

REFLECTIONS ON ENGLISH JUDICIAL APPROACHES TO THE IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

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It is a fundamental requirement that the arbitral tribunal acts fairly and impartially as between the parties.¹ In English law, these requirements form part of the general duty imposed on the tribunal in conducting the arbitration proceedings, in dealing with issues of procedure and evidence and in the exercise of all other powers conferred on it.² As such, the tribunal is under a duty to maintain an open mind and to decide the dispute on the evidence before it, free from any connection with the parties and free from any preconceptions of them or the witnesses. The duties of impartiality and fairness protects the legitimacy of the arbitral process, it maintains the parties' confidence in the functions of the tribunal and, ultimately, in the arbitral award that is rendered. Conversely, a failure to observe these fundamental requirements may be used to challenge either the arbitral award³ or seek the court's permission to remove the arbitrator during the arbitral proceedings⁴ on the grounds of actual or apparent bias.

Although actual bias is rarely alleged,⁵ challenges based on allegations of apparent bias are more common and those challenges increasingly⁶ relying on the 2014 International Bar Association Guidelines on Conflict of Interest in International Arbitration (the IBA Guidelines).⁷ The IBA

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¹The duties of impartiality and fairness are encompassed within the general duty of the arbitral tribunal which is set out in the Arbitration Act 1996, s33. That section states "(1) The tribunal shall— (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

² Arbitration Act 1996, s33. This section expands on the general principle laid down by article 18 of the UNCITRAL Model Law which states: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

³ Arbitration Act 1996, s68.

⁴ Arbitration Act 1996, s24.

⁵ DJ Sutton, J Gill, M Gearing, *Russell on Arbitration* (Thomson Reuters 2015) 4-112.

⁶ Research conducted by the ICC between July 2004 and August 2009 showed 106 out of 187 challenges handled by the ICC Court between July 2004 and August 2009 referred to at least one example contained in the IBA Guidelines. See Feris and Greenberg 'Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration when deciding on arbitrator independence in ICC cases' in Fry and Greenberg, 'The arbitral tribunal: Applications of Article 7-12 of the ICC Rules in recent cases' (2009) 20 ICC International Court of Arbitration Bulletin 12, Appendix.

⁷ Available http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (Accessed 20 July 2016). Previously the IBA issued the 2004 Guidelines on Conflicts of Interest in International Commercial Arbitration and subsequently updated the Guidelines which were adopted by resolution of the IBA Committee on 23rd October 2014. For discussion of the 2004 Guidelines, see Tore Wiwen-Nilsson 'IBA Draft Guidelines on Impartiality, Independence and Disclosure' (2003) Stockholm Arbitration Newsletter; Otto de Witt Wijnen, Nathalie Voser and Neomi Rao 'Background information on the IBA Guidelines on Conflicts of Interest in International Arbitration' (2004) 5(3) Business Law International 433; David A. Lawson 'Impartiality and Independence of International Arbitrators. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration' (2005) 23(1) ASA Bulletin 55; Markham Ball 'Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?' (2005) Arbitration International 223; Loretta Malintoppi 'Independence, Impartiality and the Duty

Guidelines, which apply to both international commercial arbitration and investment arbitration,⁸ aim to establish a common set of principles addressing certain concrete situations in which a conflict may arise and in which the arbitrator may be obliged to make relevant disclosures. The policy underlying the IBA Guidelines is to avoid the risk of arbitrators from different cultural backgrounds applying inconsistent and radically diverging standards of disclosure of any potential conflicts issues and, as a consequence, encourage greater consistency and harmonisation in the area of arbitrator conflicts.

Although the IBA Guidelines are soft law and as such do not bind national courts,⁹ national courts will, nevertheless, consider whether the IBA Guidelines can be of assistance when determining conflicts issues. Sheppard has noted that although the IBA Guidelines are non-binding, they are increasingly seen as representing good practice within the arbitration community¹⁰ and this recognition of the important status of the IBA Guidelines has also been recognised by judges. As Kane J put it in the Canadian case of *Telesat Canada v Being Satellite Systems International Inc*¹¹, the IBA Guidelines were useful for the court in shedding 'light directly on the issue of this Chairperson through the lens of the arbitration community.'¹² Similarly, the Swiss Federal Supreme Court, whilst noting the supremacy of national law over the IBA Guidelines, drew attention to the importance of the IBA Guidelines in international arbitration when it explained,

