

Judicial Approaches to the IBA Guidelines on Conflicts of Interest in International Arbitration

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Abstract

This paper seeks to close the gap in the research surrounding the IBA Guidelines by critically considering how national courts actually perceive and utilise the IBA Guidelines during the decision making process when faced with conflicts applications. Through a doctrinal analysis of case law from various jurisdictions, this paper reveals the existence of two distinct judicial approaches. The first approach places heavy reliance on the IBA Guidelines and, as a result, they form an integral part of the adjudicative process. The second approach utilises the IBA Guidelines merely as a guide, a point of reference and a means of simply reinforcing judicial reasoning. It will be argued that the first judicial approach is highly unsatisfactory both from a legal and policy perspective. It will be argued that the second approach is to be desired because it remains consistent with the aims of the IBA Guidelines and it has enabled the courts to identify inherent weaknesses in the IBA Guidelines. Finally, recommendations for reforming aspects of the IBA Guidelines will be made in order that they may continue to be a source of guidance and assistance to the arbitration community and national courts.

It is a fundamental requirement that an arbitral tribunal acts fairly and impartially as between the parties.¹ 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 connections 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

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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 s33 Arbitration Act 1996.

² See, for example, 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 David Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration*, 4-112. (London: Thomson Reuters 2015).

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

Association Guidelines on Conflict of Interest in International Arbitration (the IBA Guidelines).⁷ The IBA 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.

The 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.⁹ The Introduction to the IBA Guidelines states that ‘it is hoped....that they will *assist parties, practitioners, arbitrators, institutions and courts* in dealing with these important questions of impartiality and independence.’¹⁰ Thus, the IBA Guidelines serve as a useful tool to provide the arbitration community and national courts with assistance and guidance on issues of independence and conflicts challenges. However, it is common practice for parties to make extensive reference to the IBA Guidelines and to rely upon them heavily before national courts. To some extent this phenomenon is understandable. The fundamental principle of party autonomy¹¹ which underpins the institution of arbitration dictates that the parties are free to choose the arbitrator(s) to adjudicate their dispute as well as retaining the liberty to choose the substantive and procedural laws, including any internationally accepted norms and practices which will govern the arbitration. This would include the use of the IBA Guidelines. Although national courts will seek to uphold the principle of party autonomy in arbitration

IBA Guidelines - see Jose R. Feris and Simon Greenberg, *Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration When Deciding on Arbitrator Independence in ICC Cases* in Jason Fry and Simon Greenberg, *The Arbitral Tribunal: Applications of Article 7-12 of the ICC Rules in Recent Cases* 20 ICC International Court of Arbitration Bulletin 12, Appendix, (2009).

⁷ International Bar Association, Practice Rules and Guidance http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (Accessed 6 June 2017). 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 Otto de Witt Wijnen, Nathalie Voser and Neomi Rao *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration* 5(3) Business Law International 433 (2004); David A. Lawson, *Impartiality and Independence of International Arbitrators. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration* 23(1) ASA Bulletin 55 (2005); Markham Ball, *Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?* Arbitration International 223 (2005).

⁸ IBA Guidelines Introduction para. 5.

⁹ Introduction para. 6 of the IBA Guidelines.

¹⁰ Introduction para. 6 of the IBA Guidelines. Emphasis added.

¹¹ For example, Art. 19(1) of the UNCITRAL Model Law embodies the principle of party autonomy which provides: ‘Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings’. Also, s. 1(b) of the English Arbitration Act 1996 states ‘the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest’. For an interesting discussion on the principle of party autonomy, both before and after the appointment of the arbitral tribunal, see Michael Pryles *Limits to Party Autonomy in Arbitral Procedure* 24(1) Journal of International Arbitration 327 (2007).

and thereby entertain the IBA Guidelines, the extent to which they will rely on the IBA Guidelines in the decision making process will vary from county to county.¹²

The approaches adopted by national courts towards the status of the IBA Guidelines is rather more complex as compared with those taken by the parties. An analysis of the case law from various jurisdictions reveals that there exists two distinct judicial approaches when national courts are faced with conflicts challenges in international commercial arbitration. The first judicial approach, common in some US states and Portugal for example, places heavy reliance on the IBA Guidelines and, as a result, they form an integral part of the adjudicative process. The second judicial approach, commonly found in Canada, England and Austria, utilises the IBA Guidelines merely as a persuasive tool, a point of reference and a means of reinforcing judicial reasoning.

