

ETHICS IN INTERNATIONAL ARBITRATION

Introduction

This alert provides a brief summary of the rules and guidelines applicable to both arbitrators and counsel in international arbitration, along with examples of how these rules and guidelines have been applied in practice.

The main guidance on ethics is that adopted by the International Bar Association ("IBA"), which has produced guidelines including "*Rules of Ethics for International Arbitrators*", "*Guidelines on Conflicts of Interest in International Arbitration*" and "*Guidelines on Party Representation in International Arbitration*". While not binding, these guidelines have been considered by a number of arbitral tribunals since their adoption. In addition, arbitral institutions have themselves also implemented rules and guidance on the conduct of arbitrations.

This paper will refer to the following matters:

1. The Approach of Arbitral Institutions – the IBA, ICC, LCIA, UNCITRAL and ICSID.
2. Decisions of Arbitral Tribunals and the English Courts

IBA

Ethics of Arbitrators

In 1987, the IBA adopted "*Rules of Ethics for International Arbitrators.*" These were derived in part from the Code of Ethics adopted in 1977 by a joint committee of the American Bar Association and American Arbitration Association. Despite being over 25 years old, these guidelines remain influential in international arbitration practice. The Rules of Ethics provide for a general rule that an arbitrator will proceed diligently and efficiently to provide the parties with a just and effective resolution, and shall be and remain free from bias, and include provisions on elements of bias, the duty of disclosure of arbitrators, and rules on communications with parties.

In 2004, the IBA published a detailed set of guidelines and commentary on the independence of arbitrators (the "*IBA Guidelines on Conflicts of Interest in International Arbitration*"). Those Guidelines supplement the IBA Rules of Ethics, and in addition identify circumstances which can raise doubts as to an arbitrator's independence or impartiality, and also provide for disclosure of such circumstances by arbitrators and prospective arbitrators. In contrast to the approach taken by other arbitral institutions (such as the LCIA and ICC), the IBA established specific situations in which disclosure should be made. The Guidelines comprise two main parts – the "*General Standards Regarding Impartiality, Independence and Disclosure*", and the "*Practical Application of the General Standards*". The latter section divides a non-exhaustive list of "circumstances" into four separate colour groups –

- Non Waivable Red List - where an arbitrator should not act even with the consent of all parties (ie, where arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income there from)
- Waivable Red List - matter which, while potentially leading to disqualification, may be accepted by the express agreement of the parties to the dispute (ie, where an arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties, arbitrator currently represents or advises one of the parties or an affiliate of one of the parties, arbitrator is a lawyer in the same law firm as the counsel to one of the parties)
- Orange List - which, depending on the facts, may give rise to justifiable doubts about the arbitrator's impartiality and independence, and are intended to deal with situations which an arbitrator should provide disclosure (ie, arbitrator and another arbitrator are lawyers in the same law firm)
- Green List - where no apparent or actual conflict of interest arises from an objective point of view, and therefore there is no requirement for any disclosure (ie, arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator)

Ethics for Counsel

In 2013, the IBA adopted the "*Guidelines on Party Representation in International Arbitration*", which were "*inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.*" The Guidelines covered a number of issues, including party representation, communication with arbitrators, submissions to the arbitral tribunal, information exchange and disclosure, and witnesses and experts; and also provided for remedies for misconduct.

ICC

The ICC Arbitration Rules (2012) provide that arbitrators must be and remain impartial and independent, pursuant to Article 11. Prior to appoint, a prospective arbitrator must sign a statement of acceptance, availability and independence, and is required to disclose in writing any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.

The ICC Arbitration Rules also contain one of the broadest challenge provisions, providing for a challenge to an arbitrator based on "*an alleged lack of impartiality or independence, or otherwise*"(Article 14).

UNCITRAL

Pursuant to Article 11 of the UNCITRAL Arbitration Rules (as revised in 2010), a prospective arbitrator must disclose (and has a continuing duty to disclose) any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence – this is clearly a more limited provision than that set out in the ICC Arbitration Rules.

LCIA

The LCIA Rules specify that all members of the arbitral tribunal must remain impartial and may not act as advocates of the parties. Prospective arbitrators are also required to provide a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. This is a continuing duty. (Rule 5.3)

An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. (Rule 10.3)

As with many arbitral institutions, it is understood that the LCIA is reviewing its rules at present and a new version is to be released shortly which may contain specific provision by way of guidelines as to the ethical conduct of legal representatives.