The Guidelines certainly do not have the same value as statutory law; but they nevertheless constitute a valuable tool, likely to contribute to harmonisation and unification of the standards to be applied to conflicts of interests in international arbitration i.e. an instrument that is likely to influence the practice of both institutions and State Courts.¹³

of Disclosure in Investment Arbitration' ILA Committee on Investment Law, 22 July 2005; Fernando de Trazegnies Granda, 'Conflictuando el conflicto. Los conflictos de interés en el arbitraje' (2006) 1 Lima Arbitration 163; Leon Trakman 'The Impartiality and Independence of Arbitrators Reconsidered' (2007) University of New South Wales Faculty of Law Research Series paper 25; Matthias Scherer 'The new case law from Austria, Switzerland and Germany regarding the IBA Guidelines on Conflicts of Interest in International Arbitration' (2008) 5(4) TDM.

⁸ IBA Guidelines Introduction para. 5.

⁹ IBA Guidelines make clear that they are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties (Introduction para. 6 of the IBA Guidelines).

¹⁰ A. Sheppard (2009) 'Arbitrator Independence in ICSID Arbitration' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds.) *International Investment Law for the 21st Century: Essays in honour of Christopher Schreuer* (Oxford: Oxford University Press) 136. See also the comments of Ramon Mullerat 'Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines On Conflicts of Interest in International Arbitration' https://law.pace.edu/lawschool/files/iicl/odr/Mullerat_notes.pdf (Accessed 20 July 2016); David A. Lawson (n. 7).

¹¹ Ontario Superior Court of Justice, 09-46022, 16 July 2010 at [153]-[160].

¹² *ibid* 154.

¹³ DFT 4A_506/2007 of 20 March 2008, c. 3.3.2.2., ASA Bull 3/2008, 575-576. The Spanish courts have also relied upon the IBA Guidelines when ruling on the impartiality of arbitrators, see Judgement of the Supreme Court of Justice of Madrid of 28 January 2015. Examples of courts from various jurisdictions using the IBA Guidelines, see Austria, Commercial Court Vienna, Decision of 24 July 2007 (16 No 2/07w) (Situation 3.1.3 of the Orange List)38; Belgium, Brussels, Appellate Court, Decision of 29 October 2007, Republic of Poland v (1) Eureko BV (2) Stephen Schwebel (3) Yves L Fortier (4) Jerzy Rajski; Sweden, Supreme Court, 19 November 2007, T 2448-06, Anders Jilkén v Ericsson AB; Germany, OLG Frankfurt. Decision of 4 October 2007. (Situation 3.5.2 of the Orange List) and the United States, Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. July 9, 2007).

Although the English High Court has also considered the IBA Guidelines in five decisions, it has taken a very cautious approach when commenting on the status, influence and degree of importance of the IBA Guidelines. This stands in stark contrast with judicial approaches adopted in other jurisdictions where the IBA Guidelines have been heavily relied upon and enthusiastically embraced as ‘guiding principles’ and being ‘particularly useful’ in determining issues of impartiality and conflicts of interest in international arbitration.

This paper reflects upon English judicial approaches towards the IBA Guidelines. It will be argued that, despite parties placing significant emphasis and reliance on the IBA Guidelines and almost elevating,¹⁴ at least impliedly, to the status of hard law, English courts (like the Austrian courts) have consistently adopted a cautious approach and attitude towards the status and influence of the IBA Guidelines, recognising them as an important soft law instrument in international arbitration but treating them as a mere reference point or simply using them to reinforce judicial reasoning. In contrast, other jurisdictions, such as Portugal, take the opposite approach and appear to rely heavily upon the IBA Guidelines in the judicial decision making process. It will be argued that the English approach is in-line with the aim and objectives and status of the IBA Guidelines of *assisting* courts in conflicts issues rather than rigidly dictating judicial reasoning.

Part I of this paper will briefly outline the IBA Guidelines. Part II will critically consider English jurisprudence surrounding the IBA Guidelines, the diverging approaches adopted by the parties making applications and recent judicial approaches adopted in Portugal and Austria. Part III will conclude by reflecting on the need for courts to follow a consistent line in their treatment of the IBA Guidelines in order to provide those engaging in international arbitration with clarity and some degree of predictability when dealing with conflicts issues. It will also put forward ways in which some problematic provisions of the IBA Guidelines may be amended to introduce greater clarity in their interpretation and practical application.

