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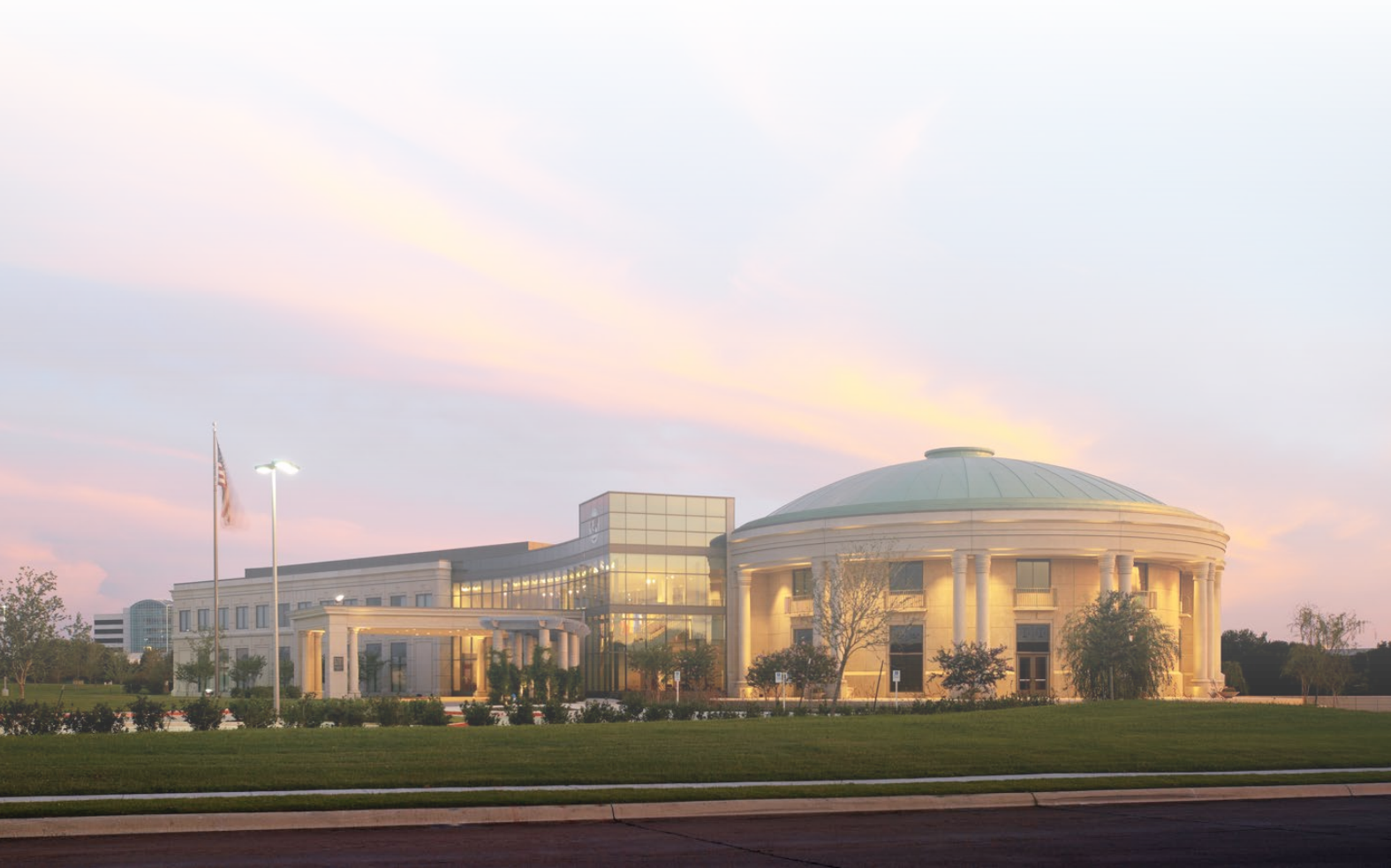

ITA IN REVIEW

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IBA GUIDELINES ON CONFLICTS OF INTEREST: THE 2024 REFORM AND ITS IMPACT ON INVESTORS

by Lorenzo Poggi

I. INTRODUCTION

In February 2024, the International Bar Association (IBA) published a proposal for an update to its Guidelines on Conflicts of Interest in International Arbitration ("Guidelines").[1] The Guidelines are a soft-law instrument setting the framework for the avoidance of conflicts of interest in international arbitration, and its application is almost universally accepted.

The existence of a conflict of interest between a party and an arbitrator may result in a challenge to the arbitrator—potentially delaying the proceeding and ultimately the disqualification of the arbitrator—which may undermine the interest of the party that appointed that arbitrator. This contribution addresses the impact of the 2024 reform on investors in investor-state dispute settlement ("ISDS").

II. UPDATE OF GENERAL STANDARDS

Part I of the Guidelines sets out "General Standards Regarding Impartiality, Independence and Disclosure," to which the parties and the arbitrators should conform to avoid a conflict of interest. As the 2024 introduction states: "Part I of the Guidelines contains the principles that must always be considered."[2] Indeed, some of the changes to the Guidelines introduced in 2024 could dramatically change the rules of the game for investors.

For instance, General Standard 4, paragraph (a), deals with the parties' waiver of potential conflicts of interest in case of inaction lasting more than 30 days after the

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[1] IBA Guidelines on Conflicts of Interest in International Arbitration, https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024#:~:text=will%20be%20necessary.-,(2)%20Conflicts%20of%20Interest,to%20be%20impartial%20or%20independent [hereinafter "Guidelines"].

