INDEPENDENCE, IMPARTIALITY AND CONFLICTS OF INTEREST IN ARBITRATION

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A. Introduction

1. One of the key advantages of arbitration is that parties may participate in selecting the tribunal or arbitrator that adjudicates their dispute.

2. In tribunals with three arbitrators, the selection of the co-arbitrators, who may between them choose the chairman of the tribunal, is an extremely important means by which the parties can maintain an indirect influence over the arbitral process.

3. The quality of arbitration proceedings is largely dependent on the quality and skill of the arbitrators chosen. Careless selection can result, at best, in spending more time and money getting to a winning result than should have been necessary and, at worst, in jeopardising any prospects of success. The fact that the grounds of appeal or challenge to an arbitral award are limited makes the selection all the more important.

4. A fundamental aspect of the arbitration process is that arbitrators chosen must be independent and impartial.

5. This is assured by means of national law. For example, Section 24(1)(a) of the Arbitration Act 1996 gives the court power to remove an arbitrator on the ground that "circumstances exist that give rise to justifiable doubts as to his impartiality". The circumstances which may arise are not exhaustively listed but subject to a general test.

6. Or arbitral institutions have sought to set out principles or guidance listing what should happen in defined circumstances.
7. Sometimes there may be a tension between a global test or more detailed guidance as will be developed in this talk.

**B. Illustrative examples of Conflicts Scenarios**

8. To set matters in context, it is useful (in broad terms) to set out some of the most common scenarios which might give rise to a conflicts of interest in terms of an arbitrator(s):

   i. **Arbitrator has an interest in the dispute.**

9. Where the arbitrator has a significant financial interest, this will almost certainly give rise to doubts as to his or her impartiality and be a ground for seeking his or her removal. Shareholdings are less clear-cut and it may depend on the size of shareholding and the type of company, in particular if it is public or not. To take one example, in *AT&T Corporation v Saudi Cable Co* [2000] EWCA Civ 154, the ICC Court had dismissed a challenge by AT&T to the chairman of the tribunal on the ground that he was a non-executive director of, and held shares in, one of AT&T’s competitors. AT&T applied to the English Commercial Court for the removal of the arbitrator. The Court of Appeal upheld the High Court’s decision dismissing the application, finding that any benefit that could indirectly accrue to the company concerned as a result of the outcome of the arbitration would be of *de minimis* and of minimal benefit to the arbitrator, making it unreasonable to conclude that it could influence him.

   ii. **Arbitrator is in the same barristers’ chambers as counsel.**

10. Unlike lawyers who practise as associates or partners in law firms, barristers are self-employed and, although they may be based in chambers with other barristers, they should operate independently of each other. There are several cases in which challenges were brought against arbitrators who were in the same chambers as counsel for one of the parties to the arbitration. These challenges have invariably
failed, as courts and institutions have drawn a distinction between law firms and barristers’ chambers. A well-known case on this issue in England was case of *Laker Airways Inc v FLS Aerospace Ltd and another* [2000] 1 WLR 113, where Rix J (as he then was) rejected a challenge to an arbitrator based on the fact that he was in the same chambers as the barrister instructed by the claimant. He held that the test for bias needed to be made and that an arbitrator would also be disqualified for actual bias or if he had a pecuniary or proprietary interest in the case.

11. There have also been decisions of the LCIA Court (the arbitral body in the *W Ltd* case) finding that both the claimant and claimant’s counsel (who were both non-English) were sufficiently familiar with the organisation of barristers in England and therefore concluded that the grounds for challenge under the LCIA Rules were not satisfied. The result would probably have been the same had the challenge been made under the UNCITRAL Rules, the ICDR Rules or the SCC Rules, which all prescribe the same grounds for challenge as the LCIA Rules or the ICC Rules.

12. Unusually, however, in *Hrvatska Elektroprivreda v Republic of Slovenia* (ICSID Case No. ARB/05/24), the tribunal observed that there was a risk of an "appearance of impropriety" where an arbitrator and counsel were in the same chambers and barred counsel from the proceedings. The counsel concerned had been instructed after the appointment of the president and neither party wished the president to resign. The tribunal concluded that a reasonable independent observer would have justifiable doubts as to the independence or impartiality of the tribunal, bearing in mind (among other things) the fact that the system of barristers was foreign to the claimant. However, it was not appropriate in this case for the president to resign. Because the respondent had not instructed its counsel until after the constitution of the tribunal, the appropriate course in this case was to bar the counsel.

13. We will return later the IBA Guidelines on Conflicts but, for present purposes, it should be noted that the 2014 update to those Guidelines attempts to address the relationship between counsel and arbitrators by requiring the parties to identify their
counsel, and any relationship with a member of the tribunal, at the earliest opportunity and in the event of any change to the counsel team (see General Standard 7(b)).

iii. **Arbitrator has a relationship or connection with a party**

14. If an arbitrator has a relationship or other connection, personal or business, with one of the parties, this may give rise to justifiable doubts as to his independence and impartiality. It is a question of degree depending on the facts of each case. The situations can range from: (i) an arbitrator’s law firm previously acting for a party; (ii) an arbitrator previously being involved in the case; (iii) an arbitrator or an arbitrator's law firm previously acting as counsel against one of the parties in an unrelated arbitration; (iv) other relationships (social or professional) between arbitrator and party or counsel; and (v) where an arbitrator or arbitrator's law firm is acting, or has previously acted, for a party.