Part I: Outline of the IBA Guidelines

The policy underlying the IBA Guidelines is to avoid the risk of arbitrators from different cultural backgrounds applying inconsistent and radically diverging standards of disclosure of any potential conflicts issues and, as a consequence, encourage greater consistency and harmonisation in the area of arbitrator conflicts. The introduction to the IBA Guidelines explain the need to defuse the tension between, on the one hand, the parties’ right to disclosure of circumstances that may call into question an arbitrator’s impartiality, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties’ right and ability to select arbitrators of their choosing. Consequently, the IBA Guidelines aims to provide greater consistency, certainty and uniformity in the applicable standards for disclosure, objections and challenges.

In Part I, the IBA Guidelines set out ‘General Standards Regarding Impartiality, Independence and Disclosure’ and each of these general standards is followed by an explanation. Part II of the IBA Guidelines is entitled ‘Practical Application of the General Standards’ and provides a non-exhaustive

¹⁴ See research ICC research (n. 6).

list of ‘circumstances’ which have arisen in practice and which the drafters assume are likely to occur in practice. As Part II explains:

If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today’s arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interests, or should or should not be disclosed.

These ‘circumstances’ are colour coded as follows:

- i. ‘Non-Waivable Red List’ – includes examples of situations in which an arbitrator should not act even with the consent of all of the parties. It also illustrates the principle that no person should be judge in his own case. Disclosure of such situations cannot cure the conflict and the arbitrator must decline to accept or refuse to continue to act as an arbitrator.
- ii. ‘Waivable Red List’ – includes examples of situations that, while potentially leading to disqualification, may be accepted by express agreement of the parties as not requiring disqualification in the circumstances of the particular case.
- iii. ‘Orange List’ – includes a non-exhaustive list of specific situations which may, in the eyes of the parties, raise doubts as to the arbitrator’s impartiality or independence. If properly disclosed, the parties will be deemed to have waived their rights if they fail to make a timely challenge in relation to that disclosure.
- iv. ‘Green List’ – includes examples of situations in which no conflict of interest arises from an objective point of view and so there is no duty on a prospective arbitrator to disclose such circumstances.¹⁵

Part II: IBA Guidelines: An analysis of the jurisprudence

Since their promulgation, the IBA Guidelines have generally received a positive reception among the arbitration community. They have also been recognised by national courts. However, there exist distinctive diverging judicial approaches to the degree of reliance and importance attached to the IBA Guidelines when determining applications of arbitrator bias. That diverging approach is especially clear when analysing English jurisprudence and comparing the parties’ emphasis of them when making applications and how other jurisdictions utilise them in the decisions making process. This Part will reflect upon English judicial approaches to the IBA Guidelines revealing that the courts correctly and consistently adopt a cautious approach towards them despite the parties incorrectly attaching too much importance and emphasis on them. English approach will also be contrasted with judicial approaches taken in recent decisions in the courts in Portugal and Austria.

English authorities and party reliance

The first case to consider the IBA Guidelines was *ASM Shipping of India v TTMI Ltd of England*¹⁶ in which the court was concerned with an application to remove Mr. X, the chairman of a tribunal.

¹⁵ For a discussion of case law concerning the 2004 version of the Orange and Green Lists, see Matthias Scherer (n. 7).

During certain preliminary hearings, ASM's principal witness, Mr M, realised that Mr X had previously been instructed by the same law firm that now acted for TTMI, as advocate in an earlier arbitration in which allegations of a personal nature, relating to a failure to make proper disclosure of important documents, had been made against Mr M by Mr X's clients. Further, issues of disclosure were also a major issue in the present arbitration. It was only after Mr M had completed his evidence did Mr X disclose his involvement with the previous case. At that stage ASM objected to Mr X continuing to sit as an arbitrator on the basis of apparent bias. However, Mr X refused to stand down, stating that no circumstances existed which gave rise to justifiable doubts as to his impartiality. ASM made an application to the court alleging apparent bias. As part of its submissions, TTMI relied on the IBA Guidelines and argued that the situation in this case did not appear on any of the lists, not least the Red List. Applying the common law principles, Morison J held that the common law threshold of apparent bias had been met. There was an appearance of bias on the part of Mr X and, further, that this amounted to a serious irregularity and, as a result, Mr X should resign. Morison J made passing reference to the IBA Guidelines and only to highlight its limitations in providing guidance to the courts. Morison J stated that "the IBA Guidelines do not purport to be comprehensive and as the Working Party added "nor could they be."" According to Morison J the IBA Guidelines were to be "applied with robust common sense and without pedantic and unduly formulaic interpretation." More recently, in *Cofely Limited v Bingham, Knowles Limited*,¹⁷ the court paid very little attention to the IBA Guidelines, preferring instead to referring to the fact that the facts indicated that a disclosure would also be triggered under the Orange List.¹⁸

