Kluwer Arbitration Blog

The IBA Guidelines on Conflicts of Interest: Time for a Relook?

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Independence and impartiality of an arbitral tribunal has been fundamental to arbitration and was recently re-emphasized by major decisions in common law jurisdictions including by the UK (*Halliburton v. Chubb*) and Indian (*Perkins Eastman v. HSCC*) Supreme Courts. However, independence and impartiality in arbitration is not a common law question and is deeper seated and all-pervasive in the general system of law. An arbitrator's ability or the lack thereof to make transparent, timely and exhaustive disclosures can result in a severe detriment to the arbitrator's appointment, and to the award debtor and creditor. Hence, it is a matter of concern for all stakeholders in an arbitral process to have clear guidance on the disclosures that are appropriate, timely and preserve the integrity of the arbitral process.

The International Bar Association ("**IBA**") Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**") provide disclosure requirements and guidance on evaluating conflicts of interest. Despite their non-binding nature, apex courts across a range of jurisdictions (*e.g.*, Colombia, India, Switzerland, UK and others) have referred to the IBA Guidelines as reflective of international best practices.

Revisions to the IBA Guidelines have been considered on a number of occasions. Gary Born, for example, has argued that the Red, Orange and Green Lists should be omitted entirely or converted into a single checklist of factors for consideration. Revisions could similarly redress the inconsistencies that plague the existing draft of the IBA Guidelines, as explored in more detail below. This post shall highlight two separate issues that exist in the IBA Guidelines today – differing standards for disclosure by arbitrator(s) and mandatory withdrawal of arbitrator(s) in a fixed set of situations regardless of any mitigating factors.

Differing Standards for Disclosure by Arbitrator(s)

The centerpiece of both the 2004 and 2014 versions of the IBA Guidelines are the Red, Orange and Green Lists. An earlier post succinctly explains how the lists provide practical examples of when an arbitrator cannot act at all (the Non-Waivable Red List); when the arbitrator can only act if s/he first makes disclosures and the parties expressly agree to the appointment (the Waivable Red List); when the arbitrator has a duty to disclose but can nonetheless act unless the parties make a timely objection (the Orange List); and when disclosure is not necessary due to the absence of any conflict

of interest from an objective point of view (the Green List). The introduction to the IBA Guidelines states that the lists were introduced to help improve consistency in arbitral practice and avoid unnecessary challenges and withdrawals. However, it is the lists themselves that warrant attention.

The IBA Guidelines contains seven General Standards ("**GS**") which are based on principles that arbitrators must follow to ensure they do not find themselves in a situation involving a material conflict of interest. GS 3 states that those facts or circumstances that may give rise to doubts to the arbitrator's independence or impartiality "in the eyes of the parties," shall be disclosed by the arbitrator. The UK Supreme Court has held that the duty of disclosure under GS 3 stems from the parties' interest in being fully informed. Yet, interestingly, when it comes to the Green List, the IBA Guidelines state that there must be reasonable limits to disclosure and for such situations, an objective test should prevail over a purely subjective one such as "in the eyes of the parties".

This, however, is a dangerous path to take and goes against the very purpose of disclosure highlighted in the introduction section of the IBA Guidelines – to protect awards against challenges based upon an arbitrator's alleged failures to disclose. For example, point 3.5.2 in the Yellow List requires arbitrators to disclose any publication that reflects their position on the case at hand. In contrast, if the prior publication is not focused on the case at hand, point 4.1 in the Green List finds no requirement to disclose the same. Consequently, a prior publication dealing with similar but not the same facts and points of law would fall under point 4.1 and the arbitrator would be under no obligation to disclose this fact. Rather, the Green List deems such a situation as objectively having no actual conflict of interest. However, situations like this have in the past led to an arbitrator's removal. The existence of impartiality based on an arbitrator's pre-judgement of an issue can only be recognized and brought to the front when parties are firstly aware of the arbitrator's previously expressed legal opinions. In an ICCA-ASIL Report, it was found that while publications are an important tool for professional development, a party also rightly cares about having their claims decided in a fair manner by an unbiased arbitrator.

