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Relationship between the Arbitrators and their Law Firm: A case for Dynamic Application of the IBA Guidelines on Conflicts of Interest

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Independence and impartiality of an arbitrator form the bedrock of effective and fair legal proceeding. However, there are many requisites to an impartial tribunal such as fair and timely disclosures of potential conflicts by parties and the arbitrators. In this article, I shall explore the critical impact of the professional relationships of an arbitrator's law firm on the perception of arbitrator's independence.

The IBA Guidelines on Conflicts of Interest reflect on the growth of law firms and the commercial realities surrounding the practice of appointing arbitrators belonging to large law firms. In this regard, the Guidelines mandate that the arbitrator, in principle must be considered to bear the identity of his/her law firm. The Guidelines in multiple entries under waivable red list and orange list discuss the impact of engaging an arbitrator who belongs to the law firm with whom a party to the case has an established connection.

This is because the arbitrator has a substantial interest in his law firm's sustenance and well-being and is expected to appreciate the professional relationships of his law firm as an active agent of the firm. However, this raises concerns on the presumptive approach under the Guidelines in stark contrast to the analytical approach under most of the domestic arbitration rules and even UNCITRAL, ICC etc.

Application of IBA Guidelines

In the case of *Vivendi*, the arbitrator was challenged on account of a connection between his law firm and a party. The challenge was dismissed on the ground that the connection was of minor value and wholly discrete. However, applying the IBA Guidelines, it was envisaged that an arbitrator's law firm's professional relationship with any party to the case may seriously impair his/her independence in the proceedings. It is further observed that where the arbitrator holds a key position in the law firm, there is a legal presumption on singularity of interest between arbitrator and his law firm so far as his independence in any arbitration is concerned (KPMG AB v PROFILGRUPPEN AB (Svea Court of Appeal), (Case no. T 1085-11)).

A different position emerged in the case of *W v. M. Ltd.* The point of contention was whether in treating the arbitrator and his or her firm as well ''compendiously'' without reference to the question of whether the particular facts could realistically have any effect on the impartiality or

independence of the arbitrator is consistent with the need to evaluate cases of impartiality from an objective standpoint. The Judge even went on to state that where the facts fit the situation detailed under the IBA Guidelines, it ‘‘*causes a party to be led to focus more on assumptions derived from the fact, and to focus less on a case-specific judgment*.”

Dynamic interpretation of the IBA Guidelines

The IBA Guidelines are not legal provisions and are not meant to override any applicable national law or arbitral rules chosen by the parties. The Working Group while framing these guidelines trusted that they will be applied with robust common sense and without pedantic and unduly formalistic interpretation. While detailing the scope for a factual approach to conflicts of interest, the Guidelines state that “*the relevance of the activities of the arbitrator’s firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.*”

The case-specific analysis as the W v. M Ltd. case requires, might hinder the larger goal that the IBA Guidelines set out to achieve. An analytical approach will defeat the purpose of the Guidelines to achieve uniformity and consistency. However, blanket acceptance of these Guidelines will dissuade appointment of any arbitrator who has any semblance of a commercial relationship with appointing party merely to escape the narrow conduit under the Guidelines.

Independence and impartiality of arbitrator are shaped by the ‘legal traditions and culture’ along with the specific nuances of each case (Jung Science Information Technology Co. Ltd. v. ZTE Corp.). In the light of such clear observations, it might be premature to accord significant value to the relationships of the law firm of arbitrator while assessing the arbitrator’s impartiality as the identity of an arbitrator with law firm has to be preceded by a legal analysis of the likelihood of justifiable doubt and cannot be naturally presumed.

Though tribunals have repeatedly stated that these Guidelines carry indicative value only, it must be ensured that the IBA Guidelines must not take the position of customary international arbitration law (Will Sheng Wilson Koh, p. 720). In conclusion, it would suffice to say that any assessment of an arbitrator’s propriety will have to take cognisance of the dynamic and commercially oriented law firm-client relationship without restricting the application of law to any pre-conception or pigeon holes.

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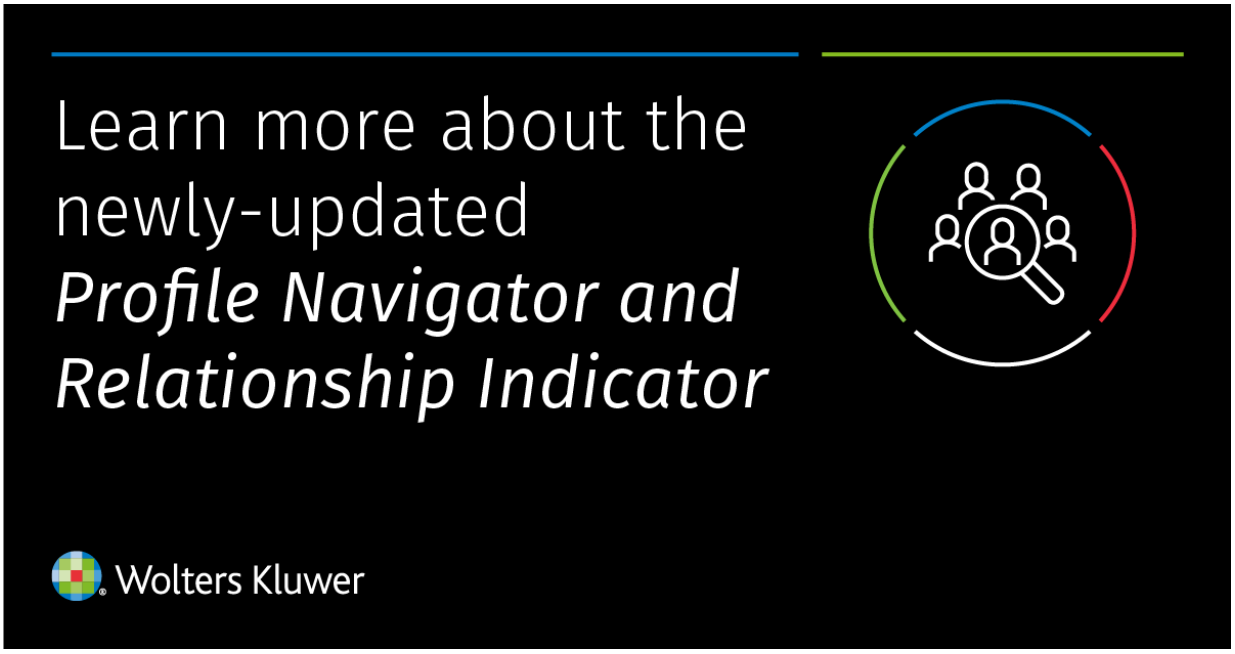

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