In *A v B*¹⁹, in which the court dismissed the claimant allegations of apparent bias, the court provided more detailed commentary on the IBA Guidelines. The claimant had relied extensively on the IBA Guidelines contending that their spirit showed what the international arbitration community considers does give rise or may give rise to a real risk of bias. The claimant submitted that, even if the present situation did not fall expressly within the Waivable Red List, the court should apply the approach of the IBA Guidelines by analogy on the basis that their spirit covers what should happen in all cases of potential conflict, irrespective of whether the facts of the particular case fall within the list. Flaux J appeared to simply illustrate how his findings, grounded on common law principles, were not altered by the IBA Guidelines. The judge used the IBA Guidelines as a means to reinforce his judgement and not to guide his reasoning nor to influence or alter it. Flaux J confined the IBA Guidelines to a point of reference and this is clear when he explained that "the Guidelines are not intended to override the national law. It necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion."²⁰ Therefore, the national laws, the *lex arbitri*, would prevail regardless of whether the IBA Guidelines came to the opposite conclusion.

¹⁶ *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm); [2006] 2 All E.R. (Comm) 122 (QBD (Comm)). For a discussion of the test of bias at common law and its consideration in the ASM case, see Khawar Qureshi 'Passing the bias test' (2006) 156(7223) N.L.J. 744. See also Steven Friel, "'Apparent bias" and "serious irregularity" in English arbitration' (2006) 9(1) Int. A.L.R. N1-3; and Huw R. Dundas 'Arbitration and the English courts: progress and redress' (2006) 72(2) Arbitration 140.

¹⁷ *Cofely Limited v Bingham, Knowles Limited* [2016] EWHC 240 (comm).

¹⁸ *Cofely* [109].

¹⁹ *A v B* [2011] EWHC 2345 (Comm); Stephen Burke 'English High Court considers apparent bias' (2012) 15(1) Int. A.L.R. N1-3; and Huw R. Dundas 'Conflicts of interest and arbitrator disclosure revisited: barristers acting as counsel and as arbitrator' (2012) 78(1) Arbitration 72.

²⁰ *A v B* [73].

The claimant was successful in its application to the court seeking to remove the arbitrator on grounds of impartiality. The claimant and the first and second respondents (D) had entered into a loan agreement which contained an arbitration clause. The claimant failed to make repayments and D appointed an arbitrator. The claimant and D subsequently agreed to repayment of the loan and suspended the arbitration. The arbitrator assisted in drafting that agreement and advised D about its terms. However, none of the agreements were performed and D revived the arbitration. The claimant objected to the arbitrator on a number of grounds alleging that he could not be impartial because he had been employed by a bank of which the first respondent was chief executive. The claimant also contended that the arbitrator's father continued to work for the bank that his father had acted for the first respondent on personal matters and that he had a financial interest in his father's law firm.

In granting the application Poppelwell J held that there was a real possibility that the law firm in which the arbitrator had an interest had, through his father, been instructed to act for the first respondent personally, and for the bank of which the first respondent was chairman. The firm derived a significant financial income from those instructions, which were continuing. It followed, Poppelwell held, that the fair-minded observer would conclude that the connections gave rise to a real possibility that the arbitrator would be predisposed to favour the first respondent in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three.