ICSID

In contrast to other sets of arbitration rules, Article 14(1) of the ICSID Convention (adopted in 1966 to provide for Investor claims against States) provides that persons designated to serve as an arbitrator in an ICSID proceeding “*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.*” It should be noted that this is limited to “independence”, and does not refer to impartiality. The difference between the two has been the subject of discussion in various ICSID cases, with the Tribunal in *Alpha Projektholding GMBH v Ukraine* noting:

“under Article 14(1) of the ICSID Convention, as interpreted by past ICSID decisions, an analysis of an arbitrator’s reliability “to exercise independent judgment” entails two concepts: impartiality and independence.⁵ Commentators have observed a distinction between impartiality and independence:

It is generally considered that “[in]dependence” is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise By contrast the concept of “impartiality” is considered to be connected with actual or apparent bias of an arbitrator – either in favour of one of the parties or in relation to the issues in dispute.”

Prospective arbitrators are required, pursuant to Rule 6, to give an arbitrator declaration giving details of any past or present professional, business or other relationship with the

parties, along with any other circumstances that might cause an arbitrator's reliability for independent judgment to be questioned by a party.

Under Article 57 of the ICSID Convention, an arbitrator may be challenged on the grounds of *"of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14"*, a provision almost as wide as that set out in the ICC Arbitration Rules.

Arbitration Act 1996

At a domestic level, in England and Wales, Section 24(1)(a) of the Arbitration Act 1996 allows the supervising court to remove an arbitrator for justifiable doubts as to his impartiality:

"Section 24

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds-

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality"

In substance, the terms of Section 24(1)(a) are the same as Article 12 of the UNCITRAL Model Law on International Commercial Arbitration, permitting the removal of an arbitrator where circumstances give rise to *"justifiable doubts as to his impartiality."*

Also of relevance, is Section 68(2)(a), (g) and (i) of the Arbitration Act 1996, which is often pleaded alongside a claim under Section 24(1)(a):

"Section 68

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award....

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person rested by the parties with power in relation to the proceedings or the award."

Additional Standards for Lawyers

Lawyers are typically subject to codes of conduct and standards imposed by the legal institutions in their own jurisdiction; however, there have been various attempts (in addition to the IBA Guidelines discussed above) to impose a transnational code applicable to lawyers engaged in international arbitration.

In 1988, the Council of the Bars and Law Societies of the European Community (CCBE) adopted the Code of Conduct for Lawyers in the European Union, which, by virtue of Article

4.5, extended the principles governing a lawyer's relationship with the courts to his relations with arbitrators. The Code of Conduct included general principles on independence and confidentiality, among others, and also imposed obligations in respect of a lawyer's relationship with the courts, his client and other lawyers. In particular, the Code of Conduct requires a lawyer to have due regard for the fair conduct of proceedings (Article 4.2), maintain due respect and courtesy toward the tribunal and defend the interests of the client honorably (Article 4.3), never knowingly give false or misleading information to the tribunal and comply with the rules of conduct of that tribunal (Article 4.4). It should be noted that the CCBE Code of Conduct is part of the Code of Conduct of the Bar of England and Wales and that Barristers are required to obey it unless to do so would be inconsistent with the provisions of the Bar's Code. The Bar Standards Board of the Bar Council of England and Wales approved the amended CCBE Code of Conduct on 25 January 2007.

Decisions of the English Courts and Arbitral Tribunals

The majority of arbitration decisions on ethical matters focus on the obligations of arbitrators.

Arbitrators: ICSID Decisions

Alpha Projektholding GMBH v Ukraine (ICSID Case No. ARB/07/16) (Decision on Proposal for Disqualification of an Arbitrator 19 March 2010)

In *Alpha Projektholding GMBH v Ukraine*, an ICSID Tribunal dismissed an application to disqualify an arbitrator based on his shared educational experience with counsel for the claimant and failure to disclose this, along with his purported lack of arbitral experience and a brief phone call by counsel for the claimant to the arbitrator to determine whether he would be available to serve. The two members found that the applicant had failed to prove any fact that would indicate a manifest lack of impartiality or independence on the part of the arbitrator.

