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IBA GUIDELINES ON CONFLICT OF INTEREST:

THE TRAFFIC LIGHTS FLASH AMBER

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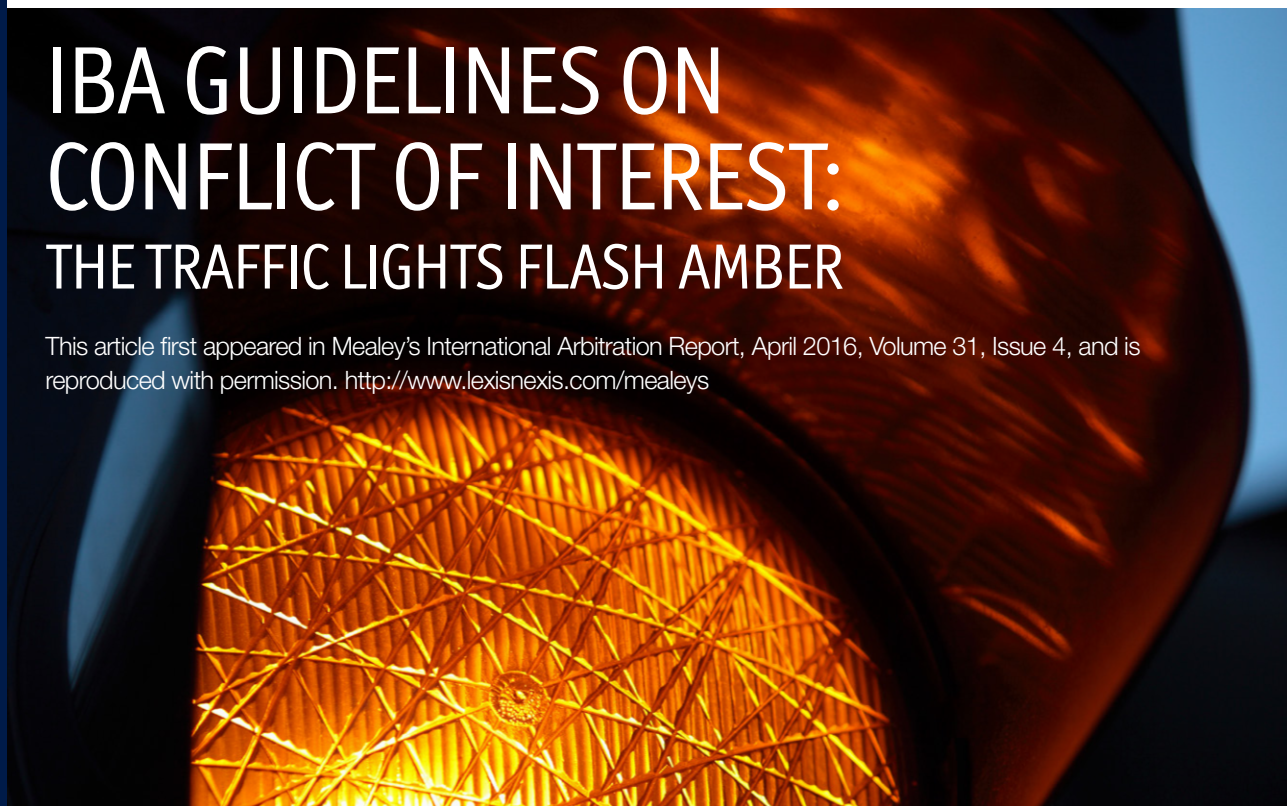


A recent English court decision in *W Ltd v M SDN BHD*[1] has refused to follow the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)[2] and has dismissed a challenge to an arbitrator despite the fact that the situation fell fairly and squarely within the Non-Waivable Red List. The case has sent ripples through the international arbitration world. Nicholas Longley and Joyce Ngai explain the IBA Guidelines, summarise this new decision and comment on it and its effects.