15. If the arbitrator is a legal representative of a party to the arbitration, this will almost certainly justify his removal from the tribunal. However, the fact that the arbitrator's law firm acts, or has previously acted, for a party will not automatically sustain a challenge. It is necessary to balance the interests of a party to appoint the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. Whether the arbitrator should be barred from acting in this situation depends on the nature and extent of his law firm’s involvement with the party and the relevance of the law firm’s activities.

16. To take some examples. In *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic* (ICSID Case No ARB/97/3 (Decision on the Challenge to the President of the Committee)), Argentina challenged the president of the ad hoc committee on the ground that his firm had been instructed on a tax matter by a party connected to one of the parties, Vivendi. The challenge was rejected on the basis that the work was unrelated and the arbitrator was not involved in that work.
The mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator. Disqualification of an arbitrator would be justified only if the circumstances that were actually established (and not merely supposed or inferred) placed in clear doubt the appearance of impartiality. However, the committee held that: if an arbitrator himself gives legal advice to a party or a related person after the dispute in question has arisen, this can be justified only if it qualifies as *de minimis*.

17. In a decision dated 29 May 1996, the LCIA (the arbitral body in the *W Ltd* case) was acting as appointing authority in an arbitration under the UNCITRAL Rules. The LCIA Court sustained a challenge to an arbitrator on the ground that his law firm had represented a bank involved in an asset transfer which was part of the subject matter of the arbitration.

18. By contrast, in a decision dated 24 December 2003, the LCIA Court rejected a challenge to an arbitrator who had, four years earlier, assisted one of the parties on a project which was said to be a substantial matter for his law firm. The arbitrator was not the lead partner on the matter and had moved to another firm shortly afterwards. The LCIA Court said that the arbitrator’s association with the party was brief and no lasting personal relationship had developed from it.

19. The above examples, and other cases, suggest that a challenge will stand a greater chance of success where the arbitrator's firm is currently being retained by a party or an entity related to the party; or the arbitrator's firm has previously given advice on a matter which is related to the subject matter of the arbitration; or if the arbitrator himself has given legal advice to the party or related entity and the arbitrator or his firm obtains significant financial income from such advice. Arbitrations involving states, rather than private entities, also appear to a much more fertile ground for conflicts to emerge.
(iv) **Issue conflict**

20. Several scenarios may give rise to an issue conflict, including:

   - The arbitrator is acting as counsel in a different arbitration in which the same, or a similar, point of law is in issue.

   - The arbitrator has been a member of a tribunal in another case involving one of parties to the current arbitration in which there were similar issues.

   - The arbitrator has previously made comments on the issues raised in the arbitration, or on the arbitration itself (for example, in a publication).

21. A good example of the problems, which may arise is the case of *Urbaser SA v Argentina* (ICSID Case No. ARB/07/27) (Decision on Claimant's Proposal to Disqualify). In that case, the challenged arbitrator had written about most favoured nation clauses and the defence of necessity in various publications. Both issues were relevant in the arbitration, and Argentina argued that the opinions expressed by the arbitrator meant that he had already prejudged the issues and therefore manifestly lacked the qualities required to exercise independent judgment.

22. However, the tribunal rejected the challenge: taking a position on an issue raised in the arbitration did not establish bias. Nor was there any appearance of bias because a reasonable person would not consider that the arbitrator would rely on his expressed academic opinions without giving proper consideration to the facts, circumstances and arguments in the arbitration. On a more pragmatic level, the tribunal considered that excluding arbitrators because of previously expressed academic opinions would stifle debate and would mean that many ICSID arbitrators would be open to challenge.

23. For this type of challenge to succeed, the tribunal stated that it must be shown that the arbitrator's opinion or position is supported by one of the following:
- Factors relating to or supporting a party to the arbitration (or a closely related party).
- A direct or indirect interest in the outcome of the dispute.
- A relationship with any individual involved.

24. Essentially, an arbitrator's previously adopted opinion should not be "of such force as to prevent [him] from taking full account of the facts, circumstances and arguments presented by the parties in the particular case".

25. In practice, a challenge based on issue conflict is more likely to arise in the context of investment treaty arbitration than mainstream international commercial arbitration. This is because the range of issues in investment treaty arbitration is comparatively small, increasing the likelihood that a given arbitrator will, for example, have sat in an arbitration involving similar issues. There is also a relatively small "pool" of arbitrators with experience in investment treaty arbitration.

26. It is also worth remembering that it is very unusual for awards to be published in commercial arbitration, so it will be difficult to establish common issues between two arbitrations.

