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The IBA Arbitration Guidelines and Rules
Subcommittee

Report on the reception of the IBA arbitration soft law products

September 2016

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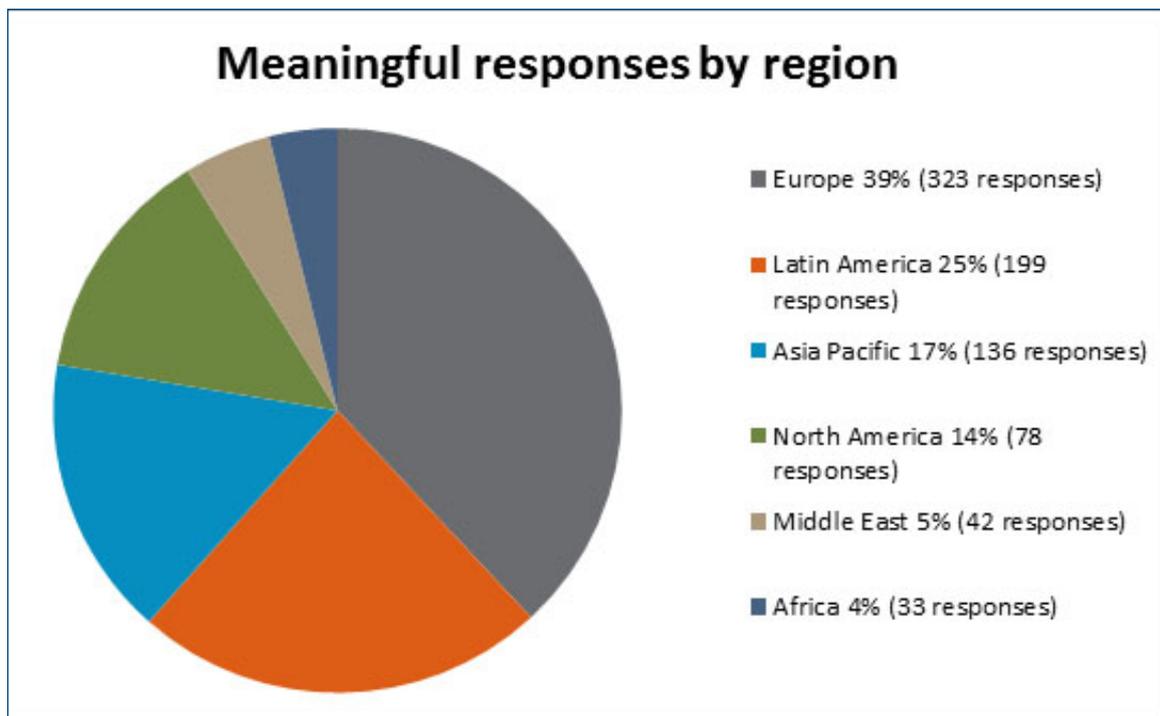
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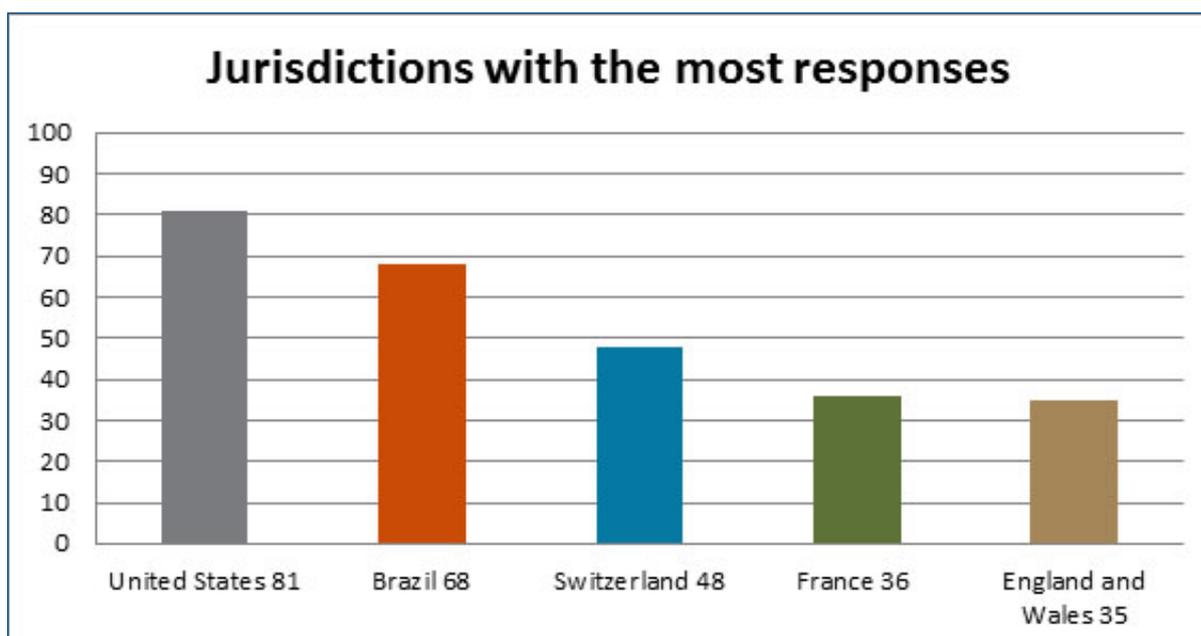
I. Introduction

1. In June 2015, the IBA Arbitration Committee organised the IBA Arbitration Guidelines and Rules Subcommittee (the ‘Subcommittee’) to conduct a worldwide survey on the use of the IBA arbitration practice guidelines and rules. The survey concerns the use of three practice guidelines and rules: (i) the IBA Rules on the Taking of Evidence in International Arbitration, 2010 (the ‘Rules on Evidence’); (ii) the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 (the ‘Conflicts of Interest Guidelines’);¹ and (iii) the IBA Guidelines on Party Representation in International Arbitration, 2013 (the ‘Party Representation Guidelines’) (collectively, the ‘IBA Rules and Guidelines’).
2. The Subcommittee is comprised of 120 members, including the Chair, two secretaries, 16 steering group members (from 11 countries) and 77 reporters covering 57 jurisdictions around the world.
3. The survey was conducted in five phases: preparation, development, data collection, data analysis and report. The Subcommittee sets out its analysis and recommendations in this *Report on the reception of the IBA arbitration soft law products* (the ‘Report’).
4. This report first outlines the reception of each of the IBA Rules and Guidelines in arbitral practice, case law and legal publications. Subsequently, it provides a comprehensive analysis of the survey results, based on which it identifies a series of recommendations for the future.
5. To inform its work, the Subcommittee developed and distributed a survey questionnaire intended to solicit opinion and any other related information from those who use the IBA Rules and Guidelines in their practice. This survey questionnaire consisted of 35 questions. The Subcommittee received 845 meaningful responses which, in the Subcommittee’s view, statistically represents a reasonable collection of data from which to draw observations.
6. The responses were received from jurisdictions across the globe, and were submitted by respondents with a variety of experiences in international arbitration, including counsel, arbitrators, case administrators, arbitration users and academics.
7. The Subcommittee received meaningful responses from Europe (323), Latin America (199), Asia Pacific (136), North America (78), the Middle East (42) and Africa (33). The following chart illustrates the breakdown of meaningful responses received by region:

¹ As the survey targeted situations occurring in the last five years, some of the responses related to the Conflicts of Interest Guidelines may refer to their previous iteration issued in 2004.



8. The median number of responses received per jurisdiction was ten, whereas the average number of responses received per jurisdiction was 18. The reason for these low numbers is that, for 14 jurisdictions, only one meaningful response was received.² The highest number of responses was received from the United States, Brazil, Switzerland, France, and England and Wales. This is depicted in the following graph:



9. In addition to the responses received, the Subcommittee also solicited – and ultimately received – 55 Country Reports, each of which analysed the survey responses collected in a country, as well as the use of the IBA Rules and Guidelines as reflected in arbitral jurisprudence and doctrine (‘Country Reports’). The Subcommittee received Country Reports from Europe (23), Latin America (13), Asia Pacific (9), North America (2), the Middle East (8) and Africa (2).

² Angola, Bosnia, Cyprus, Ethiopia, Greece, Guatemala, Honduras, Jordan, Kuwait, Nepal, Norway, Paraguay, Qatar and Scotland.

All Country Reports are available on the website of the Arbitration Subcommittee.³

10. The responses reflect objective data gathered as a result of the survey. However, the following factors are worth considering:
 - The size of the dataset for some jurisdictions had a significant influence on the regional and global statistics. For instance, in Latin America, three jurisdictions provided 78 per cent of the data sample for the region,⁴ another 15 per cent of the data sample was provided by four jurisdictions⁵ and the remaining seven per cent was provided by six jurisdictions.⁶ This means that when we say, for example, that in Latin America the Conflicts of Interest Guidelines have been referenced in 56 per cent of the cases in which issues of conflicts arose, this statistic largely reflects the situation of the three jurisdictions that provided most of the data, but may not reflect the reality in the remainder of the region. In addition, all the cases cited in the survey were given the same weight in the regional and global statistics. The end result may therefore reflect the reality in the jurisdictions with the most cases rather than the reality across the region.
 - Most survey questions asked the respondents to identify the number of arbitrations they knew that fit certain requirements. It is unavoidable that the respondents therefore will have reported some of the same arbitrations in response to several questions. When adding up the total number of arbitrations reported, some arbitrations will invariably be counted more than once. Therefore, absolute numbers of cases should not receive much weight. Instead, percentages and comparative results should be given greater significance because they reflect the reality the respondents have experienced.
11. Despite these caveats, the responses received by the Subcommittee to the survey questionnaire and the Country Reports provide a meaningful reference point for globally assessing the current status and utility of the IBA Rules and Guidelines, and help to identify areas that may be potentially considered for reform in the future.

II. The IBA Rules on the Taking of Evidence in International Arbitration

A. Executive summary

12. The key findings from the survey with respect the Rules on Evidence are as follows:
13. Nearly half (48 per cent) of the arbitrations known to the respondents worldwide referenced the Rules on Evidence. Reference to the Rules on Evidence was above 50 per cent in all regions but Latin America (30 per cent) and Africa (25 per cent). It was particularly high in some

³ When the Country Reports were written, the reporters addressed inconsistencies in the responses differently. However, in drafting the final report, the steering group found it necessary to harmonise these approaches. For example, there were times when the steering group decided to exclude inconsistent responses, even when these were not excluded in the Country Report(s). Therefore, the conclusions with respect to the numbers in the Country Reports on one hand and this report on the other may vary.

⁴ In Latin America, 602 out of a total of 776 reported arbitrations in which issues of conflict arose at the time of the constitution of the arbitral tribunal occurred in Brazil (258 cases), Peru (233 cases) and Mexico (111 cases).

⁵ In Latin America, 114 out of a total of 776 reported arbitrations in which issues of conflicts arose at the time of the constitution of the arbitral tribunal occurred in Argentina (40 cases), Ecuador (40 cases) and Chile (34 cases).

⁶ In Latin America, 60 cases out of a total of 776 reported arbitrations in which issues of conflict arose at the time of the constitution of the arbitral tribunal occurred in Venezuela (15 cases), El Salvador (14 cases), Costa Rica (ten cases), the Dominican Republic (ten cases), Honduras (six cases) and Colombia (five cases). There were no reported cases for Guatemala, Nicaragua or Uruguay, and we received no survey responses from Cuba or Panama.

of the most common arbitral seats, such as England, Wales and Singapore, and to a slightly lesser extent, France, Switzerland and the US. Within all regions (except North America), the frequency of use varied significantly.

