

Conflicts of interest in arbitration—challenges to arbitral appointments

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This Practice Note should be read in conjunction with Practice Note: [Conflicts of interest in arbitration—applicable principles](#).

What are the main types of conflict of interest that pose a challenge in arbitration proceedings?

Advocates and arbitrators from the same barristers’ chambers or law firm

It is not uncommon for advocates and arbitrators from the same barristers’ chambers and/or law firms to be involved in the same case, and this may give rise to a conflict of interest challenge.

The ‘Orange List’ of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines, para 3.3) addresses the ‘Relationship between an arbitrator and another arbitrator or Counsel’. (It should be noted that the ‘Orange List’ items must be disclosed to the parties because of the possibility for raising justifiable doubts as to the arbitrator’s impartiality and independence, but these items do not result in automatic disqualification of the arbitrator.)

Although English barristers are frequently referred to as ‘counsel’, the reference to ‘counsel’ in the IBA Guidelines is a reference to a party’s lawyer and thus encompasses barristers and solicitors. Examples of relationships appearing in the Orange List include:

- the arbitrator and another arbitrator are lawyers in the same law firm (para 3.3.1)
- the arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers’ chambers (para 3.3.2)

The revisions to the Guidelines issued in 2014 also promoted the following relationship, previously on the Green List, to the Orange List:

- the arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel (para 3.3.9)

The English system of barristers’ chambers will be less familiar to civil law lawyers than common law lawyers and the concept of a barrister’s independence from his colleagues in chambers can prove difficult to accept for parties not familiar with the English system (and indeed for those who are).

As a matter of English law, see: *Laker Airways v FLS Aerospace* [1999] 1 WLR 113 (not available in Lexis®Library), which confirmed the relevant test to be ‘whether circumstances exist that gave rise to justifiable doubts as to an arbitrator’s impartiality’. In the absence of a personal connection between the two barristers,

References:

[IBA Guidelines on Conflicts of Interest](#)

a barrister may generally accept an appointment as an arbitrator even though a barrister from the same set of chambers is acting for one of the parties in the case.

However, in *Hrvatska (Hrvatska Elektroprivreda v Republic of Slovenia)*, ICSID Case No ARB/05/24, the International Centre for Settlement of Investment Disputes (ICSID) tribunal upheld the claimant company's challenge to Slovenia's right to instruct (at a late stage in the proceedings) an English barrister who was from the same set of chambers as the chairman of the tribunal. The tribunal concluded that '[t]he justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include '...the fact that the London chambers system is wholly foreign to the claimant...'. Those circumstances also included the late announcement by Slovenia regarding the appointment of the barrister.

In *Rompetrol (Rompetrol Group v Romania)*, ICSID Case No ARB/06/3, Romania sought to remove Rompetrol's lawyer from the case on the grounds that he had previously worked in the same firm as one of the arbitrators. Romania did not seek to challenge the tribunal itself, but grounded its challenge on the inherent general powers of the ICSID tribunal to 'police the integrity of [its] proceedings'. In rejecting Romania's challenge on the basis that the integrity of the arbitral process was not an issue, the tribunal observed that a power on the part of any judicial tribunal to exercise a control over the representation of the parties was 'a weighty instrument' and should only be used when there is 'an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process'. The tribunal appeared to recast the *Hrvatska* decision as 'an ad hoc sanction for the failure to make proper disclosure in good time than as a holding of more general scope'.

As set out in Practice Note: [Conflicts of interest in arbitration—applicable principles](#), Guideline 5 of the IBA Guidelines on Party Representation seeks to address the issue raised by the above cases and requires that once a tribunal has been constituted, a person should not accept appointment as a party representative 'when a relationship exists between the person and an arbitrator that would create a conflict of interest, unless none of the parties objects after proper disclosure'. The wording would appear to refer to situations of actual (as opposed to perceived or potential) conflict, though the comments on the guideline which state that 'in assessing whether any such conflict of interest exists, the arbitral tribunal may rely on the IBA Guidelines on Conflict of Interest in International Arbitration' would appear to indicate that the two sets of IBA Guidelines are intended to work consistently.

In July 2015, the Bar Council issued an Information Note for barristers following concerns on this issue. The Information Note sets out to identify relevant principles, which must be viewed in the context of the particular type of dispute and arbitration tribunal. Its stated purpose is to:

- set out types of considerations barristers should bear in mind when dealing with practical problems which can occasionally arise, by reference to problems which have occurred in practice
- ensure any concerns clients may have regarding arbitrator or counsel situations are met, and to ensure the valuable protection given to clients by independent Bar availability is not compromised

In issuing the Information Note, the Bar Council stressed it was intended only as information and assistance, not as a regulatory document. It was also only concerned with barristers acting as advocates, not as arbitrators, who will be

References:

Hrvatska Elektroprivreda v Slovenia ICSID ARB05.24 Ruling on participation of counsel 6.5.2008

References:

Rompetrol Group v Romania, ICSID Case No ARB/06/3 Decision on participation of counsel

References:

IBA Guidelines on Party Representation in International Arbitration

References:

Bar Council—Information Note regarding barristers in international arbitration

subject to the rules governing the type of arbitration in question. For more information, see: Bar Council guidance for arbitration barristers ([LNB News 15/07/2015 131](#)).

