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2014 IBA Guidelines On Conflicts of Interest In International Arbitration

BY JAMES H. CARTER
AND JOHN V.H. PIERCE

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Arbitrators and potential arbitrators involved in international commercial and investment arbitration cases may face complex issues involving conflicts of interest. What sorts of past or present involvement with a party, or with one of its subsidiaries or a joint venture in which it participates, or with the law firms that are counsel in the arbitration, must be disclosed? How far back in time should one go in searching for potential conflicts? What basis does a party need to object to a disclosed connection? Are the parties free to waive any conflicts that exist, or are there some conflicts that are "non-waivable"? Are some types of relationships so routine that they need not be disclosed at all? Do the answers vary depending on the country where the arbitration will be held? Laws and arbitration rules speak in generalities, and would-be arbitrators search for more specific guidance.

In the United States, arbitrators look first to the American Arbitration Association-American Bar Association Code of Ethics for Arbitrators in Commercial Disputes,[1] first promulgated jointly by those two organizations in 1977 and later amended in 2003. It offers advice in the form of a statement of general ethical principles (called "canons"), each accompanied by a number of elaborations of its application to some issues that typically arise in relation to the subject of the canon, such as disclosure. U.S. courts regularly cite the Code as useful in ruling on challenges to arbitral awards in which arbitrator disclosure or conduct is questioned.

In 2004, the International Bar Association published its IBA Guidelines on Conflicts of Interest in International Arbitration,[2] which are intended for and are used by arbitrators and counsel around the world. Like the AAA/ABA Code, the IBA Guidelines contain a short list of "general principles" followed by a series of explanatory notes for each. But the Guidelines also include a separate series of lists of specific examples of disclosure scenarios, divided into a Red List, an Orange List and a Green List.

The IBA Red List contains examples of conflicts considered so severe that they normally would preclude service as an arbitrator. But the Red List is subdivided into non-waivable and waivable sections, the latter identifying some conflicts that parties to the arbitration can waive. For example, according to the 2004 Guidelines, current representation by an arbitrator of one of the parties or its affiliate is a waivable conflict, unless the representation is "*regular*" and "the

JAMES H. CARTER *is senior counsel and* JOHN V.H. PIERCE *is a partner at Wilmer Cutler Pickering Hale and Dorr in New York.*

arbitrator or his or her firm derives a *significant* financial income therefrom."[3]

At the other extreme, the IBA Green List sets out examples of conflicts considered so minor that they normally need not even be disclosed, such as ownership by the arbitrator of an "insignificant" number of shares in a publicly listed company that is a party to the arbitration.[4]

In between are examples on the IBA Orange List, which describe situations that require disclosure and involve conflicts that parties are free to waive but that might or might not preclude an arbitrator from serving if either party objects. The Guidelines stress that any Orange List conflict, in particular, must be evaluated in the context of the particular circumstances involved.

The IBA Guidelines serve multiple audiences. Their most valuable role is to help potential arbitrators evaluate the conflicts they might face and consider what disclosures, if any, they should make in deciding to undertake an arbitral assignment. In addition, the Guidelines help counsel and the parties they represent consider when a challenge might be made based on a disclosure. The Guidelines also are available to help arbitral institutions rule on challenges to arbitrators and to assist courts facing arbitrator disclosure questions when asked to enforce or set aside awards.

The 2004 Guidelines have been referred to regularly by U.S. and other international arbitrators, and many consider them helpful. Arbitration institutions say that they have been useful to them to some extent, as well. But institutions have not incorporated the Guidelines wholesale into their rules and procedures, and courts have referred to them only occasionally in their opinions. The Guidelines consist of many Orange List examples and "it depends on the circumstances" qualifications, and some have suggested that the Guidelines could be improved if they were made more concrete or at least addressed additional examples of conflicts not expressly covered. Some critics argue that the Guidelines are fundamentally flawed because they lack clarity, which contributes to uncertainty about disclosure issues, and that they adopt stricter standards of independence and impartiality than some national laws and institutional rules and may contribute to increased challenges to arbitrators.[5]

