

The IBA updates its guidelines on conflicts of interest in international arbitration

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In May of this year, the International Bar Association (IBA) released the updated version of its guidelines on conflicts of interest in international arbitration,¹ which have become a reference around the world, even in domestic arbitrations. This article highlights some of the most important updates.

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General Standard 3 (Disclosure by the Arbitrator) now provides, in paragraph (e), that arbitrators must decline a nomination or appointment if, due to a professional secrecy, they are prevented from disclosing a fact or circumstance that could generate a conflict of interest. Its new paragraph (g) under the disclosure standard makes it clear that an arbitrator's failure to disclose does not necessarily mean that a conflict of interests exists. With a recent decision by the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*), the position of Brazil's courts is now aligned with the IBA guideline.²

Paragraph (a) under General Standard 4 (Waiver by the Parties) continues to provide that a party will be deemed to have waived its right to object to an arbitrator if the party does not do so within the appropriate deadline, starting from the knowledge of the fact or circumstance that could constitute a potential conflict of interest. In the new version of the guidelines, however, the party is deemed to have learned any relevant fact or circumstance if this party could have discovered it through a reasonable inquiry.

General Standard 6 (Relationships) had already provided that third-party funders have an economic interest in the arbitral award and therefore can be equated to a party for the purposes of determining when a conflict of interest exists. The updated version of the guidelines adds that these third parties may influence the conduct of the proceedings or even the choice of arbitrators, which should also be considered when checking for potential conflict of interests.

In the Red List, a distinction has now been made: if the arbitrator currently or regularly advises one of the parties or an affiliate of one of the parties, and those services generate significant income, the conflict is non-waivable (item 1.4), but if the arbitrator does not earn significant income from the services, then the parties may waive their right to object to the arbitrator, after the circumstance has been disclosed.

The Orange List sets out examples of circumstances that should be disclosed by arbitrators, but do not prevent an arbitrator from acting if the parties do not object. This list now has two new items, 3.1.6 and 3.2.9, to deal with situations where the arbitrator has acted as expert for one of the parties or has been appointed as expert more than three times in the last three years by the same legal counsel or the same law firm. A new item 3.3.6 addresses

situations where the arbitrator is instructing an expert in the arbitration proceeding by reason of another matter in which the arbitrator acts as legal counsel.

New items 3.2.12 and 3.2.13 under the Orange List deal with situations where (i) an arbitrator and legal counsel to one of the parties, or (ii) two or more arbitrators, are members of an arbitral tribunal in another proceeding.

In the Green List, a new item 4.5.1 states that there is no conflict of interests when an arbitrator has heard testimony in another proceeding from an expert common to both the current and the earlier proceedings.

Although the guidelines are not imperative law, they have become widely accepted and applied in arbitrations since they were first released 20 years ago. The situation is no different in Brazil, where the guidelines are compatible with this country's Arbitration Law and the recent guidelines issued by the Brazilian Arbitration Committee – CBAr on arbitrators' duty of disclosure.³ The most recent version of the IBA Guidelines serves to consolidate their place as the reference guide on arbitrator impartiality, independence and disclosure.

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