

Conflicts of interest in arbitration—applicable principles

Produced in partnership with Marie-Claire O’Kane and Richard Liddell of 4 New Square and Peter Halprin and Stephen Wah of Anderson Kill

This Practice Note should be read in conjunction with Practice Note: [Conflicts of interest in arbitration—challenges to arbitral appointments](#).

What are the general principles of fairness, impartiality, and independence?

A cornerstone of procedural fairness is the impartiality and independence of the decision-maker and this is as fundamental an ingredient of arbitration as it is of litigation. It is reflected both in domestic arbitration laws (see, for example, the general duty of the arbitrator in [section 33](#) of the Arbitration Act 1996 (AA 1996) to act fairly and impartially) and in international institutional rules, eg the London Court of International Arbitration (LCIA) Rules, Article 5.3 (LCIA, Art 5.3).

In general, commentators have explained that independence refers to the requirement that there be no actual or past dependent relationship between the parties and the arbitrators which may or at least appear to affect the arbitrator’s freedom of judgment. Impartiality, generally, refers to the requirement that arbitrators neither favour one party nor are predisposed with regard to the disputed issue(s). According to Julian Lew, ‘[w]hile impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done’.

How are an arbitrator’s impartiality and independence assessed?

Most international arbitration rules expressly require arbitrators to be and remain ‘impartial and independent of the parties’, eg the International Chamber of Commerce Rules of Arbitration (ICC Rules), art 11(1) and guidance issued to arbitrators—see [News Analysis: ICC Court adopts guidance on conflict disclosures by arbitrators](#), [LNB News 23/02/2016 117](#).

Likewise, every well-recognised set of international arbitration rules provides that an arbitrator must file a certificate or statement of impartiality and independence, eg ICC Rules, art 11(2), the purpose of which is to confirm the arbitrator’s impartiality and to elicit information which might give rise to a party challenging the arbitrator’s appointment.

The exercise of assessing an arbitrator’s independence is undertaken by both the arbitrator and the parties. In some cases, such assessment will be straightforward and the arbitrator/party will (or at least should) immediately recognise a potential or actual conflict of interest. However, in other cases such assessment might prove to be more difficult.

It should be noted that, as far as London seated arbitrations are concerned and as confirmed by the Court of Appeal in *Halliburton v Chubb* (at para 38, per

References:

[LCIA Rules, Art 5.3](#)

References:

[ICC Rules 2017](#)

[ICC Court adopts Guidance Note on conflict disclosures by arbitrators](#)

[Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration](#)

References:

[Halliburton Company v Chubb Bermuda Insurance Ltd \[2018\] EWCA Civ 817](#)

Hamblen LJ), [AA 1996](#) does not recognise lack of independence as a separate ground for removal of an arbitrator. Justifiable doubts as to impartiality are required ([AA 1996, s 24\(1\)\(a\)](#)). See Practice Note: [Challenging the tribunal's independence or impartiality](#).

What guidance is available for assessing and dealing with potential conflicts of interest?

A few organisations such as the International Bar Association (IBA) and the American Bar Association (ABA) have produced guidance to assist arbitrators and parties to assess and deal with potential conflicts of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration approved in May 2004 and revised in October 2014 are widely recognised as the pre-eminent set of principles (the IBA Guidelines).

According to a 2016 report on the usage of the IBA Guidelines, of the 3,201 arbitrations known to respondents over the past five years in which issues of conflicts arose, the IBA Guidelines were referenced in 57% of them (para 99). The survey had 35 responses from England. According to the report, in England and Wales, roughly half of the arbitrations involving arbitrator conflicts of interest referred to the IBA Guidelines (para 118). Where the survey respondents acted as counsel in arbitrations involving arbitrator conflicts of interest, they consulted the IBA Guidelines in 90% of cases, and consulted the IBA Guidelines to decide whether to take on an appointment in 61% of cases (para 118).

The introduction of the IBA Guidelines make it clear that they apply to both investment arbitration and international commercial arbitration, and to both legal and non-legal professionals serving as arbitrator.

Part 1 of the IBA Guidelines on Conflicts provides seven 'General Standards' regarding impartiality of the arbitrator (to the parties, the lawyers and the subject matter of the dispute), independence (from the parties to the dispute and from the subject of their dispute) and disclosure.