Situations in the Non-Waivable Red List ("**NWRL**") have been found to not give rise to justifiable doubts in some cases, and it is equally possible that there may be situations that *prima facie* fall under the Green List but give rise to justifiable doubts. The IBA Guidelines' systemic inconsistency exposes itself in point 4.1 by handing over the discretion to the arbitrators for deciding firstly, whether a legal opinion is focused on the case at hand and secondly, whether to disclose that particular publication. It is in such instances that the flaw in an approach opting for differing standards for disclosure exposes itself.

When the explanation (a) to GS 3 itself states that any hesitations to disclosure should be resolved in favour of disclosure, it is surprising that such an opposite and blanket approach is taken for situations found in the Green List. This is particularly so insofar as the IBA Guidelines characterize such Green List situations to be situations "that could never lead to disqualification under an objective test."

Mandating Withdrawal of Arbitrator(s) in Red List Situations Regardless of the Stage of Proceedings

The Explanation to GS 2 of the Guidelines reads:

"(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the

arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process."

Such a strict approach to conflicts of interest that are discovered well into the proceedings is harmful for not only the appointing party, but the challenging party as well. If the arbitration has reached an advanced stage, any change in the composition of the tribunal is likely to increase the costs and result in time inefficiencies for both parties. This is particularly so where the arbitrator pool is small, making it difficult to find a suitable replacement expeditiously. Even where a replacement is found they will require time to familiarize himself/herself with the case. Moreover, any interim awards made by the previously constituted tribunal may now be open to challenge. While this additional expense and time may be justified in the interest of maintaining the tribunal's independence and impartiality, it is not accurate to say that every situation listed in the NWRL necessarily gives rise to a material conflict of interest that must be addressed.

In *W Ltd. v. M SDN BHD (2016) EWHC 422* for instance, following making of two awards, the Claimant learned that a conflict of interest falling under the NWRL existed. This conflict of interest was absent at the appointment stage and the facts giving rise to it transpired sometime during the proceedings. The English Court deciding upon the challenge concluded that a fair minded and informed observer would not see any bias in this case, and further questioned whether justifiable doubts would necessarily exist in such a NWRL situation (paras 36-42).

Similar situations may also arise under the more expansive Waivable Red List. However, unlike in NWRL situations, such conflicts may be waived by an express agreement of all the parties. While this may *prima facie* seem to pave the way for efficiency if the arbitration has reached an advanced stage and replacing the said arbitrator would cause more harm than good, the question arises as to whether such an agreement is practicable in nature, including where a recalcitrant party wishes to merely delay the proceedings against them for as long as possible.

Therefore, the requirement in the IBA Guidelines for arbitrators to step down in each instance of the Red List unless both parties agree appears to be too rigid and may become impracticable or lead to cost or time inefficiencies.

The Way Forward

Over recent years, the UNCITRAL and ICSID secretariats have jointly released four versions of a Draft Code of Conduct for adjudicators, or arbitrators and judges, in international investment disputes. These drafts reflect the work of UNCITRAL's Working Group III on investor-State dispute settlement reforms. The author recommends that similar discussions be held – *e.g.*, through the IBA or another UNCITRAL Working Group –to reach a coherent set of new Guidelines on conflicts of interest which are capable of application in both commercial and investment arbitrations.

While the IBA Guidelines may be seen as the "gold standard" of internationally recognized practices on conflicts of interest, such a recognition only reinforces the need to correct the issues that have arisen in their application, and for tailored and innovative solutions to respond to the gaps that still exist. While two of the larger issues have been flagged, tackling conflicts of interest in complex arbitrations involving multiple parties, preventing conflicts of interest through

overlapping appointment situations that may be hidden due to the confidential nature of earlier proceedings and revision to the Lists based on current commercial sensibilities are just some of the additional issues that demand our attention. It is hoped that the IBA catches onto these issues and endeavors to fix them.

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