Through a doctrinal analysis of the case law, this paper will seek to argue that the first judicial approach is highly unsatisfactory both from a legal and policy perspective. From a legal perspective, national courts are implicitly elevating the status of the IBA Guidelines to such an extent that they may be perceived as having the force of law. Consequently, from a policy perspective, the first approach has the undesired consequence of reinforcing the parties' heavy reliance on the IBA Guidelines in making challenges to national courts and thus causing unnecessary delays and expense in the arbitration process. It will be argued that the second approach is to be desired especially in light of the inherent weaknesses in the IBA Guidelines as identified by the English judiciary. Finally, recommendations for reforming the IBA Guidelines will be made in order that they may continue to provide guidance and assistance to the arbitration community and national courts.

It should be noted from the outset that this paper does not provide an analysis of the specific issues of impartiality and independence as dealt with under national laws nor does it provide a comparative analysis between those laws and the IBA Guidelines; this path has been well trodden others.¹³ Rather, this paper seeks to close the gap in the current literature concerning the IBA Guidelines by considering the extent to which national courts utilise the IBA Guidelines in the decision making process. It explores judicial attitudes towards the role and status of IBA Guidelines in conflicts challenges and, using the second approach, seeks to tackle some of their inherent weaknesses.

Part I of this paper sets outline the IBA Guidelines and policy. Part II critically consider the two judicial approaches taken towards the IBA Guidelines. Finally, relying on the second judicial approach, Part III will conclude with proposals for reform.

I. Outline of the IBA Guidelines

¹² In the US this practice will vary from State to State.

¹³ For example Mark Baker and Lucy Greenwood *Are Challenges Overused in International Arbitration?* 30(2) *Journal of International Arbitration* 101 (2013) and the literature mentioned in footnote 8 above.

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 aim 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 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.

It should be noted that the UNCITRAL Model Law¹⁴, the UNCITRAL Arbitration Rules¹⁵ and domestic arbitral legislation¹⁶ contain provisions concerning impartiality and independence. Article 12 (2) of the UNCITRAL Model Law, for example, states:

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Some within the arbitration community have raised legitimate concerns that challenges to arbitrators for lack of impartiality and independence has increased notwithstanding the aims of the IBA Guidelines.¹⁷ There has been a marked increase in the number of conflict challenges and parties are increasingly invoking and placing heavy reliance on the IBA Guidelines in their applications to national courts. For example, the International Chamber of Commerce (ICC) recorded an increase from an average of 20 per annum in the 1990s to an average of 30 per annum by 2009.¹⁸ Jefford has argued that this may be as a result of the use of challenges for ‘strategic and professional relationships within the international legal market.’¹⁹ Jefford continues to explain the impact of this phenomenon ‘This means both the arbitrators have been increasingly affected by conflict of interest and that there may be a growing sense that such challenges will be successful.’²⁰ Therefore, it is important that national courts take a pragmatic approach when considering conflicts challenges and, more significantly, when making reference to the IBA Guidelines. This approach is especially required in order that the courts strike the correct balance between respecting and upholding the principle of party autonomy on the one hand and, on the other, ensuring that tactical challenges (including over-reliance on the IBA Guidelines by the parties and the courts) are not causing unnecessary delays and thereby undermining the arbitral process.

II. An Analysis of the Two Approaches

¹⁴ UNCITRAL Model Law on International Commercial Arbitration (1985)

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 6 June 2017)

¹⁵ UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (accessed 6 June 2017). The UNCITRAL Arbitration Rules article 11(1) provides: ‘When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.’

¹⁶ For example s24 of the Arbitration Ordinance (Cap) 609 in Hong Kong which gives effect to article 12 of the UNCITRAL Model Law. See *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] 4 HKLRD 776 in which s24 was considered and applied by the Court of First Instance.

¹⁷ Nerys Jefford *Challenges to Arbitrators for Bias: How Concerned Should We Be?*, Hong Kong International Arbitration Centre (HKIAC) 24 (2014).

¹⁸ *Ibid*, 23.

¹⁹ *Ibid*.

²⁰ *Ibid*.

National courts will make reference to the IBA Guidelines when considering a conflicts challenge. Sheppard has noted that although the IBA Guidelines are non-binding, they are increasingly seen as representing good practice within the arbitration community²¹ and this recognition has been confirmed by national courts. As Kane J put it in the Canadian case of *Telesat Canada v Being Satellite Systems International Inc*²², the then 2004 IBA Guidelines were useful for the court in shedding ‘light directly on the issue of this Chairperson through the lens of the arbitration community.’²³ 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.²⁴

Although the IBA Guidelines are recognised by national courts the question is, to what extent do courts rely on them when formulating their final decision? This part seeks to address that question by analysing judicial approaches towards the IBA Guidelines in Austria, Canada, England, Portugal and New York.