The IBA Guidelines also have been criticized because they seek a balance between what appears to be a "reasonable" degree of disclosure of "significant" arbitrator conflicts on the one hand and, on the other, what the Guidelines call "unnecessary" or "excessive" disclosure that could lead to "frivolous" challenges to arbitrators. For example, the Guidelines suggest a three-year time limit for certain types of disclosures, such as the Orange List example of a disclosure that an arbitrator was *within the past three years* a partner or lawyer in the same firm with one of the lawyers appearing in the case or with another arbitrator serving in the matter.[6] Some U.S. lawyers, noting that the AAA/ABA Code and U.S. case law do not contain such time limitations on disclosures and that U.S. arbitrators generally would not restrict such a disclosure to events or relationships during the last three years, have suggested that the Guidelines set the bar too low and would relieve arbitrators of the duty to be more completely forthcoming about conflicts occurring more than three years ago.

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But others have complained that the 2004 Guidelines strike the balance wrong in the opposite way, by failing to consider properly the situation of one category of prospective arbitrators: lawyers affiliated with large, global law firms.[7] These critics say that the Guidelines make too little allowance for the complexity of potential conflicts and disclosure requirements presented by a firm with thousands of lawyers and an even larger number of clients. The Guidelines identify any lawyer employed by or affiliated with a law firm as in principle "identical to his or her law firm" for conflicts purposes and make no provision for the ethical walls routinely used by large firms to exclude particular attorneys from knowledge of specified matters. The Guidelines do state, however, that "the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure."[8]

The 2004 Guidelines also view with disfavor, and seek to prohibit, the use of advance waivers in which parties acknowledge that, after appointment, the arbitrator is not obligated to make ongoing conflicts checks and additional disclosures about new matters affecting his or her law firm and one of the parties, so long as the arbitrator is not personally involved with them.[9] In the United States, party autonomy is given wide scope. Informed advance waivers of conflicts for arbitrators have been expressly approved by some institutional rules and noted by the courts without surprise.[10] Some believe that such waivers are, as a practical matter, necessary in matters involving members of large law firms who serve as arbitrators in international commercial matters. Conflicts checks are snapshots at a particular moment in time, and it may be unrealistic to expect that a lawyer/arbitrator will be able to conduct daily conflicts updates to review and describe new matters not personally involving him or her and that in fact pose no threat to neutrality.

In October 2014, after a decade of experience with the initial version of the Guidelines, including a two-year consultation and evaluation process with international users, the IBA issued the first revision of these disclosure standards. The 2014 IBA Guidelines[11] retain the framework and much of the text of their 2004 predecessors and add some examples to address new situations. But they do not attempt a radical transformation to address complaints that they should be more prescriptive or should alter the balance of what is considered reasonable disclosure.

Nor do the new Guidelines sharply change the balances struck by the IBA in the former version of the Guidelines (1) prescribing what is reasonable disclosure, (2) defining the role of the large law firm lawyer, and (3) dealing with advance waivers of conflicts.

On the first subject, reasonable disclosure, the 2014 Guidelines retain the basic rules that arbitrators should disclose information that "may, in the eyes of the parties," give rise to doubts as to the arbi-

trator's impartiality or independence, even though the arbitrator believes that the information in fact should not do so (the so called "subjective" standard).[12] But the Guidelines make clear that an arbitrator should be disqualified only if the information actually would give rise to a justifiable doubt about his or her neutrality "from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances" (the "objective" standard) and if there has been no express waiver of the conflict in question.[13]

Some changes have been made to the examples of disclosure issues on the three lists, but none is significant. The 2014 Guidelines do address some new disclosure topics, including the use by prospective arbitrators of social media. They add to the Green List, ordinarily requiring no disclosure, the fact that an arbitrator "has a relationship with one of the parties or its affiliates through a social media network."[14]

The 2014 Guidelines also continue to identify all lawyers "in principle" with "their" law firms, while continuing to add that "the relationship of the arbitrator with the law firm should be considered in each individual case."[15] The only notable addition to the conflicts category of "relationships," General Standard 6, states that a party may be defined for disclosure purposes to include "any legal or physical person having a controlling influence" on the party or "a direct economic interest in, or a duty to indemnify a party for the award."[16] These are references to third-party funders and insurers.