In its decision, the ICSID Tribunal sought "guidance from the 2004 International Bar Association Guidelines on Conflicts of Interest in International Arbitration". Those Guidelines were regarded as instructive as they related to the UNCITRAL "justifiable doubts" standard that was referenced in the Discussion Paper and in the Working Paper that led to the adoption of Rule 6(2)(b) in the ICSID Arbitration Rules. In addition, the Tribunal stated that since their adoption in 2004, the IBA Guidelines had been widely used as a catalogue of the bases for challenge as well as for the parameters of an arbitrator's duty of disclosure, and that multiple tribunals applying the ICSID Convention had recognised the persuasive authority of the IBA Guidelines.

Perenco v Ecuador (PCA Case No. IR-2009/1, Decision dated 8 December 2009)

In the ICSID case of *Perenco v Ecuador* (ICSID Case No. ARB/08/6), the parties had agreed that any challenges to an arbitrator would be resolved by the Secretary-General of the Permanent Court of Arbitration ("PCA"), applying the IBA Guidelines on Conflicts of Interest in International Arbitration. In August 2009, Ecuador became aware of a published interview given by the Hon. Charles N. Brower, the arbitrator appointed by Perenco, in which he made comments about Ecuador and the pending ICSID proceedings. Ecuador subsequently sought for Judge Brower to be disqualified.

The issue for the PCA was whether, under IBA Guidelines, the interview comments constituted circumstances that, *“from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”*

In that case, the PCA sustained the challenge to Judge Brower on the basis that from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by Judge Brower in the interview constituted circumstances that gave rise to justifiable doubts as to his impartiality or independence.

Universal Compression International Holdings v. Venezuela (ICSID Case No. ARB/10/9) (Decision on the proposal to disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, 20 May 2011)

In this case, both sides sought to disqualify the arbitrators selected by each party – the claimants on the grounds that the respondent-appointed arbitrator had been repeatedly appointed by the respondent and its counsel in previous arbitrations; and the respondent based on the relationship between the claimant-appointed arbitrator and counsel to the claimant. The proposals to disqualify both arbitrators were dismissed.

In his decision, the Chairman of the Administrative Council referred to Articles 14 and 57 of the ICSID Convention, along with the IBA Guidelines and their application in such cases, stating that the IBA Guidelines were widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts, but it was also universally recognized that the IBA Guidelines were indicative only, both in the context of international commercial and international investment arbitration.

Arbitrators: Domestic Decisions

Applying the standard laid down in Section 24(1)(a) of the Arbitration Act 1996, it was stated by the Court of Appeal in *Locabil (UK)Ltd v. Bayfeild Prop. Ltd* [2000] Q.B. 451 (17 November, 1999) that *“All legal arbiters are bound to apply the law as they understand it to the fact of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases, but because she shuts her eyes to all considerations extraneous to the particular case.”*

As to what this means in substance, the currently prevailing standard under English law was held in *ASM Shipping Ltd of India v. TTMI Ltd of England* [2005] EWHC 2238 (Comm.) (Q.B.) (19 October 2005) to be, whether there is a *“is a real likelihood, in the sense of possibility, of bias,”* or whether a *“fair-minded and informed observer”* would conclude that there was a *“real possibility”* that the tribunal was not impartial.

Moreover, *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep. 45 (20 April 1999) (considering the circumstances in which Barristers from the same Chambers were appointed as both the applicants' and the respondents' arbitrators) held that this question was an objective rather than a subjective one:

“The test is an objective one-whether circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality. The test is thus objective in at least two respects: the Court must find that circumstances exist, and are not merely believed to exist (although I suppose that a belief may itself be a circumstance); and secondly, those circumstances must justifiable or perhaps unreasonable doubt is not sufficient: it is not enough honestly to say that one has lost confidence in the arbitrator's impartiality. On the other hand, doubts, if justifiable, are sufficient: it is not necessary to prove actual bias.”

In *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep. 14 (13 October 1999) applications made on the grounds of bias under Section 68 of the Arbitration Act 1996, were subject to the same standard.

In *Amec Capital Projects Limited v Whitefriars City Estates Limited* [2004] EWCA Civ 1418 [2005] 1 All E.R. 723; [2005] B.L.R. 1 (28 October 2004) it was determined that no apparent bias arose where an adjudicator produced a draft “Preliminary Views and Findings of Fact”. The Court of Appeal observed that such a draft could, in fact, serve as an aid to parties developing their case presentations more effectively as it provided them with an insight into the manner in which the adjudicator's thinking on various issues was unfolding and therefore what issues needed to be addressed or addressed more effectively. In this sense, there was a clear difference between reaching a provisional view for the assistance of the parties and making a premature final decision.