The first judicial approach

The first approach sees judges placing heavy reliance on the IBA Guidelines during the decision making process. Courts adopting this approach make the IBA Guidelines an integral part of the decision making process. Two jurisdictions, Portugal and New York, are illustrative of the first judicial approach.

In *Demandantes v. Demandada*²⁵ the Portuguese 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 matter concerned a patent dispute under Portuguese law. Each party had appointed an arbitrator and these arbitrators then appointed a president. None of the arbitrators disclosed any issues regarding impartiality or independence. However, party A subsequently became aware that the arbitrator appointed by party B had been previously been appointed by party B in similar arbitrations on multiple occasions. In accordance with article 14(2) of the

²¹ A. Sheppard *Arbitrator Independence in ICSID Arbitration in International Investment Law for the 21st Century: Essays in honour of Christopher Schreuer* (Oxford: Oxford University Press 2009). 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 6 June 2017).

²² Ontario Superior Court of Justice, 09-46022, 16 July 2010 at [153]-[160].

²³ *ibid* 154.

²⁴ DFT 4A_506/2007 of 20 March 2008, c. 3.3.2.2., ASA Bull 3/2008, 575-576.

²⁵ *Demandantes v. Demandada* Court of Appeal of Lisbon, Processo 1361/14.0YRLSB.L1-1, 24 March 2015.

Portuguese Arbitration Law (PAL),²⁶ party A challenged the appointment of party B's arbitrator before the tribunal. The tribunal decided to retain the arbitrator which led to party A bringing an application to the Court of Appeal.

In its submissions, Party B made extensive reference to the IBA Guidelines. It relied heavily on the provisions under the Orange List in arguing that the arbitrator should not be removed. It further argued that the IBA Guidelines did not forbid repeated appointments and could not, in any event, be read in abstract. Part A contended that the arbitrator did not meet the duty of disclosure imposed on him by Portuguese and international law. The numerous occasions on which party B had previously appointed its arbitrator raised suspicion as to the arbitrator's independence and impartiality. Further, the arbitrator's failure to comply with his duty to disclose justified his removal.

The Court of Appeal noted that, although the PAL stated that "the arbitrators must be independent and impartial"²⁷ and that the arbitrator can be removed if there are "serious doubts as to his credibility or independence"²⁸, it did not provide a definition of those concepts. Consequently, the Court looked to the IBA Guidelines and held that the arbitrator was under a duty to disclose his past appointments. In formulating its reasons, the Court made extensive reference to various parts 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.*'²⁹ Applying IBA Guideline 3(c) the Court of Appeal concluded that the arbitrator was under an obligation to disclose his past nominations and, by not doing so, he had failed to comply with that obligation.

A bolder approach was adopted by the New York District Court which was later affirmed by the Second Circuit Court of Appeals in *Applied Industrial Materials Corp. v Ovalar Makine Ticaret Ve Sanayi*.³⁰ Having considered the issue of impartiality in light of established US case law, Patterson USDJ paid particular attention to the IBA Guidelines in concluding that the arbitral award should be vacated due to the arbitrator's failure to disclose relevant information. After commenting on the relevance of the IBA Guidelines in arbitral disputes, Patterson USDJ held:

[r]eason dictates that there must be a continuous obligation on the part of the arbitrator to avoid partiality or the appearance of partiality.....

²⁶ Portuguese Arbitration Law, Law 63/2011. For an overview of the key provisions of the PAL, see José Carlos Soares Machado and Mariana França Gouveia <http://thelawreviews.co.uk/edition/the-international-arbitration-review-edition-7/1136481/portugal>.

²⁷ PAL, article 9(3).

²⁸ PAL, article 13(3).

²⁹ Emphasis added.

³⁰ *Materials Corp. v Ovalar Makine Ticaret Ve Sanayi* No. 05-CV-10540 (S.D.N.Y. June 28, 2006); *Materials Corp. v Ovalar Makine Ticaret Ve Sanayi*, A.S., 492 F.3d 132 (2d Cir., 2007).