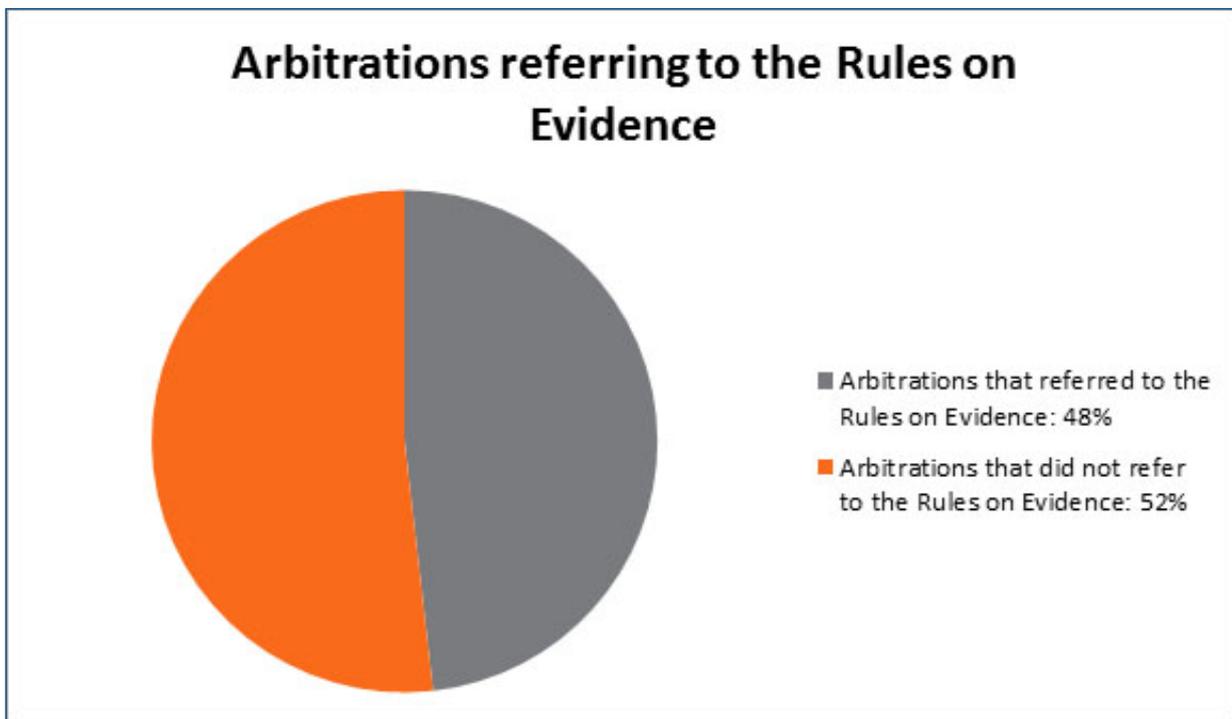
14. The Rules on Evidence were most frequently referenced in commercial rather than investment treaty arbitrations, and there did not appear to be a difference in their use between common and civil law jurisdictions.
15. The provisions of the Rules on Evidence most often cited were Article 3 on document production (approximately 21 per cent of all references), followed by Article 9 on the admissibility of evidence (approximately 13 per cent).
16. In approximately 80 per cent of those arbitrations in which reference was made to the Rules on Evidence, the arbitral tribunal consulted them on the basis that they represented non-binding guidelines. In the remaining 20 per cent of instances, the Rules on Evidence were considered binding. Yet, even in those arbitrations in which the tribunal consulted the Rules on Evidence as guidelines only, it overwhelmingly followed them (in more than 90 per cent of cases).
17. There appeared to be a general consensus that the use of the Rules on Evidence will grow. In those circumstances identified by the respondents where the Rules on Evidence were not referenced, the respondents cited a lack of awareness of the Rules on Evidence and/or availability of local or institutional rules on evidence that made reference to the Rules on Evidence unnecessary.
18. The general view was that the Rules on Evidence should not be changed. However, of potential changes considered, adjusting the Rules on Evidence regarding discovery so that they resemble US-style rules less closely was most frequently suggested. Some respondents also called for clarification of the phrases ‘relevance’, ‘materiality’ and ‘category’.

B. The Rules on Evidence in arbitral practice

1. How often are the Rules on Evidence referred to in arbitral practice?

19. The data collected shows that the Rules on Evidence have gained acceptance and been used often by the international arbitration community. Of the three IBA instruments surveyed, the Rules on Evidence were the second most commonly referred to. Eight hundred and thirteen respondents answered the survey question seeking to confirm the frequency with

which the Rules on Evidence were referenced in arbitration proceedings in their jurisdiction.⁷ Those respondents indicated that nearly half (48 per cent) of the arbitrations known to them referenced the Rules on Evidence,⁸ as illustrated in the following chart:

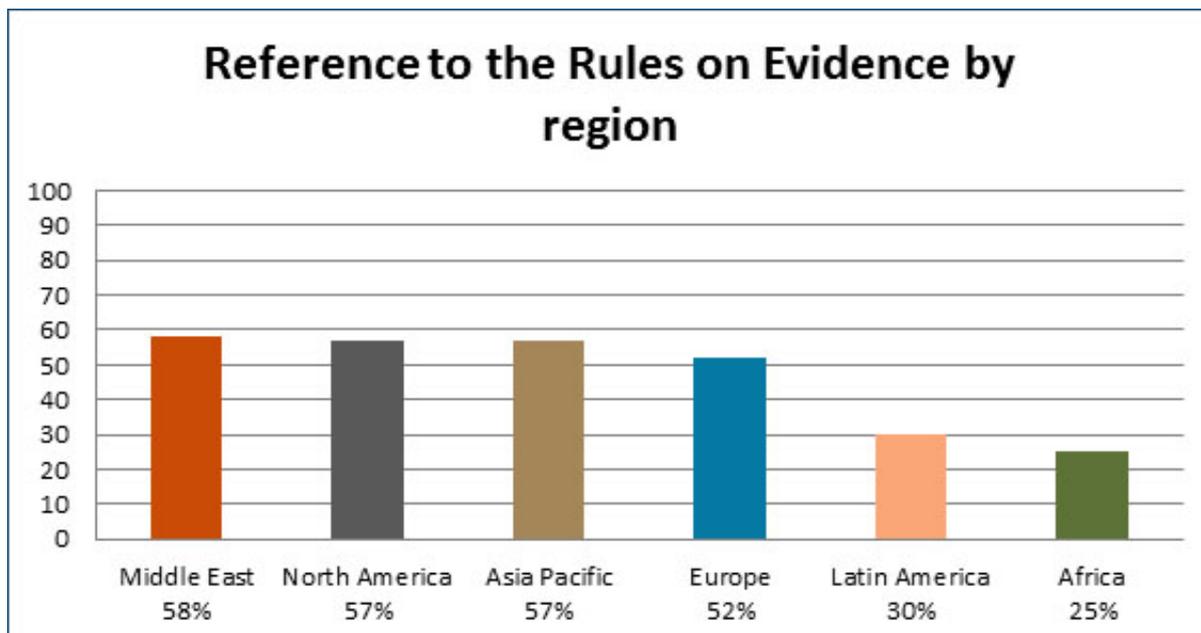


REGIONAL ANALYSIS

20. When broken down by region, the survey results show that the regions in which the Rules on Evidence were referenced least frequently are Latin America (30 per cent) and Africa (25 per cent). In all other regions, the Rules on Evidence were referenced in more than 50 per cent of the arbitrations known to the respondents: 58 per cent in the Middle East, 57 per cent in Asia Pacific, 57 per cent in North America and 52 per cent in Europe, as illustrated in the following chart:

⁷ Of the 813 responses to this survey question, 153 were statistically non-meaningful because they: (i) included uncommonly high or inconsistent numbers; (ii) did not provide an answer to both parts (a) and (b) of the question; (iii) were expressed in percentages that could not be translated into numbers; or (iv) stated ‘unable to estimate’.

⁸ Overall, the results yielded by the survey questionnaire appear to be consistent with the information available from publicly available arbitral decisions, eg, from France (see, for instance, International Chamber of Commerce (ICC) case No 12260, Final Award, September 2005, paras 284–285, relying on the Rules on Evidence to decide on an objection relating to the admissibility of evidence); Switzerland (see, for instance, *WADA and UCI v Alejandro Valverde & RFEC*, CAS 2007/A/1396 & 1402, Final Award, 31 May 2010, discussing whether Arts 4.7 and 5.5 of the Rules on Evidence supported the inadmissibility of an article published by a doctor who was not party appointed and had not produced a written statement in the arbitration); or Ecuador (see *Autoridad Portuaria de Manta v Terminales Internacionales de Ecuador SA – En Liquidación, IIHC Limited, Hutchison Port Holdings Limited*, Center of Arbitration and Mediation of the Chamber of Commerce of Quito, Case No 091-13, Final Award, 30 November 2015); and from investment treaty cases against the Czech Republic (see *ECE Projektmanagement v The Czech Republic*, United Nation Commission on International Trade Law (UNCITRAL), Permanent Court of Arbitration (PCA) Case No 2010-5, Award, 19 September 2013, para 1.43) or Canada (see *Lone Pine Resources Inc v Canada*, International Centre for Settlement of Investment Disputes (ICSID) Case No UNCT/15/2, Procedural Order No 1, 11 March 2015; *Eli Lilly and Company v Canada*, ICSID Case No UNCT/14/2, Procedural Order No 1, 26 May 2014; *Mesa Power Group, LLC v Canada*, UNCITRAL, PCA Case No 2012-17, Procedural Order No 1, 21 November 2012, Procedural Order No 4, 12 July 2013, Procedural Order No 6, 5 March 2014; *Windstream Energy LLC v Canada*, PCA Case No 2013-22, Procedural Order No 1, 16 September 2013, Procedural Order No 2, 12 January 2014). Most reporters, however, noted that they were unable to unearth many references to the IBA Rules and Guidelines in local arbitral practice, presumably because most arbitral awards, decisions and procedural orders are not published and may be subject to confidentiality and non-disclosure agreements.



21. In interpreting these regional results, two important caveats should be considered:
- First, in some regions, there were few responses to this question. As a consequence, the results obtained from such regions may not be statistically significant. In particular, Africa and the Middle East yielded only 32 and 36 responses, respectively, to this question.⁹ By contrast, 320 responses were received from Europe, 188 from Latin America, 128 from Asia Pacific and 115 from North America.¹⁰
 - Second, the survey results indicate that, among countries within a particular region, the frequency with which the Rules on Evidence were referenced in arbitration proceedings appeared to vary significantly (North America is an exception). While this result may be due in part to the low number of survey responses received from particular jurisdictions within those regions (eg, only six survey responses were received from the Netherlands), it is likely that reference to the Rules on Evidence indeed varied significantly within all regions except North America. The results from the regions will be discussed below.

North America

22. North America, with the highest regional average of arbitrations that referenced the Rules on Evidence (57 per cent), is also the only region where that number is consistent among countries in the region. In the US, the Rules on Evidence were referenced in 55 per cent of the arbitrations known to the respondents. The percentage was slightly higher (58 per cent) – but overall consistent – in Canada. It should be noted that although, geographically speaking, Mexico is in North America, we have considered North America as comprised of the US and Canada, whereas Mexico has been grouped with Latin American jurisdictions.

Middle East

23. In the Middle East, while the Rules on Evidence were referenced in 58 per cent of the

⁹ In Africa, out of the 32 responses to this question, only 28 were statistically meaningful. In the Middle East, 33 out of the 36 responses were statistically meaningful.

¹⁰ In Europe, out of the 320 responses, only 263 were statistically meaningful, 143 out of 187 in Latin-America, 93 out of 115 in North America and 102 out of 128 in Asia Pacific.

arbitrations known to the respondents, that percentage varies significantly among countries.

24. In particular, the Rules on Evidence were referenced in approximately 66 per cent of the arbitrations known to the respondents in Lebanon and the United Arab Emirates (UAE), but only around 16 per cent in Israel.¹¹
25. The respondents in the region referred to a general lack of awareness of the existence of the Rules on Evidence and their content within the region.

Asia Pacific

26. The same pattern holds true in Asia Pacific: the regional average of 57 per cent of arbitrations known to the respondents referring to the Rules on Evidence masks great differences among the countries in this region.
27. In Australia, the Rules on Evidence were referenced in over 90 per cent of the arbitrations known to the respondents, and in 78 per cent of such arbitrations in Singapore. However, the percentage drops to 55 per cent in Japan, followed by 43 per cent in China and 33 per cent in India.
28. The Country Reports for certain jurisdictions, such as South Korea, indicate that the lower percentage of arbitrations referencing the Rules on Evidence might be explained by the fact that arbitrations in those jurisdictions closely follow the domestic court rules of procedure.

Europe

29. In Europe, whereas the Rules on Evidence were referenced in 52 per cent of the arbitrations known to the respondents, that percentage varies significantly among countries.
30. In particular, the survey results indicate that the Rules on Evidence were referenced in more than 70 per cent of the arbitrations known to the respondents in Belgium and England,¹² and in more than 50 per cent of such arbitrations in France, Germany and Switzerland. The frequency with which they were referenced decreases significantly, however, among other European countries: approximately 45 per cent in Italy, Romania and Spain; below 30 per cent in Finland and the Netherlands,¹³ and below 15 per cent in Portugal and Slovenia.¹⁴

Latin America

31. The responses received from Latin America show a similar pattern. Whereas the regional average of references to the Rules on Evidence is 30 per cent, that number varies greatly among countries within the region.
32. The Rules on Evidence were referenced in more than 70 per cent of the arbitrations known to the respondents in Argentina (a percentage particularly high in light of the fact that several local

11 Note that 13 responses were received for the UAE, out of which one was statistically non-meaningful; six responses were received for Lebanon and five for Israel.

