

Following a two year consultation process, on 23 October 2014 the International Bar Association (the "IBA") approved revisions to its Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines"). A copy of the Guidelines, which were published on 28 November 2014, can be found [on the IBA website](#).

The Guidelines, first introduced in 2004, reflect best practice and aim to provide uniformity in the approach of arbitrators when faced with a conflict, or potential conflict situation, in international arbitrations. Through the Guidelines, the IBA aims to promote the independence and impartiality of arbitrators – for example, when considering challenges to arbitrator appointments. In addition to the General Standards and explanations, the Guidelines contain Application Lists, designated Red, Orange and Green. These provide examples of specific situations that do, or do not, warrant disclosure by an arbitrator or the disqualification of an arbitrator.

Despite having introduced a range of new principles, the Guidelines have avoided any radical overhaul to the previous 2004 guidelines. The new Guidelines now clearly extend their scope of application to include commercial and investment arbitrations, as well as applying the provisions to both legally and non-legally qualified arbitrators. The most far-reaching changes are summarised below:

"Advance Waivers" by Arbitrators Do Not Discharge an Ongoing Duty of Disclosure

An arbitrator cannot discharge the ongoing duty of disclosure by a declaration or waiver in advance if there is a potential future conflict. However, the validity and effect of advance declarations or waivers should be assessed according to the factual situation in a given case, and the applicable law. The Guidelines do not clarify whether such waivers should be enforceable or indeed accepted, but instead state that they "*do not discharge the arbitrator's ongoing duty of disclosure under General Standard (3)(a)*".

Duty of Impartiality and Independence Extends to Tribunal Secretaries

General Standard 5(b) of the Guidelines extends the duty of independence and impartiality (including the duty of disclosure) to Tribunal Secretaries. Thus, administrative secretaries should apply the Guidelines in the same way as they are applied to the arbitrators themselves. The Guidelines place the responsibility on ensuring this is met on the arbitral tribunal itself.

Third-party Funding and Insurance

Under the Guidelines, General Standard 6(b) now provides that, "*any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration may be considered to bear the identity of such party.*" In addition to shareholders for example, the explanation to this standard confirms that third party funders and insurers are now included expressly. The amendment to 6(b) means parties to disputes, who are third-party funded, must now disclose to the Tribunal the existence of this funding.

Arbitrators Must "Bear the Identity" of the Law Firm to Which They Are Attached

If an arbitrator is associated with a particular law firm, General Standard 6(a) of the Guidelines requires that arbitrator, in principle, to "*bear the identity*" of that law firm. However, the Guidelines explain that the fact that the arbitrator's law firm has been associated with one of the parties does not necessarily amount to a conflict or something requiring disclosure; it depends upon the particular factual circumstances. The rationale behind this change stems from the fact that, in modern arbitral practice, a significant number of arbitrators also work as lawyers in law firms and that these firms may have acted for one of the parties now before the arbitrator in a wholly unrelated matter, which would not necessarily give rise to objective justifiable doubts as to the arbitrator's independence or impartiality.

Disclosure Obligations

The newly worded General Standard 7(b) provides that the parties must inform the tribunal, the arbitral institution, and the other parties to the dispute, of the identity of the counsel it has appointed. In particular, the parties' duty of disclosure includes:

- Relationships between the party and the arbitrator;
- Relationships between the arbitrator and any person or entity with a "*direct economic interest*" (General Standard 7(a)) in the award;
- Their counsel; and
- Relationships between the arbitrator and their counsel.

This new provision appears to reflect concerns that arose out of a series of rulings in investment treaty cases, in particular the tribunal's ruling in *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia* (ICSID Case No. AR/05/124) concerning changes to the counsel team representing a party and their relationships with members of the tribunal.

The extent of disclosure has also been expanded. Previously, the parties were only under a duty to search for publicly available information. Now, this duty extends to any information that is reasonably available to them (Explanation to General Standard 7(c)). The Explanation to the General Standard clarifies that where there is a change in the team during the arbitration proceedings this disclosure should be made at the earliest opportunity (Explanation to General Standard 7(b)).

The Lists

In addition, further scenarios have been added to the Lists. The Lists contain specific examples of potential disclosure scenarios. The Red List sets out conflicts that would normally prevent an arbitrator from serving. Part of this list is said to be non-waivable by the parties, while the remainder provides examples of situations where the parties may waive the conflict.

The Orange List sets out situations that involve a conflict that the parties may waive. However where a party objects, the Guidelines provide that the Orange List conflicts should be evaluated in the particular context to determine whether the arbitrator may serve.

Finally, the Green List identifies situations where the conflict is so minor that even disclosure is not normally required. The Green List has been expanded to include situations where an arbitrator has a social media relationship with another arbitrator or counsel, or where they teach together in the same faculty or school.

Summary

Overall the new Guidelines have received support from those in the arbitration community. Given the increasing complexity surrounding conflicts of interests in modern international practice, this update to the Guidelines should assist parties, their counsel and arbitrators in ensuring that current best practice is followed.

We hope you found this update of interest and if you would like to discuss any aspect further, please do not hesitate to contact the team below.

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