Finally, in *A v B* [2011] EWHC 2345 (Comm), [2011] All ER (D) 71 (Sep) (15 September 2011) Flaux J. rejected a Section 24(1)(a) application to remove a sole arbitrator and (for the same reasons) dismissed a challenge to a partial award based upon Section 68(1) where the arbitrator inadvertently failed to mention promptly that he was instructed in another matter by one of the firms of solicitors on the record in the arbitration.

A QC (Mr X) was appointed as a sole arbitrator to determine a share sale and purchase agreement dispute, pursuant to the LCIA rules. Just before finalising a partial award, Mr X drew to the attention of the parties the fact that he had been instructed in 2004 on an unrelated matter (the Y litigation) by the law firm which was also representing the defendant in the matter before him. After Mr X signed a partial award deciding one crucial issue in favour of the defendants, the claimants made a challenge to the LCIA for the removal of Mr X which was rejected before coming before the Court.

In line with earlier authorities, Flaux J held that the test for apparent bias was an objective one, and thus it was irrelevant that a foreign party “*might, for example, regard as odd the way in which a member of the English Bar can be instructed in one case by a firm of solicitors while acting as arbitrator in another case where the same firm of solicitors was acting for one of the parties*”. Furthermore, the test required the court to approach the matter from the perspective of the “*fair-minded and informed observer*”, which meant considering all the facts, as well as assuming that such a person “*is expected to be aware of the way in which the legal profession in this country operates in practice*”.

The claimant referred to the IBA Guidelines on Conflict of Interest in International arbitration, and suggested that the circumstances should be treated as falling within the “waivable red list”. Flaux J stated that even if this argument were correct, the IBA Guidelines

were not intended to override national law. In any event, the guidelines had been breached in this case neither in letter nor in spirit.

Legal Counsel: ICSID Decisions

There has also been some jurisprudence on the ethics of legal representation, and when it is appropriate to exclude counsel, though this has been of a more limited nature.

Hrvatska Elektroprivreda DD v The Republic of Slovenia (ICSID Case No ARB/05/24) (Order Concerning Participation of Counsel 6 May 2008)

In this case, the Tribunal asked by the claimant to recommend to the respondent that is not use the services of a British barrister who was of the same chambers as the president of the tribunal. The barrister was a relatively late addition to the respondent's legal team and the claimants found out about him some way into the case.

The Tribunal held that, whilst the ICSID Convention does not grant an explicit power to the an arbitral tribunal to exclude counsel, and whilst there is a basic principle at play that parties should be able to use representatives of their own choice, there was an overriding principle that tribunal should be properly constituted such that a party cannot be allowed to alter their legal team after a tribunal has been constituted in such a way as to "*imperil the Tribunal's status or legitimacy*". On this basis the Tribunal had an inherent power to take measures to preserve the integrity of the proceedings and ordered the barrister in question be disqualified from the respondent's legal team. Nevertheless, it emphasised the fact that in so doing, it was not suggesting there existed a "*hard and fast*" rule that prevented barristers from the same chambers acting as counsel and arbitrator in the same case.

Rompotrol Group NV v Romania (ICSID Case No ARB/06/3) (Decision on the Participation of a Counsel 14 January 2010)

In contrast to the decision in *Hrvatska v Slovenia*, in this case, when the respondent asked the ICSID tribunal to disqualify the claimant's counsel on the grounds that he had previously practiced in the same law firm as the claimant appointed arbitrator, the Tribunal refused to do so, displaying a marked reluctance to find that tribunals have an inherent power to remove counsel. It observed that "*one would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation.*" Since there was no such provision in the ICSID Convention/Arbitration Rules, "*the only justification for the tribunal to award itself this power*" is an overriding need to safeguard the essential integrity of the arbitral process.

The Tribunal described the role of the counsel as being to present his client's case "*with diligence and with honesty, and in due compliance with the applicable rules of professional conduct and ethics*", but made its decision primarily on the basis of a consideration of the risk that the arbitrator in question would be biased. It found that there was no such risk.

Conclusion

The issue of ethics in international arbitration remains a controversial one. There are those who insist that the status quo should remain and resist any further initiatives to institute more concrete standards of practice and behaviour, which they see as unnecessary. Nevertheless, recent decisions in the domestic courts and international arbitral tribunals suggest that there is indeed now a groundswell of support for the institution of further norms and standards. What seems to be certain is that this is an area in which discussion will continue to intensify.

8th October 2013