12 Note, however, that only seven responses were received for Belgium, out of which one was statistically non-meaningful.

13 Note, however, that only six responses were received for the Netherlands.

14 In some other European jurisdictions, the survey indicates that the Rules on Evidence were referenced in all the arbitrations known to the respondents (Norway, Scotland and Slovakia). In others (Russia), the survey results indicate that the Rules on Evidence were not referenced in any of the arbitrations known to the respondents. The data for these countries is, however, based on a limited number of responses in each case (a single response from both Norway and Scotland; four responses from Russia, out of which only one was statistically meaningful; three responses from Slovenia; and four responses from Slovakia). The data is therefore not statistically significant.

arbitral institutions, such as the Tribunal de Arbitraje de la Bolsa de Comercio de Buenos Aires, the Centro de Mediación y Arbitraje Comercial (CEMARC) and the Cámara Arbitral de la Bolsa de Cereales de Buenos Aires, have their own rules on evidence); approximately 55 per cent of such arbitrations in Peru; around 43 per cent in Mexico; and 34 per cent in Costa Rica. The frequency of instances in which the Rules on Evidence were referenced is, however, significantly lower in Ecuador (13 per cent), Brazil (11 per cent) and Venezuela (eight per cent).¹⁵

33. Many respondents from Latin America indicated that the limited references to the Rules on Evidence in certain jurisdictions may be attributable to a general lack of awareness of the existence of the Rules on Evidence and their content, and pointed to the need to advertise and distribute the Rules on Evidence more broadly. Interestingly, a number of the respondents seemed to be unaware that the Rules on Evidence are currently available in various languages and requested the translation of the Rules on Evidence into Spanish.

Africa

34. The survey results for Africa, with a regional average of 25 per cent of the arbitrations known to the respondents that referenced the Rules on Evidence (but few answers to this question, as noted above) also show great disparities among countries within the region.
35. The Rules on Evidence were referenced in approximately 35 per cent of the arbitrations known to the respondents in Nigeria, but in only 14 per cent of such arbitrations in Ghana and five per cent in Mozambique.
36. As in Latin America and the Middle East, the respondents highlighted a general lack of awareness of the existence of the Rules on Evidence and their content within their regions, and pointed out that the use of the Rules on Evidence will most likely grow in the coming years.

The use of the Rules on Evidence in common and civil law jurisdictions

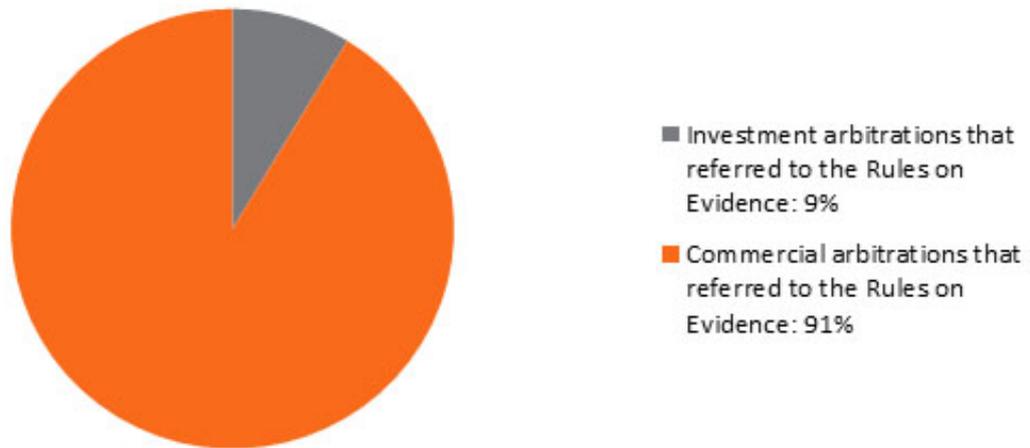
37. In terms of the frequency with which the Rules on Evidence were referenced in common and civil law jurisdictions, the survey results interestingly do not indicate any significant difference between the two. By way of example, a relatively high number of arbitrations in England referred to the Rules on Evidence (72 per cent), whereas a lower number of US arbitrations (56 per cent) did so. The frequency of such references in France, however, appeared to lie somewhere between the two (62 per cent).

The use of the Rules on Evidence in investment and commercial arbitrations

38. The survey results indicate that, of those arbitrations known to the respondents in which the Rules on Evidence were referenced, 91 per cent were commercial arbitrations, whereas only nine per cent were investment arbitrations, as illustrated in the following chart:

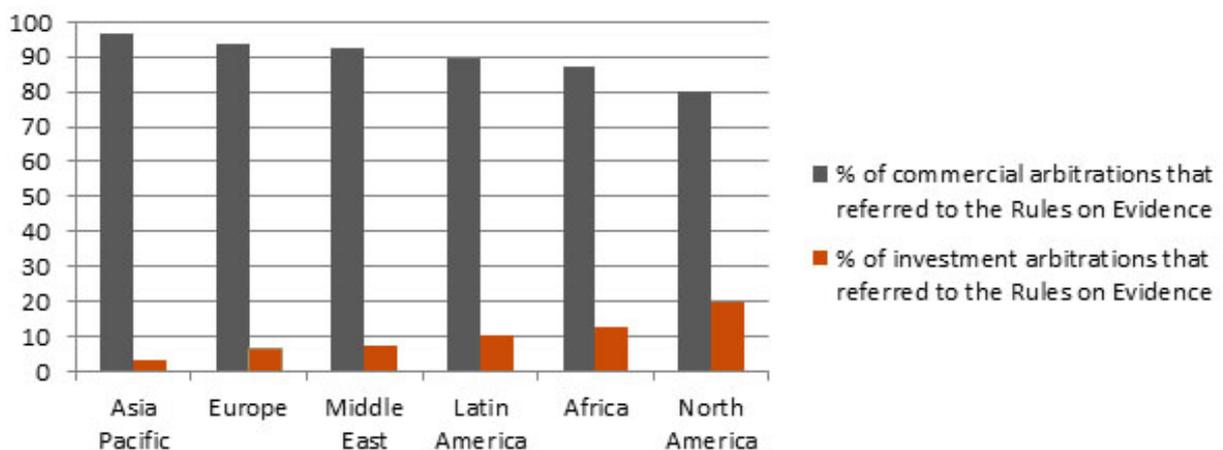
¹⁵ The limited number of responses from Chile, Colombia, the Dominican Republic, Paraguay and Uruguay does not offer conclusive results for those jurisdictions (12 responses from Chile, out of which seven were statistically meaningful; five from Colombia, out of which one was statistically meaningful; three from the Dominican Republic; two from Uruguay and one from Paraguay). No responses were received for Bolivia, Nicaragua or Panama.

Reference to the Rules on Evidence in commercial and investment arbitrations worldwide



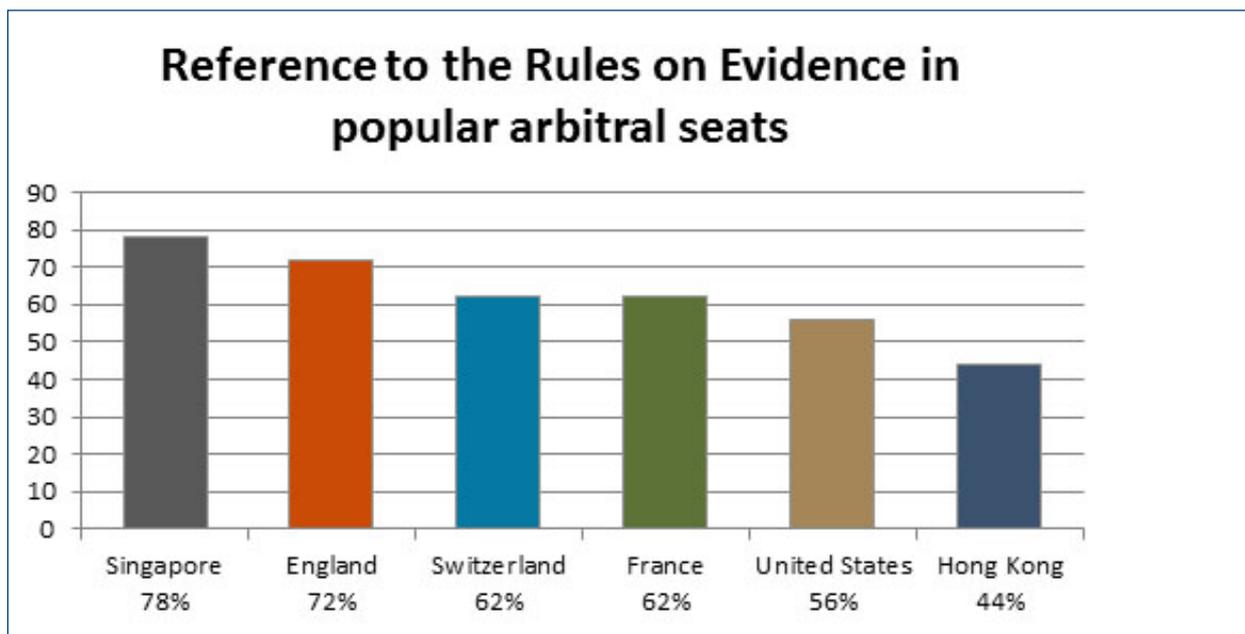
39. It does not necessarily follow from this finding, however, that the Rules on Evidence were referenced more frequently in commercial arbitrations. The disparity illustrated above may simply reflect the fact that most practitioners, particularly in certain jurisdictions, participate in a far greater number of commercial arbitrations than investment arbitrations, and thus the number of investment treaty arbitrations from which data was obtained is lower.
40. The frequency with which the Rules on Evidence were referenced in investment treaty arbitrations also varies among regions, ranging between 20 per cent (North America) and three per cent (Asia Pacific). Perhaps surprisingly, only seven per cent of the references to the Rules on Evidence were made in investment arbitrations known to the respondents in Europe. These figures are illustrated in the following chart:

Reference to the Rules on Evidence in commercial and investment arbitrations by region



2. *The use of the Rules on Evidence in key jurisdictions*

41. Perhaps unsurprisingly, references to the Rules on Evidence were more common in those jurisdictions that serve as the most popular seats for international arbitrations, where familiarity with the Rules on Evidence may be presumed.
42. In England and Singapore, more than 70 per cent of the arbitrations known to the respondents referenced the Rules on Evidence. In other jurisdictions, such as France (62 per cent), Switzerland (62 per cent) and the US (56 per cent), the percentages were lower, yet still well above the global average of 48 per cent. In Hong Kong SAR, the respondents reported a slightly lower percentage (44 per cent), as illustrated in the following chart:

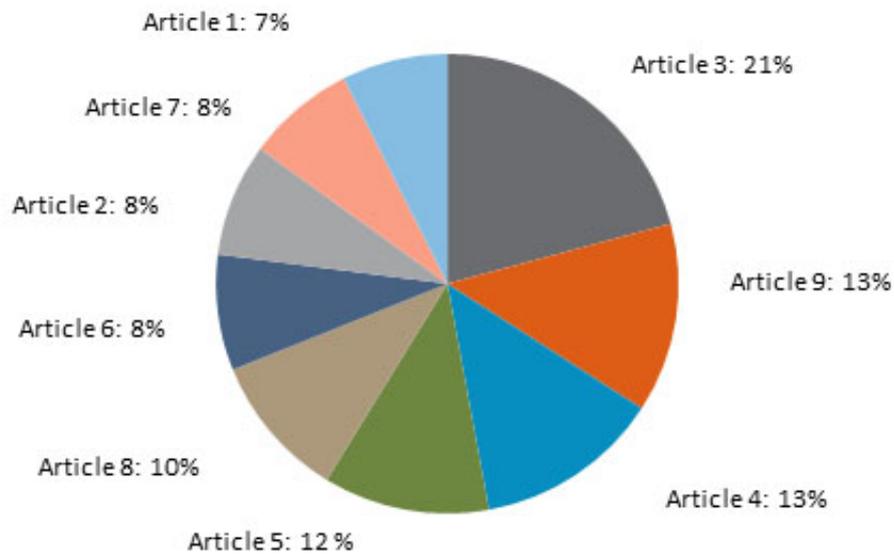


43. Interestingly, the Netherlands, a popular seat for international arbitration, defies this trend, with only 29 per cent of the arbitrations known to the respondents referencing the Rules on Evidence. As noted above, however, relatively few (six) survey responses were received from the Netherlands and no Country Report was produced. As a result, the extent to which the aforementioned figure is reliable is uncertain.

