

The role of professional arbitral organizations in regulating the conduct of arbitrators

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Introduction

Should professional arbitral organizations have a role in regulating conduct of arbitrators?

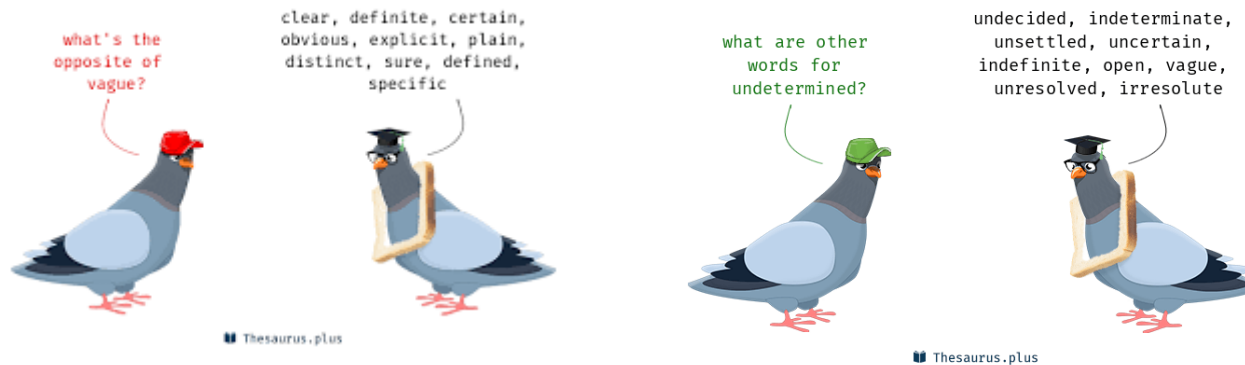
The International Bar Association (IBA) and the IBA Guidelines on Conflicts of Interest in International Arbitration.

Case law on the independence and impartiality of arbitrators

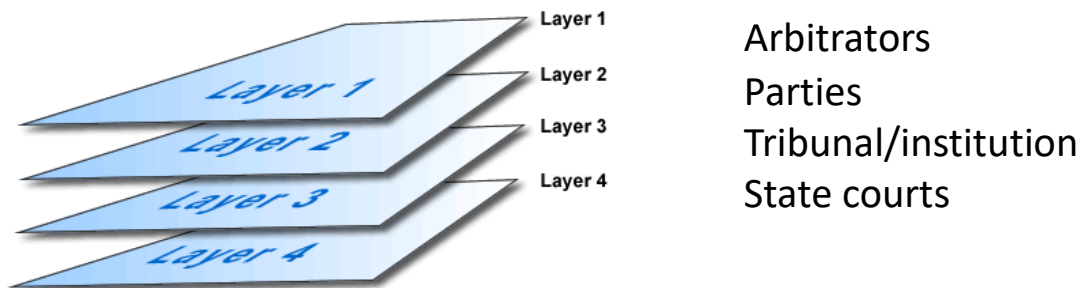
The proliferation of differentiated regimes

Should arbitral professional institutions help regulate arbitrators?

“Independence” and “impartiality”?



Who decides if an arbitrator is independent and impartial?



Should arbitral professional institutions help regulate arbitrators?

Who defines the criteria to decide if an arbitrator is independent and impartial?



No criteria



Rules/decisions issued by professional organizations



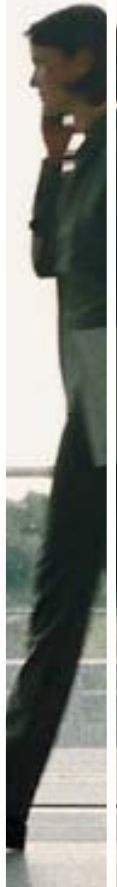
Guidelines / codes / practical guides (by professional arbitral organizations)



The IBA and its role in promoting uniformity in the conduct of arbitrators



- Established in 1947
- Over 80 000 individual members
- Over 190 member bar associations and law societies
- Goal: to promote an exchange of information between legal associations worldwide

