

International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration

March 8, 2024

Last week, the International Bar Association (“IBA”) published its highly anticipated revisions to the 2014 Guidelines on Conflicts of Interest in International Arbitration (the “2014 IBA Guidelines”),¹ which provide a global framework and general set of standards to guide arbitrators, counsel, and institutions in identifying conflicts of interest and assessing the need for disclosure, among other things.

The revised IBA Guidelines (the “2024 IBA Guidelines”)² – while presenting relatively modest changes – provide important clarification on the standards applicable to highly-contested and nationally-divergent expectations relating to issues such as arbitrator disqualification, and have been modernized to address recent topics like third party funding.³

A summary of the 2024 IBA Guidelines is below.

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¹ IBA Guidelines on Conflicts of Interest in International Arbitration (2014), <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafce8918> (“2014 IBA Guidelines”).

² IBA Guidelines on Conflicts of Interest in International Arbitration (2024), <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> (“2024 IBA Guidelines”).

³ Cleary Gottlieb Alert Memorandum, *Five International Arbitration Trends and Topics for 2024* (Jan. 4, 2024), <https://www.clearygottlieb.com/-/media/files/alert-memos-2024/cleary-gottlieb-five-international-arbitration-trends-and-topics-for-2024.pdf>.



The 2024 IBA Guidelines represent the second set of changes to the IBA Guidelines that were originally published in 2004, and are the result of a survey among arbitration practitioners that suggested changes should be made the following areas of “(i) arbitrator disclosures; (ii) third-party funding; (iii) issue conflicts; (iv) organisational models for legal professionals in different jurisdictions (e.g., barristers’ chambers, vereins, etc.); (v) expert witnesses; (vi) sovereigns or their agencies and instrumentalities; (vii) non-lawyer arbitrators; and (viii) social media,” as well as public comment.⁴ The 2024 IBA Guidelines made revisions to the following sections, among others:

1. General Standard 2 (Conflicts of Interest)

The issue of when an arbitrator should decline an appointment or may otherwise be disqualified for lack of impartiality or independence continues to be addressed through General Standard 2 on “Conflicts of Interest.”

The 2024 IBA Guidelines confirm the view expressed in earlier versions of the IBA Guidelines that an objective test should be applied when assessing whether an arbitrator should be disqualified. Specifically, as with the 2014 IBA Guidelines, the 2024 IBA Guidelines explain that arbitrators should apply a “reasonable third

person” test that assesses whether a “reasonable third person having knowledge of the relevant facts and circumstances”⁵ would view the potential conflict as giving “rise to justifiable doubts as to the arbitrator’s impartiality or independence.”⁶

The 2024 IBA Guidelines were revised to clarify the concept of “justifiable doubt” as applied in this objective test. Amendments made to the Explanation to General Standard 2 state that when a justifiable doubt in connection with a fact or circumstance enumerated in the Non-Waivable Red List (as further described below) exists, the arbitrator “should decline the appointment or refuse to continue to act,” whether at the outset of an arbitration or during the course of proceedings. The 2024 IBA Guidelines clarify, however, that if a justifiable doubt arises with respect to a fact or circumstance described in the Waivable Red List, then the arbitrator should make a disclosure under General Standard 3 (as further described below) in order to give the parties an opportunity to waive the potential conflict.⁷

2. General Standard 3 (Disclosure)

Arbitrator disclosure has been a frequently-discussed topic in the international arbitration community.⁸ Recent debate includes the question of whether disclosure should be determined on the basis of an objective or subjective test,⁹ and

⁴ 2024 IBA Guidelines, Foreword at 2. For a comparison of the 2014 IBA Guidelines and the 2024 IBA Guidelines, see <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-comparison-2014-2024>.

⁵ 2024 IBA Guidelines, Explanation to General Standard 2(b).

⁶ *Id.*

⁷ See 2024 IBA Guidelines, Explanation to General Standard 2(c).