3. *What are the specific provisions referenced?*

44. The results of the survey show that Article 3 on document production was by far the most frequently referred-to provision of the Rules on Evidence (approximately 21 per cent of the references to the Rules on Evidence were references to Article 3), whereas Article 9 on the admissibility and assessment of evidence was the second most frequently referenced provision (approximately 13 per cent). The frequency of references to these and other provisions is illustrated in the following chart:

Specific provisions of the Rules on Evidence referenced



45. The differences in the frequency with which certain provisions were referenced can likely be explained in the following way: the more limited references to Articles 2 and 6 of the Rules on Evidence (at around eight per cent each) which deal with the consultation on evidentiary issues and tribunal-appointed experts, respectively, are likely to be due to the fact that some arbitral institutions, such as the International Chamber of Commerce (ICC),¹⁶ already offer procedural rules addressing conferences or hearings where the parties and tribunal may discuss the manner in which the taking of evidence will be dealt with. In terms of the limited use of Article 1 – on the scope of application of the Rules on Evidence – which is the provision least referred to (seven per cent) this may be explained by the fact that the Rules on Evidence were more frequently used as guidelines rather than binding rules (see section 4 below).
46. This distribution in the frequency with which particular provisions of the Rules on Evidence were referenced is consistent among regions, with the exception of Africa. In Africa, Article 9 (on the admissibility and assessment of evidence) is the provision most frequently referred to (17 per cent), followed by Articles 2 (on consultation of evidentiary issues), 3 (on document production) and 4 (on witnesses of fact); the latter three were referred to with equal frequency by the respondents from Africa (approximately 14 per cent). However, only five responses to this particular question were received from the respondents from Africa and it is therefore unclear how much reliance can be placed on this distribution.
4. *What is the status of the Rules on Evidence in the arbitrations in which they are referenced?*
47. Seven hundred and eighteen of the respondents answered this question.¹⁷ The survey results indicate that the Rules on Evidence were consulted as non-binding guidelines by arbitral

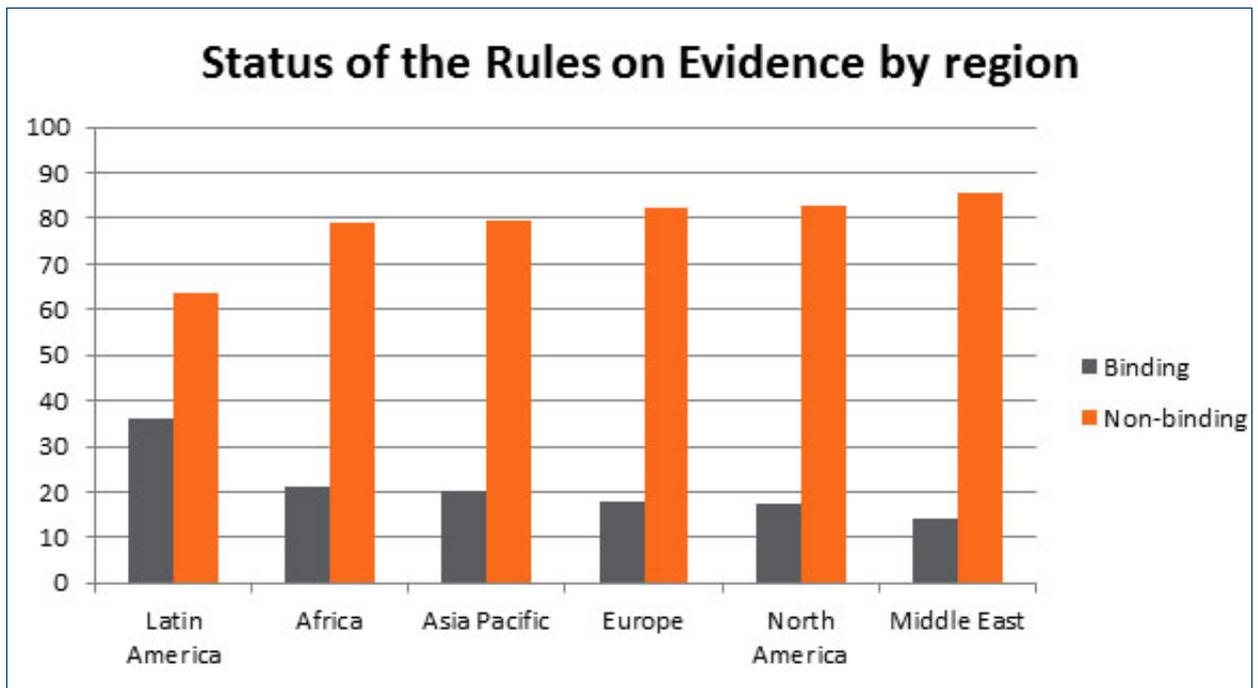
¹⁶ See the ICC Rules of Arbitration, Art 25: Establishing the Facts of the Case.

¹⁷ Of the 718 responses to this survey question, 67 were statistically non-meaningful.

tribunals in approximately 80 per cent of the arbitrations in which they were referenced, whereas they were treated as binding by arbitral tribunals in only approximately 20 per cent of those arbitrations.¹⁸



48. A regional analysis shows that the percentage of cases in which the tribunal considered itself bound by the Rules on Evidence was particularly high in Latin America (35 per cent), and between approximately 15 per cent and 20 per cent in other regions, as illustrated in the following chart:



¹⁸ The Rules on Evidence were referred to as guidelines in 4,273 arbitrations out of a total of 5,373 of reported arbitrations referencing the Rules on Evidence. They were considered binding in 1,100 reported arbitrations.

49. This regional breakdown is subject to the same caveats, however, as noted above in relation to the frequency of reference to the Rules on Evidence in general among regions (section II.B.Regional analysis).
50. In particular, in response to the question as to the way in which arbitral tribunals consulted the Rules on Evidence (guidelines or binding), the Subcommittee received few responses from the respondents in Africa (22 responses)¹⁹ and the Middle East (34 responses).²⁰
51. In addition, the survey results indicate that, among countries within a particular region, the frequency with which the Rules on Evidence were consulted as guidelines or, alternatively, binding rules, varies significantly (Africa and North America (for the latter, there was simply no significant data) are an exception).
52. In Latin America, the Rules on Evidence were considered binding in more than 45 per cent of cases in Argentina, Chile, Colombia and Peru, and in approximately 30 per cent of cases in Brazil, the Dominican Republic and Ecuador. However, the percentage decreases significantly to around 15 per cent in Costa Rica, El Salvador and Mexico.²¹
53. In Europe, the numbers also greatly vary by country. Whereas the tribunal considered itself bound by the Rules on Evidence in 60 per cent or more of cases known to the respondents in Poland and Slovenia, the percentage decreases to 27 per cent in France and around 20 per cent in Belgium and the Netherlands. The percentage is even lower in Austria, England, Germany, Spain and Switzerland, at around ten per cent each, and Romania, at three per cent.²²
54. The same is true for Asia Pacific and the Middle East. In Asia Pacific, the percentage of instances in which the Rules on Evidence were considered binding range from 59 per cent in Thailand to 12 per cent in Japan. The Rules on Evidence were considered binding in 50 per cent of cases in India, 31 per cent of cases in China and 18 per cent of cases in Singapore. In the Middle East, the Rules on Evidence were considered binding in 38 per cent of cases in Israel, approximately 20 per cent of cases in Egypt and Kuwait, and 16 per cent of cases in the UAE. The percentage then decreases to six per cent for Lebanon and five per cent for Turkey.²³
55. As noted above, these differences may be due in part to the low number of survey responses received from particular jurisdictions, but it is likely that the manner in which the Rules on

19 Out of the 22 responses from the respondents in Africa, only 18 are statistically meaningful.

20 Out of the 34 responses from the respondents in the Middle East, only 30 are statistically meaningful.

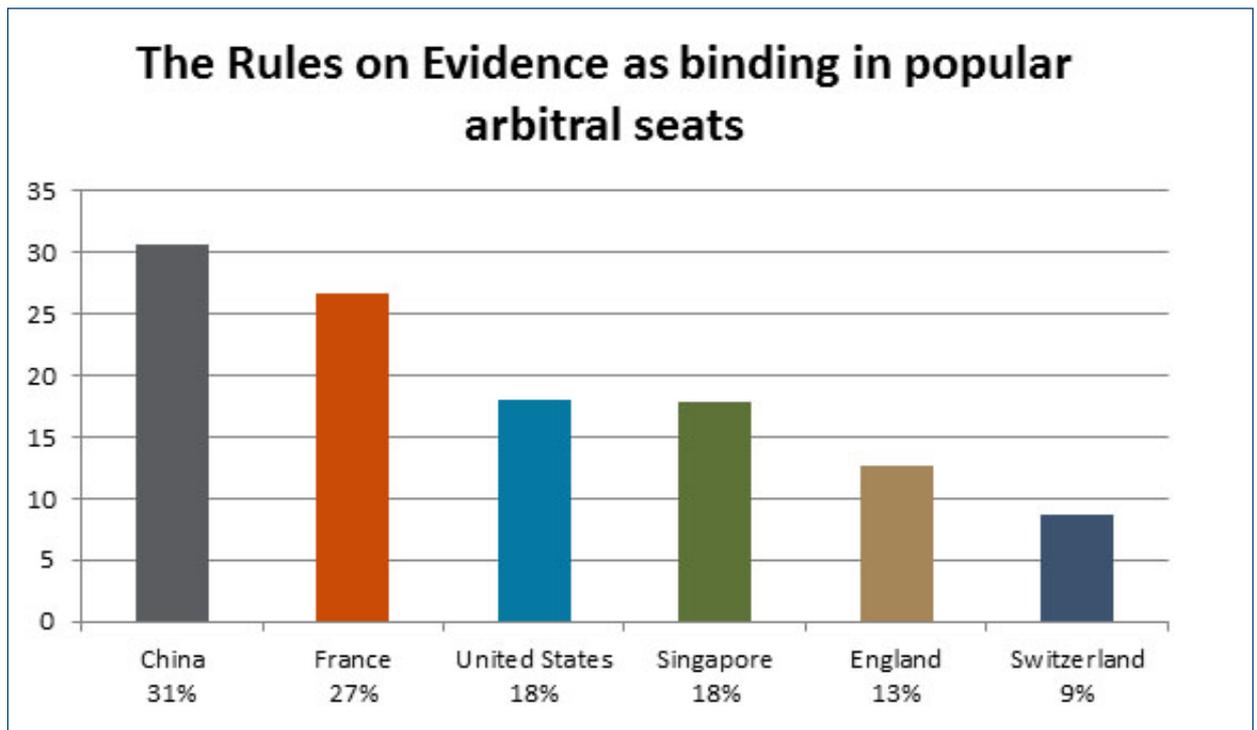
21 In some other Latin American jurisdictions, the survey indicates that the Rules on Evidence were considered as binding in all the arbitrations known to the respondents (Guatemala). In others (Honduras and Venezuela), the survey indicates that the Rules on Evidence were not considered as binding in any of the arbitrations known to the respondents. The data for these countries is, however, based on a limited number of responses in each case (a single response from both Guatemala and Honduras, and five responses from Venezuela, one of which is statistically non-meaningful), and therefore not statistically significant.

22 Again, in some other European jurisdictions, the survey indicates that the Rules on Evidence were considered as binding in all the arbitrations known to the respondents (Scotland). In others (Ireland, Russia and Slovakia), the survey indicates that the Rules on Evidence were not considered as binding in any of the arbitrations known to the respondents. The data for these countries is, however, based on only one, two or three responses in each case (a single response from Scotland; three responses from Slovakia; three responses from Ireland, one of which is statistically non-meaningful; and two responses for Russia). This data, therefore, is not statistically significant.

23 In some other Asian jurisdictions, the survey indicates that the Rules on Evidence were considered as binding in all the arbitrations known to the respondents (Taiwan). In others (Indonesia and New Zealand), the survey indicates that the Rules on Evidence were not considered as binding in any of the arbitrations known to the respondents. The data for these countries is, however, based on very few responses in each case (seven from Taiwan, two of which are statistically non-meaningful; two from Indonesia; and four from New Zealand), and therefore not statistically significant. Moreover, in some Middle Eastern jurisdictions (Jordan and Qatar), the survey indicates that the Rules on Evidence were not considered as binding in any of the arbitrations known to the respondents. Yet, again, the data for these countries, based on a single response from each jurisdiction and therefore not statistically significant.