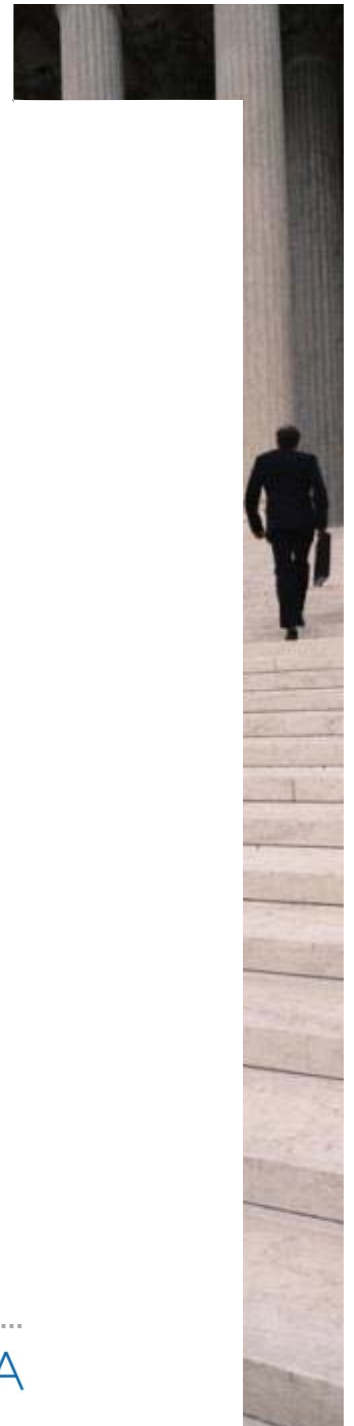


The IBA and its role in promoting uniformity in the conduct of arbitrators



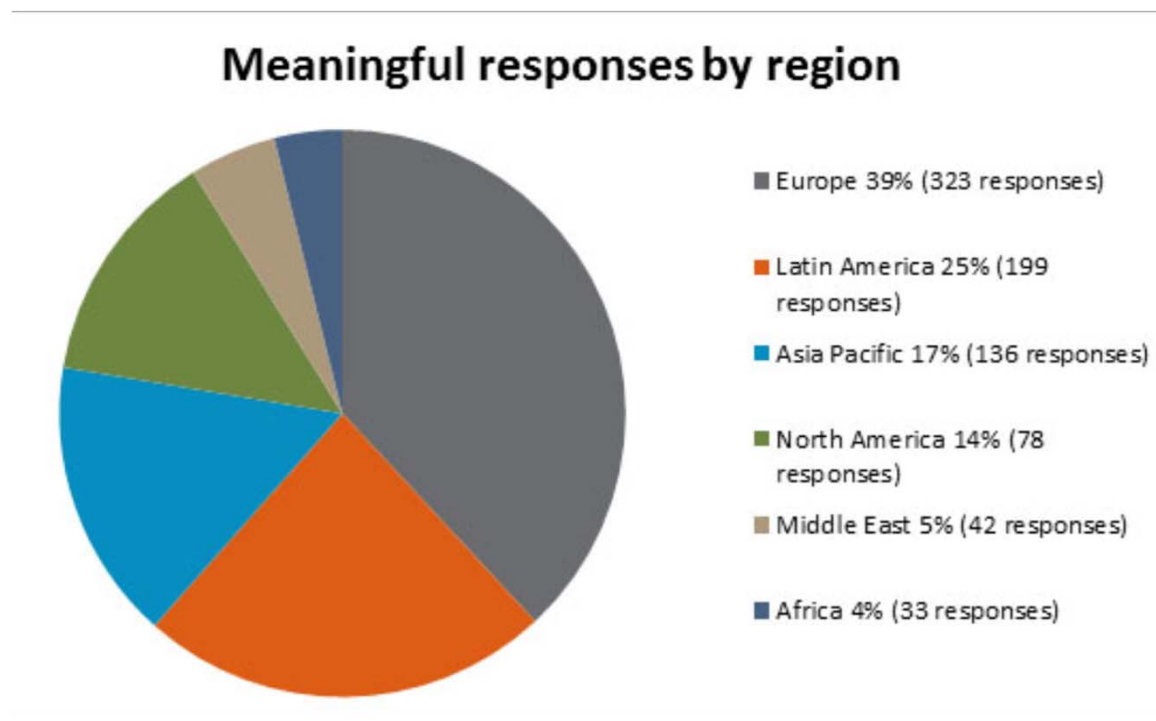
The IBA and its role in promoting uniformity in the conduct of arbitrators

- ❑ 1987 – Rules of Ethics for International Arbitrators
- ❑ 2002 – Working Group to address problems of conflicts of interest
- ❑ 2004 – Adoption of the IBA Guidelines on Conflicts of Interest in International Arbitration
- ❑ 2014 – Revision of the IBA Guidelines on Conflicts of Interest in International Arbitration
- ❑ 2015 – Organisation of the Subcommittee on IBA Arbitration Guidelines and Rules



