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

Sofia Martins

### 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

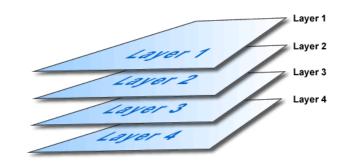
The proliferation of differentiated regimes

## Should arbitral professional institutions help regulate arbitrators?

#### "Independence" and "impartiality"?



Who decides if an arbitrator is independent and impartial?



Arbitrators Parties Tribunal/institution State courts



## 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)



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- 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



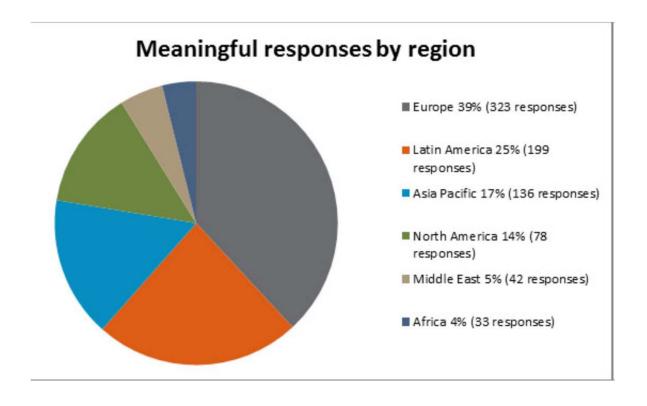
**International Bar Association** 

	Legal Practice		Public and Professional Interest Division (P		
Sections	Committees	Sections	Committees		Bar Issues Commission (BIC)
Agricultural Law Section Antitrust Section Corporate Law Section	Agricultural Law Section Antitrust Section Business Human Rights Committee Closely Held and Growing Business Enterprises Committee Corporate and M&A Law Committee	Intellectual Property,	Art, Cultural Institutions and Heritage Law Committee Communications Law Committee Intellectual Property and Entertainment Law Committee Media Law Committee Space Law Committee Technology Law Committee		ar Executives Committee
		Communications		В	Bar Issues Commission Policy Committee
		and Technology Section		В	BIC International Trade in Legal Services Committee
				В	NC Regulation Committee
Criminal Law Section	Anti-Corruption Committee Business Crime Committee Criminal Law Committee	International Sales, Trade, Franchising and Product Law	International Franchising Committee International Sales Committee International Trade and Customs Law Committee	-[1	BA's Human Rights Institute (IBAHRI)
Dispute Resolution Section	Arbitration Committee Consumer Litigation Committee Litigation Committee Mediation Committee Negligence and Damages Committee	Section	Product Law and Advertising Committee	s	Section on Public and Professional Interest
		Law and Individual Rights	Family Law Committee Healthcare and Life Sciences Law Committee Indigenous Peoples Committee Leisure Industries Section	A	Access to Justice and Legal Aid Committee
		Section		A	Academic and Professional Development Committee
Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL)	Environment, Health and Safety Law Committee International Construction Projects Committee Mining Law Committee Oil and Gas Law Committee Power Law Committee Water Law Committee			A	Alternative and New Law Business Structures Committee
		Leisure Industries Section		F	orum for Barristers and Advocates
		Maritime and	Aviation Law Committee Maritime and Transport Law Committee	H	luman Rights Law Committee
		Aviation Law Section		J	udges' Forum
		Public Law Section	Public Law Section	L	aw Firm Management Committee
Financial Services Section	Banking Law Committee Capital Markets Forum Insurance Committee Investment Funds Committee Securities Law Committee	Real Estate Section	Real Estate Section		esbian, Gay, Bisexual, Transgender and Intersex (LGBT .aw Committee
		Taxation Section	Private Client Tax Committee Taxes Committee	P	Pro Bono Committee
				Р	Professional Ethics Committee
Human Resources Section	Diversity and Equality Law Committee Employment and Industrial Relations Law Committee IBA Global Employment Institute Immigration and Nationality Law Committee Insolvency Section	Corporate Counsel Forum	Corporate Counsel Forum	R	Regulation of Lawyers' Compliance Committee
		(membership open to Corporate		R	Rule of Law Forum
		Counsel only)		s	enior Lawyers' Committee
		Regional Fora (can be joined	African Regional Forum Arab Regional Forum Asia Pacific Regional Forum European Regional Forum Latin American Regional Forum North American Regional Forum	v	Var Crimes Committee
		(can be joined individually without LPD membership)		v	Vomen Lawyers' Interest Group
Insolvency Section		LrU membersn(p)		Y	'oung Lawyers' Committee