Thus *under these guidelines* Mr. Fabrikant's failure to investigate the status of SCF's negotiations with Oxbow and his subsequent lack of knowledge do not excuse his lack of disclosure.³¹

These decisions illustrate the courts not only place heavy reliance on the IBA Guidelines but that they make it an integral part of the decision making process and in doing so national courts are implicitly elevating the IBA Guidelines to the status of 'quasi-hard law'. Although the Portuguese Court of Appeal in *Demandada* explained that the PAL did not provide definitions for the concepts of independence and impartiality, the Court failed to attempt to make reference to its national laws for guidance and assistance – it simply made extensive reference to the IBA Guidelines and based its entire reasoning on them. There was no attempt, for example, to consider whether guidance could be taken from its national laws (which was the applicable law in the arbitration) on the concepts of impartiality and independence. Rather, it based its entire decision on its interpretation of the IBA Guidelines. The New York District court's final decision in *Applied Industrial Materials Corp* was eventually based on 'these guidelines' (i.e. the IBA Guidelines) which resulted in the arbitral award being vacated.

The first approach gives the impression to the parties and others in the arbitration community that national courts (at least in Portugal and New York) will base their decisions on the IBA Guidelines and thereby providing them with 'quasi-hard law' status. The harmful effect of this approach is clear. It has the potential undesirable effect of fuelling unnecessary, expensive and time consuming conflicts challenges in the national courts. By simply relying on the IBA Guidelines and making it an integral part, if not the only part of the final decision, the courts are in danger of inadvertently misrepresenting the IBA Guidelines as 'quasi hard-law.' What the courts should, in fact, be doing is reinforcing the status of the IBA Guidelines by explicitly making clear that they are merely a tool to assist in resolving conflicts issues and that they are only a point of reference and guidance.

The second judicial approach

The second approach is more pragmatic as compared with the first. It correctly perceives the IBA Guidelines as a useful tool in assisting and guiding judges with the determination of difficult conflicts issues. It does not elevate the IBA Guidelines to an almost 'quasi-hard law' status by utilising it in the heart of the decision making process. Rather, the second approach maintains the legal status of the IBA Guidelines as a purely soft law instrument and as such it complements and is subordinate to hard law. The strength of this approach is particularly evident when analysing the English judicial approaches which have exposed inherent weaknesses in the IBA Guidelines.

The 2014 IBA Guidelines have been considered in one Canadian case: *Jacob Securities Inc v Typhoon Capital B.V.*³² In that case the arbitration concerned a claim by the applicant that it was entitled to compensation from the respondent for having introduced them to a source of

³¹ Emphasis added.

³² *Jacob Securities Inc v Typhoon Capital B.V.* 2016 ONSC 604 (Can. Ont. S.C.).

financing, N Co, for one of their wind-energy projects. The appointed arbitrator was an experienced litigator and a former partner in a law firm that had previously acted for N Co. The arbitrator has disclosed that he had no previous dealing with the parties but did not perform a conflicts check with his former firm. After the arbitrator dismissed the applicant's claim, the applicant became aware of the previous relationship between the arbitrator's former law firm and N Co and challenged the arbitral award. The applicant relied heavily on General Standard 6(a) of the IBA Guidelines and further argued that the arbitrator had failed to comply with the IBA Guidelines' disclosure requirement in General Standard 3. Mew J, in dismissing the application, made reference to the IBA Guidelines when he said they were 'widely recognised as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.'³³ He distinguished the facts of the case from the Non-Waivable Red list, noting that the arbitrator had no knowledge of the relationship between his former firm and N Co. Despite making reference to the IBA Guidelines and its authoritative status within the arbitration community, Mew J did not rely on them in formulating his decision. Rather, Mew J made extensive reference to established Canadian case law to support his conclusion that the arbitrator's connection with N Co was too remote.

Austrian courts have been more direct in their comments and views on the IBA Guidelines. 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.

The second approach is prevalent and consistent when analysing the English authorities. The first case to consider the IBA Guidelines was *ASM Shipping of India v TTMI Ltd of England*³⁵ in which the court was concerned with an application to remove Mr. X, the chairman of a tribunal. 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

³³ Para. 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 *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* 156(7223) New Law Journal 744 (2006). See also Steven Friel, *Apparent Bias* and *"Serious Irregularity"* in *English Arbitration* 9(1) International Arbitration Law Review N1-3(2006); and Huw R. Dundas, *Arbitration and the English courts: Progress and Redress* 72(2) Arbitration 140 (2006).

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*,³⁶ 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.³⁷

In *A v B*³⁸, 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.”³⁹ Therefore, the national laws, the *lex arbitri*, would prevail regardless of whether the IBA Guidelines came to the opposite conclusion.

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

³⁶ *Cofely Limited v Bingham, Knowles Limited* [2016] EWHC 240 (comm).

³⁷ *Cofely* [109].

