Weaknesses in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration

The IBA Guidelines (the Guidelines) on Conflicts of Interest in International Arbitration were first published in 2004 following a collaboration of a group of 19 experts from 15 countries. The Guidelines were revised in 2014 by an expanded conflicts of interest subcommittee of 27 members and have been described as a ‘distinguished contribution in the field of international arbitration’.¹ Although the Guidelines are not legally binding, parties, counsel, arbitrators as well as the courts are encouraged to use them as a persuasive tool to assist them in their decisions regarding conflicts of interest and disclosures.

The 2014 Guidelines are a result of the IBA Arbitration Committee’s endeavours to address issues that have frequently emerged in the field of international arbitration, which commonly involves individuals from different cultural backgrounds, as well as various perspectives of the legal world. Some of the key revised matters in the Guidelines encompass the following:

a. The effects of ‘advance waivers’
b. The independence and impartiality of arbitral or administrative secretaries
c. Third party funding
d. Disclosure matters and ‘issue’ conflicts

The 2014 Guidelines include circumstances believed not to have been contemplated in the 2004 Guidelines, as well as bring about necessary improvements, as noted by the 2014 subcommittee, co-chaired by David Arias. The main goal of the revision was to promote consistency, avoiding unnecessary challenges and arbitrator removals, as well as withdrawals. This can be seen under the ‘Duty of the parties and the Arbitrator’ and the

¹ *W Limited v M SDN BHD* 2016 EWHC 422 Comm (Mr Justice Knowles CBE).
'Application lists'. However, the recent case of *W Limited v M SDN BHD* illustrates that weaknesses remain in the 2014 Guidelines as concerns disclosure and conflicts of interest. Although the 2014 Guidelines do indeed bring more certainty into the picture, the case of *W Limited v M SDN BHD* shows a different side of the coin, and namely, that the IBA Rules provide for a rigid application.

In the case of *W Limited v M SDN BHD*, the claimant alleged that the Arbitrator, Mr Haigh QC, had not made proper disclosure and as such sought to overturn the awards he had made in the defendant’s favour. Mr Haigh QC was a partner in a law firm that had prior dealings (amounting to substantial remuneration) with the defendant’s affiliates, but not the defendant itself. The 2014 Guidelines includes an additional provision whereby the affiliates of an arbitrator’s firm are part of the Non-waivable Red List; a step further than the 2004 Guidelines.

Mr Haigh QC indicated that although he was a partner of the law firm in question, he was rarely involved in any meetings or dealings concerning the law firm and would describe himself as an independent arbitrator merely making use of the administrative facilities provided by the firm. Mr Haigh QC also added that he had not been made aware of any conflicts by the firm during a conflicts check. The judge in this case determined that Mr Haigh QC had passed the test of what a reasonable person would have deemed to have been a conflict of interest.

The judge thus commented that, although the Guidelines are very valuable to cases of international arbitration, there are some shortcomings and the Guidelines should allow for flexibility on a case-by-case basis. Whilst the circumstances of Mr Haigh QC in this case fit squarely into the 2014 Guidelines’ Non-waivable Red List, the judge found that the List did not give room for case specific instances. In this sense, the facts of the case leave room for open questions with respect to the wider applicability of this instrument – should the IBA Rules be applied mechanically or should there be a judgement exercise of the specific circumstances of the case? Furthermore, why shouldn’t the parties have discretion to waive a disclosure by an arbitrator which falls under the Red List, especially as such a waiver would not amount to the parties actually acting as judges of their own case? As pointed out by *W Limited v M SDN BHD* 2016 EWHC 422 Comm.
Mr Justice Knowles CBE, this case should not automatically be conflicted by the Non-waivable Red List.

The authors of this article do not take the view that the IBA Guidelines on Conflicts of Interest should be ignored, but rather agree with the judge’s comments in *W Limited v M SDN BHD* that the Guidelines should allow for a case-by-case analysis.

In 2005, the 2004 Guidelines were successfully relied on in the English courts in the case of *ASM Shipping Ltd of India v TTMI Ltd of England*[^3^], which dealt with an application to set aside an award on the grounds of serious irregularity, as provided by section 68 of the English Arbitration Act 1996. The set-aside application concerned a maritime arbitration, in which the third arbitrator (appointed by the other two arbitrators on the panel) was challenged on the ground of apparent bias. The facts underlying the challenge revolved around the idea that the arbitrator had been previously instructed by respondent’s solicitors in a different arbitration, between different parties, but involving the same principal fact witness. Furthermore, the allegations of bias arose from the disclosure process in which the same principal fact witness and the arbitrator were involved.

The arbitrator refused to withdraw from the proceedings, considering that his involvement in the previous arbitration was irrelevant to the present proceedings. As a result, the tribunal rendered an award, which the applicant successfully sought to set aside on the grounds listed under section 68 of the English Arbitration Act 1996. In its reasoning, the court touched upon an argument raised by the defendant, who suggested that no serious irregularity can be found, because the facts of the present case cannot be identified with any of the instances listed in the Guidelines’ Red List. In this respect, the court held that ‘[t]he IBA guidelines do not purport to be comprehensive’ and ‘are to be applied with robust common sense and without pedantic and unduly formulaic interpretation’.

There is no doubt that the 2014 IBA Guidelines are an invaluable tool in the world of international arbitration. It enables arbitrators and parties in a dispute to gain a better understanding of the scope of any disclosures that need to be made. The Guidelines, however, could also open the flood gates for frivolous

and vexatious challenges as the scope of disclosure is now wider than ever. In order to ensure the smooth running of international arbitration it is imperative that a common sense approach is applied when parties, arbitrators and courts utilise these Guidelines. This in effect will avoid delays and unnecessary challenges, all of which could stand to make arbitration an undesirable alternative to dispute resolution.

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