

Arbitrators' Repeat Appointments and Conflicts of Interest

The IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") are widely recognised as the definitive guide to conflicts and set out general principles and guidance to assist parties and arbitrators in assessing and dealing with potential conflicts of interest.

The IBA Guidelines have lists of examples of "justifiable doubts as to the arbitrator's impartiality and independence" (so-called "Red List" items); matters that "in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality and independence" (so-called "Orange List" items) and "situations where no appearance of, and no actual, conflict of interest exists" (so-called "Green List" items). The Red List items are divided into waivable and non-waivable items. For the former (and for the Orange List items), there must be full disclosure by the proposed arbitrator. For the Red list items, the parties must expressly state their willingness to have the person as arbitrator, for the Orange List lack of objection after the disclosure is a deemed acceptance. Because certain Red List items are non-waivable, there is no disclosure obligation and, similarly, there is no disclosure obligation for Green list items as they are matters not considered to be a conflict.

The lists are non-exhaustive and support statements of principle none of which might be considered controversial. The IBA Guidelines principles start with impartiality and independence (Principle 1) and move to not accepting or refusing to continue if there are doubts as to the ability to be impartial and independent (Principle 2); disclosure if he/she considers himself/herself impartial and independent but recognises that another view might reasonably be held (Principle 3); the ability of the parties to waive apparent conflict (Principle 4); not applying to non-neutral arbitrators as some rules permit (Principle 5); extend to other relationships indirect relationships an arbitrator may have (Principle 6) and the duty on the parties and the arbitrator to make reasonable enquiries (Principle 7).

Paragraph 3.1.3 of the Orange List addresses the following situation:

"The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties."

In *Tidewater Inc and others v Venezuela* (ICSID Case No ARB/10/5) (23 December 2011) the respondent appointed Professor Stern as an arbitrator. She filed an arbitrator's declaration on the ICSID standard form as prescribed by the ICSID Arbitration Rules but with part of the declaration deleted.

The claimants requested that Professor Stern provide a complete declaration. As a result, the Professor filed a declaration without deletions together with a note disclosing three other ICSID cases in which she had been appointed arbitrator by Venezuela. In one of the cases she had been appointed more than three years ago. The claimants filed a proposal to disqualify Professor Stern, contending that:

- 1 Multiple appointments by the same party and by the same counsel gave rise to objective and justifiable doubts regarding her independence and impartiality. Those doubts were compounded by the arbitrator's failure to disclose them in her initial declaration.
- 2 The IBA Guidelines should be applied as persuasive authority not only in commercial arbitrations but also in investment arbitrations.
- 3 The fact that earlier appointments were in the public domain was irrelevant and, in any event, the ICSID website listed the names of arbitrators in the tribunal but did not provide information about which party had appointed them.
- 4 The three-year time limit concerning previous appointments prescribed in paragraph 3.1.3 of the Orange List of the IBA Guidelines should be interpreted flexibly.
- 5 Multiple appointments, as addressed in the Orange List, gave at least a potential for undue influence or appearance of such influence.
- 6 In one of the disclosed cases an identical issue was at the core of the dispute. This meant the arbitrator, deciding in the other case, would be prejudging this issue in the present case.

Professor Stern explained her view that the obligation of disclosure concerned only facts that were unknown to the parties.

The other two arbitrators considered^[1] and dismissed the claimants' proposal to disqualify Professor Stern. They decided that:

- A The standard for disqualification of an arbitrator for lack of independence and impartiality, prescribed in Articles 14^[2] and 57^[3] of the ICSID Convention, required the applicant to show that it was obvious and highly probable, not just possible, that the arbitrator could not be relied upon to exercise independent and impartial judgement.
- B Non-disclosure would not in itself indicate manifest lack of impartiality unless the circumstances of non-disclosure called into question the arbitrator's ability to exercise independent and impartial judgement.
- C The IBA Guidelines could be, and were, applied in investment treaty arbitrations for their indicative value. However, the circumstances falling within the Orange List of the IBA Guidelines did not of themselves indicate an objective conflict of interest, and no presumption regarding disqualification was attached to them.
- D The time limits indicated in the IBA Guidelines should not be interpreted too strictly. For example, an appointment accepted shortly after the three-year time limit, leading to the constitution of the tribunal within the three-year period in a pending case, should be included in the number of subsequent multiple appointments.
- E As a rule, arbitrators should disclose appointments by the same party that occurred within the previous three years, including appointments which were publicly available. They should not rely on parties making their own enquiries, as the arbitrators were in the best position to provide information about their own past appointments. However, in deciding requests for disqualifications, it was necessary to take into account the transparency of ICSID arbitration and the fact that information about appointments was publicly available on the ICSID website and in the ICSID Register of Requests for Arbitration.
- F Non-disclosure of previous appointments was not sufficient to disqualify an arbitrator when the non-disclosure was based on an honest exercise of

judgement; particularly where immediate disclosure of supplementary explanation was given on the request of one of the parties.