The new Guidelines clarify, but in most respects do not really change, the IBA position on advance waivers. Most significantly, new General Standard 3(b) provides more clearly that advance declarations or waivers of possible conflicts relating to circumstances that may arise in the future do not "discharge the arbitrator's ongoing duty of disclosure." But the Guidelines duck any further suggestions about advance waivers. Explanation 3(b) candidly acknowledges that the Guidelines "do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law."

The 2014 Guidelines do make a change, however, with respect to waivers of objections to what in the U.S. has been known as the "non-neutral" party-appointed arbitrator. The AAA/ABA Code expresses the preference that all arbitrators, including those appointed directly by one party, be neutral, as is the practice internationally; but the Code allows for party agreement to the contrary, which occurs in some domestic U.S. arbitrations. If all parties waive objections to full neutrality, so that the playing field is level, they may choose what the Code calls "Canon X arbitrators" having a different set of obligations with respect to the parties who appointed them.

The older IBA Guidelines allowed for the existence of such arrangements, as well, by providing that the Guidelines did not apply at all to "non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws."[17] The 2014 Guidelines delete this language from General Standard 5 and state instead that they apply "equally to tribunal chairs, sole arbitrators and co-arbitrators howsoever appointed." The new Guidelines continue to permit informed waivers of "serious" conflicts of interest, namely those on the Waivable Red List, in recognition of the interests of party autonomy.[18] But arbitrators who are the beneficiaries of such waivers remain bound by the obligations of impartiality in behavior and exercise of judgment found elsewhere in the Guidelines.

The Guidelines are not limited entirely to guidance for arbitrators, and the 2014 edition now clarifies that parties and their counsel, as well as arbitrators, have disclosure obligations. As one example, General Standard 7(b) requires that a party inform the arbitral tribunal at the outset of a case of the identity of its counsel appearing in the arbitration and thereafter of "any change in its counsel team." The much debated question of how such a change in counsel might be dealt with if it presents a potential conflict with one of the sitting arbitrators is left to be resolved elsewhere.

The 2014 Guidelines, like the older version, require that parties advise arbitrators of any relationships involving the arbitrator that might be considered in connection with possible conflicts; and they also specify that to do so the parties are "required to investigate *any relevant information that is reasonably available to them*."[19] This expands the party disclosure obligation from the prior duty to search only information that is "publicly available."

In summary, the 2014 IBA Guidelines do not attempt to fix something that its authors believe was not broken. Although, like the 2004 version, they will surely be the subject of criticism, the 2014 Guidelines continue to serve an important function for which the 2004 version originally was intended: to give prospective arbitrators food for thought in considering their ethical and legal disclosure obligations, without attempting to prescribe how most conflict questions should be resolved. Other audiences, such as arbitral institutions and courts that are the decision makers for conflicts challenges, may find it helpful to consider the Guidelines, as well; but a document intended for global use in raising and classifying issues for consideration should not be expected to provide all the answers.

1. Available at www.adr.org (last visited Oct. 6, 2014).
2. Available at www.ibanet.org (last visited Oct. 6, 2014).
3. Examples 1.4 and 2.3.1.
4. Example 4.5.2.
5. E.g., Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION §12.05[J] (2d ed. 2014).
6. Example 3.3.3.
7. E.g., Born at §12.05[K], 1893-1895.
8. General Standard 6(a) and Explanation 6(a).
9. General Standards 2(d) and 4(b).
10. E.g., *Cook Industries v. C. Itoh & Co. (America)*, 449 F.2d 106 (2d Cir. 1971).
11. To be available at www.ibanet.org.
12. General Standard 3(a).
13. General Standards 2(b) and 4.
14. New Example 4.5.4.
15. General Standard 6(a).
16. General Standard 6(b).
17. Old General Standard 5.
18. Explanation 4(c).
19. General Standard 7(a) and Explanation 7(c).