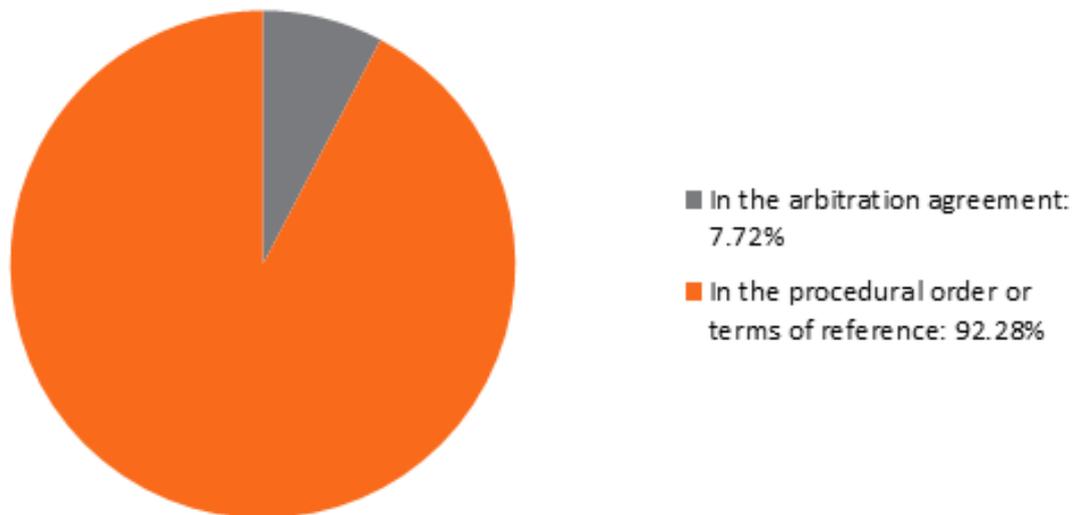
Evidence were consulted does indeed vary significantly within these regions.

56. Interestingly, this difference in treatment of the Rules on Evidence did not appear to be attributable to the popularity of the jurisdiction as an arbitral seat or to the legal system (civil or common law) of the jurisdiction in which the arbitration took place. By way of example, in both Singapore and the US, the Rules on Evidence were treated as binding in approximately 18 per cent of instances in which they were referenced, compared to 15 per cent in England. In civil law countries, the Rules on Evidence were treated as binding in approximately 27 per cent of the arbitrations seated in France in which they were referenced, yet only eight per cent in Switzerland, whereas responses from other prominent arbitral seats (such as China, with 31 per cent) showed higher numbers. These figures are illustrated in the following chart:



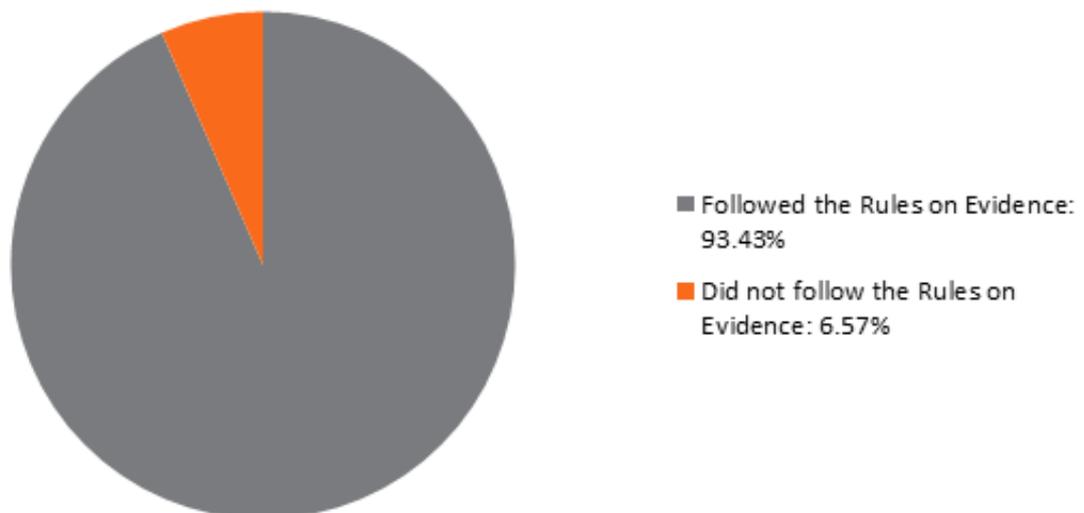
57. The survey results also indicated that, where the Rules on Evidence were considered as binding, they were treated in this way because the parties and/or the tribunals agreed to this after the dispute had arisen (eg, in the first procedural order or in the terms of reference), not prior to the dispute by way of the parties' pre-existing arbitration agreement. In more than 90 per cent of the reported arbitrations in which the tribunal was bound by the Rules on Evidence, the parties and/or tribunals decided that the Rules on Evidence would be binding once the arbitration had already commenced. In particular, this was agreed in 42 per cent of cases in the terms of reference and 51 per cent of cases as part of the first procedural order. Only in eight per cent of instances did the parties agree that the Rules on Evidence were to be binding by way of an arbitration agreement, as illustrated in the following chart:

Stages at which the status of the Rules on Evidence is decided

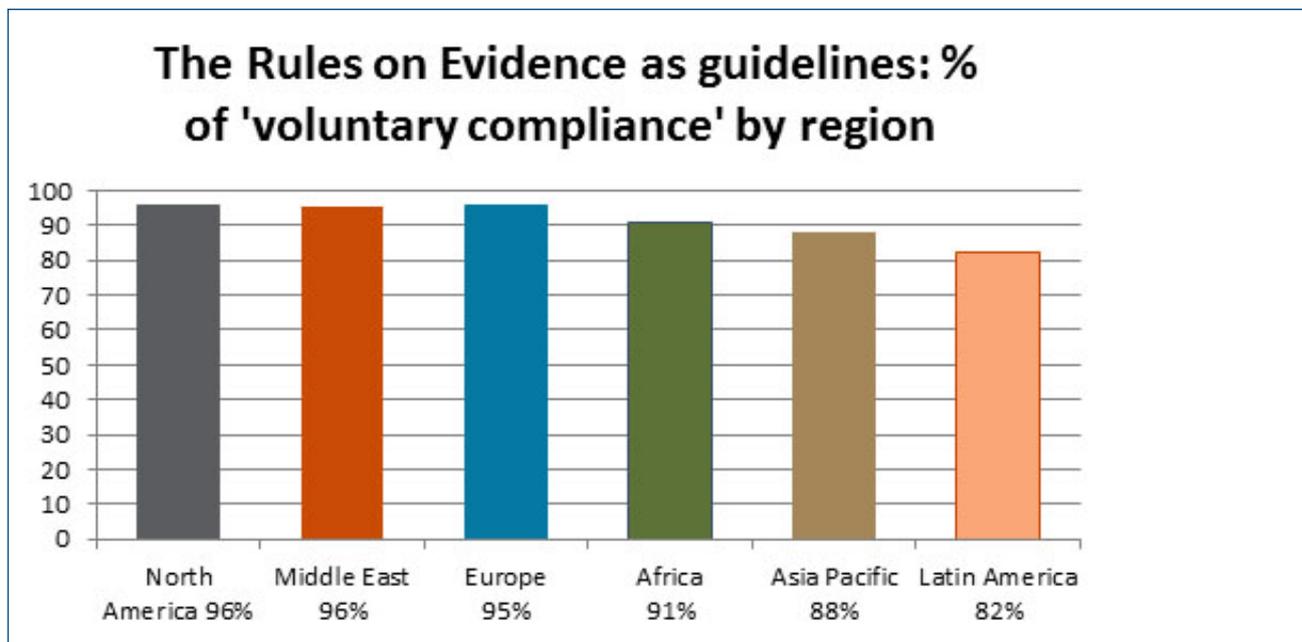


58. Finally, it is notable that when the parties and/or tribunals chose to consult the Rules on Evidence as guidelines, they almost always (93 per cent) followed them. This is perhaps the best evidence of the real force of the Rules on Evidence: they are widely accepted and voluntarily complied with even when the parties choose not to make them binding.

The Rules on Evidence as guidelines: % of 'voluntary compliance'



59. This conclusion holds true across all regions (with percentages above 95 per cent in Europe, the Middle East and North America), as evidenced in the following chart:



C. The Rules on Evidence in case law

60. Responses to the survey, together with the Country Reports, suggest that references to the Rules on Evidence in domestic case law were non-existent in some regions but relatively common in others. In particular, the respondents from Asia Pacific, Europe and North America and the reporters noted instances in which domestic courts referred to the Rules on Evidence.
61. In North America, domestic courts in the US often referred to the Rules on Evidence when deciding issues relating to document production, particularly in relation to Title 28 US Code (USC) section 1782 (section 1782 is the federal statute provision allowing ‘any interested person’ involved in proceedings before ‘a foreign or international tribunal’ to seek evidence, including documents and testimony, from a person or entity located in the US).²⁴ In that context, the Rules on Evidence were either considered to weigh against, or in favour of, allowing the petitioner to obtain discovery from the relevant person or entity located in the US.²⁵
62. In Asia Pacific, the Singapore High Court has stated that the Rules on Evidence provide more comprehensive guidance as to the issue of document disclosure than the Arbitration Rules of the Singapore International Arbitration Centre.²⁶

²⁴ See *Landmark Ventures, Inc v Insightec, Ltd*, 63 F Supp 3d 343, 348, 352 (SDNY 2014); *Yang v Majestic Blue Fisheries, LLC*, 2015 WL 5003606 (D Guam 2015).

²⁵ See *In re Application of Caratube Int'l Oil Co, LLP*, 730 F Supp 2d 101, 108 (DDC 2010); *In re the Republic of Ecuador*, Nos C 11-80171 CRB, 2011 WL 4434816, at *3 (ND Cal 2011); *In re Application of Republic of Ecuador v Douglas*, 2015 WL 9272853, *3 (D Mass 2015).

²⁶ *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871.

63. In Europe, local courts in England,²⁷ Spain,²⁸ Sweden²⁹ and Switzerland³⁰ have all referred to the Rules on Evidence.
64. However, the respondents from Latin America did not point to any particular court decisions that referred to the Rules on Evidence. Yet, the Country Report from Ecuador referred to a decision of the Provincial Court of Pichincha,³¹ ruling that an arbitral tribunal's departure from the provisions on the taking of evidence of the Ecuadorian Civil Procedure Code did not constitute grounds for annulment. In the opinion of the reporters from Ecuador, this decision opens the door for parties to freely agree on which rules should govern the taking of evidence, including the Rules on Evidence.
65. The respondents in Africa and the Middle East did not point to any particular court decisions that referred to the Rules on Evidence.
66. Some of the reasons that may explain the limited reference to the Rules on Evidence in case law in many jurisdictions are similar to those referred to above in section II.B in relation to arbitral practice, including a lack of awareness of the Rules on Evidence and/or the existence of local or institutional rules. Perhaps more importantly, the limited reference to the Rules on Evidence in case law might be explained by the limited number of local court proceedings relating to aspects of an arbitration that may be covered by the Rules on Evidence, particularly in certain jurisdictions. A domestic court may be involved in the arbitral process only at three distinct stages: the granting of interim relief, enforcement of the award and a challenge to the award. In ordinary circumstances, these are not instances in which the appraisal of evidence would be at issue. Moreover, the appreciation of evidence is the prerogative of the arbitral tribunal. It is therefore unsurprising that very few examples of case law referencing the Rules on Evidence were cited in the Country Reports. One may also speculate as to whether the non-binding consultation of the Rules on Evidence in most cases explains the limited reference to the Rules on Evidence in case law in many jurisdictions. Finally, in some jurisdictions, such as Thailand, most court decisions are not publicly reported.
67. It is, nevertheless, arguably safe to assume that references to the Rules on Evidence in domestic proceedings will increase concomitantly with the growth of the arbitration market in general within some regions. The respondents suggested that using tools, such as training sessions and

27 See *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm): 'it is important to have in mind that the ICC arbitration in this case was conducted in accordance with civil-law arbitration procedure. In particular, the rules for disclosure of documents were based on the IBA rules. There was no duty to disclose relevant documents, akin to CPR Part 31, such as would be the case with London arbitration, conducted in accordance with English procedure. In these circumstances, the court must be careful not to import into its assessment of GTT's conduct and the serious allegations of concealment made by CAT English law concepts of the duty of disclosure' and '[i]t may be that, if one were looking at this answer in the context of disclosure obligations under English law, it would be open to criticism, but it is important to have in mind that this arbitration was being conducted in the more narrow confines of a disclosure procedure akin to that under the IBA rules, much closer to the procedure applicable before the French courts'.

28 See *SACYR Concesiones, SL v Inprisma, SL*, Superior Court of Justice of Madrid (Civil and Criminal Chambers, s 1), Judgment No 58/2013, 16 July 2013 (Claim No 83/2012).

29 See *Euroflon Tekniska Produkter Aktiebolag v BA*, NJA 2012 p 289, Case No Ö 1590-11 (concerning an application before the national courts for assistance in obtaining evidence in an ongoing arbitration and referring to Art 3 of the Rules on Evidence guidance).