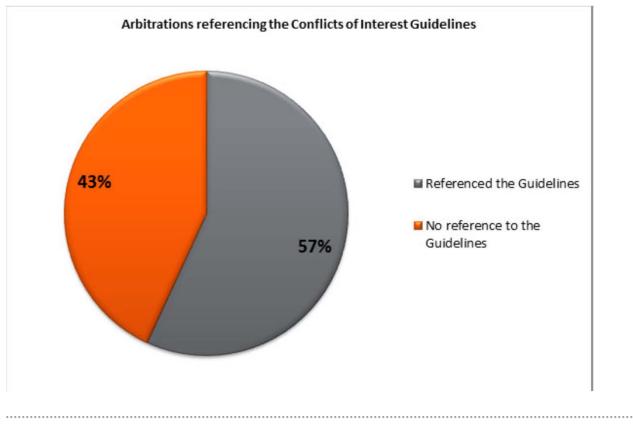
- □ 1987 Rules of Ethics for International Arbitrators
- 2002 Working Group to address problems of conflicts of interest
- 2004 Adoption of the IBA Guidelines on Conflicts of Interest in International Arbitration
- 2014 Revision of the IBA Guidelines on Conflicts of Interest in International Arbitration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

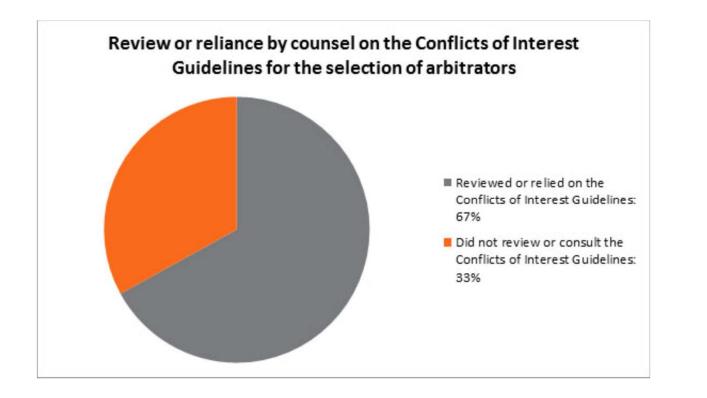


**IBA Subcommittee survey questionnaire** 



#### **Broad acceptance**



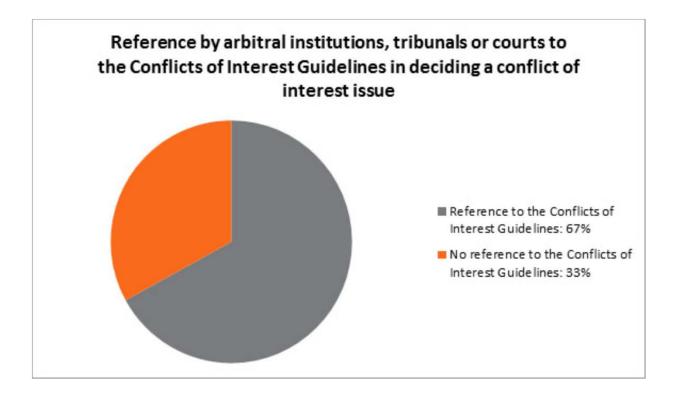




Review or reliance by arbitrators on the Conflicts of Interest Guidelines in deciding to take on an appointment Review or reliance by arbitrators on the Conflicts of Reviewed or relied on the Conflicts of Interest Guidelines: Interest Guidelines in making a disclosure to the parties 61% and arbitral institution Did not review or rely on the Conflicts of Interest Guidelines: 39% Reviewed or relied on the Conflicts of Interest Guidelines: 56% Did not rely on the Conflicts of Interest Guide lines: 44%

