
**ANALYSIS OF THE INTERNATIONAL BAR
ASSOCIATION (IBA) 2024 GUIDELINES ON
CONFLICTS OF INTEREST AND PRACTICAL
IMPLICATIONS FOR ARBITRATORS**

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ANALYSIS OF THE INTERNATIONAL BAR ASSOCIATION (IBA) 2024 GUIDELINES ON CONFLICTS OF INTEREST AND PRACTICAL IMPLICATIONS FOR ARBITRATORS

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1.0 INTRODUCTION

At the heart of any dispute resolution model is the requirement for the decision maker to be seen by the parties as impartial and independent. In arbitration, the arbitrator is the decision maker and is required to disclose any circumstance that might give rise to justifiable doubt as to his impartiality and independence.¹ In simple terms, the arbitrator must not be influenced by any other factor other than the merits of the case (i.e., the arbitrator must not be conflicted). The requirement for the arbitrator to avoid conflict of interest is aimed at ensuring due process and vesting legitimacy and trust in the arbitral process. Accordingly, where a circumstance may raise justifiable doubts as to the impartiality of an arbitrator, he is required to disclose, refuse to accept an appointment, or resign (where he has accepted an appointment) where necessary.

The seemingly clear phrase "*circumstance giving rise to justifiable doubts*", has over the years proven to be quite opaque in some instances. This has led to many conflicts of interest challenges in international arbitration.² To guide arbitrators and parties in navigating uncertain circumstances (when they do occur), the International Bar Association (IBA), on May 22, 2004, issued its first-ever Guidelines on Conflicts of Interest in International Arbitration ("2004 Guidelines"). The 2004 Guidelines provided practical examples and hypothetical situations to define the situations that qualify or lead to a potential conflict of interest and categorised these situations in a traffic-light system (green, orange and red list).³

Following the wide acceptance of the 2004 Guidelines, the IBA introduced the 10-year review system. Through this review system, the IBA ensures that the Guidelines are reviewed every 10 years to ensure they are updated with best practices. Further to this, on October 13, 2014, the IBA introduced the 2014 Guidelines ("2014 Guidelines"),⁴ which replaced the 2004 Guidelines, imposed stricter standards on an arbitrator's independence and impartiality, and provided more disclosure instances not contemplated by the 2004 Guidelines. The 2014 Guidelines expanded the scope of application to all international arbitration, whether lawyers or

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¹ Article 12 (1), United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

² See the cases of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, *Secretariat Consulting Pte Ltd & ors v A Company* [2021] EWCA Civ 6

³ The International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2004), <https://www.acerislaw.com/wp-content/uploads/2024/03/2004-IBA-guidelines-on-conflicts-of-interest-in-international-arbitration.pdf>

⁴ The International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2014), <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed on March 11, 2024



non-lawyers arbitrate the proceedings,⁵ tribunal chairs, sole arbitrators, and co-arbitrators.⁶ Similarly, in February 2024, the IBA released its updated Guidelines to replace the 2014 Guidelines – the 2024 IBA Guidelines ("2024 Guidelines").⁷

This article examines the notable provisions and changes introduced by the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration, and proffers recommendations for arbitration users.

2.0 THE HIGHLIGHTS OF THE 2024 IBA GUIDELINES ON CONFLICT OF INTEREST

a. Structure of the IBA 2024 Guidelines on Conflict of Interest

As with the previously issued IBA Guidelines on Conflicts of Interest, the 2024 Guidelines is divided into two major parts. The first part addresses the General Standards Regarding Impartiality, Independence, and Disclosure, while the second part addresses the Practical Application of the General Standards (the "Practical Application"). The subsequent part of this paper shall examine the provisions of Parts 1 and 2 of the Guidelines.

b. General Standards Regarding Impartiality, Independence, and Disclosure

Part 1 of the IBA Guidelines reiterates the general standards on impartiality, independence, and disclosure in arbitration. Primarily, an arbitrator is required to be 'independent of the parties' during the life of the arbitration. The life of the arbitration begins any time from the acceptance of the appointment and continues until the award is delivered or corrected (where necessary).⁸ To comply with this independence requirement, the arbitrators are expected to disclose conflict of interest situations that cast doubts about their impartiality or independence.

In practice, determining whether a conflict-of-interest situation arises may not always be black and white. Hence, the Guidelines provides two tests to reach this conclusion: subjective and objective.

