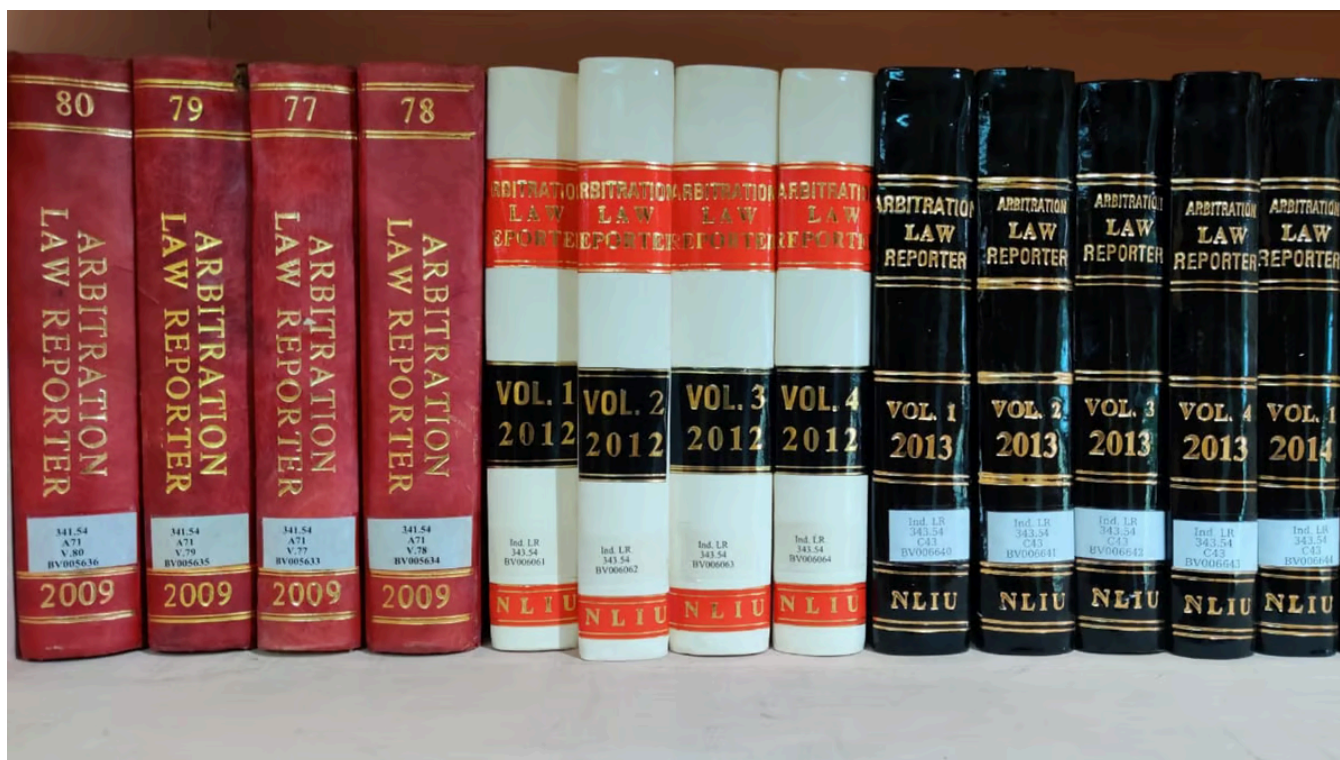


# The revised IBA guidelines on conflict of interest in arbitral appointments: Key highlights

*The 2024 Guidelines promise a stronger framework for avoiding conflict of interest, which will foster renewed confidence in arbitration.*



Arbitration

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The International Bar Association (IBA) recently published the revised Guidelines on Conflict of Interest in International Arbitration. The [updated guidelines](#) were approved by the IBA Council in May 2024. The guidelines were last updated in 2014 and originally published in 2004.

These guidelines are soft laws, setting out the framework for impartiality, independence and disclosures governing the selection, appointment and continuing role of arbitrators in international arbitrations. These guidelines are followed [worldwide](#). Even the Indian Arbitration and Conciliation Act 1996 relies on the 2014 Guidelines through Schedules V and VII, introduced in 2015 ([see 246th Law Commission Report](#)). The 2014 Guidelines were also commonly referred to by [Indian courts](#).

While retaining the essence of the 2014 Guidelines, the 2024 Guidelines update the General Standards and Explanatory Notes along with the three lists - (a) non-waivable Red List, (b) waivable Red List, (c) Orange List and (d) Green List.