Poppelwell J found that "assistance is derived from the [IBA] Guidelines on Conflicts of Interest in International Arbitration ('the IBA Guidelines') ..." where waiver of a Waivable Red List conflict of interest requires *express acceptance* of the arbitrator by a party who has *actual knowledge* of the facts of the conflicts, constructive knowledge being insufficient. In contrast, an Orange List can be waived by inactivity following disclosure by the arbitrator. The judge found that both the Non-Waivable Red List (para.1.4) and the Waivable Red List (paras 2.3.1 and 2.3.6) reflected the wider category of circumstances recognised both in *Locabail*⁷ and in s.24 of the Arbitration Act 1996 as giving rise to a justifiable doubt as to an arbitrator's impartiality. The state of evidence, Poppelwell J argued, would lead a fair-minded observer to conclude that there was a real possibility that the relationship between the arbitrator and the bank fell within these criteria, as well as the situation described in the Orange List.

Sierra Fishing Co is regarded by some commentators as illustrating the English courts favourable approach to the IBA Guidelines. Dundas enthusiastically makes the point that "The importance of *Sierra Fishing* is, it is submitted, the reinstatement of the IBA Guidelines to the forefront of English judicial thinking.." ²¹ However, it is submitted that a closer reading of the judgement reveals that the court was simply remaining consistent with the approaches taken in the previous decisions of *ASM* and *Av B* that is, although the court makes reference to the IBA Guidelines, the courts are conscious of keeping them at arms-length, not relying on them to guide their decision but to use them to either reinforce their decision or to simply use them as a point of reference. Poppelwell J was utilising the IBA Guidelines to simply "assist" in illustrating his conclusions. He did not rely upon them as part of the judicial decision making process, they were not guiding principles, they were

²¹ Hew R. Dundas, 'Arbitral rarities: recent arbitration cases in the English courts with a Scottish postscript' (2015) 81(3) Arbitration 332, 337.

simply helpful. This analysis of English judicial approaches also finds support when considering the diverging approaches taken by the parties, who place significant reliance on the IBA Guidelines, and the judicial approaches in placing less significance on them.

The IBA Guidelines were scrutinised in detail in the recent case of *W Limited v M SDN BHD*.²² Knowles J considered a challenge by the claimant of an arbitral award on the grounds of 'serious irregularity' under s68(2) of the Arbitration Act 1996. The claimant alleged apparent bias on behalf of the sole arbitrator, H, based on alleged conflict of interest. In doing so the claimant argued that the matter fell within paragraph 1.4 of the Non-Waivable Red List which provides that an arbitrator should not act where '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.'

There was no doubt that the dispute fell within paragraph 1.4 because H was a partner at the law firm representing an affiliate of the defendant company in the arbitration. The law firm (but not H) regularly advised the affiliate of the defendant (but not the defendant) and derived substantial financial income in doing so.

At the time of H's appointment as arbitrator, a company, Q, was a client of the law firm. A senior partner of the firm was a member of Q's board and a shareholder in Q. The managing partner of the firm was Q's company secretary. The defendant was a subsidiary of another company, P. P later acquired Q and on the acquisition the senior partner of the firm resigned his directorship in Q and sold his shareholding. The managing partner also resigned his office as Q's secretary. However, since Q became a subsidiary of P, the law firm continued to provide legal services to Q although P took its legal advice from another law firm.

On accepting the appointment as arbitrator H made some disclosures to the parties revealed by the firm's disclosure checks system. Those conflict check systems did not however alert him to the fact that the firm had Q as a client. Despite there being substantial publicity in due course when P acquired Q, the law firm's conflict check system did not draw Q or its new relationship with P to his attention.

Knowles J first considered the issue of bias. The test at common law for apparent bias was succinctly described by Lord Hope in *Porter v Magill* as requiring the court to consider whether 'a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'²³ In *Yiacoub v The Queen* Lord Hughes added 'That and similar formulations use the word "biased", which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality.'²⁴ Further, in *Helow v Secretary of State for the Home Department and another*²⁵ Lord Mance explained the nature and application of the test when he said:

²² *W Limited v M SDN BHD* [2016] EWHC 422 (Comm).

²³ *Porter v Magill* [2002] AC 357 at [103] per Lord Hope.

²⁴ *Yiacoub v The Queen* [2014] UKPC 22 at [12] Lord Hughes (with whom Lords Neuberger, Mance, Clarke and Toulson agreed).

²⁵ *Helow v Secretary of State for the Home Department and another* [2008] UKHL 62; [2008] 1 WLR 2416 at [39].

