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The Revised IBA Guidelines on Conflicts of Interest: A Call to Action for Parties and Counsel?

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In February 2024, the Arbitration Committee of the International Bar Association (“IBA”) released a revised version of the [IBA Guidelines on Conflicts of Interest in International Arbitration](#) (the “2024 IBA Guidelines” or the “Revised Guidelines”). First published in 2004 (the “2004 IBA Guidelines”) and then revised in 2014 (the “2014 IBA Guidelines”) (collectively, the “IBA Guidelines”), the IBA Guidelines have become a go-to guide for arbitrators, counsel, and arbitral institutions in identifying conflicts of interest and assessing the need for disclosure. The Revised Guidelines are the product of over a year of broad public consultations and surveys conducted at the IBA annual meeting and in other meetings around the world, led by a Task Force responsible for revising the 2014 IBA Guidelines. As [reported](#), the IBA Council is expected to rule on whether to adopt the 2024 IBA Guidelines in May.

While containing what may at first appear to be limited changes, the 2024 IBA Guidelines are significant because, among other things, they place a particular emphasis on the need for a concerted effort to ensure that the arbitration proceedings are conducted transparently, impartially and independently. These objectives are usually seen primarily as duties of the arbitrator(s). However, the 2024 IBA Guidelines underscore that the role of counsel and parties in this context is equally important. This post addresses how the Revised Guidelines have enhanced the duties of counsel and parties, focusing on:

1. The due diligence requirements imposed by the revised General Standard 4 on parties who wish to avoid waiving their right to challenge arbitrators for issues of conflict; and
2. The disclosure obligations imposed by the revised General Standard 7 on parties with respect to the arbitrator’s relationships.

1. Revised General Standard 4

It is broadly accepted in international arbitration that arbitrators have an ongoing duty to (reasonably) investigate and disclose circumstances that may give rise to doubts about their independence and impartiality. There is also little doubt that a similar duty (sometimes called the “duty of curiosity”) applies to the parties. The parties’ “duty of curiosity” is increasingly seen as stringent. For example, it is more frequently seen in international arbitration that a party’s constructive (as opposed to actual) knowledge of circumstances or facts which may constitute a

conflict of interest is deemed sufficient to trigger the time limit for bringing a challenge to the arbitrator's independence or impartiality (see examples from both common law and civil law jurisdictions [here](#) and [here](#)). As a result, if the duty to investigate is not complied with, a party may be said to have waived its right to challenge an arbitrator on grounds of impartiality and independence stemming from circumstances constructively known to it.

The 2024 IBA Guidelines appear to reflect this trend. Under the [original General Standard 4](#), a failure by a Party to object to an arbitrator within 30 days after gaining knowledge (through disclosure or otherwise) of a fact or a circumstance that could amount to a potential conflict of interest constituted a waiver of that party's right to "raise any objection based on such facts or circumstances at a later stage" (except, of course, for the Non-Waivable Red List items or the Waivable Red List items, for which the express consent of all involved was not obtained). General Standard 4 has now been revised to extend this rule to any facts or circumstances that a party could have learned through "a reasonable enquiry [...] conducted at the outset or during the proceedings."

Given the widespread dissemination of the Guidelines, this revision may prove to be significant. First, the extension of the waiver rule to the parties' constructive knowledge may discourage frivolous challenges to arbitrators. Second, it provides the international arbitration community with a further tool to address novel questions relating to the extent of a party's duty of curiosity in the internet and social network era. For example, it will be interesting to see how international tribunals and institutions, as well as national courts, will interpret the "reasonableness" requirement embodied in the 2024 IBA Guidelines in an environment where information about an arbitrator's past or present relationships or opinions may be disseminated through a potentially endless number of platforms and fora.

This issue was addressed in a 2021 [Blog post](#) by Panagiotis Kyriakou and Charlène Thommen, which commented on the Swiss Federal Tribunal's ("SFT") revision of the Court of Arbitration for Sport ("CAS") award in [WADA v. Sun Yang](#). In that case, the SFT annulled a CAS award because it found that certain tweets by the presiding arbitrator, allegedly discovered after the award was rendered, called into question the impartiality of the Chairperson. In that context, the SFT discussed the extent of a party's "duty of curiosity" when it comes to searching existing social media platforms, and concluded that this duty cannot be "transformed into an obligation to carry out very extensive, if not almost unlimited, investigations requiring considerable time", especially considering the fact that "the universe of social networks is fluctuating and evolving rapidly" and "even if some of them could be described, once and for all, as 'flagship social networks', the scope of the duty of curiosity would still need to be redefined over time" (at [page 13](#)). The SFT did not use the word "reasonable," but the standard it used is consistent with the "reasonable enquiry" that the 2024 IBA Guidelines require from the parties (and, therefore, from any counsel assisting them). In the wake of the Revised Guidelines, it is reasonable to expect that other courts and tribunals will adopt the same, or a similar, standard in the future.

2. General Standard 7

The 2024 IBA Guidelines further require that the parties undertake "reasonable enquiries" in order to comply with General Standard 7(a), which sets out the information that the parties are required to provide to avoid conflicts of interest and foster comprehensive disclosures. While the standard

of diligence required from a Party in this context (“reasonable enquires”) remains unchanged from the Guidelines’ previous revisions, the 2024 IBA Guidelines have increased the parties’ disclosure duties.

Since the Guidelines’ inception, General Standard 7 has required parties to “inform” all involved (i.e., the arbitrators, the arbitral tribunal, the other parties and any institutions or appointing authorities) of any relevant relationships that may call into question the arbitrator’s independence and impartiality. The types of relationships that need to be disclosed include:

- relationships between the arbitrator and (a) the party, (b) any company of the same group, (c) persons or entities having a controlling influence on the party, and (d) any persons or entities having a direct economic interest in the arbitration; and
- relationships – and these are the two 2024 additions – between the party and (a) “a person or entity over which a party has a controlling influence”, and (b) “any other person or entity” the party “believes an arbitrator should take into consideration when making disclosures” under the Guidelines.

The first addition (“a person or entity over which a party has a controlling influence”) is easy to explain. The 2004 IBA Guidelines already required the parties to disclose relationships with entities or persons having a controlling influence on the party. There was of course no valid reason not to extend this requirement also to entities or persons over which the party has a controlling influence.

The second addition (“any other person or entity” the party “believes an arbitrator should take into consideration when making disclosures”) requires the parties to make a judgment concerning what, among potentially many, relationships need to be disclosed. While this addition may at first appear too demanding on the parties, it must be read in conjunction with the requirement that the parties undertake “reasonable enquiries.” If, in the context of those enquiries, any circumstances come to light that may call into question the impartiality and independence of the arbitrator, then those circumstances should be disclosed. Placing this burden on the parties is also practical because it is often the party who is more likely to be aware – or to be in a position to become aware – of factors such as the structure of a complex group of companies or relevant contractual arrangements.

Conclusion

The Revised Guidelines remind the international arbitration community that transparency of proceedings and impartiality and independence of arbitrators are communal objectives, and must be pursued as such. While it remains to be seen how the changes discussed above will be addressed in practice by tribunals, courts, and institutions, it is important that the parties (and, therefore, counsel assisting and representing them) are put on notice that their due diligence and disclosure duties must be treated as seriously as those of the arbitrator, and may ultimately have an impact on the overall success of the proceedings in a similar manner.

The views expressed herein are those of the authors and should not be construed as necessarily reflecting those of their firm or of any of its clients.

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