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The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration

The IBA Council in Tokyo recently approved a revised version of the International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration* (the Guidelines). The new Guidelines entail changes regarding the effects of "advance waivers" of conflicts of interest, the impartiality and independence of arbitrators working at large law firms, third-party funding of arbitration proceedings, and the impartiality and independence of arbitral or administrative secretaries.

The IBA Conflicts of Interest Subcommittee reviewed the 2004 Guidelines and considered the views of arbitration counsel, arbitrators and arbitral institutions, together with case law that has developed over the past ten years in matters of conflicts of interest of arbitrators. The 2014 Guidelines consist of seven General Standards and four Application Lists, which apply to both commercial and investment arbitration, as well as to both legal and non-legal professionals serving as arbitrators.

While they are not binding, the Guidelines are intended as an expression of best practices in international arbitration and offer a set of standards seeking to enhance legal certainty and preserve the integrity, transparency and fairness of arbitral proceedings. Arbitral institutions and courts refer to the Guidelines in deciding challenges of arbitrators.

Among the new provisions in the General Standards, General Standard (3)(b) stipulates that advance waivers, which are declarations by arbitrators in relation to possible future conflicts of interest, often seeking to obtain the consent of the parties to the arbitration to waive potential future challenges, do not discharge arbitrators from their ongoing duty of disclosure under the Guidelines.

Of particular relevance in matters involving arbitrators who work at large law firms is the new language regarding potential conflicts of interest that may arise from activities in other cases handled by their firms, in particular those involving the same parties (General Standard (6)(a)). The Guidelines suggest that while the "arbitrator is in principle considered to bear the identity of his or her law firm," assessments should be made on a case-by-case basis considering the "relevance of the activities of the arbitrator's law 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" (General Standard (6)(a) Explanation). The Standard therefore endeavors to strike a balance between the interest of the parties to appoint the arbitrator of their choice and the effective implementation of the duty of impartiality and independence of all arbitrators.

Legal entities with a direct economic interest in the outcome of an arbitration are identified with a party to the arbitration for purposes of the conflict assessment (General Standard (6)(b)). Prominent examples are third-party funders and insurers who provide financial compensation to one of the parties in a manner that depends upon the outcome of the arbitration. In practice, this means that parties may wish to disclose a relationship with a third-party funder, including the identity of the funder, so that the relationship can be considered when examining potential conflicts of interest with the arbitrators.

The application of the new Guidelines also extends to arbitral or administrative secretaries and assistants of either the arbitral tribunal or its individual members (General

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Standard (5)(b)). This category of persons now is expressly bound by the same duty of impartiality and independence as arbitrators.

As in the past, the four updated Application Lists in the second part of the Guidelines entail a nonwaivable Red List, a waivable Red List, an Orange List and a Green List. The Lists provide concrete examples of situations that (i) give rise to conflicts of interest, (ii) should be disclosed and (iii) do not give rise to conflicts of interests, respectively. The Lists are meant to ensure consistency in the interpretation and application of the General Standards with a view to avoiding unnecessary challenges and arbitrator resignations and removals.

In line with the new approach of treating entities with a direct economic interest in the outcome of the arbitration as parties to the arbitration, a situation in which an "arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the [arbitral] award" is now regarded as a nonwaivable conflict of interest (nonwaivable Red List, para. 1.2). Further, the situation in which "[t]he arbitrator and another arbitrator or counsel for one of the parties in the arbitration currently act or have acted together within the past three years as co-counsel" (Orange List, para. 3.3.9) has been moved from the Green List to the Orange List.

Some minor changes also have been made to reflect the increased use of social media networks. For instance, a relationship of the arbitrator with another arbitrator, with counsel for one of the parties or with one of the parties through a social media network is considered to be part of the Green List and does not warrant disclosure (Green List, paras. 4.3.1/4.4.4).

These revisions, clarifications and additions to the Guidelines hopefully will limit challenges of arbitrators that are without merit and will support efficient proceedings. Indeed, challenges are one of the main causes of delay in arbitration, causing it to fail in its promise to provide the parties with an effective means of dispute resolution. The Guidelines may bring the focus back to the merits of the arbitration.