Impartiality And Independence Of Arbitrators

The impartiality and independence of arbitrators is of utmost importance in the world of international arbitration.

Article 12(2) of the United Nations Commission on International Trade Law (UNICITRAL) Model Law provides that *"[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence..."*. The UNCITRAL Model Law has been widely adopted in many jurisdictions including Australia, Hong Kong, New Zealand and Singapore.

It would be fair to say that a general consensus exists between many jurisdictions that a challenge to an arbitrator depends on the appearance of bias and not actual bias.[3] Indeed jurisdictions which have not adopted the UNCITRAL Model Law, have adopted provisions which reflect that approach. Relevantly, England, which is not a model law jurisdiction, adopts a test for bias which is whether:

"a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[4]

1 [2016] EWHC 422 (Comm)

2 *See* The IBA Guidelines on Conflict of Interest in International Arbitration (which was first issued in 2004 and revised in October 2014). The revised IBA Guidelines are available for download at http://www.ibanet.org/publications/publications_iba_guides_and_free_materials.aspx.

3 *See* Otto L O de Witt Wijnen, Nathalie Voser and Neomi Rao, Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration

4 *See Porter v Magill* [2002] AC 357 at 103

IBA Guidelines On Conflicts Of Interest In International Arbitration

The International Bar Association (IBA) first published the IBA Guidelines in 2004. The IBA Guidelines since they were first adopted have gained wide acceptance in the international arbitration community. In the light of experience, the IBA reviewed the IBA Guidelines and published a revised version of the IBA Guidelines in 2014.

The purpose of the IBA Guidelines is:

1. to promote greater consistency; and
2. to avoid unnecessary challenges to arbitrators.

The IBA Guidelines are divided into two parts. The first part sets out seven General Standards and second part sets out a Practical Application of the General Standards and a list of situations which may occur. It is well known that this second part is divided into Red, Orange and Green lists after the colours of a traffic light.

The Red List *"…details specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence."* It is divided into two lists, a Non-Waivable Red List and a Waivable Red List. The difference between these two lists is that the former includes *"…situations deriving from the overriding principle that no person can be his or her own judge"* and therefore such conflict cannot be waived, whereas the latter includes situations which can be waived if the parties being aware of such conflict agrees to the waiver." In other words, if the situation is the same or similar to a situation in the Non-Waivable Red List, then to comply with the IBA Guidelines, the arbitrator cannot act.

The Orange List sets out *"…specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence"* and therefore, the arbitrator has a duty to disclose such situations. This includes situations where the arbitrator and the counsel for one of the parties are barristers in the same set of chambers.

Finally, the Green List sets out *"…specific situations where no appearance and no actual conflict of interest exists from an objective point of view"* and thus, the arbitrator has no duty to disclose such situations. This for instance includes a situation where the arbitrator has expressed a view on an issue that arises in the arbitration but this opinion does not focus on the specific dispute.

The IBA Guidelines have also been frequently cited by national courts in both civil law and common law states.[5] Parties regularly refer to the IBA Guidelines as the basis to challenge arbitrators or to oppose challenges to arbitrators, whilst institutions refer to the IBA Guidelines to decide challenges.

The recent decision of the English High Court in *W Ltd v M SDN BHD* has bucked that trend. Indeed the judge, Mr Justice Knowles went so far as to criticise the IBA Guidelines and stated that *"…there are weaknesses in the 2014 IBA Guidelines…"* [6] and explained why he *"…do[es] not, with respect, think they can yet be correct."* [7] This decision has sparked controversy in the international arbitration community.

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

The Facts

W Ltd (Claimant) and M SDN BHD (Defendant) were in dispute in relation to a contract for a project in Iraq. The dispute was referred to arbitration in the LCIA and Mr. David Haigh QC (Arbitrator) was appointed as the sole arbitrator. The arbitration was subject to English law. The Arbitrator proceeded to make two awards in the arbitration.