The IBA and its role in promoting uniformity in the conduct of arbitrators

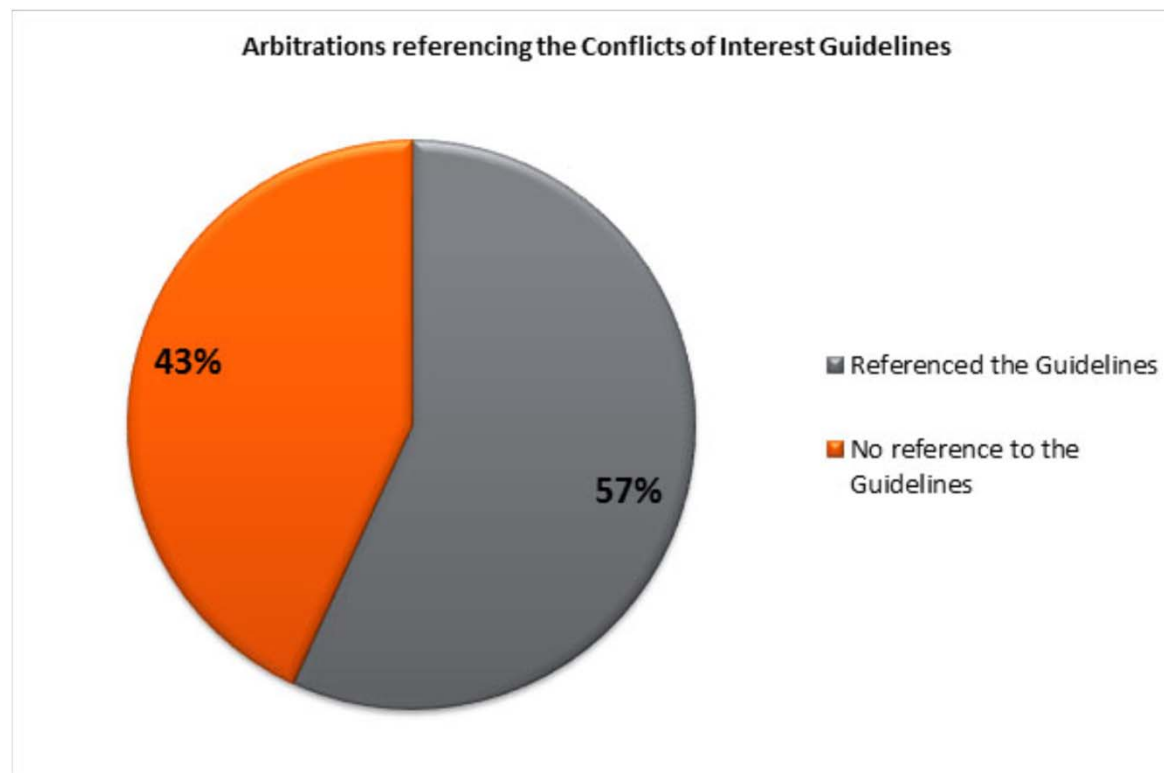
IBA Subcommittee survey questionnaire



The IBA and its role in promoting uniformity in the conduct of arbitrators

IBA Subcommittee report – key conclusions

Broad acceptance



The IBA and its role in promoting uniformity in the conduct of arbitrators

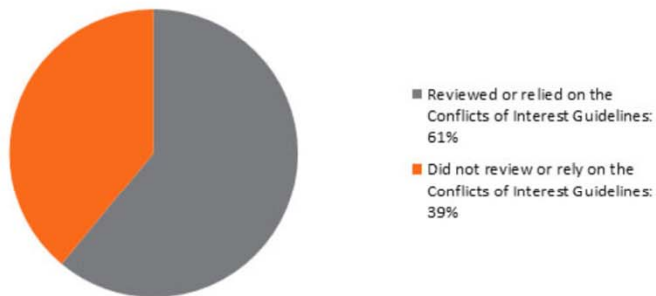
IBA Subcommittee report – key conclusions



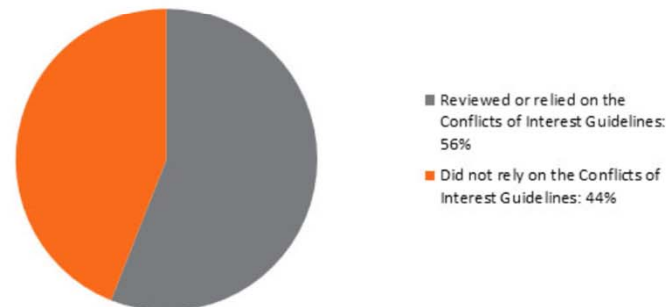
The IBA and its role in promoting uniformity in the conduct of arbitrators

IBA Subcommittee report – key conclusions

Review or reliance by arbitrators on the Conflicts of Interest Guidelines in deciding to take on an appointment