The 2014 revisions to the IBA Guidelines provided the following notable clarifications on the General Standards:

- General Standard 1 on the General Principle of impartiality and independence explains that the period that the arbitrator must be independent and impartial of the parties is 'the entire course of the arbitration proceeding' including the time period for the correction or interpretation of the final award under the relevant rules, assuming such a time period is known or readily ascertainable
- General Standard 2 deals with Conflicts of Interest. The Explanation to GS2 states that in the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. Arbitrators should therefore err on the side of caution
- General Standard 3 addresses Disclosure by the Arbitrator. An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure
- General Standard 4, dealing with Waiver by the Parties, expressly provides that any purported waiver by the parties of a Non-Waivable Red List situation shall be regarded as invalid

References:

[IBA Guidelines on Conflicts of Interest](#)

References:

[Report on the reception of the IBA Arbitration Soft Law Products](#)

- General Standard 5 on the Scope of Guidelines has been amended so as to remove the exemption for 'non-neutral' arbitrators, such that the Guidelines apply to all arbitrators, as well as arbitral or administrative secretaries and assistants
- General Standard 6 on Relationships clarifies that if one of the parties is a legal entity, 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 a party. The Explanation to GS6 clarifies that third party funders and insurers in relation to the dispute may have a direct economic interest in the award and as such may be considered to be the equivalent of that party. It is stated, however, that the terms 'third party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case, and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Because the authors are unaware of any case law or awards rendering decisions on the scope of the principles, it is unclear how expansive a view a court, arbitral institution, or tribunal would take with regard to funders and insurance companies
- General Standard 7 addresses the Duty of the Parties and the Arbitrator. Parties are obliged to inform an arbitrator, the tribunal, the other parties and the arbitration institution of any relationship between the arbitrator and any person or entity with a direct economic interest in, or duty to indemnify a party for, the award issued in the arbitration. Parties are also required to inform the arbitrator, tribunal etc, of the identity of counsel appearing in the arbitration, in addition to any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. In satisfying their duty of disclosure, the 2014 revisions require the parties to investigate any relevant information that is reasonably available to them. The Explanation to GS7 requires disclosure of 'relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award'

Part 2 of the Guidelines deals with the 'practical application of the general standards' and provides 'specific guidance to arbitrators, parties, institutions and courts as to what situations do and do not constitute conflicts of interest and should be disclosed'.

Part 2 essentially consists of three 'traffic light' colour-coded lists which provide non-exhaustive examples of potential conflicts of interest in international commercial arbitrations. These lists reflect, and are subject to the general standards in Part 1:

- red list items, which are divided into waivable and non-waivable items, are examples of 'justifiable doubts as to the arbitrator's impartiality and independence':
 - > a non-waivable item will result in automatic disqualification of an arbitrator—this includes an arbitrator who has a significant financial or personal interest in one of the parties or the outcome of the case (para 1.3 of the Non-Waivable Red List) (but see criticism of this list from the English court in *W v M SDN BHD*)

References:

W Limited v M SDN BHD
[2016] EWHC 422 (Comm)

- > conversely, waivable items must be disclosed and the parties would need to consent expressly (and provide a specific waiver) if the arbitrator's appointment were to continue—waivable items include an arbitrator who is a lawyer in the same law firm as the lawyer to one of the parties (para 2.3.3 of the Waivable Red List)
- orange list items are matters that may 'in the eyes of the parties give rise to doubts as to the arbitrator's impartiality and independence'—an arbitrator is under a duty to disclose such situations. However, such a disclosure does not automatically result in the disqualification of the arbitrator; rather, its purpose is to allow the parties to make an informed decision whether to request that the arbitrator be disqualified on the basis that there is an objective, justifiable doubt as to an arbitrator's impartiality and/or independence. By way of example, one of the orange list items includes an arbitrator who has within the past three years received more than three appointments by the same lawyer or the same law firm (Part II of the IBA Guidelines, para 3.3.8).

The orange list was referenced in English court decisions in *Cofely v Bingham and Halliburton Company v Chubb*, in which the issue of repeat appointments and disclosure was addressed and determined on the basis of their specific facts with the former challenge succeeding but not the latter.