27. Finally, as an addendum in March 2015, a Joint ICCA-ASIL Task Force on Issue Conflicts in Investor-State Arbitration published a draft report for discussion. The Task Force's mission was to evaluate and report on issue conflicts in investor-state arbitration, and to make recommendations on best practices going forward. The draft report concluded that it would not be useful to attempt to articulate "bright line" principles to identify issue conflict (or "inappropriate predisposition") as each situation will be fact-specific.
C: THE LEGAL FRAMEWORK

(a) The International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration (“IBA guidelines”)

28. The assessment of whether an arbitrator is independent and impartial is complicated by the fact that there are no uniform rules governing the issue. The International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration (“the IBA Guidelines”) represent an attempt to produce a set of principles to promote common standards of independence and impartiality, regardless of legal culture and background. They were first published in 2004, followed by a revised version in October 2014.

29. The IBA Guidelines comprise a series of general standards, followed by non-exhaustive lists of circumstances (IBA Application Lists), which give guidance on the practical application of the general standards.

30. General Standard 1 of the IBA guidelines (general principle) provides:

"Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."

31. General Standard 2 of the IBA guidelines (conflicts of interest) provides that an arbitrator shall decline to accept an appointment or refuse to continue to act as arbitrator if: "(b) ... facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence".
32. Under General Standard 2(c), doubts are justifiable if: "a reasonable person and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."

33. The explanation to General Standard 2 describes this as an "an appearance test" to apply "objectively".

34. The IBA Application Lists are divided by colour (red, orange and green), with different disclosure requirements and consequences for each colour:

   a) Red: situations constituting disqualifying conflicts of interest (divided into non-waivable and waivable situations).
   b) Orange: situations where there may be a disqualifying conflict of interest present, which the arbitrator should disclose.
   c) Green: situations where there is no disqualifying conflict of interest and no disclosure is necessary.

35. The IBA guidelines are not legally binding, but are often used by parties, arbitrators and, sometimes, the courts when considering the independence and impartiality of an arbitrator. The English courts have considered the IBA guidelines when determining whether there are justifiable doubts as to the arbitrator’s impartiality. Indeed, a failure by an arbitrator to disclose matters falling within the guidelines may, of itself, reinforce such doubts.

36. Thus in Sierra Fishing Company and others v Hasan Said Farran and another [2015] EWHC 140 (Comm.), the court removed an arbitrator who had been a legal adviser to the bank of which the defendant was a chairman, and whose father continued to advise both the defendant and the bank, and made extensive use of the IBA Guidelines.

37. The IBA Guidelines were also extensively cited by Mr Justice Hamblen in Cofely Limited v Bingham [2016] EWHC 250.
38. The extent of their use by arbitral institutions is less clear. In general, the major institutions seem to view the IBA guidelines as a useful guide for arbitrators regarding their disclosure obligations. However, most do not commit to applying the guidelines when considering challenges to arbitrators, although some may refer to them as part of their analysis of the challenge.

39. Although the use of the IBA guidelines in private international arbitrations is widespread, the decision in Republic of Mauritius v United Kingdom (Reasoned Decision on Challenge, 30 November 2011) indicates that they will be of limited application in inter-state arbitrations. In that case, a tribunal in an inter-state arbitration under the United Nations Convention on the Law of the Sea 1982 rejected a challenge to an arbitrator appointed by one of the parties. It found that the law and practice of courts and tribunals not seized of inter-state disputes, which included the IBA guidelines, was irrelevant to the determination of an arbitrator challenge in an inter-state arbitration. The IBA guidelines had not been adopted by states, nor did they form part of a general practice accepted as law.

40. The IBA Conflicts Committee, a sub-committee of the IBA Arbitration Committee, published a report, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*. This summarises the application of the IBA guidelines between their inception, in 2004, and 2009. The report refers to case law that mentions the IBA guidelines and collates information gathered from arbitral institutions regarding reference to the IBA guidelines in arbitrator challenges. The report is described as a "work in progress", with future sub-committees continuing to monitor case law and identify areas for possible improvement.

(b) Institutional Rules

41. Most of the major international arbitral rules have, in some form or another, requirements of independence and impartiality on arbitrators.
For example:

a) The ICC Rules 2012 impose obligations of both independence and impartiality, and provide that an arbitrator may be challenged for "an alleged lack of impartiality or independence, or otherwise" (Article 14.1). The ICC Rules 2012 require arbitrators to be and remain "impartial and independent" of the parties (Article 11(1)). Before appointment or confirmation, a prospective arbitrator must sign a statement of acceptance, availability, impartiality and independence (Article 11.2).

b) The LCIA Rules 2014 provide that: "All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration." (Article 5.3.) Article 5.4 also requires them to sign a declaration stating "whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, and if so, specifying in full such circumstances in the declaration". They go further than the 1998 Rules as they also require the arbitral candidate to declare that he or she will "devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration" (Article 5.4).

c) The UNCITRAL Rules 2013 provide that: "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." (Article 11.) The Annex to the UNCITRAL Rules includes model statements of independence for use by arbitrators.
d) Article 14(1) of the ICSID Convention requires arbitrators to be "of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."

e) The International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes require arbitrators to be "independent and impartial" prospective arbitrators must disclose any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality (Rule 7).

f) In arbitrations involving the International Centre for Settlement of Investment Disputes (ICSID), arbitrators must be persons of "high moral character and recognised competence", who may be relied on to "exercise independent judgment" (Article 14(1), ICSID Arbitration Rules. Arbitrators must sign a declaration disclosing any past or present relationships with the parties and any other circumstances that might cause a party to question the arbitrator's reliability for independent judgment (Rule 6(2), ICSID Arbitration Rules).

g) The Financial Industry Regulatory Authority (FINRA) Code of Arbitration Procedure for Customer Disputes and Code of Arbitration Procedure for Industry Disputes require arbitrators to "disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination" (Customer Rule 12504(b); Industry Rule 13408(b)). It also and empowers FINRA to remove any arbitrator for conflict of interest or bias (Customer Rule 12407(a); 13410(a)).

h) Singapore this year was proud to announce its new SIAC 2016 Rules effective from 1 August 2016. I note that Rule 13 of those rules provide:
“13.1 Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the parties, shall be and remain at all times independent and impartial.