The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the [here, arbitrator] as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the [arbitrator] on it, and no attention will be paid to any statement by the [arbitrator] as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, paras 17 and 39.²⁶

Applying the test to the facts, Knowles J held that the fair minded and informed observer would not conclude that there was a real possibility that the arbitral tribunal was biased, or lacked independence or impartiality. The firm was the entity which earned substantial remuneration from providing legal services to a client company that has the same corporate parent as a company that is a party in the arbitration. The firm did not advise the parent or the party and there was no suggestion the arbitrator did any of the work for the client company. Knowles J also noted that, although the publicity of the corporate acquisition would have drawn much attention within the firm, it was clear from the facts that this had not been brought to the H's attention. As Knowles J explained:

....where, as here, the arbitrator made checks, and made disclosures where the checks drew matters to his attention, and the problem was that the facts in relation to Q were not drawn to his attention, the fair minded and informed observer would say that this was an arbitrator who did not know rather than this was an arbitrator whose credibility is to be doubted, who "must have known", and who was choosing not to make a disclosure in this one important instance.²⁷

The real uncertainty lay with the wording of the IBA Guidelines which formed a substantial aspect of the claimant's arguments. In fact, the heavily reliance placed on the IBA Guidelines by the claimant was noted by Knowles J when he observed the claimant's oral submissions urging that paragraph 1.4 provides a "clear steer", is "pretty emphatic", and may be a "very powerful factor to weigh I the balance, and that there is a real possibility of bias "because that is what we are told through Paragraph 1.4."²⁸

Whilst acknowledging the "distinguished contribution" made by the IBA Guidelines in the field of international arbitration, Knowles J went onto identify two inter-related weaknesses in the IBA Guidelines which the present case had revealed. First, there was an inherent weakness in grouping together (i) the arbitrator and his or her firm, and (ii) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Secondly, by grouping (i) and (ii) together, the IBA Guidelines failed to deal with or provide

²⁶ *W Limited* (n. 22) [39].

²⁷ *W Limited* (n 22) [23].

²⁸ *W Limited* (n 22) [37].

assistance on the question of whether the particular facts of a matter could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

Knowles J noted that paragraph 1.4 maintained the original text from the previous, 2004 IBA Guidelines with the words ‘regularly advises ... an affiliate of the appointing party’ and that a footnote to the 2014 IBA Guidelines indicated that the term “affiliate” includes all companies in a group of companies. Knowles J observed that the effect of maintaining that text when the earlier part of the paragraph had been changed was to include in the Non-Waivable Red List the situation where the advice is to an affiliate and the arbitrator is not involved in the advice, and without reference to the arbitrator's awareness or lack of awareness of that advice. It was difficult to see why this situation should be included in the Non-Waivable Red List. As Knowles J explained:

The situation is classically appropriate for a case-specific judgment. And if the arbitrator had been aware and had made disclosure, why should the parties not, at least on occasion, be able to accept the situation by waiver? Yet, as the Claimant's reference to Paragraph 1.4 in the present case amply illustrates, the nature of something called a Non-Waivable Red List, and the consequences of inclusion in such a List, do not clearly allow for that.²⁹

The consequence was that where the facts of a matter fell within paragraph 1.4 it was clear how a party could be led to focus more on *assumptions* derived from that fact and to focus less on a case-specific judgment.

Although paragraph 2 of Part II of the IBA Guidelines expressly qualified 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’, this did not overcome the difficulties with paragraph 1.4. This was because paragraph 1 of Part II states ‘in all cases’ it is ‘the General Standards [that] should control the outcome.’ And paragraph 2(d) of the General Standards provides that justifiable doubts ‘necessarily exist’ as to the arbitrator’s impartiality or independence ‘in any of the situations described in the Non-Waivable Red List.’ Although General Standards (6) (a) appropriately stated that the relationship of the arbitrator with the law firm ‘should be considered in each individual case’ and that the same should apply when considering a member of a group with which the arbitrator’s firm may have a relationship, this did not cure the problems because General Standard 2(d) and paragraph 1.4 clearly took a diverging approach to General Standard (6) (a).

Knowles J also observed that the situations allocated to the Waivable Red List included where the arbitrator himself or herself has given legal advice on the dispute to a party³⁰ where ‘[a] close family member of the arbitrator has a significant financial interest in the outcome of the dispute’³¹ and where ‘[t]he arbitrator has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.’³² Knowles J rightly argued that ‘These situations

²⁹ *W Limited* (n. 22) [37].

