

**AN EXAMINATION OF THE 2024 IBA
GUIDELINES ON CONFLICT OF INTEREST
IN INTERNATIONAL ARBITRATION:
RECOMMENDATIONS FOR
BETTER PRACTICE**



INTRODUCTION

Since its first edition in 2004, the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration have been the go-to guide for Arbitrators, Counsel, and Arbitral Institutions in identifying conflicts of interest and assessing the need for disclosure. In February 2024, The International Bar Association (the “IBA”) released the most recent version of the IBA Guidelines on Conflicts of Interest in International Arbitration (the “2024 IBA Guidelines”/ “the Guideline”)¹. The 2024 IBA 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. It is trite that, conflict of interest goes to the root of international arbitration practice as it can be a ground for the nullification of an arbitration proceeding, the disqualification of an Arbitrator, and the challenge of an arbitral award. For this reason, 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 thereby retaining arbitration as the suitable and reliable dispute resolution mechanism for users. This piece seeks to examine the provision of the guidelines and makes effective recommendations on best practices for identifying conflicts of interest as well as disclosing the same in international arbitration.

¹The 2024 IBA Guidelines apply to all International Arbitrations, Arbitral Tribunal Chairs, Sole Arbitrators, and Co-Arbitrators. However, the Guidelines do not override any applicable national law, arbitral rules, codes of conduct, or other binding instruments chosen by the parties to an Arbitration.

REVIEW OF THE 2024 IBA GUIDELINES

Just like the 2004 and the 2014 IBA Guidelines, the 2024 IBA Guidelines continue to be organized in two parts which consist of general standards that must always be considered by Arbitrators and Parties to international arbitration, and practical scenarios for the application of the general standards. The parts are discussed below:

PART I: General Standards Regarding Impartiality, Independence and Disclosure.

As a general principle, every Arbitrator is obligated to be impartial and independent of the Parties at the time of accepting an appointment to serve, and shall remain so during the entire course of the arbitration proceeding and until the final award has been rendered or the proceedings have otherwise been finally terminated. However, this obligation does not extend to the period during which the award may be challenged before any relevant Courts or bodies. However, if after setting aside the arbitral award or other proceedings in respect of the dispute, the dispute is referred to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interest will be necessary.

a. Determining Conflicts of Interest

Conflicts of interest are a crucial consideration in international arbitration proceedings. Where this is disregarded, it may nullify the entire arbitration proceedings and serve as a ground to challenge the arbitral award. In determining what constitutes conflicts of interest, the 2024 IBA Guidelines adopted the provisions of Article 12(2) of the UNCITRAL Model Law which provides an objective test (a reasonable third-person test), using an appearance test based on justifiable doubts as to the impartiality or independence of the Arbitrator. In deciding whether to decline an appointment or refuse to continue to act, the Arbitrator should bear in mind the objective standard to evaluate the relevant facts or circumstances. Under the 2024 IBA Guidelines, an Arbitrator shall decline an appointment or, if the arbitration has already been commenced, refuse to act as an Arbitrator, if the Arbitrator has any doubts as to his or her ability to be impartial or independent. This is also the case where in the

view of a reasonable third party having knowledge of facts and circumstances will give rise to justiciable doubts as to the Arbitrator's impartiality or independence unless there is a waiver by the parties after full disclosure by the Arbitrator. To wit, where facts and circumstances fall under the Non-waivable Red List², the Arbitrator must decline appointment or resign where the Arbitrator has already been appointed. However, where the facts or circumstances fall under the Waivable Red List³, or the Orange List⁴, the Arbitrator is mandated to make a disclosure for the Parties to exercise their discretion to waive the potential conflict and give their consent to the appointment of the Arbitrator.

b. Disclosure by the Arbitrator

An Arbitrator has a continuing duty, irrespective of the stage of the arbitration proceeding to disclose to the Parties, co-arbitrators (if any), and Arbitral Institutions or other appointing authority (if any, and if so, required by the applicable institutional rules) facts or circumstances which may in the eyes of the Parties, give rise to doubts as to the Arbitrator's impartiality or independence prior to accepting an appointment. This duty to disclose still stands even where there is an advance declaration or waiver by the parties in relation to possible conflicts. However, where an Arbitrator fails to exercise the duty of disclosure, it does not necessarily give rise to the arbitrator's impartiality or independence neither does it necessarily mean that a conflict of interest exists, or that a disqualification should ensue. On the flip side, the disclosure of facts or circumstances by an Arbitrator does not imply the existence of a conflict of interest. This is because the question of whether a conflict of interest exists by reason of the non-disclosure is subjected to an objective test and not the Arbitrator's failure to disclose.