[2] Guidelines, Introduction, ¶ 7.

arbitrator's disclosure or the discovery, by the affected party, of the objectionable circumstance. If the affected party does not raise an objection to the circumstance within the 30-day period, they are barred from raising it at a later stage.[3]

While there are no issues in relation to disclosure, as it takes place at a precise time, doubts may arise with respect to when (and if) a party has in fact learned of a given fact. To avoid any uncertainty, the 2024 drafters have added language setting out an objective standard to the formulation of General Standard 4, paragraph (a): "A party shall be deemed to have learned of any facts or circumstances . . . that a reasonable enquiry would have yielded if conducted at the outset or during the proceedings."[4] It follows that the 30-day waiver period for objecting to conflicts of interests is now extended to all circumstances that an investor reasonably should have known. However, as the scope of the presumptive waiver has been extended, the parties have a *de facto* duty to enquire about circumstances that may give rise to conflicts of interest if they do not want to lose their right to later complain about it.

Investors should, therefore, bear in mind that the new formulation is relevant not only to circumstances that they *subjectively* know concerning the relationship between the host State and arbitrator(s) but also the circumstances that they *objectively* should have known. Failure to do so may result in a waiver of the right to later raise the objection.

A new sentence potentially affecting investors in the appointment process and throughout the course of the arbitration has been included in General Standard 6. The newly introduced paragraph (c) of General Standard 6 specifies that "[a]ny legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party."[5] It follows that all the circumstances

[3] Guidelines, General Standard 4(a).

[4] Guidelines, General Standard 4(a), last sentence.

[5] Guidelines, General Standard 6(c).

giving rise to an actual or potential conflict of interest[6] must be disclosed[7] in relation to the controlling (or controlled) entities of the investor, potentially expanding the number and frequency of conflicts of interests in cases of large multinational corporations.

The changes in General Standard 6 are also reflected in General Standard 7, which sets out the duty of the parties and the arbitrators in the proceeding. A party now must disclose a relationship between the party and an arbitrator where it arises from a relationship between the arbitrator and "a person or entity over which a party has a controlling influence."[8]

Considering that the explanatory note to Article 6[9] makes clear that the provision shall be considered to extend to third-party funders and insurers (which are now seen frequently backing investors and their claims) it follows that the controlling entities of the funder or the insurer should also be disclosed.

III. EXPANSION OF THE ORANGE LIST

Part II of the Guidelines is named "Practical Application of General Standards" and provides for three lists of circumstances that are indicative of the fact that conflicts of interests exist (Red List), may exist (Orange List), or do not exist (Green List). The lists of circumstances are non-exhaustive[10] and, in any event, "the General Standards govern over the illustrative Application Lists."[11]

The Orange List provides for a non-exhaustive set of situations that "may, depending on the facts of a given case"[12] give rise to doubts about the impartiality and independence of an arbitrator. The circumstances in the Orange List, as the

[6] *See infra* (listed in the Red and Orange Lists).

[7] Guidelines, General Standard 4(a).

[8] Guidelines, General Standard 7(a)(i).

[9] Guidelines, Explanation to General Standard 6, ¶ (b).

[10] Guidelines, Part II, ¶ 1.

[11] Guidelines, Part II, ¶ 1.

[12] Guidelines, Introduction, ¶ 3.

Introduction of the 2024 Revision peremptorily states, "must . . . be disclosed pursuant to General Standard 3."[13] Accordingly, when choosing an arbitrator, an investor should consider all the circumstances in the Orange List, as the respondent state may use such grounds to challenge the arbitrator. Failure to disclose an Orange List circumstance may result in the appointment of the arbitrator by the administering institution as well as significant delays to the proceeding.

Further, the 2024 reform expands the list of "Services to a party" rendered by an arbitrator that the party must disclose and the presence of which may result in the arbitrator having a conflict of interest. For example, having assisted in mock trials or other activities for preparing an arbitral hearing on two or more occasions[14] and having served as a party appointed expert in an unrelated matter[15] may be sufficient for a conflict of interest as per the new (expanded) Orange List.

Investors therefore should bear in mind that employing or retaining such services from potential arbitrators may result in the institution or a court declaring their arbitrator conflicted and disqualified.

IV. CONCLUSION

The 2024 Reform, which is due to be approved by the IBA Council in May, does not dramatically change the substance of the well-known soft-law instrument, but it does contain some relevant changes that investors should bear in mind. The duty to enquire regarding circumstances that may conflict an arbitrator can have substantial consequences on the appointment process and likely delay the proceeding. Furthermore, the expansion of the Orange List may reduce the potential number of arbitrator candidates and jeopardize the appointment of a party's "preferred" arbitrator.

[13] Guidelines, Introduction, ¶ 3.

[14] Guidelines, Orange List, ¶ 3.1.4.

[15] Guidelines, Orange List, ¶ 3.1.6.

LORENZO POGGI is a trainee at Squire Patton Boggs, where it focuses his practices on International Dispute Resolution. He also has experience working in arbitration-related matters in the Commodities & Shipping Sector. Lorenzo is regularly involved in Investor-State arbitrations under the ICSID rules as well as high profile commercial arbitrations, with a particular focus on the Oil and Gas, Commodities and Shipping and Telecommunications industries.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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Advisory Board members also have the opportunity to participate in the work of

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Plano, Texas, 75024-3561
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