Repeat appointments of the same arbitrator

It is not unusual for an arbitrator to be appointed more than once by a party and/or by a law firm.

In practice, although appointments are made by the parties under arbitral rules, the IBA Guidelines consider appointments made by law firms. As noted in the Guidelines, 'The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues...Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it

is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.'

The above reflects the reality that parties are highly dependent upon counsel for recommendations and advice regarding arbitrator selection and that concerns about an arbitrator's potential bias as a result of financial interests can arise with a law firm just as it can with a party. A law firm who recommends an arbitrator to many clients, and then appoints that arbitrator on their behalf, may therefore need to counsel clients that the arbitrator is likely to disclose the prior appointments and that this may pose an issue.

The recurrent appointment of an arbitrator can constitute a ground for challenge (although the burden of proof is relatively high).

The 'Orange List' (paras 3.1 and 3.3 of the IBA Guidelines) specifically addresses the subject of repeat appointments of the same arbitrator:

- by one of the parties or an affiliate of one of the parties—para 3.1.3 requires disclosure when the arbitrator has 'within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties'
- by the same counsel or law firm—para 3.3.8 requires disclosure when the arbitrator has 'within the past three years been appointed on more than three occasions by the same counsel or the same law firm'

An important exception is made in the IBA Guidelines (footnote 5) as follows:

'It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.'

It is generally accepted in practice that, whatever the actual size and composition of their respective pools, repeat appointments do not have to be disclosed in these types of arbitration. Nevertheless, it is important for practitioners to be aware of the rules of the various institutions servicing

References:

[IBA Guidelines on Conflicts of Interest](#)

References:

[Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration](#)

arbitrations. The International Chamber of Commerce (ICC), for example, requires arbitrators to consider disclosure where '[the] prospective arbitrator or arbitrator 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.' (ICC Note to Parties and Arbitral Tribunals, paragraph 23).

It should also be noted that the IBA footnote does not mention insurance and reinsurance arbitration.

Universal (*Universal Compression International Holdings v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9) involved a challenge by the claimant against an arbitrator on the basis of her being appointed by Venezuela in at least three other pending ICSID cases, all of which dealt with the same issue. In dismissing Universal's challenge, the ICSID's Chairman of the Administrative Council found that the arbitrator's appointments by Venezuela did not amount, on their own, to objective evidence that the arbitrator suffered from a 'manifest' lack of independent and impartial judgment. Venezuela also unsuccessfully challenged Universal's appointed arbitrator because of his alleged close professional links with counsel for Universal. Both arbitrators who were unsuccessfully challenged in *Universal* were subsequently appointed by the parties in a different case, involving claims against Ecuador (*Murphy Oil v Ecuador*—both arbitrators were challenged on similar grounds to the ones rejected in the *Universal* case, but both arbitrators resigned).

The decision in *Universal* followed two earlier ICSID decisions, *Tidewater* (*Tidewater v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5) and *Opic Karimun* (*Opic Karimun v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14), which also rejected challenges to the same arbitrator due to her repeated appointments by Venezuela. In all three cases, it was held that something in addition to multiple appointments was needed to disqualify an arbitrator.

The earlier decisions are also interesting for the tribunal's different analyses of the position. In *Tidewater*, the tribunal opined that multiple appointments of an arbitrator by the same party should, on its own, have a neutral effect on the determination of whether the arbitrator is biased. However, in *Opic Karimun*, the two unchallenged arbitrators stated that 'multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case'.

For information on ICSID disqualification proposals, see: [ICSID—procedure of an ICSID arbitration—Proposals to disqualify arbitrators](#).

In *Cofely Ltd v Anthony Bingham and Knowles Limited*, claimant Cofely applied to remove Bingham as an arbitrator on the grounds that there were circumstances giving rise to justifiable doubts as to his impartiality. Cofely and Knowles were involved in a contract dispute, and through the Chartered Institute of Arbitrators (CIArb), Bingham was appointed as sole arbitrator. After becoming aware of another High Court decision involving Knowles and Bingham, Cofely subsequently learned of Bingham's repeated appointments by Knowles. Bingham had acted as an arbitrator or adjudicator for 25 cases involving Knowles (either as a party or as a representative of a party). Among other grounds, Cofely relied on subsections 3.1.3

References:

***Universal Compression International Holdings v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9 Decision on disqualification of arbitrators**

***Universal Compression International Holdings v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9 Order suspending proceedings**

Better the arbitrator you know than the one you don't—Norton Rose

References:

***Tidewater v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5 *Opic Karimun v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14**

References:

***Cofely Ltd v Anthony Bingham and Knowles Limited* [2016] EWHC 240 (Comm)**

and 3.1.5 of the Orange List to show that there was an apparent bias. The High Court noted that while only three of the 25 cases involved Knowles as a party, this was sufficient to trigger disclosure pursuant to the Orange List.

Eighteen percent of Bingham's arbitrator appointments and 25% of his income as an arbitrator over three years derived from cases involving Knowles. Accordingly, in combination with other factors, the High Court found that there were grounds for apparent bias and ordered Bingham to be removed.