SUBJECTIVE TEST	OBJECTIVE TEST
The arbitrator's perception of his state of mind to arbitrate on the matter.	A reasonable third party's perception of the arbitrator's ability to arbitrate on the matter.

⁵ Paragraph 5, 2024 IBA Guidelines on Conflict of Interest

⁶ *ibid*

⁷ The International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2024), <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>, accessed March 10, 2024

⁸ See General Standard 1, 2024 Guidelines



By the subjective test, where an arbitrator doubts his ability to be impartial and independent, then such arbitrator has to recuse himself from or refuse to accept appointment in the arbitration. On the other hand, the objective test is the test of a reasonable third party who knows the relevant facts and circumstances. Where such a reasonable third party would conclude that there is a likelihood of bias or of the arbitrator being influenced by factors other than the merits of the case, then there is a requirement for such arbitrator to also recuse himself from or refuse to accept the appointment in the arbitration.⁹

“...the objective test is the test of a reasonable third party who knows the relevant facts and circumstances.”

In addition to the above, where facts exist which 'in the eyes of the parties' cast doubts on the arbitrator's capacity to be independent, the arbitrator has to disclose such facts to the parties, the arbitration institution or other appointing authority (where necessary), or the co-arbitrator. This duty of disclosure is not extinguished by any advance declaration or waiver of possible conflicts of interest. Arbitrators use advance declarations or waivers to exonerate themselves from any future conflict issue arising. By such advance declarations, the parties agree to waive their right to challenge the arbitrator in a defined conflict situation or where the arbitrator seeks to discontinue the application of the disclosure obligations.¹⁰

Certainly, circumstances may arise when the arbitrator is unsure whether to disclose. Where such confusion arises, the 2024 Guidelines advises default disclosure. Default disclosure simply means that where there is doubt as to whether there should be a disclosure of specific facts and circumstances concerning the impartiality and independence of an arbitrator, such doubt should be resolved in favour of disclosure.¹¹

Notwithstanding the above, it is important to state that there may be times when parties would be deemed to have waived any potential conflict of interest. The Guidelines provide that if a party does not raise an express objection, within 30 days after the receipt of any disclosure by the arbitrator or after such party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, the party would be deemed to have waived any potential conflict of interest in respect of such facts or circumstances. Knowledge of relevant facts or circumstances is also imputed on a party if a reasonable inquiry by the party would have shown such a conflict of interest.¹²

Another cardinal general principle on impartiality and independence in

⁹ Such a conclusion can be readily reached in a situation contained on the Non-Waivable Red List.

¹⁰ See, Alefiyah M Shipchandler, 'Advance Waivers of Conflicts of Interest – Changing the Dimensions of Arbitrator Challenge' Kluwer Arbitrator Blog (September 27, 2018) Available online at <https://arbitrationblog.kluwerarbitration.com/2018/09/27/advance-waivers-of-conflicts-of-interest-changing-the-dimensions-of-arbitrator-challenges/> on March 26, 2024

¹¹ *ibid*, General Standard 3, Paragraph 3 (d)

¹² It is important to state that a party cannot waive conflict of interest for a scenario that falls under the unwaivable red list as any such waiver would be invalid. This is because conflicts contained in the unwaivable red list are considered to be too prejudicial to be waived. However, a person can still act as an arbitrator for circumstances contained in the waivable red list if all the parties, arbitrators, and the appointing authority (or arbitration institution) have full knowledge of the conflict of interest and if all the parties agree that such a person may serve as arbitrator, despite the conflict of interest. See Part II: Practical Application of the General Standards, Paragraph 2, 2024 Guidelines



the Guidelines relates to relationships. It is generally perceived that an arbitrator bears the identity of his employer or law firm. Hence, such a relationship should preclude the arbitrator from taking up certain appointments due to conflict reasons. However, the Guidelines now states that before imputing the identity of the arbitrator's law firm or employer on the arbitrator, regard should be made to the arbitrator's law firm/employer's activities, organisational structure, mode of practice and the relationship between the arbitrator with the law firm or employer. Hence, the mere fact that the activities of the arbitrator's law firm or employer involves one of the parties shall not necessarily constitute a source of such conflict or a reason for disclosure. Essentially, the Guidelines note that each relationship shall be considered based on the unique circumstances of each case.¹³

Notwithstanding the above, a party must also inform the arbitration tribunal, other parties, and the arbitration institution if any relationship exists, direct or indirect, between itself and an arbitrator or even between the arbitrator and other parties to the arbitration.