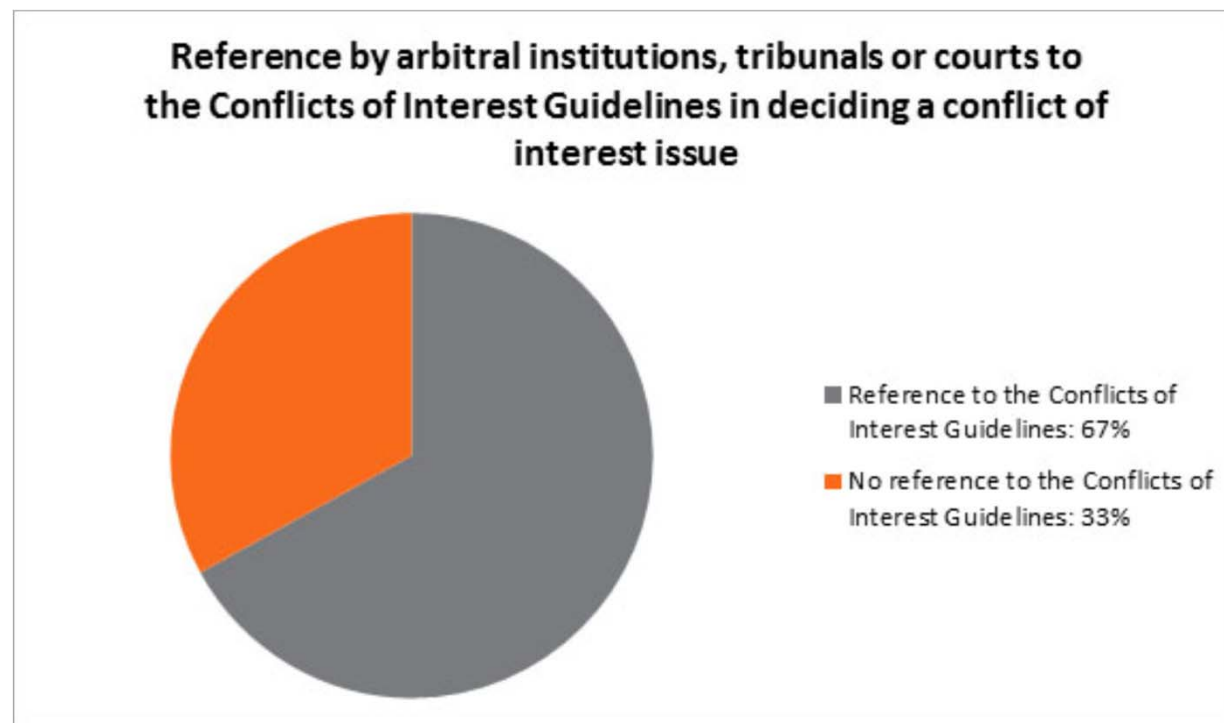


Review or reliance by arbitrators on the Conflicts of Interest Guidelines in making a disclosure to the parties and arbitral institution



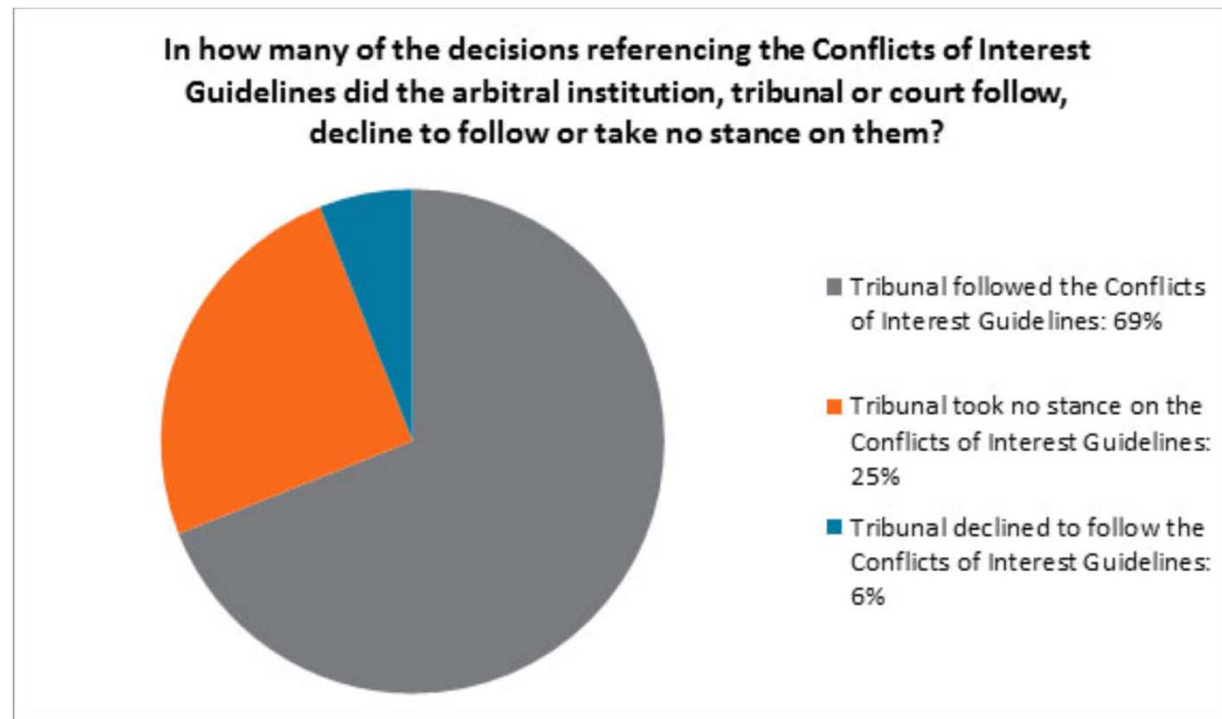
The IBA and its role in promoting uniformity in the conduct of arbitrators