13.2 In appointing an arbitrator under these Rules, the President shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations that are relevant to the impartiality or independence of the arbitrator.

....

13.4 A nominated arbitrator shall disclose to the parties and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before his appointment.

13.5 An arbitrator shall immediately disclose to the parties, to the other arbitrators and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence that may be discovered or arise during the arbitration.

43. Surveying the different rules as a whole, there are some very subtle differences in formulation. The grounds for challenge in ICSID arbitration arguably impose a higher threshold than other international arbitration rules, such as the LCIA, UNCITRAL, ICDR or ICC Rules, making arbitrator challenges less likely to succeed in ICSID arbitration. However, there is no real difference in practice between the grounds for challenge under most of the major international arbitration rules.

(c) Grounds for Challenge under Arbitral Law

44. In addition to these rules, most modern arbitral laws provide for the removal of arbitrators who are not independent or impartial (or both), or “evident partiality” as s.10(a)(2) of the US Federal Arbitration Act expresses it.
Although arbitrator challenges are by no means common, statistics from arbitral institutions suggest that they have increased recently, especially in the field of investment treaty arbitration. This may be due to the growing popularity of arbitration as a method of resolving disputes, as well as the substantial amounts of money at stake, in addition to the increasing amount of tactical challenges.

It is no surprise therefore that the majority of cases and learning in this area relate to removing or attempting to remove an arbitrator during the course of the arbitration, rather than (as in the W Limited case, which will form the basis of later part of this talk) a challenge to an award after it is made on the ground of lack of bias/impartiality under the guise of “a serious procedural irregularity” - to use the language of s.68 of the English Arbitration Act 1996. This was because, as will be seen, in the W Limited case, the alleged apparent bias was not discovered until after the awards were made. This is important as, where a party has the power to seek to remedy a serious irregularity during the course of the arbitral proceedings, and it has not acted to do so, the party will have waived its right to rely on section 68.

Thus in ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm), the High Court held that, while the involvement of the tribunal's chairman in the proceedings constituted a serious irregularity of apparent bias, because the claimant did not make a timely application to remove the chairman under section 24 of the Act, and instead waited until an unfavourable award was issued against it, the claimant had lost its right to challenge the award under section 68. A similar waiver applies in other jurisdictions, such as the United States.


The grounds for challenge are contained in the rules that the parties have agreed will apply to the arbitration. If the parties have not agreed on any rules, any provisions on removal of or challenge to arbitrators in the arbitral law of the seat of arbitration apply.
Most of the cases in this area, certainly in England and Wales, as noted above, arise from applications to Court to remove an arbitrator during the arbitral process. Such challenges are not the strict focus on this talk, and, as noted above, the *W Limited* case concerned s.68 and focused on the IBA Guidelines. However, many of the issues/tests are the same for s.24 of the Arbitration Act 1996 as they are under s.68 of the Arbitration Act 1996 (or indeed the general law of bias in England and Wales).

Under section 24 of the English Arbitration Act 1996, a party may apply to the English court to remove an arbitrator on any of the following grounds:

i. Circumstances exist that give rise to justifiable doubts as to his impartiality (section 24(1)(a)).

ii. He does not possess the qualifications required by the arbitration agreement (section 24(1)(b)).

iii. He is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so (section 24(1)(c)).

iv. He has refused or failed to conduct the proceedings properly or with "reasonable despatch", if substantial injustice will be caused to the applicant (section 24(1)(d)).

The relevant test for an application under section 24(1)(a) (existence of circumstances giving rise to justifiable doubts as to impartiality) is whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. Bias in this context means apparent bias as well as actual bias.

The test in section 24(1)(a) is an objective one, which was approved by the House of Lords in *Porter v Magill* [2002] 2 AC 357. It was confirmed by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004 and *AT&T Corporation v Saudi Cable Co* [2000] EWCA Civ 154 that that test applies to arbitrators as well as judges; the common law test for apparent bias is reflected in section 24 of the Arbitration Act 1996.
53. An "informed" observer takes a balanced approach and appreciates that context forms an important part of the material to be considered (see Helow v Secretary of State for the Home Department and another [2008] UKHL 62). The tribunal's explanations as to his or her knowledge or appreciation of the relevant circumstances are also a factor that the fair minded observer may need to consider when reaching a view as to apparent bias (In re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350), though there can be no question of cross examining the Arbitrator and the Court is not bound to accept the Arbitrator’s explanation at face value.