30 See Decision of the Swiss Federal Supreme Court No 4A_596/2012 of 15 April 2013, where the Swiss Federal Supreme Court, in the context of dismissing a set aside application based on an arbitral tribunal's decision to order production of documents, observed that the tribunal's decision, which was made pursuant to the Rules on Evidence (Arts 3.10 and 9.5, in particular), was a procedural one made pursuant to procedural rules. As such, the decision could not be challenged before the court.

31 *Wilson Orlando Acosta Paredes v Ecuador Bottling Company Corp*, Provincial Court of Pichincha, Case No 17111-2009-0748, judgment, 15 January 2010.

seminars, to improve awareness and knowledge of the Rules on Evidence in certain regions may facilitate this process.

D. The Rules on Evidence in legal publications

68. The Country Reports show that the Rules on Evidence were often discussed among scholars around the world, with the exception of Africa. The general consensus regarding the Rules on Evidence was positive, although reporters also pointed to some areas for improvement.
69. In Europe, a substantial number of legal writings referring to the Rules on Evidence have been published, including in jurisdictions such as England, France, Germany, Sweden and Switzerland.³² Overall, scholars believed the Rules on Evidence to be of valuable guidance and that they constituted a good compromise between common law and civil law traditions.³³
70. While this does not appear to constitute the majority view in Europe, some German publications revealed a certain degree of reluctance towards adopting the document production provisions contained in the Rules on Evidence, which they viewed as embracing the Anglo-American legal concept of discovery.³⁴ Some German publications also criticised the coexistence of both party and tribunal-appointed experts under the Rules on Evidence as an inefficient practice.³⁵
71. In North America, there were numerous publications regarding the Rules on Evidence.³⁶ While the reporters from Canada indicated that the references were overall positive, due to the large number of legal publications on this subject in the US, the reporter stated that ‘it is difficult to summarize and distill the approving or critical tone of the publications’.³⁷
72. The Rules on Evidence were also the subject of active discussion among academics in Asia and Oceania. Although most of the publications in this region discussed the Rules on Evidence only descriptively and in general terms, others included a more detailed review. The writings in jurisdictions such as China, Hong Kong SAR, Japan, New Zealand, Singapore and Taiwan all expressed positive and complimentary views of the Rules on Evidence, although some also included suggestions for reform with respect to document disclosure of electronically stored

32 German scholarship has provided several contributions that deal with specific issues of the Rules of Evidence, such as document production, discovery and, more specifically, e-discovery. See H Raeschke-Kessler, *The Taking of Evidence in International Commercial Arbitration*, 2010 DIS-Schriftenreihe 45, Vol 26. See also AC Kläsener and A Dolgorukow, *Die Überarbeitung der IBA-Regeln zur Beweisaufnahme in der internationalen Schiedsgerichtsbarkeit*, [2010] SchiedsVZ 302; A Sessler, *Reducing Costs in Arbitration – The Perspective of In-house Counsel*, [2012] SchiedsVZ 15.

33 See in Finland, G Knuts, ‘Asiakirjakategorian esittämispyyntö kansainvälisessä välimiesmenettelyssä International Bar Association Rules of Evidenceen mukaan’, in E Havansi, R Koulu, H Lindfors, *Oikeudenkäyntejä ja tuomioistuimia Juhlakirja Juha Lappalainen 60 vuotta (2007)*, pp 202–203; C Wallgren-Lindholm, ‘Predictability of Proceedings in International Commercial Arbitration And is there a Nordic Way?’, 2011 Tidskrift utgiven av Juridiska Föreningen i Finland 705, Vol 4 5. See also, in Lithuania, Dr D Bublioni and Dr P Zapolskis, ‘The process of electronic disclosure (E-Disclosure) and data protection in international arbitration’, 2015 Arbitration: Theory and practice 26, Vol 1 (referring to the fair balance between the legal cultures of European civil law and Anglo-American common law in the context of discovery proceedings in international arbitration, in particular e-disclosure). In Slovenia, an author has pleaded for the wide use of the Rules on Evidence in corruption cases, arguing that the Rules on Evidence, which combine the principles of investigatory and adversarial procedure of civil and common law legal traditions, provide for a uniform standard of proof. See A Friedl, ‘Tackling Corruption in Arbitration’, 2015 Slovenian Arbitration Review 36, Vol 4, Issue 3.

34 See SP Finizio, ‘Discovery in International Arbitration: Frankenstein’s Monster in the Digital Age’, 2010 DIS-Schriftenreihe 57, Vol 26.

35 SH Elsing, ‘Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds’, [2011] SchiedsVZ 114; see also S Wilske, L Markert, in V Vorwerk, C Wolf (eds), *Beck’scher Online-Kommentar zur ZPO* s 1049, para 6.

36 See J Casey, *Arbitration Law of Canada: Practice and Procedure* (2nd ed 2011); D D’Allaire, R Trittmann, ‘Disclosure Requests in International Commercial Arbitration: Finding A Balance Not Only Between Legal Traditions but Also Between the Parties’ Rights’, 2011 Am Rev Int’l Arb 119, Vol 22; P Ashford, ‘Document Production in International Arbitration: A Critique from ‘Across the Pond’’, 2012 Loy U Chi Int’l L Rev 1, Vol 10.

37 US, Country Report, *IBA Arbitration Guidelines and Rules Subcommittee*, p 6.

information.³⁸ In New Zealand, one scholar has indicated that parties and tribunals usually referred to the Rules on Evidence for guidance only in order to avoid potential challenges of the award on the basis that the Rules on Evidence were not complied with.³⁹

73. In Latin America, and notably in jurisdictions such as Argentina, Brazil, Chile, Ecuador and Mexico, the Rules on Evidence were also referred to in academic publications.⁴⁰
74. In the Middle East, the reporters referred to few legal publications in Lebanon, Turkey and the UAE that referenced the Rules on Evidence. They also explained that the Rules on Evidence were occasionally referred to by professors of the Qatar University law programme in their courses.
75. The reporters from African jurisdictions, however, indicated that they were not provided with, or did not have knowledge of, publications referring to the Rules on Evidence. It should be noted, however, that only two Country Reports (Angola and Mozambique) were received from African jurisdictions.

E. Need to amend the Rules on Evidence and suggestions in that regard

76. With a total of 714 responses, the question of whether the IBA Arbitration Committee should revise the Rules on Evidence received significant attention from the respondents.
77. The majority of the respondents were of the view that the Rules on Evidence should remain unaltered and offered positive comments about their usefulness and their '[good] balance between civil and common law systems'.⁴¹ By contrast, less than ten per cent of the respondents believed that the Rules on Evidence warranted revision. Intriguingly, more than a third of the respondents expressed no view as to whether the Rules on Evidence should be amended.⁴²

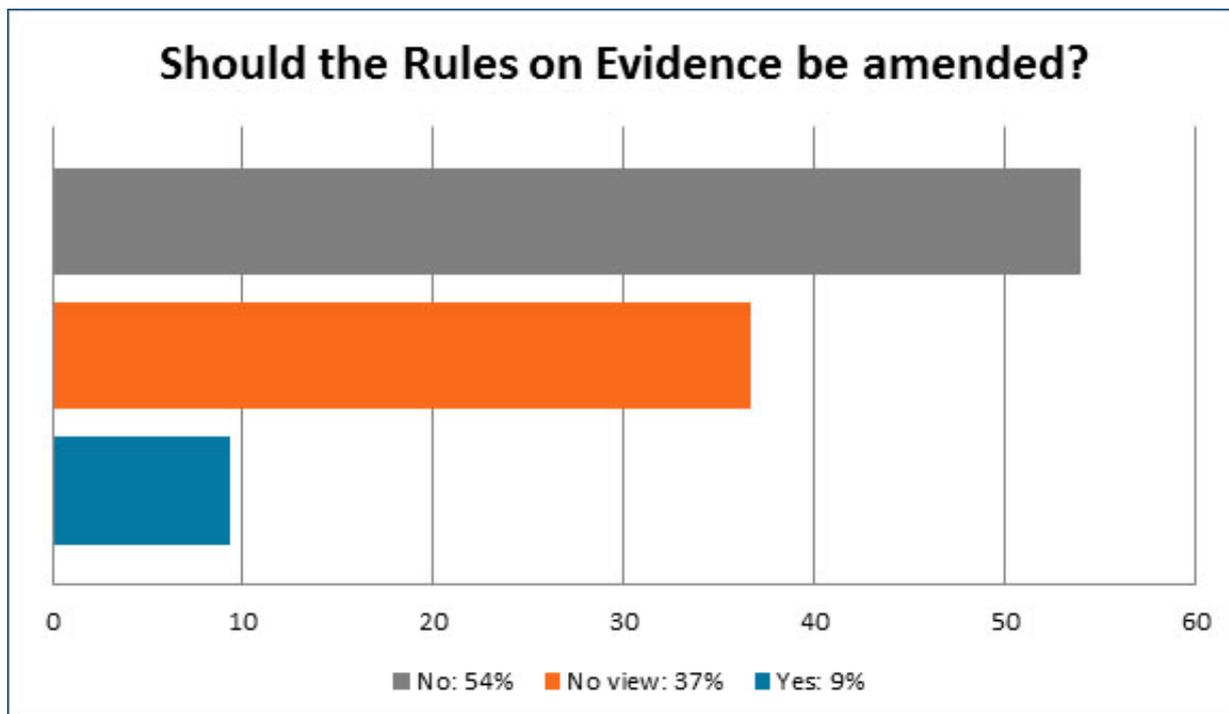
38 See D-H Kim, 'A study on the taking of electronic evidence in International Arbitration', 2011 *Bupjo Association Journal*, Vol 655, p 203, suggesting that the Art 3.12(b) provision relating to disclosure of documents maintained in electronic form should be an alternative solution to submitting the document in its original form if the latter is not convenient or extremely onerous.

39 DAR Williams QC, A Kawharu, *Williams & Kawharu on Arbitration* (2011), Chapter 25, p 714.

40 A total of 18 publications referring to the Rules on Evidence have been reported in Brazil, three in Mexico, and two in Argentina and Ecuador. The respondents have also acknowledged the existence of a few publications referencing the Rules on Evidence in Chile but their total number is undetermined.

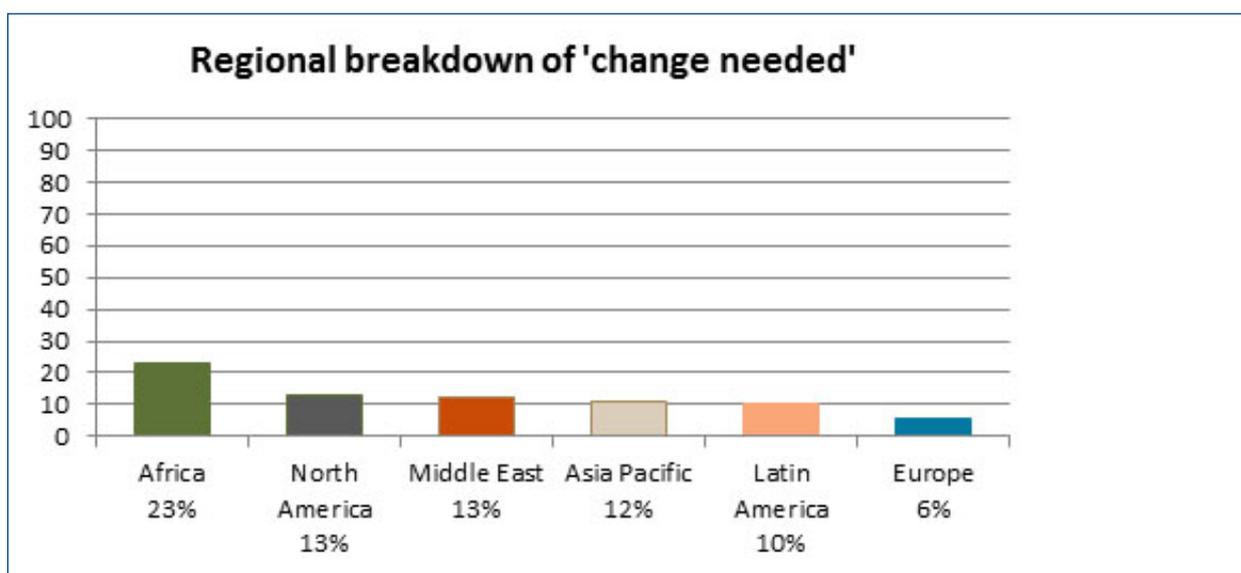
41 The quote refers to a respondent from Brazil, but similar comments were offered by the respondents from England, Finland, Germany, the Netherlands and Portugal.

42 The respondents who chose the 'no view' option could not expand on the reasons underlying their decision (eg, whether they had not yet applied the Rules on Evidence in a sufficient number of cases so as to form a view as to whether the Rules on Evidence should be amended).



