Case No: CL-2015-000344

Neutral Citation Number: [2016] EWHC 422 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

In the matter of the Arbitration Act 1996
And in the matter of an arbitration

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/16

Before :

MR JUSTICE KNOWLES CBE

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Between :

W Limited	**Claimant**
- and -	
M SDN BHD	**Defendant**

- -
- -

Huw Davies QC and Siddharth Dhar (instructed by **Clyde & Co LLP**) for the **Claimant**
Luke Parsons QC and Caroline Pounds (instructed by **Fenwick Elliot LLP**) for the **Defendant**

Hearing date: 16 December 2015

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Judgment

Mr Justice Knowles :

Introduction

1. The Claimant is a corporation incorporated in the British Virgin Islands. The Defendant is a corporation incorporated in Malaysia. The parties contracted in relation to a project in Iraq. A dispute arose, and an LCIA arbitration was commenced by the Defendant in April 2012. Mr David Haigh QC, a Canadian lawyer, was appointed sole arbitrator.

2. Mr Haigh QC has made two awards in the arbitration; one dated 16 October 2014 and one dated 26 March 2015. The Claimant challenges the awards under section 68 of the Arbitration Act 1996 ("the 1996 Act").

3. That section provides that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) "apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award". By section 68(2) "serious irregularity" means an irregularity, of one or more of nine specified kinds (three are referenced by the Claimant in this case), "which the court considers has caused or will cause substantial injustice to the applicant".

4. It is common ground that the present case is not a case of actual bias, or of actual absence of independence or impartiality. The challenge in the present case alleges apparent bias based on alleged conflict of interest.

5. The case has wider importance because the Claimant highlights and relies on "[t]he fact that the conflict of interest in this case fell squarely within paragraph 1.4 of the Non-Waivable Red List within the 2014 IBA Guidelines", i.e. the 2014 edition of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. That paragraph in the 2014 IBA Guidelines now reads:

> "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 arbitrator

6. There is no doubt that the present case falls within the description given in Paragraph 1.4 of the 2014 IBA Guidelines. The arbitrator's firm (but not the arbitrator) does regularly advise an affiliate of the Defendant (but not the Defendant) and the arbitrator's firm (but not the arbitrator) derives substantial financial income from advising the affiliate.

7. There is also no doubt that the present case would not have fallen within Paragraph 1.4 of the "Non-Waivable Red List" before that List was amended in 2014. One of the amendments made in 2014 was to add the words "or his or her firm" before the words "regularly advises".

8. Mr Haigh QC is with Burnet Duckworth & Palmer LLP ("the Law Firm"). He has been admitted to the Alberta Bar for 50 years and was appointed Queen's Counsel in 1984. He is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitration, and a Founding Member of the Western Canada Commercial Arbitration Society.

9. Mr Haigh QC's curriculum vitae, published on the website of the Law Firm, suggests a wider brief, but he has informed the Court that "[o]ver the past half dozen years or so, I have sat almost exclusively as an international arbitrator".

10. The Law Firm is fairly described by the Claimant as of medium size. Mr Haigh QC is a partner in the Law Firm. He has provided further detail to the Court, including the following:

> "I no longer participate in partnership matters and only rarely attended partnership meetings in the period between 5-10 years ago. More recently, I have not attended such meetings. The current version of [the Law Firm's] partnership agreement, approved by a full vote of the partners, expressly "grandfathers" me so that I am exempt from compulsory retirement. I am the only member of [the Law Firm] to which this exemption applies. … I would describe myself as essentially a sole practitioner carrying on my international practice with support systems in the way of secretarial and administrative assistance provided by [the Law Firm]. I am treated for the purposes of compensation as a separate department within the firm and, other than [one other] I am the only member of the … Alternative Dispute Resolution department"

11. At the time of Mr Haigh QC's appointment as arbitrator in the present matter, a company ("Q") was a client of the Law Firm. A senior partner ("SP") in the Law Firm was a member of Q's board and a shareholder in Q. The managing partner ("MP") of the Law Firm was Q's company secretary.

