBA Guidelines and had explained his different view of the Guideline at issue because the arbitration was international and "the role of [the] Court has an international dimension."[7]

The significant attention that the courts in each of these cases paid to the IBA Guidelines is indicative of the stature the Guidelines have achieved in the arbitration field. There have been concerns expressed that the use of the Guidelines varies so greatly among courts that it undercuts any possibility of developing uniform standards. However, the two cases discussed above indicate that courts take the Guidelines very seriously, whether or not they view them as dispositive. Even if not uniformly applied, the existence of the Guidelines as a uniform baseline against which concepts of arbitrator conflicts can be tested promotes a thoughtful international dialogue on how best to ensure an arbitrator's independence and impartiality.

References

?1 Elina Mereminskaya, Results of the Survey on the Use of Soft Law Instruments in International Arbitration

?2 Id., at 36

?3 Jason Fry and Simon Greenberg, *Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration When Deciding on Arbitrator Independence in ICC Cases*, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, Vol. 20 No. 2 p. 33 (2009).

?4 In a more recent study of the challenges filed with the ICC Court between 2012 and 2015, reference was made to the IBA guidelines in only 28.4% of the cases, although the ICC notes that reliance on the Guidelines is still "relatively frequent." "Arbitrator Challenges Under the ICC Rules and Practice, p. 8, ICC DIGITAL LIBRARY.

?5 ([2016] EWHC 422), ¶36.

?6 Id. at ¶38.

?7 Id. at ¶44.

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