In *Cofely*, Cofely sought to remove an arbitrator after learning that the arbitrator had acted as arbitrator or adjudicator in 25 cases involving Knowles. The High Court held that while only three of the 25 cases involved Knowles as a party, this was sufficient to trigger disclosure under the orange list. As such, the court ordered the removal of the arbitrator.

In *Halliburton*, the Court of Appeal rejected an arbitrator challenge noting that the IBA Guidelines requirement of disclosure of facts or circumstances that may 'in the eyes of the parties' give rise to doubts as to the arbitrator's impartiality or independence differed from the English law standard of the objective fair-minded and informed observer. Specifically, the Court of Appeal held that the challenged arbitrator's non-disclosure of several appointments by one of the parties was an 'innocent oversight'.

The IBA Guidelines state that even if a situation is not listed in the orange list, or falls outside the time limits used in some of the orange list situations, the arbitrator is still under a duty to consider, on a case by case basis, whether disclosure is required

- green list items are those 'situations where no appearance of, and no actual, conflict exists'. Consequently, those items include a situation where the arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties (para 4.3.3 of the green list) or are connections on LinkedIn (para 4.4.4 of the green list) do not need to be disclosed

The 2014 revisions to the IBA Guidelines promote certain items from the green list to the orange list, notably:

- The 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 (para 3.3.9 of the orange list)

References:

***Cofely Limited v Anthony Bingham and Knowles Limited* [2016] EWHC 240 (Comm)**

References:

***Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817**

As noted above, the IBA Guidelines have been relied upon frequently by arbitrators and parties in addressing potential conflicts and have been referred to in arbitral and court decisions.

An example is the Austrian Supreme Court's 17 June 2013, File No 2 Ob 112/12b decision on whether (and to what extent) grounds for challenging an arbitrator can also be raised in set-aside proceedings under the Austrian Arbitration Act 2006 (based on the UNCITRAL Model Law). In determining that where a challenge becomes known after the issue of the arbitration award, only 'blatant' grounds can be invoked in set-aside proceedings, it was held that the court (when deciding whether blatant grounds exist) may consider not only domestic law rules for disqualifying judges in the national courts but also the IBA Guidelines.

In *Sierra Fishing*, the English court derived considerable assistance from the IBA Guidelines on conflicts of interests when it assessed a challenge to an arbitrator's impartiality pursuant to *AA 1996, s 24*. See News Analysis: [High Court delivers rare decision on challenging an arbitrator's impartiality \(Sierra Fishing & Ors v Ali Zbeeb & Ors\)](#).

In *W v M SDN BHD*, the court acknowledged the importance of the IBA Guidelines but identified weaknesses, particularly in the 'Non-Waivable Red list' and the ability to apply the facts of the particular case to that list, see News Analysis: [Court identifies weaknesses in the IBA Guidelines on Conflicts \(M v W\)](#).

With regard to third party funding or insurance, the International Council for Commercial Arbitration (ICCA), in a joint project with Queen Mary University of London (QMUL), published its final report on third party funding (the 'Report') in April 2018.

The ICCA-Queen Mary Task Force on Third-Party Funding is a joint project between ICCA and QMUL to systemically study and make recommendations regarding ethics, procedure and policy relating to the modern

form of third party funding in international arbitration. The Report was drafted with public comments accepted from practitioners and consultation with representatives of the maritime insurance industry, maritime arbitration practitioners and other international arbitration experts.

The Report serves as a reference manual to those involved in international arbitration and provides principles for practitioners to follow in the hopes of establishing greater consistency and more informed decision making when addressing issues related to third party funding. As the Report is primarily meant to serve as a reference manual, parties, counsel and courts may use it to address issues that pertain to third party funding, but as soft law, none of the Report's principles are binding.