Concerning the duty of disclosure, the updated General Standards section of the Guidelines mandates a party to inform an arbitrator, the arbitral tribunal, other parties and the arbitration institution or other appointing authority if there exists any relationship, direct or indirect, between the arbitrator and: the party; another company of the same group of companies; a person or entity having a controlling influence on the party in the arbitration; a person or entity over which a party has a controlling influence; or any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration; and must also inform them of any other person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3. The 2024 Guidelines make it mandatory for the affected party to do so on their own initiative and at the earliest opportunity.¹⁴

c. Practical Application of the General Standards

Part II of the Guidelines provides for a number of real-life practical applications of the above-mentioned standards. Note however, that the practical application lists that follow the General Standards are by no means exhaustive of the situations where conflicts of interest may arise. However, they provide guidance on some possible scenarios that may occur.

¹³ *ibid*, General Standard 7, Paragraph (a)

¹⁴ See General Standard 7 Paragraph (a), 2024 Guidelines



As with other Guidelines (i.e. 2004 and 2014), the 2024 Guidelines retain the traffic light systems on the requirements for disclosure, i.e., the green, orange, waivable red and nonwaivable red lists.

i. Green List: The green list contains scenarios where no appearance of an actual conflict of interest exists from both an objective and subjective test. In such a situation, the arbitrator has no duty to disclose. Examples include situations where the arbitrators have previously expressed a legal opinion "(such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion was not focused on the case)"¹⁵ and where "the arbitrator and counsel for one of the parties have previously served together as arbitrators"¹⁶ etc.¹⁷

ii. Orange List: The orange list contains scenarios that may raise doubts about the arbitrator's impartiality or independence. Accordingly, in such scenarios, the arbitrator has to disclose to the party the nature of the conflicting circumstance. Where the arbitrator discloses such conflict, the parties can determine the arbitrator's capacity to decide on the dispute. Where no such objection is raised, the parties would be deemed to have waived their right to object. Where an objection is made to the arbitrator's capacity to arbitrate the dispute, the objective test of a reasonable third party is the threshold to be used to determine that challenge. Examples of scenarios under the orange list include where "the arbitrator and another arbitrator are lawyers in the same law firm or have the same employer"¹⁸ and where "the arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers"¹⁹, etc.²⁰

"...the arbitrator and counsel for one of the parties have previously served together as arbitrators."

iii. Red List (Waivable): As previously noted, the red list is subdivided into the waivable red list and the non-waivable red list. The waivable red list contains situations that raise serious conflict problems (but not as severe as the unwaivable red list). Due to their seriousness, there is a need for an arbitrator to expressly inform the parties of the conflicting circumstances, and the parties must also explicitly state their willingness to have the person as an arbitrator. Examples of circumstances on the waivable red list include situations where the

¹⁵ See 4.1.1, (4) Green List, Part II, 2024 Guidelines

¹⁶ See 4.3.2, (4) Green List, Part II, 2024 Guidelines

¹⁷ Some examples of scenarios in the Green List are: where a firm in association or in alliance with the arbitrator's law firm or employer but that does not share significant fees or other revenues with the arbitrator's law firm or employer renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter, where the arbitrator was a speaker or moderator or organiser in one or more conferences or participated in seminars or working parties of the arbitrator, where the arbitrator has a relationship with another arbitrator or counsel with one of the parties through membership in the same professional association, social or charitable organisation or through social media network, the arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties. See Practical Application 4, 2024 Guidelines.

