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Can A Party Challenge The Application Of The IBA Guidelines On Conflict of Interest?

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The IBA Guidelines on Conflict of Interest in International Arbitration (hereafter, Guidelines) have gained widespread legitimacy across jurisdictions and types of arbitrations. The Guidelines lay down General Standards (Part I) and provide Practical Application List (Part II). Its soft law nature is an example of codification by compilation (Part I) and innovation (Part II). The Guidelines clarify their aim and intent in the Introduction i.e. they do not aim to override any applicable national law or arbitral rules chosen by the parties and are not legal provisions. Generally, they perform a gap-filling function.

How To Use The IBA Guidelines?

There are various ways to introduce the Guidelines. A tribunal may use it on its own by the exercise of its inherent power. Alternatively, it may be contractually agreed upon by the exercise of party autonomy by parties. It may also be used by one party, without any opposition by another during the course of the arbitration, leading to an ex-post agreement on the application of the Guidelines.

However, there may be cases where a party rejects the application or challenges the application of the Guidelines. In such cases, on what basis does the tribunal accept or reject its application? Most tribunals answer that the Guidelines are not binding but provide international best practice. Yet the jurisprudence of the law under Guidelines has been shaped in a distinctive manner. For example, in ICS v. Argentine Republic, multiplicity of Orange List circumstances led to disqualification of an arbitrator while in EDF International v. Argentine Republic, a financial interest of the arbitrator in a related party led to the laying down of the *de minimis* principle without disqualification of the challenged arbitrator. Apart from such differences in substantial application, there is still lack of clarity on the process of its application.

Since the Guidelines do not override any applicable law, should they be introduced by the tribunal using its inherent power or by the parties? If by either, can it be susceptible to challenge? On what basis must the Tribunal decide the challenge? Does the application of Guidelines undercut the principle of party autonomy? In view of its widespread acceptance, the Guidelines are perceived to be slowly transforming into *lex mercatoria* and soft law. However, the contours of the application of soft law also cannot satisfactorily answer these questions. Any attempt to understand the Guidelines in the framework of soft law assumes that all parties agree to its force and the underlying principles. The present enquiry seeks to take a step back and envisage a situation where

its application is not beneficial to a party and it challenges its application. An academic discussion and the success of the Guidelines aside, an enquiry on the possibility of a valid challenge to the Guidelines would resolve future instances where newer instruments such as the IBA Guidelines on Party Representation in International Arbitration may be challenged.

It is pertinent to note that the Working Group expressly provided against the inclusion of a Model Clause to apply the Guidelines. The intent was to ensure that the lack of such a clause would not suggest the disagreement to apply the Guidelines. In this context, what is the difference if certain parties agree to apply it while others do not? For example, in Perenco Ecuador Limited v. the Republic of Ecuador (Decision on Challenge), the Permanent Court of Arbitration highlighted that the parties agreed to apply the IBA Guidelines to decide the challenge. The applicable law was the ICSID Convention. The agreement on the use of IBA Guidelines allowed the parties to invoke its standards for disclosure and disqualification (justifiable doubts) and not invoke the ICSID standard of 'manifest bias'. This agreement seems to have converted soft law into hard law.

Party Autonomy v. Inherent Powers

There is a tug of war between the doctrines of party autonomy and inherent power of a tribunal to apply the Guidelines. If one party does not agree to its application, then a tribunal can exercise its inherent powers to maintain 'integrity of the tribunal' and 'equality between the parties'. However, if both parties reject the application of the Guidelines, in situations of cross-challenges of arbitrators or where both parties challenge the opposite party's arbitrator, can the tribunal still introduce and depend upon IBA Guidelines?

This enquiry is relevant due to inconsistent practice of the use of the Guidelines where certain parties expressly agree to it while in other cases where courts criticize the Guidelines, rejecting their application yet basing the decision on its parameters! The resolution of the enquiry can also enable one to understand if a party can be obliged to disclose third party funding under General Standard 7, where most arbitration rules have not dealt with the issue, as well as other obligations such as the duty of the arbitrator and the party to investigate conflicts.

There would be strength in a party's opposition to the application of IBA Guidelines if an award is subsequently challenged on the basis of the tribunal's sustained use of the IBA Guidelines. The grounds for challenge of an arbitral award under Article V (1) (d) of the New York Convention includes award rendered when 'arbitral procedure was not in accordance with the agreement of the parties'. Since an applicable law usually contains grounds for challenge of an arbitrator which the Guidelines seek to supplement, the ground may be raised validly. A possible challenge would also lay down the clear juxtaposition of soft law against hard law. Setting aside an award due to usage of the Guidelines, despite a party's objection may amplify the status of such soft law to hard law. Yet, does the usage of soft law affect party autonomy in any way? Can it lead to an outcome that it sought to vanquish in the first place; namely inequality of arms?

A Possible Way Forward

In short, certain clarity is required in the process of incorporation of the Guidelines in an arbitration. This is possible either by parties incorporating it or by tribunals determining what General Standards can be incorporated without any expression by the parties. For example, can the duty to disclose third party funding be implied from the Guidelines if a tribunal uses Part II to determine conflicts? At the same time, does the explicitly non-binding nature of the IBA

Guidelines dispense the need of an agreement between the parties?

To determine applicability, if say, a distinction was made between the General Standards and Practical Application List, for guidance, then the actual benefit of the IBA Guidelines in terms of an authoritative resolution of third party funding disclosure, advance waivers, a party's responsibility to disclose etc. may be lost. On the other hand, General Standards 2 and 3, which provide for conflict of interest and disclosures do not provide any supplemental guidance vis-à-vis the applicable law.

Since the Guidelines seek to take a balanced and objective approach, another solution can be to require a party to give reasons to its opposition or seek a reasoned opposition. The onus must rest on the party opposing it. However, this amounts to IBA Guidelines being applicable by default whenever an arbitrator is challenged. Practices and usage must evolve to indicate what direction such soft law must take. The question remains whether such soft law must carve out a niche for itself or would the basic principles determine its space in the field of arbitration.

Thus, there is a need for jurisprudential content and clarity on the nature of IBA Guidelines and the tools of interpretation that may be used to interpret and apply them; 'with robust common sense and without unduly formalistic application'.

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