After the awards were made, it came to the attention of the Claimant that the Arbitrator's firm regularly provided legal services to Company Q (which is an affiliate of the Defendant), deriving substantial remuneration for such legal services. The Claimant challenged the awards on the grounds of serious irregularity under Section 68(2) of the Arbitration Act 1996 and apparent bias based on conflict of interest which fell within paragraph 1.4 of the Non-Waivable Red List under the IBA Guidelines. The effect of paragraph 1.4 is that there are *"justifiable doubts of the arbitrator's impartiality or independence"* if:

"the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."

Further, to give effect to the IBA Guidelines, the parties cannot accept this situation and agree that the arbitrator may act. The situation is 'Non-Waivable'.

Judgment

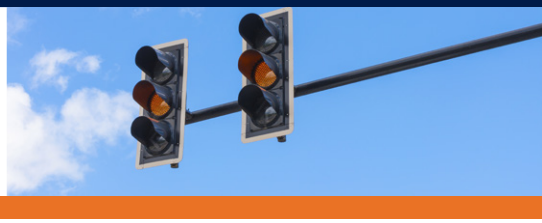
The judge accepted that the situation fell fairly and squarely within paragraph 1.4 of the Non-Waivable Red List, within the revised 2014 version of the IBA Guidelines. However he dismissed the challenge and held that there was

5 *See* Sam Luttrel, Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test (Kluwer Law International Publ., 2009) at page 195

6 *See W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) at 34

7 *Id.* at 44





no apparent bias. The judge said that he was dismissing the application *"without hesitation"*[8].

The judgment correctly states that the IBA Guidelines do not bind the court. Indeed, it was common ground between the parties that the English law test for apparent bias is derived from *Porter v Magill*,[9] which set the fair minded observer test set out above.

In determining there was no apparent bias, the following facts were considered:

1. the Arbitrator is a partner of the firm and the firm earns substantial remuneration from providing legal services to Company Q that has the same corporate parent as the Defendant;
2. the firm does not advise the corporate parent or the Defendant;
3. there is no suggestion that the Arbitrator is involved in any of the legal services provided to Company Q;
4. the Arbitrator operates effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator; and
5. the Arbitrator made other disclosures where, after checking, he had knowledge of his firm's involvement with the parties and the Arbitrator said that he would have made a disclosure here if he had been alerted to the situation.

The judge then went out to examine the IBA Guidelines and identified what he described as two interconnected weaknesses in the IBA Guidelines. These are that:

1. in treating "compendiously" the arbitrator and his or her firm as well as a party and any affiliate of the party, in the context of the provision of regular legal service from which significant remuneration is derived; and
2. in doing this without reference to the question of whether the particular facts could realistically have any effect on the impartiality or independence of the arbitrator, including where the facts were unknown to the arbitrator.

The judge found it difficult to understand why the situation in the present case should be included in the Non-Waivable Red List when in his judgment, it is more appropriate for a case-specific judgment. He adds that, as illustrated in this case, where the facts fit the situation detailed under the IBA Guidelines, it *"…cause[s] a party to be led to focus more on assumptions derived from the fact, and to focus less on a case-specific judgment."*[10]

He further identified what he described as conflicts within the IBA Guidelines itself. He referred to paragraph 2 of Part II of the IBA Guidelines, which expressly qualifies the proposition that the Non-Waivable Red List details specific situations that *"give rise to justifiable doubts as to the arbitrator's impartiality and independence"* with the phrase *"depending on the facts of a given case"*. However, paragraph 1 of Part II of the IBA Guidelines provides that *"[i]n all cases, the General Standards should control the outcome"* and General Standard (2)(d) provides that *"[j]ustifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List."*

The use of the words *"necessarily exist"* means that such situations do not allow for judgment by reference to the facts of the case. This position is maintained in the Explanation to General Standard 2(d), where it emphasises that *"…because no one is allowed to be his or her own judge… [t]he parties, therefore, cannot waive the conflict of interest arising in such a situation."*

In contrast, General Standard (6)(a) provides that *"…the relationship of the arbitrator with the law firm, should be considered in each individual case"* and *"[t]he fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict…[s]imilarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest…"*.