The Report addresses the IBA Guidelines' definition of third party funder and raises two issues with respect to the IBA Guidelines' language:

- the first issue is whether the wording extends to 'before the event' (BTE) legal expenses incurred by BTE insurance companies as some commentators have taken the view that they do not have a 'direct economic interest' in the outcome because they receive payment of a premium in advance

References:

***Sierra Fishing Company v Farran* [2015] EWHC 140 (Comm), [2015] All ER (D) 04 (Feb)**

References:

***W Limited v M SDN BHD* [2016] EWHC 422 (Comm)**

References:

ICCA-Queen Mary Task Force on Third-Party Funding

- the second issue is whether the wording extends to 'after the event' (ATE) insurance companies as some commentators have taken the view that there are 'doubt[s] that their policies could be said to be providing "material support"'. Although it's unclear whether a claimant-side insurance company might be covered by the IBA Guidelines' definition of third party funder, ATE insurance was intended to be included in the Report's definition of a third party funder, according to its commentary

Under the Report, there are four main principles for parties to follow when dealing with the disclosure of a third party funder (including an ATE insurer or liability insurer):

- a party and/or its representative should, on their own initiative, disclose the existence of a third party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into
- arbitrators and arbitral institutions have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third party funder and, if so, the identity of the funder
- for the purposes of disclosure, the term 'third party funder' refers to any natural or legal person who is not a party to the dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:
 - > a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
 - > b) such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute

In light of any disclosures made regarding the participation of any third party funder or insurer, arbitrators and arbitral institutions should assess whether any potential conflicts of interest exist between an arbitrator and a third party funder, and assess the need to make appropriate disclosures or take other appropriate actions that may be required under applicable laws, rules, or guidelines.

The Report makes clear that these principles were not intended to apply to maritime arbitration as funding by insurers is well-established and has long existed in maritime arbitration. According to the Report, as maritime arbitrations tend to involve a small, specialised pool of independent, full-time arbitrators and practitioners and well-regulated mutual funding by protection and indemnity and Defence Clubs, there is already substantial transparency as to how funding works and its impact on disclosure and conflicts. The report also excludes all

'BTE' insurance on the grounds, it says, that, with the exception of maritime arbitration, it is rarely involved in large commercial cases.

What guidance is available for assessing and dealing with potential counsel-arbitrator conflicts of interest in international arbitration?

On 25 May 2013, the IBA Guidelines on Party Representation in International Arbitration were adopted to regulate the behaviour of party representatives. They include a guideline relevant to a conflict of interest arising by reason of new counsel who has some relationship with an arbitrator being brought into a case before an independent tribunal. This addresses an issue which arose in *Hrvatska (Hrvatska Elektroprivreda dd v Republic of Slovenia, ICSID Tribunal Ruling 6 May 2008)* and *Rompetrol (The Rompetrol Group NV v Romania, ICSID Ruling 14 January 2010)* (see Practice Note: [Conflicts of interest in arbitration—challenges to arbitral appointments](#)). Guideline 5 states:

'Once the arbitral tribunal has been constituted, a person should not accept representation of a party in the arbitration when a relationship exists between the person and an arbitrator that would create a conflict of interest, unless none of the parties objects after proper disclosure.'

Guideline 6 provides for measures to safeguard the integrity of the proceedings, including exclusion of the new representative. There may be tension between the wording of Guideline 5, which arguably requires the existence of an actual conflict, and the IBA Guidelines on Conflicts which requires only a perceived conflict.

- It should be noted that the IBA report (referenced above) also examined the usage of the IBA Guidelines on Party Representation. According to the report:
- in arbitrations in which the Party Representation Guidelines were referenced, tribunals usually only consulted the guidelines and did not feel bound by them (para 202)
- no public cases making reference to the Party Representation Guidelines could be identified (paras 204, 215)
- in England and Wales, the respondents reported over 100 arbitrations in which issues of counsel conduct has arisen. Of these, only 22% referred to the guidelines (para 209)
- the Swiss Arbitration Association (Association Suisse de l'Arbitrage) Board has expressed serious reservations about the guidelines, recommending that tribunals not apply the remedies for misconduct in the absence of express consent by both parties (para 216)

Since publication of these guidelines, the International Centre for Dispute Resolution has left open the possibility of incorporating guidelines into its rules—see News Analysis: [The revised ICDR International Arbitration Rules—key changes](#). The LCIA has included ethical guidelines into the revised rules in force from 1 October 2014—see Practice Note: [LCIA \(2014\)—general guidelines for legal representatives](#). Rule 18.4 of the revised LCIA Rules 2014 provides that 'the Arbitration Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment)'.