⁸ See Cleary Gottlieb Alert Memorandum, *Five International Arbitration Trends and Topics for 2024*, Cleary Gottlieb (Jan. 4, 2024),

<https://www.clearygottlieb.com/-/media/files/alert-memos-2024/cleary-gottlieb-five-international-arbitration-trends-and-topics-for-2024.pdf> at 5-6.

⁹ See Umang Bhat Nair, *The IBA Guidelines on Conflicts of Interest: Time for a Relook?*, Kluwer Arbitration Blog (Mar. 29, 2023),

<https://arbitrationblog.kluwerarbitration.com/2023/03/29/the-iba-guidelines-on-conflicts-of-interest-time-for-a-relook/>;

Joe Rich, *U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb*, Kluwer Arbitration Blog (Dec. 1, 2020),

<https://arbitrationblog.kluwerarbitration.com/2020/12/01/u->

certain revisions incorporated into General Standard 3, titled “Disclosure by the Arbitrator,” of the 2024 IBA Guidelines, offer clarity on this issue.

The 2024 IBA Guidelines confirm that an arbitrator’s duty to disclose is governed by a subjective test, which considers whether, “in the eyes of the parties,” the facts or circumstances “give rise to doubts as to the arbitrator’s impartiality or independence.”¹⁰ The 2024 IBA Guidelines were amended to explain that an arbitrator’s determination of whether certain facts or circumstances should be disclosed are “[s]ubject to the arbitrator’s duty to investigate under General Standard 7(d),” and that the “arbitrator should take into account all facts and circumstances known to the arbitrator.”¹¹ Moreover, notwithstanding the subjective test governing an arbitrator’s disclosure responsibilities, the 2024 IBA Guidelines states that for certain “situations, like those set out in the Green List, that could not give rise to doubts in the eyes of the parties because no appearance of or actual conflict of interests exists from an objective point of view under General Standard 2,” then such situations do not need to be disclosed.¹² The 2024 IBA Guidelines similarly confirm that “a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.”¹³

Although some scholars have argued that arbitrator disclosures should also be decided under

a “justifiable doubt” threshold or the comparable “reasonable suspicion” formula, which requires an objective approach, in order to avoid imposing over broad disclosure obligations on arbitrators,¹⁴ the 2024 IBA Guidelines did not introduce such a threshold into General Standard 3, instead opting to retain language very similar to that in the 2014 Guidelines.

3. General Standard 4 (Waiver)

General Standard 4 governing “Waiver by the Parties” was amended to include a presumption of knowledge concerning any facts or circumstances a party could have discovered through a “reasonable enquiry.”¹⁵ As a result, the 2024 IBA Guidelines put an impetus on parties to conduct an investigation into, and to inform themselves of, potential conflicts of interest of the potential or currently-serving arbitrators.

4. General Standard 6 (Relationships)

General Standard 6 entitled “Relationships” was subject to various clarifications, including to make a more general reference to the arbitrator’s employer (instead of, exclusively, a law firm) and, more significantly, to establish a standard of “controlling influence” for the purposes of assessing the arbitrator’s distinctiveness from other legal entities or individuals.

The explanation to General Standard 6 clarifies that, by referencing organizations other than law firms, the General Standard purports to reflect the evolution in the organization of international legal practice. The explanation also provides criteria for assessing the affiliation of an arbitrator with a

[k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/](https://www.clearygottlieb.com/k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/).

¹⁰ 2024 IBA Guidelines, Introduction ¶ 2 and General Standard 3(a).

¹¹ 2024 IBA Guidelines, General Standard 3(a).

¹² 2024 IBA Guidelines, Explanation to General Standard 3(c).

¹³ 2024 IBA Guidelines, General Standard 3(g).

¹⁴ Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 3d ed. 2021), Ch. 12 § N[3, 5].

¹⁵ 2024 Guidelines, General Standard 4(a).

law firm, affirming that “structures through which different law firms cooperate and/or share profits may provide a basis for deeming an arbitrator to bear the identity of such other firms.”¹⁶

While third party funders and insurers were previously mentioned in the explanation to General Standard 6 of the 2014 IBA Guidelines, the 2024 IBA Guidelines were amended to establish that third party funders and insurers may be considered to have the same identity of a party for the purposes of assessing the arbitrator’s independence when the third party funder or insurer exercises a “controlling influence” over the party or has influence over the conduct of proceedings – including the selection of arbitrators.