IBA Subcommittee report – key conclusions



The IBA and its role in promoting uniformity in the conduct of arbitrators

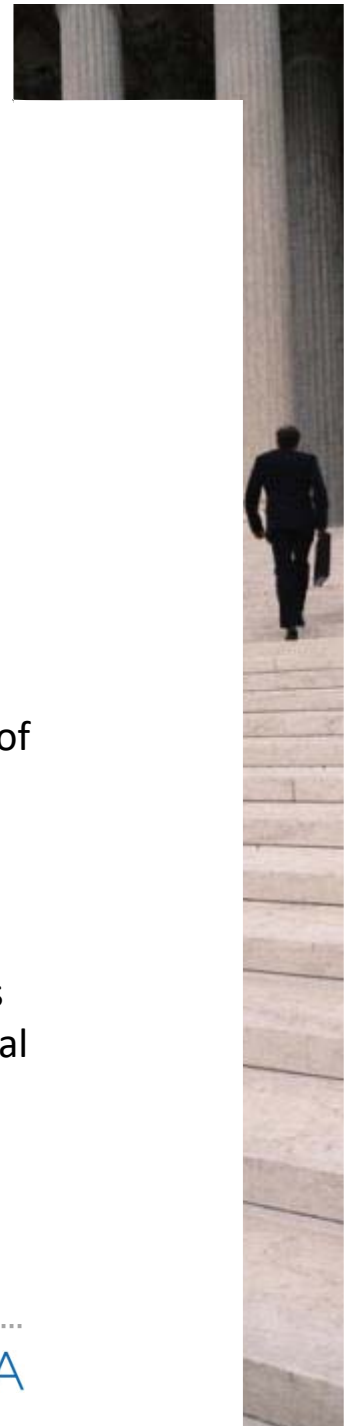
IBA Subcommittee report – key conclusions



The IBA and its role in promoting uniformity in the conduct of arbitrators

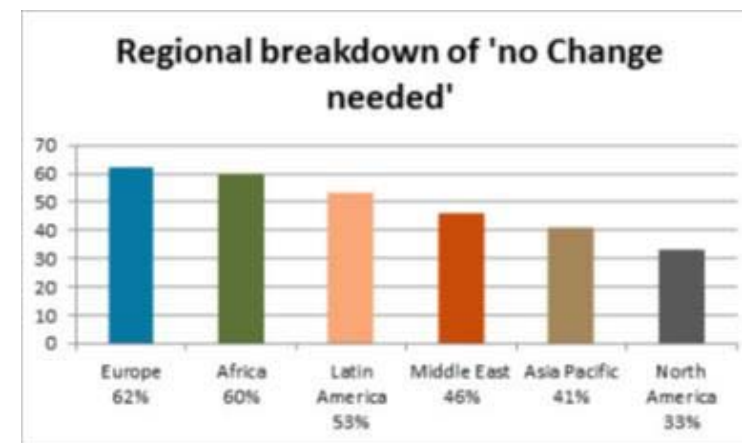
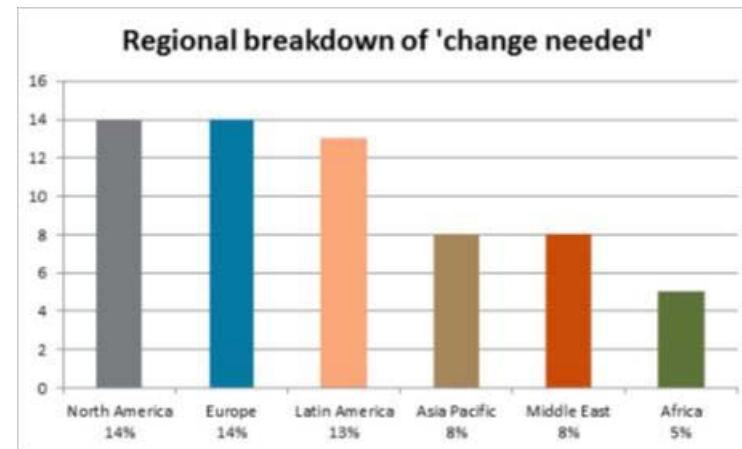
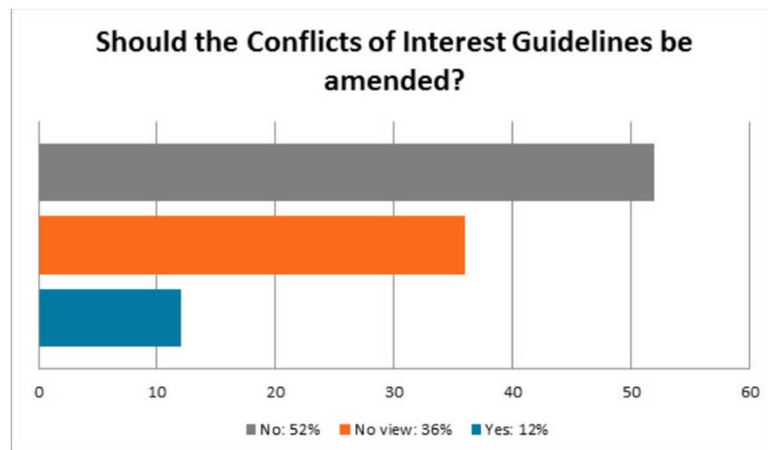
IBA Subcommittee report – key conclusions