54. In A and others v B and another [2011] EWHC 2345 (Comm), Flaux J confirmed that the court must judge whether there was a real possibility of bias at the time the application is heard and on the basis of the material before the court. Hypothetical examples of what may happen in light of a particular relationship will not meet the test, unless there is evidence that they actually occurred. The fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence.

55. In Paice and another v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC), Coulson J held that the explanations given by the adjudicator made apparent bias more rather than less likely having regard in particular to the "aggressive" and "unapologetic" terms in which they were expressed, which suggested that he had concluded that something had gone wrong and that "attack was the best form of defence".

56. Other key recent cases, to which I will return later, include Cofley Limited v Bingham [2016] EWHC 240 (Comm.) following the decision in Eurocom Ltd v Siemens plc [2014] EWHC (TCC).
Section 68

57. Section 24 of the Arbitration Act 1996 covers the removal of an arbitrator while an arbitration is underway. A party to an arbitration with its seat in England, Wales or Northern Ireland can try to challenge an award under section 68 of the same Act, on the ground that the tribunal did not comply with its duty under section 33 of the same Act and this has caused or will cause substantial injustice to the applicant. Section 33(1)(a) imposes a duty on the tribunal to act fairly and impartially as between the parties.

58. The test for setting aside an award on the ground of lack of impartiality comes broadly to the same thing s.68 as it is does under s. 24, namely the existence of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality. In ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm), the High Court considered that, if the court concluded that there was a real possibility of bias, that constituted serious irregularity which either had caused or would cause substantial injustice to the applicant (so it would not be necessary for the applicant to adduce additional evidence of substantial injustice). That view was endorsed by Colman J in Norbrook Laboratories v Ltd v Tank [2006] EWHC 1055 (Comm) and by Andrew Smith J in ASM Shipping Ltd of India v TTMI Ltd of England [2007] EWHC 1513 (Comm).

59. In Interprods Ltd v De La Rue International Ltd [2014] EWHC 68 (Comm), Teare J rejected, inter alia, the submission that the arbitrator's appointments in two other cases where one of the parties was represented by the same firm of solicitors as in this case, amounted to apparent bias.

60. Section 68 challenges are of course rare and rarely successful. When they are, the most common remedy is of course to remit (rather than set aside) the award back to the tribunal unless it will be inappropriate to do so. In cases of bias it will rarely be appropriate to allow the original tribunal to reconsider the award. The test is whether a reasonable person would have lost confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues (see, for example, Miller Construction Ltd v James Moore Earthmoving [2000] EWHC (TCC) 52, 1 November 2000).
D: W LIMITED V M SDN BHD CASE

61. The Defendants were resisting a challenge of two LCIA awards on the basis of a serious irregularity under s68 of the Arbitration Act 1996, founded on alleged apparent bias of the arbitrator. Not only did it feature a common scenario involving issues of apparent bias, but it also featured an interesting consideration of the IBA Guidelines.

62. In this case, the alleged conflict was only discovered after the two awards were made, thus s.24 or a procedure under the LCIA to remove the arbitrator were not in play.

63. S.68 of the Arbitration Act 1996 provides that an award may be set aside on grounds of serious irregularity causing substantial injunctive affecting the tribunal, the proceedings or the award. For these purposes, it is not necessary to establish actual bias. The test is an objective one: the court will ask whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased – as seen earlier by reference to Porter v Magill [2002] 2 AC 537). This is often referred to as "apparent bias".

64. As explained above the IBA Guidelines contain a series of general standards on matters that should be disclosed by arbitrators when accepting an appointment, followed by non-exhaustive lists of circumstances, divided by colour (red, orange and green), with different disclosure requirements and consequences for each. The IBA Guidelines are not binding on the English court, and do not represent English law, but may be relevant to issues of bias: see Sierra Fishing Company and others v Hasan Said Farran and another [2015] EWHC 140 (Comm) referred to above. proposition.

65. The “Red List” details specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrators impartiality and independence (set out in IBA Guidelines at Part II sub-titled “Practical Application of the General Standards” at paragraph 2). The Red List is divided into two sub-lists:
(a) The Non-Waivable Red List – This identifies situations where the arbitrator should always decline the appointment (essentially, situations where accepting the appointment would mean the arbitrator being a judge in his own cause, or where there was identity between the arbitrator and a party).

(b) The Waivable Red List – This identifies situations where the arbitrator may only accept the appointment if the parties provide fully informed, express consent.

66. General Standard (2)(d) of the Guidelines states that "Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in the situations described in the Non-Waivable Red List".

67. The Non-Waivable Red List also includes the following provision in paragraph 1.4: "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." The words "or his or her firm" were added by amendment to the IBA Guidelines in 2014.

a) Facts

68. The arbitrator was a partner in a law firm in Canada but practised almost exclusively as an arbitrator and took no active part in the law firm's management or decision making.

69. At the time of the arbitrator's appointment, a company (which the judgment calls “Q”) was a client of the law firm. The law firm earned substantial remuneration from the provision of services to Q. In December 2012, Q was acquired by a different company (which the judgment calls “P”). The defendant was already a subsidiary of P. Therefore, Q and the defendant became affiliates.