³⁸ *A v B* [2011] EWHC 2345 (Comm); Stephen Burke, *English High Court Considers Apparent Bias* 15(1) International Arbitration Law Review N1-3 (2012); and Huw R. Dundas, *Conflicts of Interest and Arbitrator Disclosure Revisited: Barristers Acting as Counsel and as Arbitrator* 78(1) Arbitration 72 (2012).

³⁹ *A v B* [73].

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.'⁴⁰ With respect, 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* in that, although the court makes reference to the IBA Guidelines, the courts are conscious of keeping them at arms-length, being careful not to overly rely upon 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 'assist' in illustrating his conclusions. He did not rely upon them as part of the decision making process, they were not guiding principles, they were 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.

⁴⁰ Hew R. Dundas, *Arbitral Rarities: Recent Arbitration Cases in the English Courts with a Scottish Postscript* 81(3) Arbitration 332, 337 (2015).

The IBA Guidelines were scrutinised in detail in the recent case of *W Limited v M SDN BHD*.⁴¹ 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.’⁴² 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.’⁴³ Further, in *Helow v Secretary of State for the Home Department and another*⁴⁴ Lord Mance explained the nature and application of the test when he said:

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

⁴¹ *W Limited v M SDN BHD* [2016] EWHC 422 (Comm).

⁴² *Porter v Magill* [2002] AC 357 at [103] per Lord Hope.

⁴³ *Yiacoub v The Queen* [2014] UKPC 22 at [12] Lord Hughes (with whom Lords Neuberger, Mance, Clarke and Toulson agreed).

⁴⁴ *Helow v Secretary of State for the Home Department and another* [2008] UKHL 62; [2008] 1 WLR 2416 at [39].

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 39.⁴⁵

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.⁴⁶

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 which urged that paragraph 1.4 provides a clear steer, is 'pretty emphatic, and may be a 'very powerful factor to weigh in the balance, and that there is a real possibility of bias 'because that is what we are told through Paragraph 1.4.'⁴⁷

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 assistance on the question of whether the particular facts of a

⁴⁵ *W Limited* (n. 22) [39].

⁴⁶ *W Limited* (n 22) [23].

⁴⁷ *W Limited* (n 22) [37].

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.⁴⁸

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 party⁴⁹ where ‘[a] close family member of the arbitrator has a significant financial interest in the outcome of the dispute’⁵⁰ and where ‘[t]he arbitrator has a close relationship with a non-party who

⁴⁸ *W Limited* (n. 22) [37].

⁴⁹ Paragraph 2.1.1 of the Waivable Red List.

⁵⁰ Paragraph 2.2.2 of the Waivable Red List.

may be liable to recourse on the part of the unsuccessful party in the dispute.’⁵¹ Knowles J rightly argued that ‘These situations 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.”’⁵²

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.

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 the duty of disclosure and they aim to assist the various arbitration players, including national courts, in resolving those difficult issues. However, as this paper has revealed, there exists distinctive and vastly diverging judicial approaches in the use and reliance of the IBA Guidelines and this undermines the very aims for which the IBA Guidelines were promulgated: the need for greater consistency and harmonisation in the area of arbitrator conflicts. The first approach gives the impression that the courts will base their final decision the IBA Guidelines and thus impliedly elevates their status beyond soft law. The second approach, however, correctly utilises the IBA Guidelines as a mere tool to guide judicial thinking in the final decision making process. It carefully maintains the IBA Guidelines as a point of reference, a source of guidance and a means of simply reinforcing the final decision which is based on hard law. It avoids inadvertently giving the impression that the courts will simply rely on the IBA Guidelines when reaching their final decision.

The wisdom of the second judicial approach has enabled the courts to expose inherent problems with the IBA Guidelines and this further supports the call in this paper for courts to adopt the second judicial approach when dealing with conflicts challenges. The inherent problems with the IBA Guidelines as revealed by *W Limited* will adversely impact on arbitrators, arbitral institutions and the parties who continue to rely on the IBA Guidelines. 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

⁵¹ Paragraph 2.2.3 of the Waivable Red List.

⁵² *W Limited* (n. 22) [41].

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. This severely undermines the fundamental aims of the IBA in introducing the Guidelines to the arbitration community. It also runs counter to the purpose and virtues of the institution of arbitration.

How, then, can those problems be effectively remedied so that the IBA Guidelines continue to assist 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, there is a need for national courts to ensure that they explicitly reinforce their status as a soft law instrument. As the second judicial approach has illustrated, utilising the IBA Guidelines as a tool to assist and guide the courts also allowed those courts to expose inherent problems which, if they remain unresolved, will adversely impact on the parties and arbitral tribunals.