The 2024 IBA Guidelines also recognize instances where an Arbitrator may be prevented by rules of professional conduct to disclose certain facts and circumstances. In this case, the Arbitrator is mandated to decline appointment or resign, if appointed. Although, under the 2024 IBA Guidelines, where the Arbitrator is in doubt as to whether to disclose or not, such doubt should be resolved in favour of the duty to disclose.

²The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be their own judge. Therefore, acceptance of such a situation cannot cure the conflict.

³The Waivable Red List covers situations that are serious yet not as severe. An acceptance upon disclosure will cure the conflict.

⁴The Orange list contains an inexhaustible list of situations that may give rise to doubts about the impartiality and independence of the arbitrator, although usually based on facts and not as serious as the Waivable Red List. An acceptance upon disclosure will cure the conflict.

c. Waiver by the Parties

Parties to an international arbitration proceeding will be deemed to have waived their right to raise an objection on any potential conflict of interest in respect of an Arbitrator if within 30 days after the receipt of full disclosure by the Arbitrator or within 30 days after a Party learns of facts or circumstances that could constitute a potential conflict of interest for the Arbitrator, no objection is raised. However, this does not include circumstances described under the Non-waivable Red List as it is not capable of being waived. By this, Parties are mandated to timely raise objections as to the impartiality or independence of an Arbitrator upon learning of relevant facts or circumstances, or upon disclosure by the Arbitrator. This also enhances the expeditious process of international arbitration proceedings

d. Duties of Parties and the Arbitrator

Parties are required to disclose at the earliest opportunity, any relationship with the Arbitrator, including persons over which a party has controlling influence. This duty of disclosure extends to identifying all counsel advising on as well as appearing in the arbitration inclusive of all members of that Party's counsel team from the commencement of the arbitration proceedings. An Arbitrator is equally under a duty to make reasonable inquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to the Arbitrator's impartiality or independence. It is envisaged that by so doing, the risk of unmeritorious challenge of an Arbitrator's impartiality or independence will be reduced hence, aiding an efficient arbitration proceeding.

PART II: Practical Application of the General Standards.

The Guidelines retained the "Traffic Light" symbolism which is used to designate specific situations that may give rise to justiciable doubts as to the Arbitrator's impartiality or independence. These situations that are likely to occur in today's arbitration practice are characterized by the Red List (Non-Waivable and Waivable), the Orange List, and the Green List.

a. The Non-Waivable Red List:

It is important to note that situations that fall under this category cannot be waived by an agreement of the Parties. Some of these scenarios include:

- i. The existence of an identity between a Party and the Arbitrator, or the Arbitrator is a legal representative in the arbitration or employee of a person or entity that is a party in the arbitration.
- ii. Where the 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 award to be rendered in the arbitration.
- iii. Where the Arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case.
- iv. Where the Arbitrator currently or regularly advises a party or an affiliate of a party, and the Arbitrator or the Arbitrator's firm or employer derives significant financial income therefrom.

It is necessary to mention that where an Arbitrator is faced with situations as listed in the Non-Waivable Red List, the Arbitrator shall decline the appointment or resign, in the event of an appointment.

b. The Waivable Red List:

The Waivable Red List covers situations that are serious yet not as severe. However, in situations like these, an Arbitrator is expected to exercise the duty of disclosing relevant facts or circumstances that may give rise to justiciable doubts as to the Arbitrator's impartiality or independence. It is considered waivable because, upon disclosure, the Parties may give their consent to the appointment of the Arbitrator. Some of these situations have been categorized under certain general headers and they are:

- i. **Relationship of the Arbitrator to the dispute:** An example is where the Arbitrator had prior involvement in the dispute.