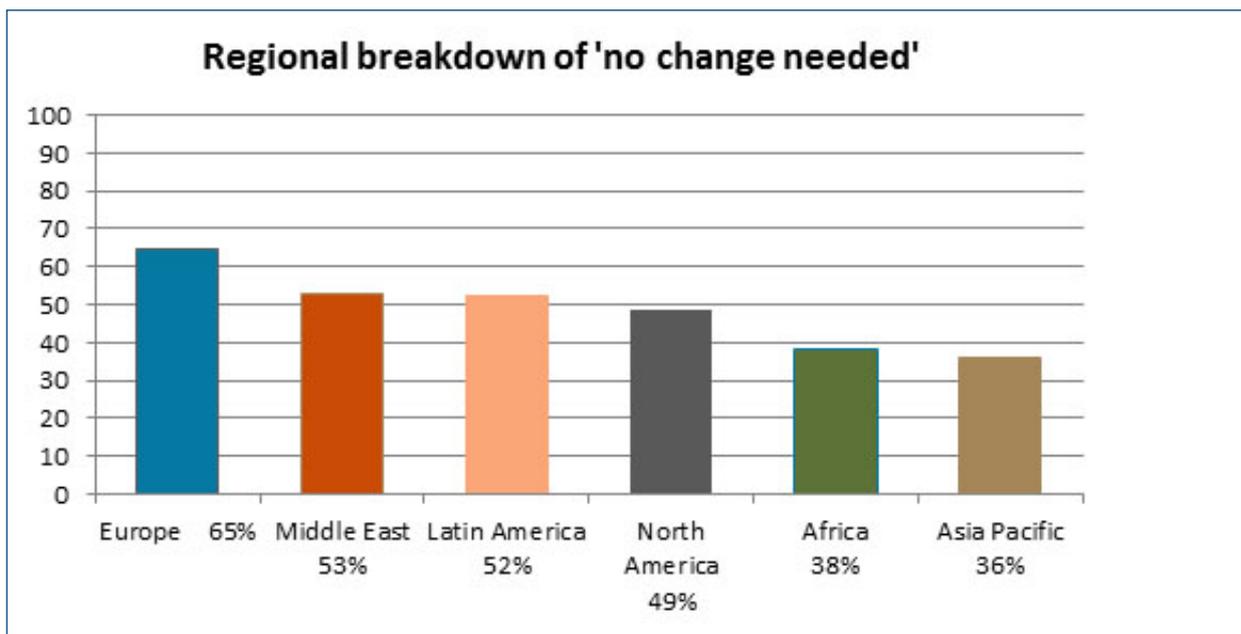
78. Compared with the answers to the same question regarding the other sets of IBA Rules and Guidelines, the Rules on Evidence garnered the highest percentage of replies opining that they should remain unchanged (compared with 53 per cent for the Conflicts of Interest Guidelines and 37 per cent for the Party Representation Guidelines).

79. The following chart illustrates the significantly lower percentage of respondents by region that believed that the Rules on Evidence should be amended:



80. The respondents from Africa, a region where the Rules on Evidence were not broadly used, generated the highest percentage of responses in favour of amendment, almost double the percentage of any other region. Europe, on the other hand, generated the lowest percentage of responses in favour of amendment: only around six per cent. In the middle, between ten per cent and 13 per cent of the respondents from North America, the Middle East, Asia Pacific and Latin America believe that the Rules on Evidence should be amended.

81. The following chart illustrates the percentage of respondents by region that believe the Rules on Evidence do not require amendment:



82. The respondents from Europe, one of the regions where the Rules on Evidence were most often used, lead the support for not revising the Rules on Evidence (with almost 65 per cent of the respondents in favour of not amending them), followed by the respondents from the Middle East, Latin America and North America (all around 50 per cent in favour of not amending). The respondents from Africa (38 per cent) and Asia Pacific (36 per cent) were less vocal about the non-revision of the Rules on Evidence.

83. In summary, and while the match is not perfect, jurisdictions where the Rules on Evidence were most often used seemed to support most strongly the position that they need not be reviewed or revised. Nevertheless, jurisdictions where the Rules on Evidence were not commonly used, such as Africa, would likely want the Rules on Evidence to reflect a regional compromise and not simply the practice of those that currently use them. This may suggest that the respondents consider the modification of the Rules on Evidence as a tool to make them more attractive in their region.

84. The ten per cent of respondents who asserted that the Rules on Evidence should be revised also identified the different provisions of the Rules on Evidence that, in their opinion, need amendment. Most of the respondents who recommended that the Rules on Evidence be revised focused on the following areas: (i) document production; (ii) burden of proof; (iii) privilege; (iv) sanctions; and (v) fact witnesses and expert testimony. We address these focus areas in the sections below.

85. Underlying several answers to the question of whether the Rules on Evidence warrant revision is the repeated – yet still minority⁴³ – sentiment that the Rules on Evidence do not yet strike a proper balance between the ‘US’ and civil law (or even the methodology adopted in other common law countries) approaches to the taking of evidence. In the view of some respondents,

⁴³ Notably, as highlighted above, several respondents found that the Rules on Evidence reflect a civil law/common law balance.

the Rules on Evidence still embody the more cumbersome and complex approach adopted in the US. Interestingly, this criticism arose in civil law jurisdictions, such as Brazil, Finland, Germany, Italy, Japan and Switzerland, but also certain common law jurisdictions, such as Canada, England, Ireland, New Zealand and Singapore. These respondents referred to the Rules on Evidence on document production as ‘too American’.

1. Document production

86. Article 3 of the Rules on Evidence was the most frequently cited provision among the respondents who recommended that the Rules on Evidence be amended. The respondents pointed to various areas of this provision that warrant revision, including scope of disclosure, objections and electronic evidence.

SCOPE OF DISCLOSURE

87. The respondents who called for a revision of Article 3 believed that the IBA Subcommittee should further limit the scope of disclosure to strike a proper balance between the civil law tradition and US legal culture. These respondents, based in both civil and common law jurisdictions, and from all regions but Africa, complained about the number and scope of document requests, as well as the cost and burden associated with addressing such requests. In their view, disclosure under Article 3 still resembles too closely discovery as it is practiced in common law litigation, or at least in the US. The proponents of a narrower Article 3 offered several suggestions:

- one respondent from Canada suggested clarifying the meaning of ‘sufficient detail’ in Article 3.3(a)(ii);⁴⁴
- a respondent from Italy proposed eliminating or nuancing the reference to ‘category of documents’ in Article 3.3(a)(ii), so that only individual documents may be sought; and another respondent, from Canada, proposed clarifying the meaning of ‘narrow and specific’ when referring to categories of documents in Article 3.3(a)(ii);
- respondents from Canada, Germany and Switzerland suggested clarifying the meaning of ‘relevant to the case and material to its outcome’ in Article 3.3(b),⁴⁵ or limiting the requirement to the materiality of the documents sought to the outcome of the case, as opposed to their relevance to the allegations asserted by the requesting party; whereas a respondent from Italy said that the word ‘relevant’ should simply be removed from the provision for the purpose of making it clearer;

44 Art 3.3(a) of the Rules on Evidence provides that: ‘A Request to Produce shall contain... (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.’ A respondent proposed clarification on whether all or some of the requirements set out in the unofficial commentary of the Rules on Evidence (presumed authors/recipients, presumed content and presumed time frame) were required under the Rules on Evidence.

45 Art 3.3(b) of the Rules on Evidence provides that: ‘A Request to Produce shall contain a statement as to how the Documents requested are relevant to the case and material to its outcome’.

- one respondent from the US suggested providing guidance on the meaning and scope of the phrase ‘possession, custody, or control’ in Article 3.3(c);⁴⁶ and
- a respondent from Argentina proposed imposing time limits on the parties’ obligation to produce documents.

OBJECTIONS

88. Another area where respondents from Europe, Latin America and North America offered recommendations for revision was in relation to the process whereby parties may object to documents sought under Article 3. In particular:
- a respondent from the US proposed amending Article 3 to conform to standard practice that requests for production are not transmitted to the arbitral tribunal; the tribunal only becomes involved at the point at which disputes have crystallised and are presented to the tribunal in the form of a Redfern (or similar) Schedule;⁴⁷
 - a respondent from Chile proposed eliminating the appointment of ad hoc experts when the propriety of an objection may only be determined by reviewing the document in question, as provided under Article 3.8,⁴⁸ and instead, making a provision for a prima facie review by the tribunal; and
 - a respondent from Australia invited the IBA Committee to determine whether arbitral tribunals are best placed to decide discovery disputes over documents giving rise to political or institutional concerns (Article 9.3)⁴⁹ and, if so, to elaborate the best procedure for tribunals to proceed with such adjudication.

ELECTRONIC DOCUMENTS

89. While a single respondent recommended that references to e-discovery be eliminated from the Rules on Evidence, most of the respondents advocated for revisions aimed at facilitating the exchange of e-documents between the parties and providing guidance on the use of electronic evidence. For example, one respondent suggested that the Rules on Evidence be amended to expressly allow the exchange of documents through secure websites.

46 Art 3.3(c) of the Rules on Evidence provides that: ‘A Request to Produce shall contain... (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party’.

47 Art 3.5 of the Rules on Evidence provides that: ‘If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3’.

48 Art 3.8 of the Rules on Evidence provides that: ‘In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed’.

49 Art 9.3 of the Rules on Evidence provides that: ‘In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules’.

2. *Burden of proof*

90. Two respondents, from Mexico and the US, indicated that the Rules on Evidence should address the allocation of the burden of proof between the parties and the possibility to shift or reduce the burden in certain circumstances.
91. In addition, a respondent from the Czech Republic suggested authorising tribunals to disallow requests calling for the production of documents concerning facts that the requested party has the burden of proving.

3. *Privilege*

92. The prevailing sentiment among the respondents from Asia Pacific, Europe and North America was that the Rules on Evidence are still unclear on the issue of privilege. Whereas Articles 9.2(b)⁵⁰ and 9.3⁵¹ recognise privilege as a ground for exclusion of documents and testimony from evidence, they fail to describe the applicable standard.
93. In addition, a respondent from Australia pointed to the need to provide a procedure for deciding issues of privilege, inviting the IBA Subcommittee to consider whether privilege claims should be decided by the tribunal or an independent third party.

4. *Sanctions*

94. Three respondents, from Argentina, Chile and Mexico, suggested introducing sanctions for non-cooperating parties, including via provisional allocation of legal costs and adverse inferences. The latter already exists for document production in Article 9.5 of the Rules on Evidence,⁵² but not for other sections, such as Article 4 on fact witnesses.
95. A respondent from Argentina specifically proposed including mandatory language in Article 3 to ensure that tribunals draw adverse inferences when faced with parties who fail to produce evidence that has been requested and/or ordered. In the view of this respondent, such an amendment is warranted because tribunals fail to exercise this power even when presented with clear-cut situations in which a party has failed to comply with a discovery order.

50 Art 9.2(b) of the Rules on Evidence provides that: 'The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons ... (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'

51 Art 9.3 of the Rules on Evidence provides that: 'In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules'.

52 Art 9.5 of the Rules on Evidence provides that: 'If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.'

5. *Witness and expert testimony*

96. The respondents from Asia Pacific, Europe, Latin America and North America who advocated for the revision of the Rules on Evidence made a series of recommendations concerning fact and expert testimony, in particular:
- two respondents, from Argentina and Singapore, called for greater clarity on the boundaries between fact witness interviews and preparation;
 - a respondent from Uruguay noted that direct testimony should be offered live in front of the tribunal to ensure accurate and independent testimony;
 - a respondent from Italy criticised the practice of witness preparation in anticipation of evidentiary hearings;
 - a respondent from Brazil proposed the inclusion of provisions on the standards of independence and impartiality of experts in the lines of the Conflicts of Interest Guidelines, and to require disclosure of the terms of expert compensation in Article 5.2(b);⁵³
 - a respondent from Peru suggested allowing tribunals to consider expert reports regardless of whether the expert attends the hearing;
 - a respondent from Canada called for more guidance on the taking of evidence via tribunal inspections;
 - a respondent from the US proposed an amendment to indicate whether there is a presumption for or against sequestration of witnesses during examination; and
 - a respondent from South Korea suggested removing Articles 4.8⁵⁴ and 5.6,⁵⁵ which state that, if a party does not request the appearance of a witness or expert at the hearing, that party shall not be deemed to agree with the contents of such a witness's statement or such an expert's report. The respondent argued that parties engage in the 'unfair practice' of not calling a witness or expert, while making attempts to undermine his or her credibility through their written submissions.

6. *Status of the Rules on Evidence*

97. Finally, the respondents from India and Lebanon raised the question of whether the Rules on Evidence should be mandatory, as opposed to mere guidelines that the parties and tribunal may adopt.