12. The Defendant was a subsidiary of another company, P. After an announcement in June 2012, in December 2012 P acquired Q. On the acquisition SP resigned his directorship in Q and sold his shareholding. MP resigned his office as Q's company secretary.

13. However following the acquisition, and thus since Q became (like the Defendant) a subsidiary of P, the Law Firm continued to provide legal services to Q. P itself takes its advice from a different law firm. The legal services provided to Q have been substantial and it is to be inferred that the Law Firm has earned substantial remuneration from Q for the work.

14. Mr Haigh QC made a statement of independence dated 18 May 2012 on consenting to his appointment as arbitrator. As it happened this was a month or so before the announcement of the acquisition of Q by P.

15. On accepting the appointment as arbitrator, Mr Haigh QC made some, in the event immaterial, disclosures to the parties revealed by his firm's conflict check systems. He made a later, in the event immaterial, disclosure in September. Those conflict check systems did not however alert him to the fact that the firm had Q as a client.

16. There was substantial publicity in due course when P acquired Q, but the Law Firm's conflict check systems did not draw Q or its new relationship with P to his attention (apparently because of the way in which the acquisition was named within the firm). He confirms that he was not otherwise alert to Q's new relationship with P, and his firm's continuing work for Q, in order to consider and make a disclosure to the parties then. He regrets that this is what happened, as he would have wished to make a disclosure had he known.

Apparent bias?

17. It is common ground between the parties that the test at common law for apparent bias is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": Porter v Magill [2002] AC 357 at [103] per Lord Hope.

18. In Yiacoub v The Queen [2014] UKPC 22; [2014] 1 WLR 2996 at [12] Lord Hughes (with Lords Neuberger, Mance, Clarke and Toulson) added:

> "That and similar formulations use the word "biased", which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality."

19. In Helow v Secretary of State for the Home Department and another [2008] UKHL 62; [2008] 1 WLR 2416 at [39] Lord Mance continued:

> "The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the [here, arbitrator] as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the [arbitrator] on it, and no attention will be paid to any statement by the [arbitrator] as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, paras 17 and 39."

20. What do the present facts amount to? An arbitrator is a partner in a law firm. The firm earns substantial remuneration from providing legal services to a client company that has the same corporate parent as a company that is a party in the arbitration. The firm does not advise the parent, or the party. There is no suggestion the arbitrator does any of the work for the client company.

21. Further, the arbitrator, although a partner, operates effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator. The arbitrator makes other disclosures where, after checking, he has

knowledge of his firm's involvement with the parties, and would have made a disclosure here if he had been alerted to the situation.

22. On considering the facts the fair minded and informed observer would not, in my view, conclude that there was a real possibility that the tribunal was biased, or lacked independence or impartiality. I reach that view without hesitation.

23. I do not overlook the publicity when P acquired Q, and the fact that many people within a firm would come to know where (as with Q) substantial legal services had since been provided by the firm. However where, as here, the arbitrator made checks, and made disclosures where the checks drew matters to his attention, and the problem was that the facts in relation to Q were not drawn to his attention, the fair minded and informed observer would say that this was an arbitrator who did not know rather than that this was an arbitrator whose credibility is to be doubted, who "must have known", and who was choosing not to make a disclosure in this one important instance.

24. The fact that the arbitrator would have made a disclosure if he had been alerted to the situation shows a commitment to transparency that would be relevant in the mind of the fair minded and informed observer. It also shows that the arbitrator could not have been biased by reason of the firm's work for the client. That work was not in his mind at all; had it been he would have disclosed it.

25. In the event, in the present case any uncertainty in the matter comes, not in applying the test, but from the 2014 IBA Guidelines that are put, understandably, at the forefront of the Claimant's case.

26. The Guidelines do not bind the Court, but they can be of assistance (see for example Sierra Fishing Company and others v Farran and others [2015] EWHC 140 (Comm); [2015] 1 All ER (Comm) 560 at [58] per Popplewell J and Cofely Limited v Anthony Bingham [2016] EWHC 240 (Comm) at [109] per Hamblen J; but cf. A and Others v B and Another [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep 591 at [73] to [78] per Flaux J), and it is valuable and appropriate to examine them at least as a check.