- Well received in jurisdictions with a more developed arbitration practice, regardless of the region, and less so in jurisdictions where the use of arbitration is less prevalent
- Certain arbitral institutions either recommended the incorporation of the Guidelines into the terms or routinely applied them when deciding on issues of conflicts of interest
- References to the Conflicts of Interest Guidelines by local courts were rare (in some cases due to absence of case law database); the rate at which the Conflicts of Interest Guidelines were referred to or relied upon by local courts was much lower than the rate at which they were used by practitioners in local arbitral practice, or by arbitral institutions when deciding on challenges
- Guidelines have caught the attention of legal scholars across the globe



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Case law on the independence and impartiality of arbitrators

United Kingdom

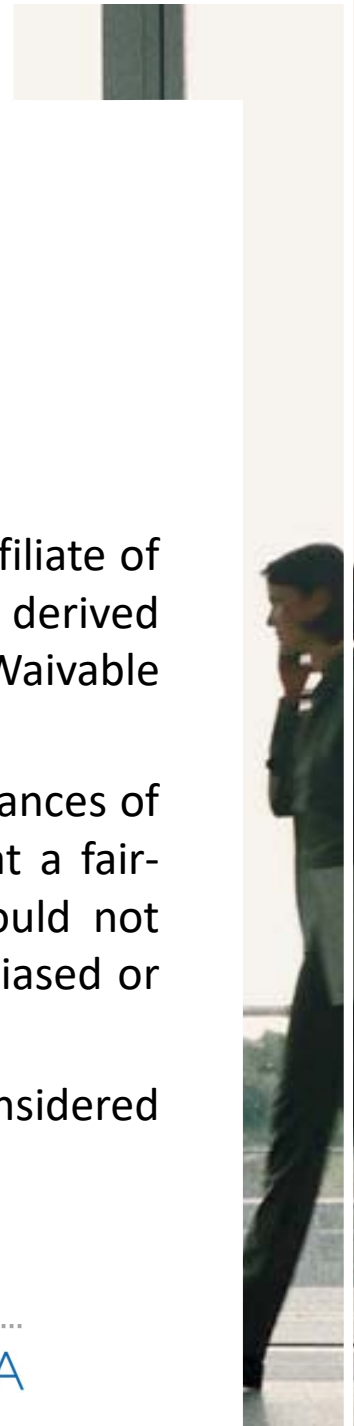
❑ Decision of the English High Court, *W Ltd v M SDN BHD* [2016]

An arbitrator had not disclosed that his law firm had advised an affiliate of one of the parties and that substantial income for the firm had derived from this representation. Such a fact is included in the IBA Non-Waivable Red List (point 1.4.).

The court criticized the Guidelines by stressing that in the circumstances of the case, a conflict did not “necessarily” exist and concluded that a fair-minded and informed observer, having considered the facts, would not consider that there was a real possibility that the arbitrator was biased or lacked independence or impartiality.

The court highlighted the importance of the instrument but considered that the facts of the case justified a different outcome

<http://www.bailii.org/ew/cases/EWHC/Comm/2016/422.html>



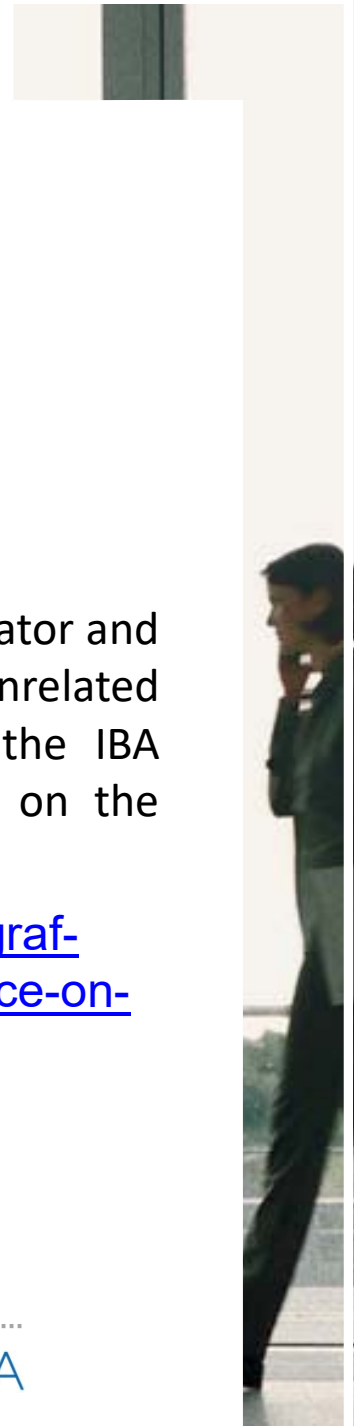
Case law on the independence and impartiality of arbitrators