- i. **Arbitrator's direct or indirect interest in the dispute:** An example is where the Arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.
- ii. **Arbitrator's relationship with the parties or counsel:** An example is where the Arbitrator is a lawyer in the same law firm as one of the Counsel to the Parties.

c. The Orange List:

The Orange List contains an inexhaustible list of situations that may give rise to doubts about the impartiality and independence of the Arbitrator, depending on the facts of the case. However, when faced with situations under the Orange List, the Arbitrator must exercise the duty of disclosure. These situations have been categorized under general headers to include:

- i. Services for one of the parties or other involvement in the case: An example is where the Arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.
- ii. Relationship between an Arbitrator and another arbitrator or counsel: An example is where enmity exists between an Arbitrator and counsel appearing in the arbitration.
- iii. Relationship between Arbitrator and party and/or others involved in the arbitration: An example is where the Arbitrator's law firm is currently acting adversely to one of the parties or an affiliate of one of the parties.
- iv. Other Circumstances which may include a situation where the Arbitrator is a manager, director, or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

d. The Green List:

The Green List contains a list of non-exhaustive specific scenarios where no appearance and no actual conflict of interest can exist either under the subjective or the objective standard. Thus, the Arbitrator has no duty to disclose situations falling within the Green List. These situations have been categorized under general headers to include:

- i. **Previously expressed legal opinions:** An example is where the Arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).
- ii. **Current services for one of the parties:** An example is where a firm, in association or in alliance with the arbitrator's law firm or employer, but that does not share significant fees or other revenues with the arbitrator's law firm or employer, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.
- iii. **Contacts with another Arbitrator, or with counsel for one of the parties:** An example is where the Arbitrator and Counsel for one of the parties have previously served together as arbitrators.
- iv. **Contacts between the Arbitrator and one of the parties:** An example is where the Arbitrator holds an insignificant number of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.
- v. **Contacts between the Arbitrator and one of the experts:** An example is when the Arbitrator, when acting as Arbitrator in another matter, heard testimony from an expert appearing in the current proceedings.

RECOMMENDATIONS FOR BETTER PRACTICE

The IBA Guidelines on Conflict of Interest in International Arbitration have been revised in 2024 to consider the most recent advancements in international commercial arbitration as well as contemporary trends in arbitral practice. Unarguably, the Guidelines offer valuable direction on addressing conflict of interest concerns, considering that conflicts could be situational or subjective. Therefore, Parties and Arbitrators to arbitration proceedings are advised to take note of the following obligations:

1. Inform an Arbitrator, the Arbitral Tribunal, or the Arbitration Institution of any relationship, direct or indirect that may give rise to justiciable doubt of the Arbitrator's impartiality or independence.
2. Investigate and make reasonable effort to ascertain and disclose any relevant information that is made available to them that might affect the Arbitrator's impartiality or independence.
3. Disclose the identity of Counsel advising on or appearing in the Arbitration and all members of that Party's Counsel Team from the outset of the proceedings.
4. Make reasonable inquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to the Arbitrator's impartiality or independence and disclose the same to the Parties as failure to disclose a conflict is not excused by lack of knowledge if the Arbitrator does not perform such reasonable inquiries.

CONCLUSION

The 2024 IBA Guidelines on Conflict of Interest in International Arbitration has been widely accepted as a global soft law that reflects international best practices to help Parties, Counsel, Arbitrators, Arbitration institutions, and the Courts to address significant conflict issues and safeguard the independence and impartiality of arbitrators. The subtle changes introduced by the 2024 IBA Guidelines reflect the IBA's effort to constantly provide Arbitrators and Arbitration Practitioners additional guidance when dealing with matters like disclosure requirements and Arbitrator disqualification. These changes will be crucial in the future for Parties, Arbitrators, Counsel, and Arbitration Institutions in ensuring that their obligations are effectively performed in dispelling issues of conflicts of interest in international arbitration.

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