This piece analyses the changes introduced in the 2024 guidelines to keep pace with the changing dynamics of arbitral appointments and best practices. They are reflective of recent trends where arbitrators may not always be from a law firm, views of potential arbitrators on social media, repeat appointments and influence of parties on arbitrators.

## **Overview of changes to General Standards**

The General Standards form the primary source for evaluating the existence of conflicts of interest (adopting an objective 'reasonable third person' test) and the obligation to disclose (adopting a subjective 'in the eyes of the parties' test).

### **1. Subsistence of obligations of impartiality and independence**

Under General Standard 1, every arbitrator is required to be impartial and independent at the time of accepting an appointment and this obligation would continue till the final award is rendered or the termination of the proceedings. The 2024 Guidelines clarify that the obligation does not extend to the period during which the award may be challenged. It further states that a fresh round of disclosure and review of potential conflict of interests 'shall' be necessary if the dispute is referred back to the same arbitral tribunal. This was not mandatory under the 2014 Guidelines.

### **2. Tests for conflict of interest**

General Standard 2 of the 2024 Guidelines clarifies that the test for declining an appointment or refusal to continue to act should be objective. An arbitrator should decline appointment or refuse to continue to act, for example in circumstances described in the non-waivable Red List. However, an arbitrator may make a disclosure as per General Standard 3, such as in circumstances described in the waivable Red List.

### **3. Thresholds for disclosures by arbitrators**

General Standard 3 of the 2024 Guidelines expressly requires the arbitrator to consider all facts and circumstances known to him to determine if the same

should be disclosed. Unlike Standard 2 (which prescribes an objective test for declining or refusing to continue an appointment), General Standard 3 lays down a subjective test that relies on the knowledge of the arbitrator. The 2024 Guidelines have elevated a few clauses from the explanation to the main text of General Standard 3.

#### **4. Waiver of potential conflict of interest by parties**

Under General Standard 4, a party is deemed to have waived potential conflict of interest if it does not raise an objection against an arbitrator within 30 days of the receipt of the arbitrator's disclosure, or if the party learns of facts or circumstances which could potentially be conflicts of interests. Under the 2024 Guidelines, a party shall be deemed to have learned of such fact or circumstance that could have been known after a reasonable inquiry at the start or during the proceedings.

#### **5. Scope of the guidelines**

The 2024 Guidelines do not make any change to the scope of the guidelines which are relevant for tribunal chairs, sole arbitrators, co-arbitrators, arbitral or administrative secretaries and assistants.

#### **6. Relationships of arbitrators with parties**

General Standard 6 sets out guidelines when an arbitrator would be considered to bear the identity of certain persons or entities, which may warrant disclosure or potential conflict. The 2014 Guidelines referred to arbitrators bearing the identity of his/her law firm. However, the 2024 Guidelines consider the changing dynamics in corporate and sovereign structures, which may potentially impact independence and impartiality of arbitrators and introduce the following changes:

- a. The 2024 Guidelines expand to include relationships of parties with the arbitrator's "law firm or employer" and not just "law firm". This may include arbitrators who are lawyers at law firms and/or employed by a company or other organisations. Corresponding changes have been made to the Lists. For example, this would now extend to in-house counsel in companies.
- b. The law firm's or employer's organisational structure and mode of practice would be relevant.

c. The 2024 Guidelines also contemplate that a party may have a controlling influence over “a natural person” and not just a legal entity. This could be controlling influence, economic interests or indemnification obligations. This could be in case of parent-subsidiary companies or promoter having controlling influence over their companies.

d. In case of states or state-entities who are parties to the arbitration, the arbitrator should consider disclosing his relationships with entities such as regional or local authorities, autonomous agencies, or state-owned entities, irrespective of whether they are part of the state or have private status, and vice-versa.

## **7. Duty of parties to disclose**

The 2024 Guidelines include additional information required to be disclosed by parties, which includes informing of: (a) a person or entity over which a party has a controlling influence, (b) any other person or entity an arbitrator should consider while making disclosures in accordance with General Standard 3. Parties’ duty to disclose relationships also applies in case of any controlling influence, direct economic interest or duty to indemnify over any legal or natural person.

## **The Lists: Practical application of the General Standards**

The Guidelines prescribe non-exhaustive lists of situations of potential conflict of interests, subject to applicable facts. The facts/circumstances surrounding the arbitrator’s failure to make disclosures can impinge upon his independence and impartiality.