Austria

❑ Decision of the Austrian Supreme Court dated 15 May 2019

The Austrian Supreme Court considered that the fact that an arbitrator and a party counsel in one arbitration act as co-counsel in another unrelated arbitration (which falls on Point 3.3.9 of the Orange List of the IBA Guidelines on Conflicts of Interest in International) cast doubt on the arbitrator's independence and impartiality and thus disqualified

<https://www.lexology.com/commentary/arbitration-adr/austria/graf-pitkowitz-rechtsanwalte-gmbh/supreme-court-takes-strict-stance-on-conflict-of-interest>



Case law on the independence and impartiality of arbitrators

United States

❑ **Decision of the US Court of Appeals for the Ninth Circuit, New Regency Productions, Inc v Nippon Herald Films**

During the arbitration proceedings, the sole arbitrator was overseeing a substantial transaction in which his company was seeking rights from one of the parties.

The Court of Appeals in New Regency held that a conflict of interest existed and confirmed the lower court decision to vacate the award. In its reasoning, it referred to General Standard 7(c) of the IBA Guidelines, observing that although the IBA Guidelines are not binding authority and do not have the force of law, they reinforce the holding that a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it.

<https://caselaw.findlaw.com/us-9th-circuit/1069442.html>



Case law on the independence and impartiality of arbitrators

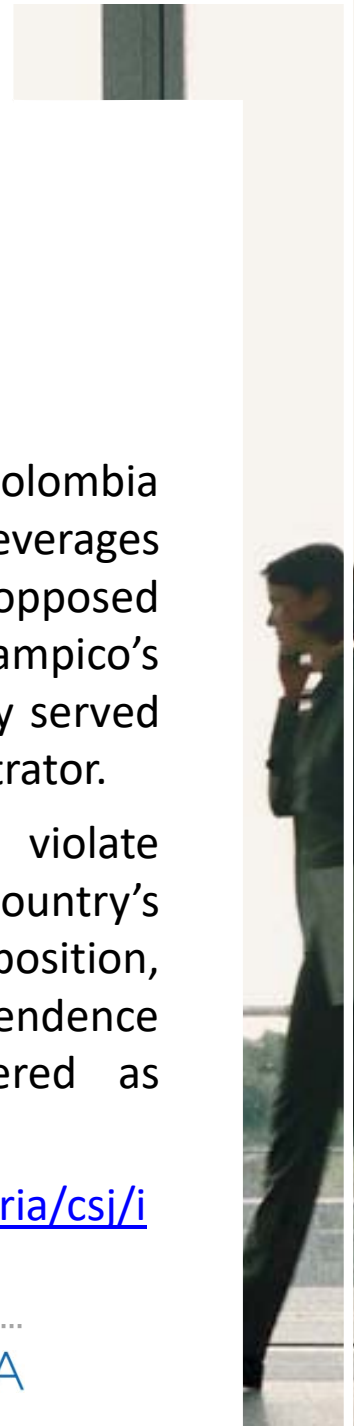
Colombia

❑ Decision of the Supreme Court of Colombia

The Guidelines influenced a decision by the Supreme Court of Colombia when it was asked to enforce an ICC award rendered in Tampico Beverages Inc. v. Productos Naturales de la Sabana S.A. Alqueria. Alqueria opposed enforcement, arguing that it would violate public policy because Tampico's party-appointed arbitrator had not disclosed that it had previously served as counsel in a case in which Tampico's current counsel was an arbitrator.

Although the court acknowledged that enforcement might violate Colombia's domestic public policy, it concluded that the country's international public policy was different and rejected Alqueria's position, finding that the non-disclosure did not demonstrate lack of independence or lack of impartiality under the IBA Guidelines, considered as representative of international practices.