- G Multiple appointments as an arbitrator by one party in unrelated disputes were neutral, as an arbitrator exercised independent judgement in each case: multiple appointments could be the consequence of the arbitrator's independence as well as an indication of justified doubts about it.
- H To prove lack of impartiality or independence in the case of multiple appointments, the applicant would have to show that the prospect of continued and regular appointments might have created a relationship of influence on arbitrator's judgment or that the arbitrator would have been influenced by factors outside the case record by virtue of her knowledge derived from other cases. The claimants had failed to show such circumstances in this case.
- J Where the factual situations raised in two arbitrations interrelated, there could be a risk of an arbitrator appointed in both arbitrations benefiting from knowledge of the facts not available in one of the cases, and a risk of pre-judging liability. However, in the present case, the overlap was between the issues of law, not facts.

There is no doubt that, in some jurisdictions, the test of partiality is different in courts and in arbitration. In the U.S., judges can be disqualified "in any proceeding in which his impartiality might reasonably be questioned"^[4] whereas in an arbitration, an arbitrator can only be disqualified in cases in which a reasonable person, considering all of the circumstances, "would have to conclude" that the arbitrator was partial to one side.^[5] In reaching that conclusion of arbitrator bias, the court found that "the standard of 'appearance of bias' . . . too low" and "'proof of actual bias' too high."

Conversely, in England the same test is applied to judges as it is to "justices or members of other inferior tribunals, or with jurors or with arbitrators."^[6] The test applied is, having regard to all relevant circumstances, that "there was a real danger of bias on the part of the relevant member of the tribunal . . . in the sense that he might unfairly regard . . . with favour, or disfavour, the case of a party to the issue under consideration by him . . ."^[7] Similarly, in *Porter v. Magill*, the test was framed as "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."^[8]

Indeed in *AT&T v. Saudi Cable Company*,^[9] the court said “it would be surprising if a lower threshold applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose ‘judges’ are selected by the parties. After all, there is an over-riding public interest in the integrity of the administration of justice in the courts.” In Australia and South Africa, as well as in the European Court of Justice, the “reasonable suspicion” or “reasonable apprehension” test is applied.

Disclosure is of potentially vital importance. As was said in the U.S. case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*:^[10]

[A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.” However, “arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. If therefore follows that where an arbitrator has reason to believe that a nontrivial conflict might exist, he must (1) investigate the conflict (that may reveal information that must be disclosed under *Commonwealth Holdings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.^[11]

If an arbitrator accepts an appointment and subsequently becomes impartial or is no longer independent, plainly he must resign his appointment. If an arbitrator resigns without good reason—which generally is not permitted, although the parties may accept the inevitable rather than try to compel the arbitrator to serve—he may disentitle himself to any fee and incur a liability to the parties.^[12]

The decision of the arbitrators in *Tidewater* confirms that, in case of multiple appointments by the same party, the three-year period prescribed in the IBA Guidelines should be interpreted flexibly which must surely be correct – conflicts cannot be judged on whether the appointment was on a Tuesday or a Wednesday.

The ‘obvious and highly probable’ test of not being capable of being relied upon to exercise independent and impartial judgement is, I suggest, too high. It sets the bar much closer to the U.S. test of ‘would have to conclude’ than the English test of ‘real possibility’ and the ‘reasonable suspicion’ or ‘reasonable apprehension’ tests. The evidential burden seems near impossible to surmount: for an applicant to show that the that

appointments might have created a relationship of influence on an arbitrator's judgment or that the arbitrator would have been influenced by factors outside the case record by virtue of knowledge derived from other cases, seems near impossible. It appears to create the burden of showing subjectively the arbitrator's state of mind rather than a legitimate objective doubt.

Equally the fairly relaxed attitude to the disclosure, both forgiving the initial non-disclosure and relying on the publicly available information for ICSID matters is, I suggest, inadequate. The IBA Guidelines and the cases make it clear that the duty is on the arbitrator to disclose and any attempt to throw the burden back on the parties to undertaken due diligence on the arbitrators is to be resisted.



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[1] Article 58 of the ICSID Convention provides: “The decision on any proposal to disqualify [an] ... arbitrator shall be taken by the other members of the ... Tribunal.”

[2] “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”

[3] “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”

[4] *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 332 – 33 (2d Cir. 1987).

[5] *Morelite Constr. Corp v. New York City Dist. Council Carpenter Benefits Fund*, 748 F.2d 79 (2d Cir. 1984).

[6] *Rv. Gough* [1993] AC 646, 669 – 670.

[7] *Id.*

[8] [2002] 2 AC 357, 494.

[9] [2000] 2 Lloyd's Rep 127.

[10] 393 U.S. 145, 149 (1968).

[11] *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret ve Sanayi*, 492 F.3d 132 (2d Cir. 2007).

[12] See the English Arbitration Act 1996 §25; French New Code of Civil Procedure §1462; Italian Code of Civil Procedure §813 and Netherlands Code of Civil Procedure §1029(2).