English Law Update: IBA Guidelines on Conflicts of Interest Criticised by English High Court in W Limited v M Sdn Bhd

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The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”), first published in 2004 and subsequently updated in 2014, has been widely used as a best practice guide to identification of arbitrator conflicts and disclosure of such conflicts. While the IBA Guidelines have no legal effect and are not binding as such, the international arbitration community customarily turns to the IBA Guidelines when issues concerning arbitrators’ disclosure of potential conflicts arise.

However, the IBA Guidelines are not without their weaknesses as the recent English High Court decision W Limited v M Sdn Bhd [2016] EWHC 422 (Comm) demonstrates.

The dispute

The parties in W Limited v M Sdn Bhd were involved in a dispute over a project in Iraq. An LCIA arbitration was commenced by M Sdn Bhd (“M”) against W Limited (“W”) and Mr. David Haigh QC, a Canadian lawyer, was appointed sole arbitrator.

At the time of Mr. Haigh QC’s appointment, company Q (“Q”) was a client of his law firm with which the firm had substantial business and connections. A month following Mr. Haigh QC’s appointment, Q was acquired by the
parent company of M. Following the acquisition, the law firm continued to provide substantial legal service to, and derived substantial income from, Q. While the acquisition of Q was widely publicized, the law firm’s conflict check system did not draw this development to Mr. Haigh QC’s attention. He was therefore not otherwise alerted to the new relationship between Q and M, both of whom now shared the same parent following the acquisition. He consequently failed to make a disclosure to the parties in the arbitration.

Mr. Haigh QC subsequently rendered awards in favour of M in the arbitration. W applied to set aside the awards.

Before the English High Court, W challenged the awards on the basis that there was “serious irregularity affecting the tribunal, the proceedings or the award… [which] has caused or will cause substantial injustice to the applicant” pursuant to section 68 of the Arbitration Act 1996. Specifically, W alleged there was apparent bias based on conflict of interest since the factual circumstances fell within the “Non-Waivable Red List” of the 2014 IBA Guidelines. The “Non-Waivable Red List” includes a situation 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.”

W submitted that, as a result of the acquisition of Q by the parent company of M, the relationship between Q, M, the law firm and Mr. Haigh QC were such that it fell squarely within the situation described above. There was therefore “apparent bias” based on this non-waivable conflict of interest.

Was there apparent bias?

The parties agreed that the test for apparent bias was set out in the House of Lords decision of Porter v Magill, namely, whether “a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

Based on the facts of the case, Mr. Justice Knowles held that there was no apparent bias. While Mr. Haigh QC is a partner of his firm, Knowles J found that he operated effectively as a sole practitioner using the firm only for secretarial and administrative assistance. There was no suggestion that Mr. Haigh QC did any work for client company Q. Further, the only reason Mr. Haigh QC failed to disclose was because the law firm’s conflict system failed to draw the matter to his attention. Under the circumstances, Knowles J concluded that a fair-minded and informed observer would not have considered there was a real possibility Mr. Haigh QC was biased, or lacked independence or impartiality.

The High Court therefore found that, as a matter of English law, the arbitral awards were not tainted by apparent bias. The application to set aside the awards was accordingly dismissed.

How does this sit with the IBA Guidelines?
Knowles J went on to consider whether application of the 2014 IBA Guidelines, which was heavily relied upon by W, would cause him to take a different view. He concluded that they would not. While commending the IBA Guidelines for their contribution to international arbitration, he noted that there were inherent weaknesses in the guidelines, specifically “in treating compendiously (a) the arbitrator and his or her law firm, and (b) a party and any affiliate of that party, in the context of the provision of regular advice from which significant financial income is derived.” Such treatment failed to account for situations where the particular facts could realistically have no effect on impartiality or independence.

**Distinction between an arbitrator and his firm, and a party and its affiliate**

As noted by the IBA Arbitration Committee, the IBA Guidelines reflect best international practice and are not intended to be applied mechanically by the international arbitration community. The IBA Arbitration Committee specifically warned against dogmatic interpretation of the guidelines, noting that they should be applied “with robust common sense and without unduly formalistic interpretation” (see paragraph 6 of Introduction to the IBA Guidelines).