References:

[IBA Guidelines on Party Representation in International Arbitration](#)

[Hrvatska Elektroprivreda v Republic of Slovenia, ICSID Case No ARB/05/24](#)

[Rompetrol Group v Romania, ICSID Case No ARB/06/3](#)

References:

[Report on the reception of the IBA Arbitration Soft Law Products](#)

Also of note in the revised rules is the arbitral tribunal's power to impose the sanctions set out in Article 18.6 on legal representatives for failing to adhere to the general guidelines, which include a prohibition on engaging in activities intended unfairly to obstruct the arbitration, such as repeated challenges to an arbitrator's appointment that are known to be unfounded (para 2).

Unless the parties have agreed to the inclusion of the IBA Guidelines on Conflicts or Party Representation (or any other guidelines) in the disputes clause of their commercial contract or have agreed to adopt them subsequently, the guidelines will not be legally binding. They are not universally accepted and do not cover (or purport to cover) every perceived conflict.

What institutional guidance is available for assessing and dealing with conflicts of interest in international arbitration?

Although arbitral institutions generally do not publish arbitral awards, there has been a movement towards greater openness in international arbitration.

Institutions, such as the LCIA, have begun to publish sanitised versions of challenge decisions (see News Analysis: [Analysing the LCIA arbitration challenge database](#)).

The LCIA Court has ruled on several challenges where a party alleged that a relationship between an arbitrator and one of the parties gave rise to justifiable doubts as to the arbitrator's impartiality.

In LCIA Reference No 101642, the Former Vice President of the LCIA Court rejected the Respondent's challenge to the LCIA-appointed Chair of the tribunal on the grounds that the Chair had been the party-appointed arbitrator of an affiliate of the Claimants in another ad hoc arbitration. The Chair opposed this challenge on several grounds, including the fact that parties in the ad hoc arbitration and LCIA arbitration were different, the parties settled after the 'Terms of Reference' were signed, and no hearings were held. Nevertheless, the Respondent argued that there were justifiable doubts as to the Chair's impartiality, citing orange list 3.1.5 of the IBA Guidelines in support of its position. The LCIA rejected the challenge, finding that the relationship between the parties and the issues in the previous ad hoc arbitration were 'at best, slight' and 'would not qualify as an example described in Guideline 3.1.5'.

Similarly, the LCIA also rejected a challenge to a Claimant's party-appointed arbitrator in LCIA Reference No 173566. Here, the Claimant's party-appointed arbitrator disclosed that they had acted as counsel for the Claimant over 17 years ago, had previously been instructed by the Claimant's counsel, and had known an individual who was employed by the Claimant's counsel for over 40 years. The co-arbitrator made two additional disclosures after the Respondent expressed concern with regard to the co-arbitrator's impartiality. The Respondent took the position that the disclosures were 'vague and inconsistent...and the three Disclosures lead to a logical and reasonable perception that the [Co-Arbitrator] is conflicted and thereby potentially biased'. The LCIA Court disagreed, finding that there were no inconsistencies with the co-arbitrator's disclosures. The disclosures evidenced that there was no

References:

LCIA Challenge Decision Database

present relationship with the Claimant and its legal representatives, and the co-arbitrator's lack of records from its representation of Claimant from over 15 years prior further suggested that there were no justifiable doubts as to their impartiality.

On the other hand, a challenge was upheld where the overseas office of an arbitrator's law firm was instructed by the Claimant in relation to a separate and unrelated dispute. In LCIA Reference No 111947, the Respondent challenged an arbitrator appointed by the LCIA Court on the grounds that there was a risk of apparent and/or actual conflict of interest. Although the Dubai office of the co-arbitrator assured that there would be no practical risk of confidential information being accessed by the co-arbitrator, the LCIA Court found that the circumstances gave rise to justifiable doubts as to the co-arbitrator's impartiality. The LCIA Court found that 'the commercial relationship between the law firm and arbitrator, on the one hand, and the Claimant [...], on the other, is thus ongoing, which reinforces the danger as to [the Co-arbitrator]'s independence or impartiality'.

These decisions suggest that the more attenuated an arbitrator's relationship is with a party, the less likely that a challenge based on an alleged conflict of interest will succeed.