¹⁸ See 3.2.1, (3) Orange List, Part II, 2024 Guidelines

¹⁹ See 3.2.2, (3) Orange List, Part II, 2024 Guidelines

²⁰ Some examples of hypothetical scenarios in the Orange List are: the arbitrator has, within the past three years, served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter; the arbitrator and another arbitrator are lawyers in the same law firm or have the same employer; the arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties, etc. See Practical Application 3, 2024 Guidelines



arbitrator had "a prior involvement in the dispute",²¹ where the arbitrator is "a lawyer in the same law firm as the counsel to one of the parties",²² and where "the arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties."^{23,24}

iv. Red List (Unwaivable): The unwaivable red list includes scenarios where disclosure cannot cure the conflict of interest. The scenarios, which mainly relate to situations where the arbitrator would be perceived to have severe conflicts, are categorised as unwaivable by the Guidelines to avoid the arbitrator being considered a judge in his own cause. Some circumstances on the unwaivable red list include situations where there is "an identity between a party and the arbitrator, or the arbitrator is a legal representative in the arbitration or an employee of a person or entity that is a party in the arbitration"²⁵, where the arbitrator "has a significant financial or personal interest in one of the parties, or the outcome of the case."²⁶

3.0 COMPARISON OF THE 2014 GUIDELINES AND THE 2024 GUIDELINES

As already mentioned above, the 2024 Guidelines replaces the 2014 Guidelines and introduces some differences and introduction. In this part, we examine some key differences between both Guidelines.

S/N	SUBJECT	2014 GUIDELINES	2024 GUIDELINES
1.	Impact of Professional Secrecy on Arbitral Appointments	No provision. Silent.	When an arbitrator is obliged to disclose under the Guidelines and finds that a professional rule of secrecy precludes such disclosure, he should not accept the appointment or resign. (See General Standard 3(e)).
2.	Expansion of the Green List (contact between the arbitrator and one of the experts).	No provision on whether the hearing of testimony from an expert constitutes a conflict of interest	The 2024 Guidelines now provide that where the arbitrator, when acting as arbitrator in another matter, hears testimony from an expert appearing in the current proceedings, the same would not require disclosure. (See 4.5.1 of the Green list).

²¹ See 2.1.2, (2) Waivable Red List, Part II, 2024 Guidelines

²² See 2.3.3, (2) Waivable Red List, Part II, 2024 Guidelines

²³ See 2.1.1, (2) Waivable Red List, Part II, 2024 Guidelines

²⁴ Examples of scenarios in the Non-Waivable Red List are: the arbitrator is a manager, director, or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration, or the arbitration currently regularly advises a party or an affiliate of a party, and the arbitrator or the arbitrator's firm or employer derives significant financial income therefrom. See Practical Application 1, 2024 Guidelines.

²⁵ See 1.1, (1) Red List, Part II, 2024 Guidelines

²⁶ See 1.4, (1) Red List, Part II, 2024 Guidelines



3.	Expansion of the Orange Lists	Under the guidelines, only about 26 scenarios were classified under the orange list.	However, the orange list has been expanded under the new guidelines to include about 5 new scenarios. Therefore, the orange list now has 31 scenarios. The addition relates to the underlisted (See the Orange List): a. Where the arbitrator serves or has acted within the past three years as an expert for one of the parties or an affiliate of one of the parties in an unrelated matter. b. Where the arbitrator has been appointed as an expert on more than three occasions by the same counsel or the same law firm within the past three years. c. The arbitrator has been appointed to assist in mock trials or hearing preparations on more than three occasions by the same counsel or law firm within the past three years. d. Where an arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration. e. An arbitrator and their fellow arbitrator(s) currently serve as arbitrators in another arbitration. The 2024 Guidelines has expanded the previous guidelines to include disclosure when an arbitrator has put out an opinion on a case publicly through social media, online professional network platforms, or otherwise. In addition to the above, the 2024 Guidelines provide more specificity and breadth to Paragraph 3.4.3 of the Orange List, which previously described a scenario where an arbitrator holds a position with the appointing authority in connection with the dispute. The 2024 Guidelines narrow down the sorts of positions to be considered for this scenario by revising this item to refer to "an executive or other decision-making" position that "has participated in decisions with respect to the arbitration" but expands the scenario by including such positions in any administering institution.
4.	Recognition of deemed knowledge of facts on conflict of interest on a party	Silent	According to the Guidelines, a party is required to object within 30 days after learning of facts or circumstances that would constitute a conflict of interest. Where such party fails to object within 30 days, he is deemed to have waived his right to object. However, the 2024 Guidelines recognise that a party shall be considered to have learned of any facts or circumstances that reasonable enquiry would have yielded if conducted at the outset or during the proceedings. (See General Standard 4(a)).