70. The arbitrator made various disclosures before and after his appointment, but the law firm’s conflict check systems (despite some publicity over the acquisition of Q by P) did not alert him to the relationship between Q and P and therefore, he did not
disclose the law firm's relationship with Q. The arbitrator made clear, had he known, he would have made the disclosure immediately.

71. The claimants applied to set aside the arbitrator's awards. It was common ground that there was no actual bias on the part of the arbitrator: the application was based on apparent bias.

\[ \text{b) Decision} \]

72. The application was dismissed. Knowles J held that as a matter of English law, a fair minded and informed observer would not conclude that there was any real possibility of bias.

73. His reasoning was that, although the arbitrator was a partner in law firm, which earned considerable remuneration from providing legal services to a client company that had the same parent company as a company that was party to the arbitration, the firm did not advise the parent, or the party. There was also no suggestion the arbitrator did any work for the client company. Further, the arbitrator, although a partner, operated effectively as a sole practitioner using the firm for administrative assistance for his work as an arbitrator. He had made disclosure he was aware of, and would have made further disclosure if he had been alerted to them. Knowles J emphasised that, on the facts, this was an arbitrator who simply did not know rather than one whose credibility was to be doubted and who must have known or chose not disclosure, despite the publicity surrounding the acquisition (not picked up by the firm). The fact that he would have made such a disclosure, had he known, confirmed his transparency to the fair-minded and informed observer.

74. Knowles J then went on to consider the relevance of the IBA Guidelines, upon which the claimant heavily relied. There was no doubt that the facts of the case fell within paragraph 1.4 of the Non-Waivable Red List. However, examination of the IBA Guidelines as they applied in this case suggested two principal weaknesses in paragraph 1.4 of the Non-Waivable Red List:
(a) First, as a result of the 2014 amendments to the IBA Guidelines, paragraph 1.4 dealt compendiously with an arbitrator and his firm, and a party and its affiliate. Therefore, the paragraph extended to situations where advice was provided to an affiliate without the arbitrator's involvement or knowledge. It was hard to understand why such a situation should fall within the Non-Waivable Red List. It was less serious than some of the circumstances stipulated in the Waivable Red List, and there seemed no reason why parties should not be able to waive such matters when disclosed. The Non-Waivable Red List was purportedly concerned with situations where a person was his own judge, or where there was identity between an arbitrator and a party, but that was not the case here.

(b) Secondly, inclusion of this situation on the Non-Waivable Red List meant that apparent bias would be assumed to exist, without any examination of the question of whether the arbitrator's impartiality or independence might in fact be affected. Although some parts of the IBA Guidelines referred to fact-specific judgments (and there was some internal inconsistency in this regard), General Standard (2)(d) clearly and emphatically stated that where circumstances fell within paragraph 1.4, then justifiable doubts as to the arbitrator's impartiality and independence would "necessarily" exist. There was no room for judgment by reference to the particular facts of the case.

75. Knowles J did not go as far as saying that the IBA Guidelines are not a statement of English law, and said (subject to the points he raised) remain a useful tool. But they did not affect his decision that no apparent bias had been made out.

c) Analysis

Apparent Bias

76. The law on apparent bias was largely agreed between the parties. And, on the facts, the judge gave short shrift, as seen above, to the apparent bias argument. This serves
as a timely reminder that, as with any s.68 claim, it will be difficult to establish not least with bias.

77. On the issue of apparent bias, the case sits well with another important case also from around the same time this year: *Cofely Ltd v Bingham and another* [2016] EWHC 240 (Comm.), which concerned an application to remove an arbitrator under s.24(1)(a) of the Act.

78. In *Cofely*, the arbitrator was nominated by claims consultants, Knowles. His nomination was confirmed by the appointing body, the Chartered Institute of Arbitrators (CIarb). Although not comparable in status to the IBA Guidelines, note, given the CIarb context, that Rule 3 of the Chartered Institute of Arbitrators’ Code of Professional and Ethical Conduct for Members (October 2000) provides: "*Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.*"

79. Following the earlier decision in *Eurocom Ltd v Siemens plc* [2014] EWHC (TCC) 3710, in November 2014, in which the same arbitrator had acted as adjudicator and Knowles' approach to adjudicator nominations had been criticised, the claimant (Cofely) requested information from Knowles and the arbitrator regarding their relationship. Ultimately, it transpired that the arbitrator had been appointed as arbitrator or adjudicator in cases involving Knowles 25 times in the past three years, and had derived 25% of his income as arbitrator/adjudicator over the past three years from those cases. However, the arbitrator had not disclosed any of that information on the acceptance of nomination form he completed when appointed.

80. The information only became available after protracted correspondence. After the arbitrator failed to respond to a request to recuse himself, Cofely applied to the court for his removal, on the ground that circumstances existed that gave rise to justifiable doubts as to his impartiality (under s.24(1)(a) of the Arbitration Act 1996).
81. In Cofely, Hamblen J held that the arbitrator’s relationship with Knowles and his failure to disclose it, together with the aggressive and hostile manner in which the arbitrator had responded to the claimant’s enquiries and its application, raised concerns of apparent bias, sufficient to satisfy the requirements of s. 24. Hamblen J also found significant Knowles’ approach to the appointment process and the existence of its appointment "blacklist”. That list would be important to anyone whose appointments and income depended to a material extent on Knowles-related cases, as was the case with the arbitrator.