The “controlling influence” test, according to the explanation to General Standard 6, also applies to the relationship between parent companies and subsidiaries, natural persons and closely held companies, and States and their respective public organizations.

With respect to States, while expressly safeguarding the need for a case-by-case assessment, the explanation favors the disclosure by arbitrators of any “relationships with entities such as regional or local authorities, autonomous agencies, or State-owned entities, irrespective of whether they are part of the organization of the State or have a private status, and vice-versa.”¹⁷

5. General Standard 7 (Duty of the Parties and Arbitrators)

General Standard 7 on the “Duty of the Parties and the Arbitrators” was amended to expressly expand the parties’ obligation to inform the arbitrators, the other parties, and the arbitration

institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and other parties that may be directly or indirectly involved or otherwise interest in the dispute.

The adjustment includes an express reference to the parties’ obligation to inform about (i) entities “having a controlling influence on the party in the arbitration”,¹⁸ (ii) “a person or entity over which a party has a major controlling influence,”¹⁹ and (iii) “any other person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3.”²⁰ According to the explanation to General Standard 7, the information provided should be accompanied by explanations regarding the persons’ and entities’ relationship to the dispute.

The explanation to General Standard 7 also adds an obligation to disclose the identity of counsel advising but not appearing in the arbitration.

6. Part II (“Traffic Light” System)

Part II of the 2024 IBA Guidelines contains the Practical Guide, which lists issues that may be taken into consideration by parties and arbitrators facing a potential conflict of interest, dividing them into three categories: the Green List, the Orange List, and the Red List (the so-called “Traffic Light” system).

With respect to the Practical Guide’s Traffic Light system, the Red List (both Waivable and Non-Waivable iterations) was not subject to substantive changes. The Green List similarly remains largely unchanged, but was updated to include a reference to an arbitrator hearing expert testimony in a different matter by the same expert in the current

¹⁶ 2024 Guidelines, Explanation to General Standard 6(a).

¹⁷ 2024 Guidelines, Explanation to General Standard 6(c).

¹⁸ 2024 Guidelines, General Standard 7(a)(i).

¹⁹ 2024 Guidelines, General Standard 7(a)(i).

²⁰ 2024 Guidelines, General Standard 7(a)(i).

proceeding. The Orange List was subject to the most changes, including the following modifications:

- Section 3.1.6. added the appointment of an arbitrator as a current or former expert for a party or affiliate in unrelated matters within the past three years.
- Section 3.2.9 added the appointment of an arbitrator as an expert on more than three occasions by the same counsel or the same law firm within the past three years.
- Section 3.2.10 added the arbitrator’s assistance in mock-trial or hearing preparations on more than three occasions by the same counsel or the same law firm within the past three years.
- Sections 3.2.12 and 3.2.13 added the serving together of arbitrator and counsel, and arbitrator and fellow arbitrators, respectively, in a different proceeding.
- Section 3.3.6 added experts appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel.
- Section 3.4.2 added the situation in which an arbitrator publicly advocates a position through a post on social media or online professional networking platforms.
- Section 3.4.3 was modified to limit the circumstances that may give rise to a potential conflict when the arbitrator holds a position with the administering institution or appointing authority. The 2024 IBA Guidelines clarify that, for the situation to fall under the Orange List, the arbitrator shall hold an executive or other decision-making position and shall have, in that role, participated in decisions with respect to the arbitration. As a result, arbitrators holding a

non-executive position with the administering institution or appointing authority or who have not participated in decisions with respect to the arbitration are not covered by this section.

Conclusion

While the 2024 IBA Guidelines present relatively modest changes when compared against the 2014 IBA Guidelines, the revisions reflect an effort to provide additional direction to arbitrators and arbitration practitioners in contending with issues such as arbitrator disqualification and disclosure obligations, and will provide important direction for arbitrators, counsel, and institutions in the future.

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