General Standard 6(a) of the IBA Guidelines provides that while an arbitrator is in principle considered to bear the identity of his firm, when determining whether a potential conflict of interest exists or whether disclosure should be made, the activities of the arbitrator’s firm and the relationship between the arbitrator and his firm should be considered on a case-by-case basis. Activities of an arbitrator’s firm should not automatically create a conflict of interest. As explained in the Explanation to General Standard 6, this is to take into account the growing size of law firms as part of the reality in international arbitration.

General Standard 6(a) further provides that where one of the parties is a member of a group with which the arbitrator’s firm has a relationship, such fact should be considered in each individual case and should not necessarily constitute by itself a source of conflict of interest, or a reason for disclosure.

**The Non-Waivable Red List**

The IBA Guidelines set out scenarios of potential arbitrator conflict and classify them into a traffic-light system: a “Non-Waivable Red List”, a “Waivable Red List”, an “Orange List”, and a “Green List”. As noted above, the case of *W Limited v M Sdn Bhd* fell squarely within the Non-Waivable Red List.

General Standard 2(d) provides that justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence where a situation falls within the Non-Waivable Red List. The Explanation to General Standard 2(d) states that the parties cannot waive the conflict of interest in this situation as “no one is allowed to be his or her own judge”, and there cannot be identity between an arbitrator and a party.
Here the IBA Guidelines run into inconsistency between General Standards 6(a) and 2(d). The weakness of the prescriptive approach of General Standard 2(d) is exposed by hard facts such as those encountered in *W Limited v M Sdn Bhd*. Specifically, the IBA Guidelines fail to take into account the situation where an arbitrator’s firm frequently advises an affiliate of a party but the arbitrator himself has not himself provided such advice and was unaware (through no fault of his own) of that relationship.

In Knowles J’s view, the facts of *W Limited v M Sdn Bhd* are “classically appropriate for a case-specific judgment”. This would also appear to be the intention of the drafters of the IBA Guidelines – General Standard 6(a) of the IBA Guidelines clearly demonstrated a preference for a case-by-case approach.

This sensible approach was however thwarted by the categorical language of General Standard 2(d). Evidently, the IBA Guidelines do not permit the parties to resolve a situation falling within the Non-Waivable Red List by waiver following appropriate disclosures by the arbitrator. This all-or-nothing approach fatally undermines the exhortation by the IBA Arbitration Committee not to apply the IBA Guidelines formalistically without regard to common sense. If Mr. Haigh QC was made aware of the conflict and had made appropriate disclosure, the parties might conclude that the situation did not undermine his independence and/or impartiality. Yet, under the IBA Guidelines, the conflict situation could not have been waived even if the parties were minded to do so.

**Conclusion**

The circumstances of *W Limited v M Sdn Bhd* demonstrate how a rigid application of soft law in international arbitration might sometimes lead to an unreasonable result. While the IBA Guidelines are not binding in international arbitrations *per se*, the widespread use of the IBA Guidelines suggests that they might have come to be considered as the *de facto* standard for dealing with matters concerning an arbitrator’s conflicts of interest even where the parties have not explicitly agreed to their application.

The greatest virtue of arbitration is the fact that the entire dispute resolution process is based on party autonomy. However, party autonomy can be undermined by the unduly prescriptive provisions in the IBA Guidelines, including the categorical statement in the IBA Guidelines that justifiable doubts over an arbitrator’s independence or impartiality “necessarily exists” where a case falls within the “Non-Waivable Red List”, and therefore cannot be waived by the parties under the IBA Guidelines.

It remains to be seen whether the IBA Guidelines would be amended in light of this recent High Court decision. In any event, we expect a re-appraisal of how the IBA Guidelines are relied upon in determining conflicts of interest issues in international arbitration. While the IBA Guidelines continue to
remain a helpful starting point for analyzing issues of conflict, it should not be considered as the final word. Parties intending to challenge an arbitrator’s nomination should not rely on the IBA Guidelines as the sole basis for their challenge. Rather than simply relying on the conclusion reached by the IBA Guidelines once it is established that the situation at hand falls within one of the categories identified in any of the four “traffic-light” lists maintained under the Guidelines, parties are well-advised to vigilantly identify circumstances that actually give rise to justifiable doubts as to an arbitrator’s impartiality and/or independence prior to making a challenge.

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