82. Of particular interest in this decision is the clear indication that the manner in which the arbitrator dealt with Cofely's (reasonable) enquiries contributed to the finding of apparent bias. The Court found it remarkable that the arbitrator appeared not to see the relevance of the information about his relationship with Knowles, or the need to disclose it. As Hamblen J observed, the situation clearly fell within the parameters of the IBA’s Orange List of situations that should be disclosed, as well as the disclosure requirements in the CIArb’s acceptance of nomination form.

Wider Implications of the Judgment

IBA Guidelines

83. Perhaps the most important, broader issue to emerge though from the case is the status of the IBA Guidelines, which this case is now the leading authority on, not least in light of them being updated in 2014.

84. English courts have never regarded the IBA Guidelines as binding or as representing English law, a point made clearly by Knowles J in his judgment. In fact, the case is a good example of a situation in which the IBA Guidelines diverge from English law, and will be regarded with interest by those in the international arbitration community. Although the IBA Guidelines are relevant and may be helpful in disputes relating to bias or conflict of interest, the English court has demonstrated that a mechanistic application of the Guidelines, based on assumptions rather than consideration of the facts of the specific case, will not be appropriate.
85. Commentators have also focused on the "weaknesses" identified by Knowles J, some of which arise from amendments made to paragraph 1.4 in 2014. Before 2014, paragraph 1.4 applied only where the arbitrator (and not where his or her firm) had advised a party or an affiliate. In 2014, the paragraph was amended to add the words "or his or her firm". Knowles J made clear that there was "no doubt" that the circumstances of the case would not have fallen within the pre-2014 version of paragraph 1.4, and noted the issues arising from the compendious approach of the post-2014 version.

86. In light of all this, what useful purpose do the IBA Guidelines (on Conflicts) serve?

i. Parties considering appointing a particular arbitrator may ask the candidate whether, by reference to the IBA Guidelines, he or she would have any disclosures to make. In this way, the IBA Guidelines relating to conflicts can be an extremely useful tool for weeding out conflicts at an early stage.

ii. Even if not expressly requested to do so by the parties, arbitrators may, of their own volition, assess whether they may have a conflict of interest by reference to the IBA Conflicts Guidelines.

iii. Institutions, in applying their own general standards for independence and/or impartiality, will consider the IBA Guidelines.

iv. A court reviewing the impartiality and independence of an arbitrator can be expected to ascribe some authority to the IBA Conflicts Guidelines, as Knowles did in *W Limited* and other judges have before him, even if not bound by what the IBA Guidelines say.

*Other Guidelines*

87. The IBA remains one of the most well-known institutions to publish guidelines that can cut across the different arbitral rules.
88. The IBA’s most well-known guidelines or rules are perhaps, not the Conflict guidelines, but the IBA Rules on Evidence in International Arbitration. These provide useful guidance on the use of witness evidence (both factual and expert). In broad terms, these aim to assist parties in the conduct of the evidence phase in international arbitration and can often harmonise the differences in civil and common law legal procedure. Parties can elect to apply the rules to the arbitration or they may be imposed by the tribunal. The parties and the tribunal are free to modify the rules for the purposes of their arbitration (see IBA Rules Preamble, paragraph 2). The IBA Rules are popular and are currently widely used in transnational arbitration.

89. The IBA also provides sample arbitration clauses.

90. The IBA Guidelines (on Conflicts) should also be seen against the wider trend in the IBA, and other bodies, to produce guidelines to regulate ethical standards of participants in the arbitral process. In 2013, the IBA’s arbitration committee and its task force on counsel conduct published IBA Guidelines on Party Representation in International Arbitration.

91. In 2008, the IBA arbitration committee established a task force to focus on issues surrounding party representatives in arbitration sometimes finding themselves subject to diverse and conflicting rules and norms that can derive from counsel's home jurisdiction, the arbitral seat and the physical locations of the hearing. In 2010, the task force circulated a survey seeking views on the impact of ethical constraints on arbitral proceedings. Respondents to the survey expressed support for the development of international guidelines. The new guidelines reflect the principles that party representatives should act with integrity and honesty and not engage in activities designed to produce unnecessary delay or expense. They include provisions covering: the application of guidelines, party representation, communications with arbitrators, submissions to the arbitral tribunal, information exchange and disclosure, witnesses and experts, and remedies for misconduct. The guidelines must be adopted by agreement and are not intended to displace otherwise applicable mandatory laws or rules. Arbitral tribunals may also apply the guidelines in their discretion.
92. Two more recent developments are of note within the context of the IBA Guidelines and guidelines generally.

93. The first is a development, also from earlier this year, by the ICC Court. They issued guidance as part of its updated "Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration" ("the Note") to provide clarification on the circumstances in which an arbitrator should opt to disclose possible conflicts of interest.