In *Halliburton Company v Chubb Bermuda Insurance Ltd, and others*, the Court of Appeal revisited the lower court's decision. The dispute was over an arbitrator who accepted several appointments by Chubb or otherwise acted in cases involving Chubb and did not disclose this information. Halliburton became aware of the arbitrator's undisclosed appointments and asked the arbitrator to resign. The arbitrator acknowledged that disclosure would have been 'prudent', but took the position that he remained impartial. The Court of Appeal affirmed the lower court ruling that there were no grounds that gave rise to any justifiable doubts as to the arbitrator's impartiality. The Court of Appeal stated that while the best practice in international commercial arbitration would have required the disclosure of the other appointments, the arbitrator's non-disclosure was an 'innocent oversight.' Taking all of the facts together, the court found 'a fair-minded and informed observer...would not conclude that there was a real possibility that [the arbitrator] was biased'.

Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co [2019] EWHC 362 (Comm). The decision in *Halliburton* was followed in *Soletanche v Aqaba*, in which the Commercial Court found that:

- the information sheet, which the ICC provided to the arbitrators for conflict checking purposes, and which contained names from the case papers, was 'simply a helpful list' and did not affect the assessment of whether any connection should be disclosed
- there was no obligation on the arbitrator to disclose his connection with another case, which he did disclose on the first day of the hearing, and the continuing duty of disclosure did not give rise to an obligation to make a further disclosure when his involvement in the second case changed.

An arbitrator who also acts or has acted as advocate for one of the parties in another case

The 'Red' and 'Orange' lists of the IBA Guidelines specifically address the situation where an arbitrator is acting or has acted for one of the parties:

- paras 1.1 and 1.4 of the Non-Waivable Red List respectively provide that an arbitrator cannot be appointed and/or is automatically disqualified where:
 - > there is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration
 - > 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 a significant financial income therefrom

References:

***Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817**

References:

ICS Inspection and Control Services v Republic of Argentina, UNCITRAL PCA Case No 2010-9

- paras 1.2 and 1.3 of the Non-Waivable Red List respectively outline that an arbitrator cannot:
 - > have 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 (ie a third party funder or insurer)
 - > have a significant financial or personal interest in one of the parties or the outcome of the case
- para 2.3 of the Waivable Red List deals with the relationship of the arbitrator to the parties or counsel where, eg, the arbitrator:
 - > currently represents or advises one of the parties or an affiliate of one of the parties (para 2.3.1)
 - > regularly advises one of the parties or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom (para 2.3.7)
- paras 3.1 and 3.2 of the Orange List deal respectively with an arbitrator who has previously provided services for one of the parties or is currently providing services for one of the parties and where, for example:
 - > the arbitrator has served, within the past three years, as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship (para 3.1.1)
 - > the arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator (para 3.1.4)
 - > the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties (para 3.1.5)
 - > the arbitrator or his or her firm represents a party or an affiliate of one of the parties to the arbitration on a regular basis, but such representation does not concern the current dispute (para 3.2.3)

In *ICS (ICS Inspection and Control Services v Republic of Argentina*, UNCITRAL PCA Case No 2010-9), the law firm of the claimant-appointed arbitrator was concurrently representing two parties in a case against Argentina. Argentina successfully challenged the appointment on the ground that the arbitrator and his law firm were concurrently in a position that was adverse towards Argentina.

ICS may be contrasted with the case of *Saint-Gobain (Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela* ICSID Case No ARB/12/13). The claimant unsuccessfully challenged the ICSID party-nominated arbitrator on the ground that he manifestly lacked independence and impartiality because (at the time of appointment, but not at the date of the decision) he was a lawyer in the Argentinean attorney general's office and he had previously argued from Argentina's perspective on issues that might arise in the case. In rejecting the challenge, the remaining members of the tribunal found that there was no evidence that cast

References:

Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/13

reasonable doubt on his impartiality and independence. The tribunal stated that the fact that a lawyer has argued a particular position in the past does not necessarily mean the lawyer will adopt the same position in the future. However, the tribunal accepted that the situation could be different if an arbitrator is simultaneously acting as counsel for a party in another arbitration.

While there are currently no express rules on the dual arbitrator/counsel role in the investor-state context, the issue of dual roles has been addressed recently within several other international processes, including the Court of Arbitration for Sport (CAS). Section 18 of its Code on Arbitration provides that 'CAS arbitrators and mediators may not act as counsel for a party before CAS'.

References:

***Court of Arbitration for Sport
code***

Potential risk of challenges to arbitral appointments

The LCIA Arbitration Rules 2014 contains an Annex on General Guidelines for the Parties' Legal Representatives. Of particular note is the requirement, contained in para 2, that a legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award. This expressly includes repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the tribunal known to be unfounded by that legal representative. If the tribunal decides that a legal representative has violated this provision, or any of the General Guidelines, it may impose any or all of the sanctions listed in [LCIA, art 18.6](#).

For further information, see Practice Note: [LCIA \(2014\)—general guidelines for legal representatives](#).