The 2014 IBA Guidelines

27. The current IBA Guidelines on Conflicts of Interest in International Arbitration were adopted by resolution of the Council of the International Bar Association on 30 October 2014. The original 2004 Guidelines were drafted by a Working Group of 19 experts from 15 countries. In 2012 a review was initiated and this was conducted by an expanded Conflicts of Interest Subcommittee of 27 members from 19 countries "representing diverse cultures and a range of perspectives, including counsel, arbitrators and arbitration users".

28. The 2014 IBA Guidelines comprise General Standards, Explanatory Notes on Standards, and what are called Application Lists (described as lists of "specific situations indicating whether they warrant disclosure or disqualification"). The Introduction states that the General Standards and Application Lists "are based upon

statutes and case law in a cross-section of jurisdictions, and upon the judgment and experience of practitioners involved in international arbitration".

29. Paragraph 6 of the Introduction states:

> "These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines … the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation."

30. Of the Application Lists, the Introduction states that these "cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be". "Nevertheless", the Introduction adds, "the IBA Arbitration Committee is confident that the Application Lists provide concrete guidance that is useful in applying the General Standards."

31. The parts of the General Standards, the Explanatory Notes on Standards and the Application Lists that are most material for present purposes are set out in the Appendix to this judgment.

32. The 2014 IBA Guidelines contain no specific explanation of why the change was made in 2014 to the text of Paragraph 1.4 of the Non-Waivable Red List so as to include the situation where the arbitrator's firm regularly advises a party, or an affiliate of a party, but the arbitrator does not. The preface to the 2014 IBA Guidelines records that "the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations".

Examining the 2014 IBA Guidelines

33. The 2014 IBA Guidelines make a distinguished contribution in the field of international arbitration. Their objective, to assist in assessing impartiality and independence, is to be commended.

34. It is therefore with diffidence that I say that the present case suggests there are weaknesses in the 2014 IBA Guidelines in two inter-connected respects. First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

35. Paragraph 1.4 of the Non-Waivable Red List maintains the original 2004 text with the words "regularly advises … an affiliate of the appointing party". A footnote indicates that the term 'affiliate' encompasses all companies in a group of companies. The

effect of maintaining that text, when the earlier part of the Paragraph has been changed, is to include in the Non-Waivable Red List the situation where the advice is to an affiliate and the arbitrator is not involved in the advice, and without reference to the arbitrator's awareness or lack of awareness of that advice.

36. It is hard to understand why this situation should warrant inclusion in the Non-Waivable Red List. The situation is classically appropriate for a case-specific judgment. And if the arbitrator had been aware and had made disclosure, why should the parties not, at least on occasion, be able to accept the situation by waiver? Yet, as the Claimant's reference to Paragraph 1.4 in the present case amply illustrates, the nature of something called a Non-Waivable Red List, and the consequences of inclusion in such a List, do not clearly allow for that.

37. The present case illustrates to me that the 2014 IBA Guidelines in the respects under examination may, where the facts fit Paragraph 1.4, cause a party to be led to focus more on assumptions derived from that fact, and to focus less on a case-specific judgment. It is no criticism of the Claimant or its Counsel that oral submissions for the Claimant in the present case urged that Paragraph 1.4 provides a "clear steer", is "pretty emphatic", and may be a "very powerful factor to weigh in the balance". And even that there is a real possibility of bias "because that is what we are told through Paragraph 1.4".

38. Of course Paragraph 2 of Part II of the 2014 IBA Guidelines, under the heading "Practical Application of the General Standards", expressly qualifies the proposition that the Non-Waivable Red List details specific situations that "give rise to justifiable doubts as to the arbitrator's impartiality and independence" with the phrase "depending on the facts of a given case". But this does not overcome the difficulty. This is because Paragraph 1 of Part II says, in introducing the Application Lists, that "[i]n all cases" it is "the General Standards [that] should control the outcome". And General Standard (2)(d) now states (again, the text has changed since 2004), and without qualification, that justifiable doubts "necessarily exist" as to the arbitrator's impartiality or independence "in any of the situations described in the Non-Waivable Red List". That categoric position, not allowing for judgment by reference to the facts of the case, is maintained in the Explanation to General Standard 2(d).