5.	The Role of an Arbitrator's law firm or organisational structure or mode of practice in Conflict-of-Interest Scenarios	The General Standard 6 of the 2014 Guidelines contained the general principles that an arbitrator is considered to bear the identity of his law firm. However, the Guidelines provide that the activities of the arbitrator's law and the arbitrator's relationship with the law firm should be considered to determine whether a conflict of interest exists.	Under the 2024 Guidelines, General Standard considerations in determining the existence of a conflict of law situation in an arbitrator law firm were expanded to recognise the organisational structure or mode of practice. In addition, the Guidelines consider the current realities of international law firm practice and their profit-sharing modalities to determine whether the arbitrator bears the identity of his law firm. Moreover, the provision also recognises that an arbitrator does not need to be a lawyer. Hence, the word, employer has been included in Standard 6 of the Rules. The 2024 Guidelines consider that the arbitrator may not work for a law firm, and this successfully accounts for all employer-employee relationships the arbitrator might have.
6.	Consequences for failure to disclose	Silent	The 2024 Guidelines provide that an arbitrator's failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubt as to the arbitrator's impartiality or independence does not necessarily mean that a conflict of interest exists or that a disqualification should arise. (See General Standard 3(g)). Accordingly, a challenge will only be successful if the objective partiality test is met.

Besides the above-identified differences between the 2014 and 2024 Guidelines, it is instructive to note the following other differences and observations:

1. The 2024 Guidelines contain guidance for assessing relationships between parent companies and subsidiaries involved in the arbitration and relationships involving nation-states and their related entities.²⁸
2. The 2024 Guidelines also add relationships with persons/ entities with a controlling influence on the list of relationships to be disclosed and add a catch-all to broaden the standard to require disclosure of any person/entity the party believes an arbitrator should disclose in

²⁸ See Explanation of General Standard 6(c), 2024 Guidelines



accordance with General Standard 3.²⁹ Interestingly, the 2024 Guidelines add that when providing a list of entities or persons to be considered for disclosure, *"the parties are required to explain these persons' and entities' relationship to the dispute."*³⁰ The explanation also expands the requirement about counsel that must be identified beyond just counsel appearing in the proceedings to include any counsel advising on the arbitration as well.

"...the parties are required to explain these persons' and entities' relationship to the dispute."

3. With respect to the Practical Application of the General Standards, the 2024 Guidelines states that the General Standards "govern over" the illustrative Application List, solidifying the IBA's position that the guiding principles for arbitrators to follow are in Part I of the Guidelines. Nevertheless, the illustrative Application Lists contained in Part II, though non-exhaustive, are a helpful reference point for those involved in arbitrations to assess potential conflicts of interest.
4. In explaining the Green List in the 2024 Guidelines, the description of the list has been revised to state that the scenarios listed are those where there is no appearance of or no actual conflict of interest under the subjective standard of review or the objective standard. The 2014 Guidelines contained only the objective standard test in this description. The 2024 Guidelines also removed the guideline that in some situations, the objective test should "prevail over" the subjective "eyes of the parties" test.

4.0 RECOMMENDATIONS AND CONCLUSION

The introduction of novel provisions in the IBA Guidelines 2024 reflects the changes in international arbitration. The IBA Guidelines are generally regarded as soft law instruments as they are only meant to guide parties. They are therefore not binding on parties except where parties choose to make them binding through their agreements for example. Notwithstanding the general non-binding nature of the IBA Guidelines, practice and procedure in international arbitration suggest that parties are often prone to comply with its provisions and to reference its provisions when presented with scenarios that cast doubt regarding the arbitrator's impartiality. The additions introduced by the 2024 IBA Guidelines shall undoubtedly aid in providing clarity on some opaque conflict scenarios in

²⁹ See General Standard 7 on the Duty of the Parties and the Arbitrator, 2024 Guidelines

³⁰ Explanation to General Standard 7, 2024 Guidelines



international arbitration and determining whether the arbitrator has to disclose in such scenarios.

Most importantly, recognising the reasonable third party (objective) test for confirming the existence of a conflict of interest is central in any dispute resolution system, as justice must be done and seen to be done. Hence, parties must trust the ability of the arbitrator to deliberate and determine the dispute without being influenced by factors other than the merits of the case. Consequently, parties and prospective arbitrators are advised to comply with the provisions of the IBA Guidelines 2024 to maintain the neutrality of the arbitral process.



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