The Red List contains situations which may give rise to justifiable doubts as to the arbitrator’s impartiality and independence. The Red List further consists of: (a) non-waivable Red List enlisting incurable conflicts; and (b) waivable Red List covering serious but less severe conflict situations.

The Orange List provides illustrative situations which may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. The 2024 Guidelines clarify that situations not included in the Orange List would be disclosed based on an assessment by the arbitrators on a case-by-case basis, if they give rise to “doubts in the eyes of the parties” instead of “justifiable doubts” as to the independence and impartiality of the arbitrator.

Unlike in case of the Orange List, situations in the waivable Red List are considered waivable only if and when the parties expressly confirm the arbitral appointment as per General Standard 4(c), irrespective of being aware of the conflict of interest situation.

The Green List includes situations where the arbitrator does not have any duty to disclose. The 2024 Guidelines require subjective or objective standards (compared to the 2014 Guidelines which were limited to objective standards) to ascertain the absence of any conflict of interest.

### **i. Non-waivable Red List**

The 2024 Guidelines specify that a non-waivable conflict situation would arise when an arbitrator is a legal representative of the party “in the arbitration”. The 2014 Guidelines merely referred to arbitrators who are legal representatives of the party (see 1.1), indicating all legal representatives and not those limited to the arbitration. The 2024 Guidelines now include situations where an arbitrator “currently” advises a party or its affiliate and derives significant financial income from such advice. Earlier, this was limited to situations where an arbitrator “regularly advises” a party or its affiliate (see 1.4).

### **ii. Waivable Red List**

Corresponding to changes in the non-waivable Red List, an arbitrator who currently represents or advises a party or its affiliate comes under the waivable Red List provided the arbitrator “does not derive significant financial income therefrom” (see 2.3.1).

### **iii. Orange List**

The 2024 Guidelines expand the Orange List to include situations where:

- a. Two arbitrators have the same employer (see 3.2.1).
- b. The arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on two or more occasions by one of the parties or its affiliate in unrelated matters (see 3.1.4).
- c. The arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on more than three occasions by the same counsel, or the same law firm (see 3.2.10).

- d. The arbitrator currently serves, or has acted within the past three years, as an expert for one of the parties or its affiliate, in an unrelated matter (see 3.1.6).
- e. The arbitrator has, within the past three years, been appointed as an expert on more than three occasions by the same counsel, or the same law firm (see 3.2.9).
- f. An arbitrator and their fellow arbitrator(s) or an arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (see 3.2.12 and 3.2.13).
- g. The arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel (see 3.3.6).
- h. The arbitrator has publicly advocated a position on the case through social media or online professional networking platforms. Earlier, the Orange List specified published paper or speech, or otherwise (see 3.4.3).
- i. The arbitrator holds an executive or other decision-making position within the administering institution or appointing authority with respect to the dispute, and in that position has participated in decisions with respect to the arbitration (see 3.4.3).

#### **iv. Green List**

The Green List remains unamended barring one additional situation - when the arbitrator, as an arbitrator in another matter, heard testimony of an expert deposing in the current proceedings. (see 4.5.1)

## **Concluding remarks**

The 2024 Guidelines promise a stronger framework for avoiding conflict of interest, which will foster renewed confidence in arbitration. They pave the way for amending laws relying on the 2014 Guidelines. For example, Schedules V and VII to the Indian Arbitration Act have not been further amended since their introduction in 2015. This may be a good opportunity to update the domestic laws to keep up with modern trends.

The 2024 Guidelines also provide leeway to parties for waiver of potential conflict situations. Several entries in the waivable Red List and Orange List can be treated as non-waivable conflict situations, for example, in case of close

family members of arbitrators having interests in the dispute. While the overall intent is to uphold party autonomy, there is a parallel need to protect the sanctity of arbitral processes. Pertinently, Indian law imposes more stringent requirements by providing a broader range of situations which render arbitral appointments invalid, as compared to the limited entries in the non-waivable Red List.

Similarly, the Green List, which enlists situations where there is no apparent or actual conflict, may in fact lead to conflict situations, more so, with the 2024 Guidelines including subjective standards for ascertaining conflict. For example, the Green List includes arbitrators who have previously expressed legal opinions arising in the arbitration but not focused on the case. However, this may be a relevant factor in case a potential arbitrator has expressed certain political views which may impact his independence and impartiality in arbitration involving states or state-owned entities.

Arbitral appointments have been challenged in the past on the ground that the arbitrators served together on two tribunals which took a position on a legal issue expected to arise in the arbitration, following which one of the challenges was sustained. Therefore, a deemed absence of conflict may not always be ideal.

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