The Explanation to General Standard (6)(a) adds that where there is a group of companies, *"[b]ecause individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case."* From these provisions, the judge considered that it can be seen that the assumption that justifiable doubts "necessarily exist" in certain situations pursuant to General Standard (2)(d) contradicts the approach of looking at the facts of individual cases.

Finally, the judge criticised the IBA Guidelines' approach to waiver and acceptance. He questioned why the IBA Guidelines do not allow the parties to have a choice to waive the conflict in situations like the present case.

8 *Id.* at 22

9 [2002] AC 357 at 103

10 *See W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) at 37



He noted that there are situations in the Waivable Red List, which would seem potentially more serious than the circumstances of the present case, such as where the arbitrator has given legal advice on the dispute to a party or an affiliate of one of the parties, or, where a close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

Comments

The decision of the English court in *W Ltd v M SDN BHD* casts doubt over the IBA Guidelines, which in many ways is regrettable. Although it is no doubt correct that the IBA Guidelines are not legal provisions and the judgment identified the proper English law test for conflict of interest, the decision that each particular case should be reviewed on its merits undermines the main purpose of the IBA Guidelines which is to promote uniformity and certainty and reduce challenges to arbitrators. It is questionable whether the approach of the judge is in accordance with international standards. In particular:

1. The judge identified that the relevant provision of the Non-Waivable Red List, paragraph 1.4 had been amended to add "or his or her firm" before the words "regularly advises" and it was the connection with the firm and the affiliate company that caused the problem. The Arbitrator himself did not advise the affiliate and there is no question as to his personal integrity. The judge made it clear that the situation would not have fallen into the Non-Waivable Red List under the original version of the IBA Guidelines. The decision however ignores the fact that the IBA have specifically considered the situation at the heart of this case, when revising the IBA Guidelines and specifically concluded that this situation should be added to the Non-Waivable Red List.
2. Further the French Courts in contrast to the decision in *W Ltd v M SDN BHD*, came to an opposite ruling in *Cour de Cassation, Civ. 1, 16 December 2015, N°D14-26.279*. This case involved similar facts but the French courts held that the sole arbitrator's failure to disclose his firm's continuing representation of the parent company of one of the parties to a dispute raised doubts as to his independence and impartiality. The French court held that the arbitral tribunal was improperly constituted and thus the partial award was unenforceable.

Further, it appears from the judgment that the judge concentrated on what the Arbitrator did know. He determined that *"the fair minded and informed observer would say that this was an arbitrator who did not know rather than that this was an arbitrator whose credibility is to be doubted, who "must have known"*. However from the stand-point of the appearance of bias, the fact that the Arbitrator's law firm received a significant financial income from an affiliate of one of the parties does give rise to justifiable doubts, irrespective of the Arbitrator's knowledge. Of course the focus on the specific facts of a case, raises the primary problem with conflicts which is uncertainty and inevitably an increase in challenges to arbitrators.

The fact is that now an English court has decided that an arbitrator can act even if his situation sits within the Non-Waivable Red List, additional fuel has been added to an argument that 'on the specific facts', an arbitrator could have a conflict even if the situation is on the Green List. Notwithstanding Mr Justice Knowles acknowledgement of the *"distinguished contribution"*[11] of the IBA Guidelines, stating that it *"can be of assistance"*[12], his judgment has put a severe dent in the overriding intentions of the IBA Guidelines. In any event, those attempting to use the IBA Guidelines in the future to challenge or defend the appointment of an arbitrator will need to exercise a little more caution.

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11 *Id.* at 33
12 *Id.* at 26