Kluwer Arbitration Blog

What to Do if Two Arbitrators Have Been Appointed in Another Arbitration?

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The International Bar Association has recently revised its guidelines on Conflicts of interest in International Arbitration (the "2024 IBA Guidelines" or "Guidelines") (see here). The 2024 IBA Guidelines contain a special disclosure obligation for arbitrators if two of them currently serve together as arbitrators in another arbitration (Section 3.2.13). This new provision places new demands on the practice and raises considerable problems for arbitration proceedings that have already begun prior to its implementation. The following post analyzes the implications and practical challenges of this new disclosure obligation in the context of the DIS Arbitration Rules (the "DIS Rules").

Addition in the "Orange List" of the IBA Guidelines

The structure of the 2024 IBA Guidelines remains unchanged. The first part of the 2024 IBA Guidelines sets out seven objective standards for deciding on the challenge or removal of an arbitrator due to conflicts of interest. The second part of the Guidelines continues to provide specific examples of application, which are categorized according to their potential for conflict in a traffic light system – "red list" (justified doubts about the impartiality of an arbitrator), "orange list" (possible doubts about the impartiality of an arbitrator in individual cases), and "green list" (no doubts about the impartiality of an arbitrator).

A new addition to the "orange list" of the 2024 IBA Guidelines is Section 3.2.13, which states: "*An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration*." This provision thus establishes a disclosure obligation for arbitrators who are serving together as arbitrators in another (pending) arbitration. In the authors' experience to date, this new provision—despite its considerable practical relevance—has gone largely unnoticed.

Tightening of Disclosure Requirements

The 2024 IBA Guidelines significantly increase the disclosure obligations of the arbitrators. The relevance of disclosure obligations is undisputed, as the independence and impartiality of the arbitrator are essential and indispensable prerequisites for the office of arbitrator.

Section 3.2.13 of the Guidelines addresses arbitrators' relationships with each other. However, an arbitrator's independence and impartiality greatly depend on the absence of relationships with the parties or their legal representatives. A survey by the Swiss Arbitration Association (ASA) shows that parallel activities with lawyers are often seen as more critical than those with other arbitrators. Disclosure of an arbitrator's simultaneous involvement with a lawyer is considered more critical than with another arbitrator. While simultaneous involvement in another arbitration can foster sympathy, it doesn't automatically imply bias. Though rare, the risk that such activities affect tribunal dynamics due to personal sensitivities cannot be ruled out.

Section 3.2.13 of the Guidelines endorses a differentiated approach. The decisive factor is whether arbitrators only work together occasionally or frequently, as frequent collaboration can increase the risk of conflicts of interest. This could strengthen personal or professional ties and influence the decision-making process. If two of the three arbitrators frequently work together in other proceedings, the parties have a legitimate interest in being informed. However, the fear of impartiality should only be relevant in exceptional cases, for example if arbitrators in other proceedings have already been appointed. An obligation to disclose joint proceedings is therefore appropriate in order to protect the parties' interests and avoid an excessive extension of the obligations.

An Obligation in Arbitration Proceedings Conducted Under the DIS Arbitration Rules?

Section 3.2.13 of the IBA Guidelines particularly affects arbitrators who are frequently appointed as arbitrators due to their specialization or specific experience. The following examines the extent to which a disclosure obligation exists in arbitration proceedings under the DIS Rules and proposes a "best practice" approach.

Disclosure Obligations under the DIS Arbitration Rules

Article 9.1 of the DIS Rules guarantees the impartiality and independence of the arbitrator. It states that "[e]*ach arbitrator must be impartial and independent throughout the arbitration proceedings and must fulfill the requirements agreed by the parties."* According to Article 9.4 DIS Rules, any circumstances that *"could raise reasonable doubts"* about impartiality must be disclosed. This obligation applies throughout the ongoing arbitration proceedings (Article 9.6 DIS Rules). If there are *"justified doubts,"* an arbitrator can be challenged, and an award may be set aside. The DIS Rules do not define *"reasonable doubts,"* leaving broad room for interpretation.

Legal Nature of the IBA Guidelines

The DIS Rules do not naturally prescribe the application of the IBA Guidelines. If compliance with the IBA Guidelines is not stipulated in the arbitration clause or as procedural rules, they are not mandatory as transnational procedural rules.