<http://consultajurisprudencial.ramajudicial.gov.co:8080/WebRelatoria/csj/index.xhtml>

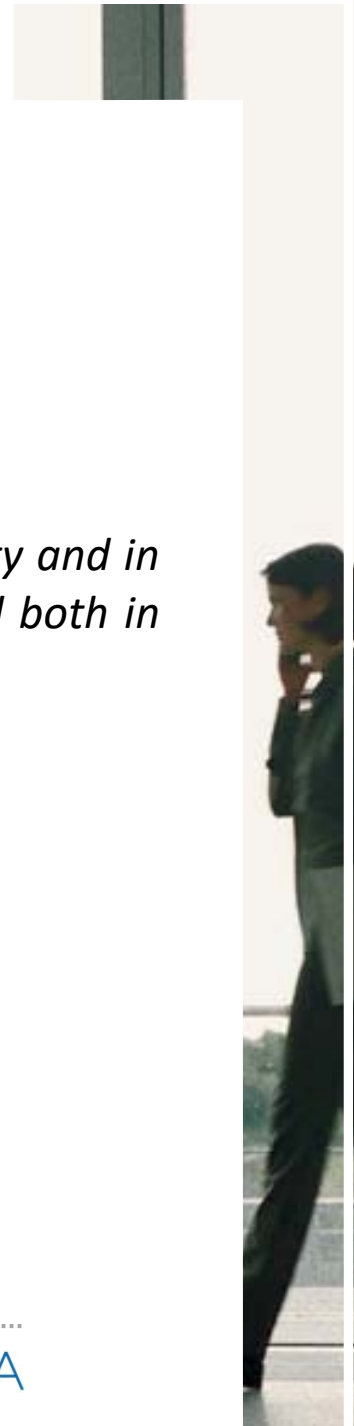


Case law on the independence and impartiality of arbitrators

Portugal

- ❑ **Decision of the Court of Appeals of Lisbon dated March 24, 2015**

“The law does not supply a notion of independence and impartiality and in this matter recourse to soft law, notably to ethical rules contained both in national and international instruments, is decisive”.



The proliferation of differentiated regimes

IBA Guidelines vs. ICC Note to Parties

IBA GUIDELINES	ICC NOTE TO PARTIES
<p>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.</p> <p>2.3.1: The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.</p> <p>2.3.7: The arbitrator 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.</p>	<p>The arbitrator or 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. (paragraph 27, subparagraph 1)</p>
<p>3.1.3: 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.</p> <p>3.3.8: The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel or the same law firm.</p>	<p>The arbitrator or prospective 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. (paragraph 27, subparagraph 9)</p>
<p>3.1.5: 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.</p>	<p>The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case. (paragraph 27, subparagraph 8)</p> <p>The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates. (paragraph 27, subparagraph 7)</p>

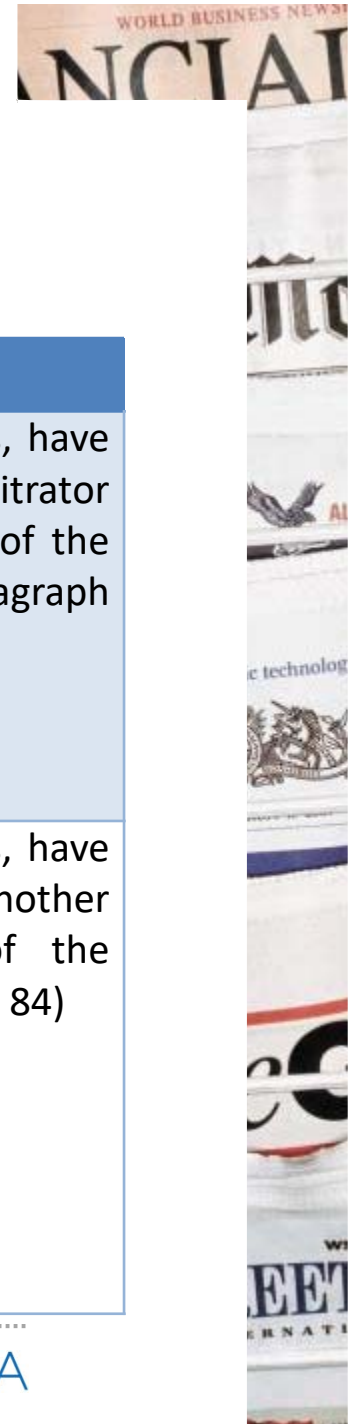
MIRANDA



The proliferation of differentiated regimes

IBA Guidelines vs. CEA Code of Best Practices

IBA GUIDELINES	CEA CODE OF BEST PRACTICES
3.3.8: The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel or the same law firm.	19) In the last 10 years, have you been appointed as an arbitrator in another arbitration by one of the lawyers for the parties? (paragraph 84)
3.1.5: 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.	7) In the last 10 years, have you served as an arbitrator in another arbitration in which one of the parties was a party? (paragraph 84)



The proliferation of differentiated regimes

Conclusion

“Through a process of intellectual cross-fertilization, these actors play a dominant role in shaping the transnational consensus on arbitration law and practice”

Gabrielle Kaufmann-Kohler

“The affirmation of soft law however supposes that there is convergence in the content of the rules and guidelines emanating from the arbitration community. In other words, it requires a sufficient level of consensus on a certain number of international standards of practice. If, to the contrary, the arbitration community fragments regionally or adopts inconsistent views on important procedural matters, there can be no emergence of a global soft procedural law”.

Alexis Mourre

MIRANDA



Thank you!

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MIRANDA

Miranda & Associados Sociedade de Advogados, SP, RL