³⁰ Paragraph 2.1.1 of the Waivable Red List.

³¹ Paragraph 2.2.2 of the Waivable Red List.

³² Paragraph 2.2.3 of the Waivable Red List.

would seem potentially more serious than the circumstances of the present case; again suggesting that the circumstances of the present case do not sit well within a “Non-Waivable Red List.”³³

W Limited is the first decision in which the English court has carefully scrutinised, dissected and validly criticised the IBA Guidelines. Despite Poppelwell J making reference to paragraph 1.4 in *Sierra Fishing*, he did not, with respect, consider the inherent tensions and uncertainties presented by that provision. By contrast, Knowles J’s judgment is an important step in identifying and bringing to the attention of the international arbitration community the weaknesses which currently exist within an important aspect of arbitral practice and procedure. The case also illustrates the consistent judicial approaches adopted when considering the IBA Guidelines. However, although performing a commendable task in his analysis of paragraph 1.4, Knowles J failed to discuss how that provision should be dealt with and this is considered by the author in Part III.

Judicial approaches in Austria and Portugal

Interestingly, English judicial approaches to the IBA Guidelines are similar to those adopted by Austrian courts. In *K-GmbH v B-GmbH*³⁴ the Austrian Supreme Court made clear that the IBA Guidelines had no normative value and that the aim of the Guidelines is to provide the parties, their representatives, arbitrators, arbitration institutions and state courts with accepted standards on conflicts and disclosure issues. The Supreme Court stressed that the IBA Guidelines simply served as a “guide”, nothing more.

In contrast to the English and Austrian approaches, the courts in Portugal have enthusiastically embraced the IBA Guidelines and have, like the parties, placed a great deal of importance in them in determining applications of conflicts and impartiality. A recent decision of the Portuguese Court of Appeal illustrates the point. *Demandantes v. Demandada*³⁵ the Court of Appeal was required to determine whether an arbitrator, who had been appointed multiple times by the same counsel in less than three years, should or should not be considered as independent to adjudicate the dispute. The appointing party relied heavily on the IBA Guidelines referring in detail to the provisions under the Orange List, arguing that the arbitrator should not be removed. Focusing primarily on the IBA Guidance, the Court held that the arbitrator was under a duty to disclose his past appointments and by not making this disclosure he had failed to comply with that obligation. In formulating its reasons, the Court made extensive reference to various part of the IBA Guidelines Orange List. In particular, the Court found that the criteria established in the Orange List “must be considered as objective indicators of the lack of independence or impartiality, even if the challenging party cannot demonstrate further evidence of them on the facts.”

Part III: Proposals and conclusion

There is no doubt that the IBA Guidelines are an important soft law instrument in international arbitration. They are intended to reflect internationally accepted practices within the arbitration community on issue of impartiality and disclosure. However, there exists distinctive diverging perceptions of the status on the IBA Guidelines between the parties and the courts. As *W Limited*

³³ *W Limited* (n. 22) [41].

³⁴ *K-GmbH v B-GmbH* Supreme Court of Austria 2 Ob 112/126 17 June 2013. A similar approach was also taken in the subsequent Supreme Court case of 5 August 2014, 18 ONC 2 / 14k and 18 ONC 1.

³⁵ *Demandantes v. Demandada* Court of Appeal of Lisbon, Processo 1361/14.OYRLSB.L1-1, 24 March 2015.

illustrates, the parties perceive the IBA Guidelines as almost having quasi-legal force because they are widely accepted within the international arbitration community and, as such, there is an expectation that the courts should attach similar importance to them. Clearly, this approach and understanding creates inconsistency because, as English and Austrian judicial approaches demonstrate, IBA Guidelines are simply seen as a point of reference, as a mere “guide” or to reinforce a judgment and this approach has remained consistent. The positive consequence of this approach is that it provides consistency and predictability to international commercial parties who have chosen London as the seat of arbitration. It also introduces a greater degree of predictability to the outcomes of applications of impartiality where the parties have referred to the IBA Guidelines.