94. Whilst the guidance does not impose any specific obligations on arbitrators, and leaves it up to the individual arbitrator to decide whether disclosure of a potential conflict is required, it gives a number of specific situations that may raise questions about an arbitrator's impartiality. Included in the list of situations that arbitrators should consider disclosing are if the prospective arbitrator, or his or her law firm: represents or advises, or has represented or advised, one of the parties or one of its affiliates; acts or has acted against one of the parties or one of its affiliates; has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute; or acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.

95. Other potential disclosures specific to the prospective arbitrator or arbitrator are if he or she: is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality; has a professional or close personal relationship with counsel to one of the parties or the counsel’s law firm; acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates; acts or has acted as arbitrator in a related case; or has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel’s law firm.

96. The Note also specifies that an arbitrator's duty of disclosure is on-going throughout the course of an arbitration and that they must make reasonable enquiries to ascertain any potential conflicts.
97. The Note is part of a general move by the ICC to improve the transparency of its arbitration process. In January, also this year, the Court set out plans to provide limited information on arbitrators sitting on ICC cases, including publishing arbitrator's names, their nationality and whether their appointment was made by the court or the parties on the ICC website. This may now place less emphasis on the IBA Guidelines which, prior to the introduction of this guidance, were acknowledged as the go-to source for arbitrators and practitioners seeking guidance on potential conflicts. This new guidance from the ICC takes a far broader approach to arbitrator disclosure than the more specific, time-limited, traffic light system of the IBA Guidelines. The ICC guidance asks that arbitrators "should in particular, but not limited to, pay attention to" the above categories of potential conflict, which may encourage a cautious approach to disclosures. This in turn may lead to increased challenges, although the note makes clear that should the arbitrator's impartiality be disputed, it is still for the Court to determine whether there are sufficient grounds for disqualification.

98. Furthermore, the new guidelines may in fact make the IBA Guidelines on Conflicts less important in ICC arbitrations.

99. The second, relatively recent, development comes from the Chartered Institute of Arbitrators. This organisation, like the IBA, publishes some very useful guidelines across the arbitral rules which covers all stages of the arbitration, perhaps most usefully its Protocol for experts. It last year not only published the CIArb London Centenary Principles (Principles), to identify the characteristics of an efficient, effective and "safe" seat of arbitration. The Principles identify the key characteristics required to make a particular place an appropriate and effective venue to conduct international arbitration. They set out desirable standards as regards the law, the judiciary, legal expertise, education, right of representation, accessibility and safety, facilities, ethics, enforceability, and arbitrator immunity. The intention is that the Principles will provide key criteria for countries, arbitral institutions, professional bodies or the legal sector when decisions are made concerning the provision of effective and safe arbitration facilities.
100. In the autumn of last year, the CIArb announced not only a new set of CIArb Rules, but revealed a new collaboration with the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to launch a CIArb Asian Directorate Office at KLRCA’s premises. The agreement establishes a framework under which the two centres can co-operate in the use of services and facilities, as well as in the organisation of seminars, conferences and training. This points toward the extremely useful and direct impact these organisations providing guidelines have and wish both the CIArb and those involved with the KLRCA every continuing success with their efforts with what is the first Regional Centre for CIArb outside London, which will no doubt greatly assist both members and branches.

E: CONCLUSION

101. Having established importance of impartiality in international arbitration, we have seen a number of common scenarios in which issues raising concerning conflicts arise. We have also seen how the various arbitral rules (which are very similar in this regard) codify their stance and procedure on conflicts, and the way that national laws can support that. As seen by focusing on recent developments in English law, this is often in the context of removing an arbitrator during the arbitral process, but can also arise (although, to be fair, much less commonly than s.24 applications) when seeking to challenge an award on the basis of a conflict of interest, as seen from the *W Limited* case.

102. The assessment of whether an arbitrator is independent and impartial is complicated by the fact that there are no uniform rules governing the issue. Thus the IBA Guidelines on Conflicts of Interest represent, over and above the various rules and national laws described above, an attempt to produce a set of principles to promote common standards of independence and impartiality, regardless of legal culture and background.

103. The case of *W Limited* is important, not only as an example of apparent bias, but also because it put these guidelines under the microscope.
104. Whilst not binding and not free from difficulties (some of which were pointed out in the *W Limited* case), the IBA Guidelines on Conflicts still have an important role to play. As we have seen, they have indirect application and exert influence on how parties and arbitrators operate within the legal frameworks applicable to them, as well as Courts (even if they do not always follow them on the facts, as in *W Limited*).

105. More broadly, they are a reminder, not only of the legitimacy, but also the utility that such guidelines can have in international arbitration, as shown by reference to other guidelines that the IBA and other institutions like the CIArb produce.

106. There is an increasing focus in arbitral guidelines to deal with issues not covered by (or appropriate for) the institutional rules or national laws, most obviously responding to the growing need to have some form of universally applicable guidelines on how professionals involved in arbitration in various seats should conduct themselves ethically, whether experts, counsel or arbitrators.

107. But, as with many guidelines, they cannot be slavishly obeyed or remain out of step with changing practices and developments, both commercial and legal. The committee responsible for the IBA Guidelines themselves acknowledged this by calling their 2014 update “a work in progress”. There thus remains a need not only to carefully monitor the case law, but also to consider the demands underlying parties/clients, and to identify future areas for possible improvement.

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