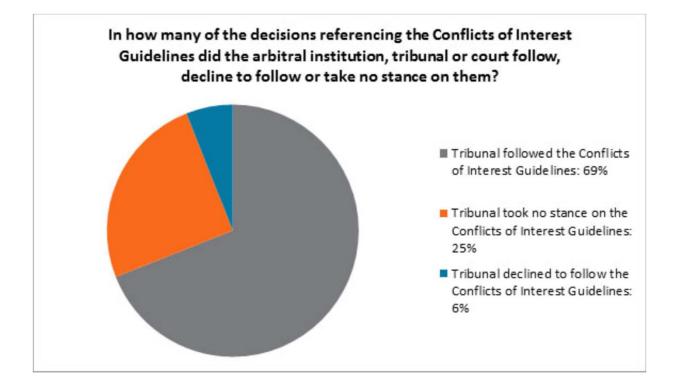
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**IBA Subcommittee report – key conclusions** 





**IBA Subcommittee report – key conclusions** 



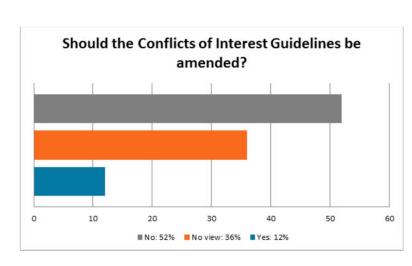


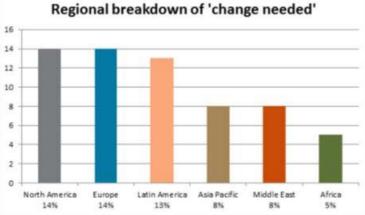


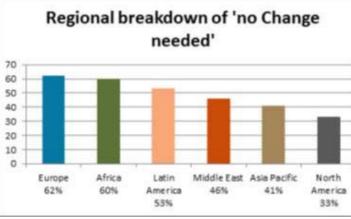
- Well received in jurisdictions with a more developed arbitration practice, regardless of the region, and less so in jurisdictions where the use of arbitration is less prevalent
- Certain arbitral institutions either recommended the incorporation of the Guidelines into the terms or routinely applied 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

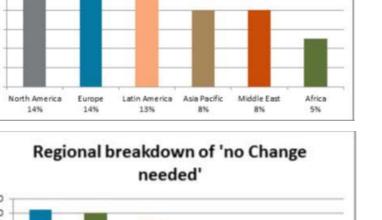


**IBA Subcommittee report – key conclusions** 











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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 fairminded 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

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/grafpitkowitz-rechtsanwalte-gmbh/supreme-court-takes-strict-stance-onconflict-of-interest

**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



#### 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/i ndex.xhtml



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
1.4: The arbitrator or his or her firm regularly advises the	The arbitrator or prospective arbitrator or his or her law
party or an affiliate of the party, and the arbitrator or his	firm represents or advises, or has represented or
or her firm derives significant financial income therefrom.	advised, one of the parties or one of its affiliates.
2.3.1: The arbitrator currently represents or advises one of	(paragraph 27, subparagraph 1)
the parties or an affiliate of one of the parties.	
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.	
3.1.3: The arbitrator has, within the past three years, been	The arbitrator or prospective arbitrator has in the past
appointed as arbitrator on two or more occasions by one	been appointed as arbitrator by one of the parties or
of the parties, or an affiliate of one of the parties.	one of its affiliates, or by counsel to one of the parties
3.3.8: The arbitrator has, within the past three years, been	or the counsel's law firm. (paragraph 27, subparagraph
appointed on more than three occasions by the same	9)
counsel or the same law firm.	
3.1.5: The arbitrator currently serves, or has served within	The arbitrator or prospective arbitrator acts or has acted
the past three years, as arbitrator in another arbitration on	as arbitrator in a related case. (paragraph 27,
a related issue involving one of the parties or an affiliate of	subparagraph 8)
one of the parties.	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)

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**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.	you served as an arbitrator in another arbitration in which one of the

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### 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".

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**Alexis Mourre** 

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## Thank you!

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