There are also inherent problems with the IBA Guidelines as revealed by *W Limited* and these will adversely impact on arbitrators, arbitral institutions and the parties who continue to use the IBA Guidelines when considering disclosure issues. Paragraph 1.4 fails to draw a clear distinction between those situations in which the arbitrator may be a member of a law firm but either not have a relationship (i.e. advise) with an entity of one of the parties to the dispute or not be aware that his firm maintains a relationship with that entity. There is clearly a need to reconsider the position here for important policy and practical reasons. From a policy perspective there is a need for clarity and certainty in the practice and procedure of international arbitration. Clarity and certainty in the provisions of the IBA Guidelines (as with any other arbitral instrument) promotes greater understanding and proper status and application of the provisions to the specific facts of the case.

What, then, should be done? It may be argued that the status quo should be maintained, that is, retain the provisions as they currently stand and to allow the parties who choose London as their seat of arbitration to take any guidance from the publicity of *W Limited*. The obvious problem is that maintaining the status quo does not improve the situation; it fails to tackle the inherent problems with the IBA Guidelines and this will continue to provide parties with the false impression (at least in circumstances where the seat of arbitration is London) that they may successfully challenge an appointment or an award under paragraph 1.4. The practical consequences are obvious: delays are likely to be caused by applications to the court; costs will be compounded; and uncertainty and inconsistency in the interpretation and application of the IBA Guidelines will continue. All of this goes against the fundamental aims of the IBA in introducing the Guidelines to the arbitration community.

What is required is a re-draft of paragraph 1.4 so that a balance is struck between the obligation on arbitrator to make necessary conflicts disclosure and thereby to uphold his duty of impartiality and avoid accusations of bias on the one hand and allowing the parties to choose and appoint arbitrators of their choice without being subjected to delaying tactics on the other. There are two options which may be considered to try to achieve this balance: (i) remove paragraph 1.4 from the Non-Waivable Red List and insert it into the Waivable Red List; or (ii) maintain paragraph 1.4 in the Non-Waivable Red List but re-draft it.

The first is to simply remove paragraph 1.4 from the Non-Waivable Red List and to insert it into the Waivable Red List. The rationale for doing this is simple. It would avoid the situation which occurred in the *W Limited* in which the claimant referred to paragraph 1.4 because it was focusing more on the assumption that there was bias as opposed to considering the full circumstances of the specific case. By removing it from the Waivable Red List it allows the parties the flexibility and liberty to exercise

their powers of waiver on a valid disclosure by the arbitrator and to continue with the arbitral process without unnecessary delay and costs being incurred with an application to the court.

The second option is to re-draft paragraph 1.4 within the Non-Waivable Red List. Clearly where the arbitrator regularly advises one of the parties to the dispute and 'derives significant financial income' would greatly increase the risk of apparent bias. In fact, the wording 'significant financial income' is also unhelpful because an arbitrator may advise a party through, for example, opinion writing on issues which may not necessarily amount to significant financial income but which should, nevertheless, fall within the Non-Waivable Red List. On the issue of the arbitrator's link to one of the parties and regular advice, then that element of paragraph 1.4 should be retained. On the element of paragraph 1.4 that deals with the arbitrator's firm providing advice, this should be amended to include whether the arbitrator had knowledge of that fact and if he did then he should not act. The more complicated matter is the reference to the arbitrator or his firm regularly advising an "affiliate" of one of the parties. The problem has already been discussed above: it fails to distinguish between the firm providing the advice and the arbitrator not being part of that process or having the necessary knowledge. The reference to the arbitrator or his firm advising an affiliate should be taken out and inserted into the Waivable Red List. By doing this the issue remains a serious one but one which, after the necessary disclosures have been made and after the parties have had the opportunity to consider the facts of the case, allows the party to exercise their power of waiver and to avoid situations such as the one in *W Limited* from occurring which undermine the nature and process of international arbitration.

The IBA Guidelines are an important source of guidance to those engaged in arbitration. The essential aims and objectives of the IBA Guidelines are admirable and the desire to avoid inconstancies in determining issue of impartiality and disclosure are to be applauded. However, they have been perceived by the parties and national courts in distinctly diverging ways, at least when one considers English judicial approaches. Despite this, the English courts have consistently maintained an approach which confines the IBA Guidelines to its true status: as merely a guide which should not play a central role, as it has done in Portuguese cases, in the judicial decisions making process. Further, as the IBA Guidelines continue to be used by the arbitration community, there is an urgent need to remedy the inherent problems with some of the provisions.