39. General Standard (6)(a) appropriately states that the relationship of the arbitrator with the law firm "should be considered in each individual case". And it is realistic when it observes that "[t]he fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict …. [s]imilarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest …". The Explanation to General Standard (6)(a) adds that in the context of a group of companies:

> "… [b]ecause individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case."

But there is a tension between all of this and General Standard (2)(d) when an affiliate of a party is a client of the arbitrator's firm, because in that situation General Standard (2)(d) and Paragraph 1.4 of the Non-Waivable Red List (with the definition of affiliate) appear to take a different approach to that taken by General Standard (6)(a).

40. The approach to waiver or acceptance perhaps highlights the problem further. Paragraph 2 of Part II says that the Non-Waivable Red List "includes" situations "deriving from the overriding principle that no person can be his or her own judge". "Therefore," it says, "acceptance of such a situation cannot cure the conflict." Paragraph (d) in the Explanation to General Standard (2) takes the same "example", adding that "there cannot be identity between an arbitrator and a party". The Explanation adds that the consequence of inclusion in the Non-Waivable Red List is that the parties "cannot waive the conflict of interest arising in such a situation". The situation under consideration in the present case is within the Non-Waivable Red List but it is not near to the situation where a person is his or her own judge, or where there is identity between an arbitrator and a party.

41. At the same time, situations allocated to the "Waivable Red List" rather than the "Non-Waivable Red List" include where the arbitrator himself or herself has given legal advice on the dispute to a party (Paragraph 2.1.1 of the Waivable Red List), where "[a] close family member of the arbitrator has a significant financial interest in the outcome of the dispute" (Paragraph 2.2.2 of the Waivable Red List) and where "[t]he arbitrator has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute" (Paragraph 2.2.3 of the Waivable Red List). These situations would seem potentially more serious than the circumstances of the present case; again suggesting that the circumstances of the present case do not sit well within a "Non-Waivable Red List".

Conclusion

42. The fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr Haigh QC was biased or lacked independence or impartiality.

43. Following the examination above, the 2014 IBA Guidelines do not cause me to take a different view of the present case from that expressed above.

44. Of course I decide the outcome of the present case under English law. It would be possible simply to say that the 2014 IBA Guidelines are not a statement of English law and then not enter into any examination of them. However the present arbitration is international, and parties often choose English Law in an international context. Thus the role of this Court has an international dimension. I therefore prefer to consider the 2014 IBA Guidelines, as I have done, and explain why I do not, with respect, think they can yet be correct.

45. The Claimant's challenges to the awards under section 68 of the 1996 Act must fail. These particular challenges are best concluded on their substantive merits, but in light of the conclusion I have reached I will also refuse a related application by the Claimant for an extension of time in which to bring the challenges.

Appendix

The General Standards start with a statement of General Principle that "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."

General Standard (2) is entitled "Conflicts of Interest". It is in these terms:

> "(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.
>
> (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.
>
> (c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is 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.
>
> (d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List."

In the Explanation to General Standard 2:

> "(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.
>
> (b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation."

General Standard (3) concerns disclosure.

General Standard (4) is entitled Waiver by the Parties. It includes these passages on the Application Lists

"(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

The Explanation to General Standard (4) includes the following:

"…

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

General Standard (6) is entitled Relationships and provides:

"(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a

potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party."

The Explanation to General Standard (6) is as follows:

"(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. …"

The Application Lists are introduced in the Guidelines by "Part II: Practical Application of the General Standards". This provides:

"1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

…

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive."

Footnotes provide that "throughout the Application Lists" the term 'affiliate' "encompasses all companies in a group of companies, including the parent company".

The Lists include the following entries:

"1. Non-Waivable Red List

1.1 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.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a 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.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

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.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.

2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

…

3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 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.

…

3.5 Other circumstances

…

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

…"