However, the IBA Guidelines are widely recognized as a guide for interpreting the concepts of impartiality and independence in arbitration practice. They are widely used in the practice of international arbitration and cannot be ignored. Therefore, the question arises as to how to deal with the new regulation in DIS arbitration proceedings.

Proposal for Implementation Under the DIS Arbitration Rules

The applicability of Section 3.2.12 of the Guidelines is problematic for arbitration proceedings initiated before the new regulation came into force. Disclosure obligations should not be overstretched, as a balance between transparency and practicality is essential for efficient proceedings. Therefore, Section 3.2.13 should not be applied rigidly, but taking into account the specifics of each case, particularly the stage of the proceedings, should be considered in a balanced legal analysis.

The impact of the new regulation on ongoing disclosure obligations under Article 9.6 of the DIS Arbitration Rules and Article 3(f) of the Guidelines is crucial. Until now, simultaneous activity in another arbitration did not require disclosure. The inclusion of Section 3.2.13 in the "orange list" reflects a shift in legal interpretation. However, the ongoing disclosure obligation under the DIS Rules and the Guidelines is aimed at disclosing circumstances that arise during pending proceedings and are required to be disclosed under the legal system applicable at the time of acceptance of the arbitrator's office. Consequently, circumstances that only become relevant due to a subsequent change in the legal opinion are not necessarily covered by this ongoing disclosure obligation. A differentiated consideration is required depending on the scenario.

Scenario 1: Two "Old Cases"

For ongoing arbitration proceedings that were initiated before May 25, 2024, it is essential to weigh up the legal interests involved. It should be noted that the Guidelines are not mandatory in arbitration proceedings under the DIS Rules and are merely used as a guide. In addition, disclosure pursuant to Section 3.2.13 of the Guidelines in "old cases" entails considerable risks of abusive challenges. In particular, there is a risk that arbitrators would now be rejected for purely case-related, tactical considerations.

Disclosure in arbitration proceedings that are already at an advanced stage therefore does not necessarily serve the parties' interest in the impartiality of an arbitrator, and could rather encourage an unjustified delay. In addition, both arbitration proceedings were initiated at a time disclosure was not required. The legal consideration therefore speaks against disclosure within the meaning of Section 3.2.13 of the 2024 IBA Guidelines in "old cases", as disclosure could undermine the efficiency of the arbitration proceedings.

Scenario 2: One Old Case and A New Appointment after May 25, 2024

Furthermore, there are cases in which arbitrators are active in proceedings that began before May 25, 2024 and these arbitrators are then appointed in another, new arbitration after May 25, 2025. In this alternative, a situation arises in which there is both an "old case" and a new arbitration proceeding.

In such cases, disclosure only appears justifiable in new arbitration proceedings that have begun after May 25, 2024. This ensures that all parties are informed of potential conflicts of interest from the outset and can take appropriate action. This will not impair the efficiency of the arbitration proceedings. With regard to ongoing proceedings that began before the cut-off date, the explanations discussed above for Scenario 1 apply.

Scenario 3: Two Appointments after May 25, 2024

If two arbitrators are appointed in unrelated arbitration proceedings after May 25, 2024, disclosure should generally be required in both, especially if the 2024 IBA Guidelines are followed. Since Section 3.2.13 of the Guidelines applies when the arbitrators are appointed, disclosure should be required from the second arbitration onward, regardless of the necessity of this disclosure. Otherwise, there is a significant risk of challenges or applications to set aside the award in concluded proceedings.

Conclusion

Disclosure between the parties and the arbitrators is crucial to maintaining trust in arbitration and ensuring both the independence and impartiality of the arbitrators. Nevertheless, the requirements for disclosure must be applied with a sense of proportion, at least in cases initiated before May 25, 2014. Excessive or inflexible disclosure requirements could otherwise lead to a significant potential for abuse and impair the efficiency and fairness of the arbitration proceedings.

The above is an abbreviated version of an article published in the SchiedsVZ | German Arbitration Journal, Vol. 22, No. 5 (2024), which is also included on Kluwer Arbitration.

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