53 Art 5.2(b) of the Rules on Evidence provides: 'The Expert Report shall contain... a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions.'

54 Art 4.8 of the Rules on Evidence provides that: 'If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.'

55 Art 5.6 of the Rules on Evidence provides that: 'If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.'

III. The IBA Guidelines on Conflicts of Interest in International Arbitration

A. Executive summary

98. The key findings from the survey with respect to the Conflicts of Interest Guidelines are as follows:
99. The data collected shows that the Conflicts of Interest Guidelines have gained broad acceptance and were used often by the international arbitration community. Of the three IBA instruments surveyed, the Conflicts of Interest Guidelines were the most commonly referenced. By way of example, in the 3,201 arbitrations known to the respondents over the past five years in which issues of conflicts of interest arose (at the start of the arbitration),⁵⁶ the Conflicts of Interest Guidelines were referenced in 57 per cent of them.
100. The results of the survey, together with the Country Reports, suggest that, when acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in the selection of arbitrators even more often than the Guidelines were generally referenced in arbitrations. At the global scale, counsel made use of the Conflicts of Interest Guidelines when appointing arbitrators in 67 per cent of all reported cases. Arbitrators also appeared to make frequent use of the Conflicts of Interest Guidelines across all regions.
101. The survey also confirms that the Conflicts of Interest Guidelines were often referenced by the relevant decision-maker (arbitral institutions, tribunals or courts) in reaching a pronouncement on the existence of a conflict of interest. At a global level, the Conflicts of Interest Guidelines were referenced in 67 per cent of decisions resolving issues of conflicts of interest. Perhaps more importantly, in 69 per cent of the decisions that referenced the Conflicts of Interest Guidelines in solving a conflict of interest issue, the decision-maker chose to follow the guidelines.
102. The survey results indicate that the Conflicts of Interest Guidelines appeared to have been 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. In addition, the Country Reports suggest that practitioners who were familiar with the Conflicts of Interest Guidelines tended to approve of them and found them useful (in varying degrees), regardless of their location and legal background.
103. As to the provisions of these Conflicts of Interest Guidelines being used by the international arbitration community, the survey shows that no particular part of the Guidelines seemed to be consulted or relied on significantly more often than others.
104. The survey provides no data as to whether, or to what extent, the Conflicts of Interest Guidelines were treated as binding as opposed to merely being treated as guidelines. That being said, some Country Reports reveal that certain arbitral institutions either recommended the incorporation of the Conflicts of Interest Guidelines into the terms of reference at the beginning of the arbitration, thereby inducing the parties to make them binding, or routinely applied the Conflicts of Interest Guidelines when deciding on issues of conflicts of interest (thereby making them binding at the decision stage).

⁵⁶ As noted above, this number includes arbitrations that may have been double counted.

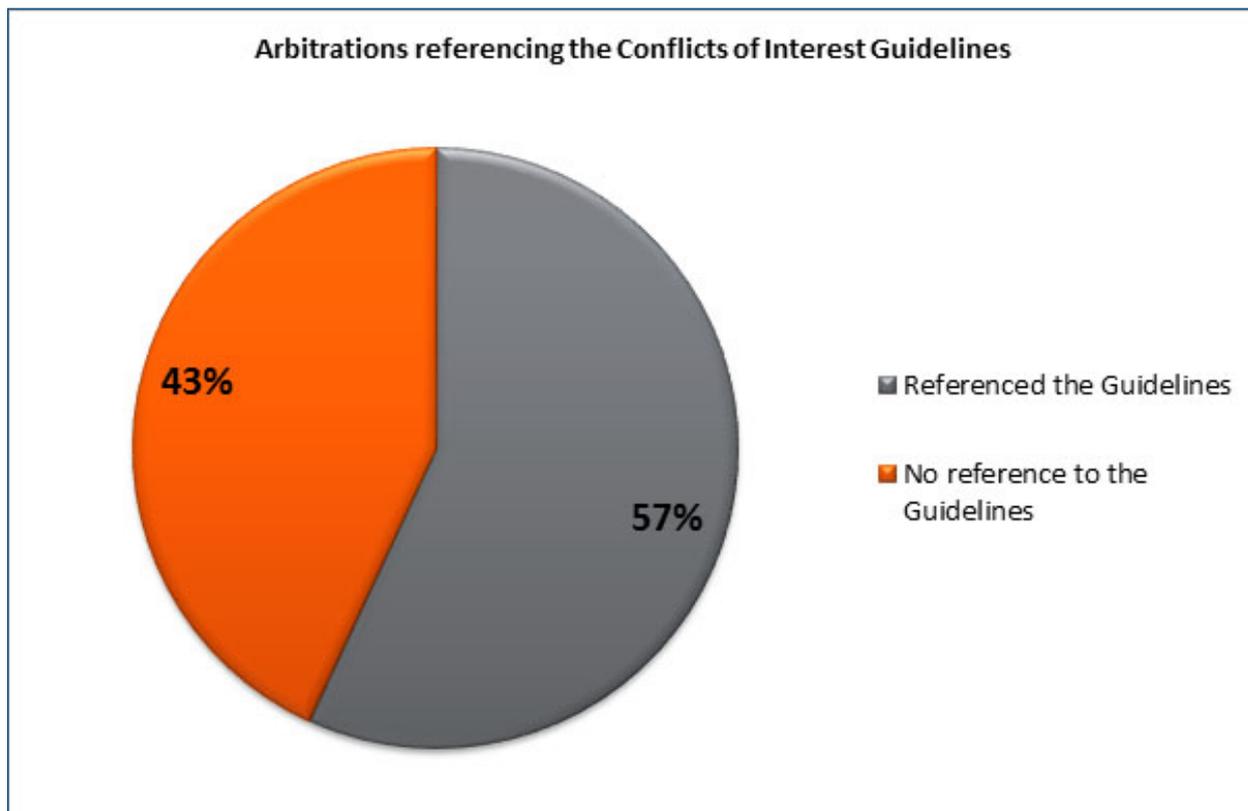
105. While references to the Conflicts of Interest Guidelines by local courts were rare, this does not necessarily indicate that courts do not apply or take into consideration the Conflicts of Interest Guidelines: the reporters for several jurisdictions noted that the absence of a case law database or search engine made the search for case law difficult. That being said, it appears undisputed that 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.
106. The Conflicts of Interest Guidelines have caught the attention of legal scholars across the globe, particularly in jurisdictions with active arbitration communities. In those jurisdictions, scholars tended to view the Conflicts of Interest Guidelines as a useful soft law tool in arbitration practice.
107. In general, the Conflicts of Interest Guidelines appear to have been well received across the various jurisdictions. However, the respondents in some countries did indicate that they believed the Conflicts of Interest Guidelines need revision. Broadly speaking, the different comments fall under the following categories: promotion, guidance, update, adaptation and revision. Some respondents made additional comments regarding the use of the Conflicts of Interest Guidelines, which cannot be properly characterised as a request for revision.

B. The Conflicts of Interest Guidelines in arbitral practice

1. How often are the Conflicts of Interest Guidelines referred to in arbitral practice?

108. The data collected shows that the Conflicts of Interest Guidelines have gained acceptance and were often used by the international arbitration community. Of the three IBA instruments surveyed, the Conflicts of Interest Guidelines were the most commonly referred-to instrument. Out of 3,201 arbitrations known to the respondents over the past five years in which issues of conflicts of interest arose (at the beginning of the arbitration),⁵⁷ the Conflicts of Interest Guidelines were referenced in 57 per cent of them, as illustrated in the following chart:

⁵⁷ As noted above, this number includes arbitrations that have been double counted.



109. The Country Reports and survey results suggest that, in jurisdictions where they were well known, the Conflicts of Interest Guidelines were frequently consulted in local arbitral practice in the following situations:

- by counsel, when appointing or challenging an arbitrator, or when challenging an award;
- by arbitrators, when deciding whether to accept an appointment or make a disclosure; and
- by decision-makers (arbitral institutions, tribunals or courts) when deciding a challenge to an arbitrator.

REFERENCE TO THE CONFLICTS OF INTEREST GUIDELINES BY COUNSEL

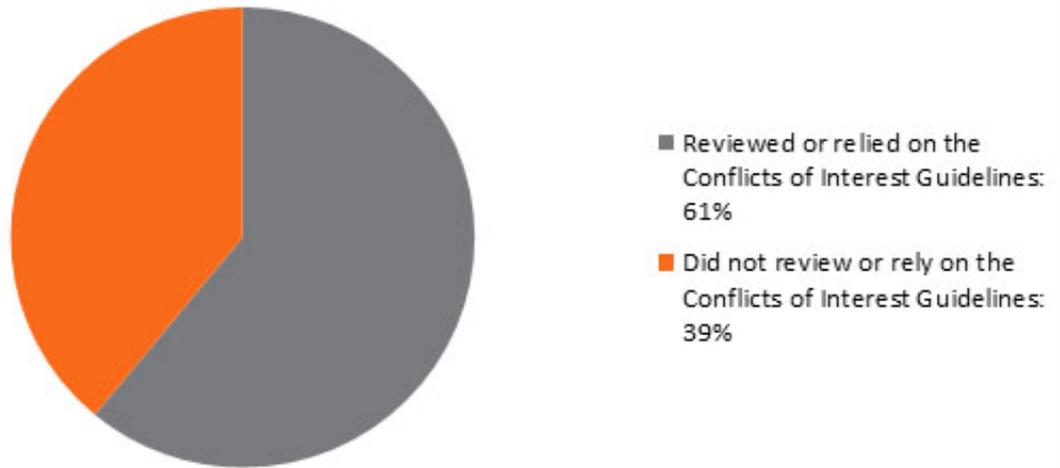
110. The results of the survey, together with the Country Reports, suggest that, when acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in the selection of arbitrators even more often than the guidelines were generally referenced in arbitrations. At the global scale, counsel made use of the Conflicts of Interest Guidelines when appointing arbitrators in 67 per cent of all reported cases. Counsel in North America reported a more frequent use of the Conflicts of Interest Guidelines (77 per cent), followed by counsel in Asia Pacific (69 per cent), Latin America (59 per cent), the Middle East (54 per cent), Europe (51 per cent) and Africa (47 per cent).



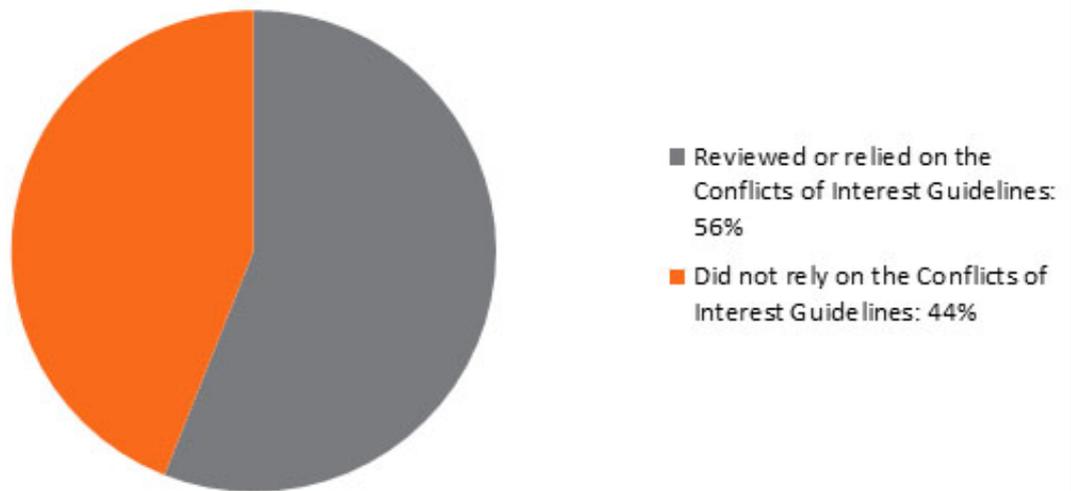
REFERENCE TO THE CONFLICTS OF INTEREST GUIDELINES BY ARBITRATORS

111. Arbitrators appeared to make frequent use of the Conflicts of Interest Guidelines across all regions. According to the survey, arbitrators consulted or referred to the Conflicts of Interest Guidelines in 61 per cent of cases when deciding to accept an appointment, and in 56 per cent of arbitrations when making decisions as to whether facts should be disclosed to the parties or arbitral institution.
112. In a pattern similar to the one observed in region-based data regarding counsel, arbitrators in North America reported a more frequent use of the Conflicts of Interest Guidelines when deciding whether to accept an appointment (84 per cent), closely followed by arbitrators in Latin America (85 per cent), and then the Middle East (79 per cent), Asia Pacific (55 per cent), Europe (53 per cent) and Africa (34 per cent).

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



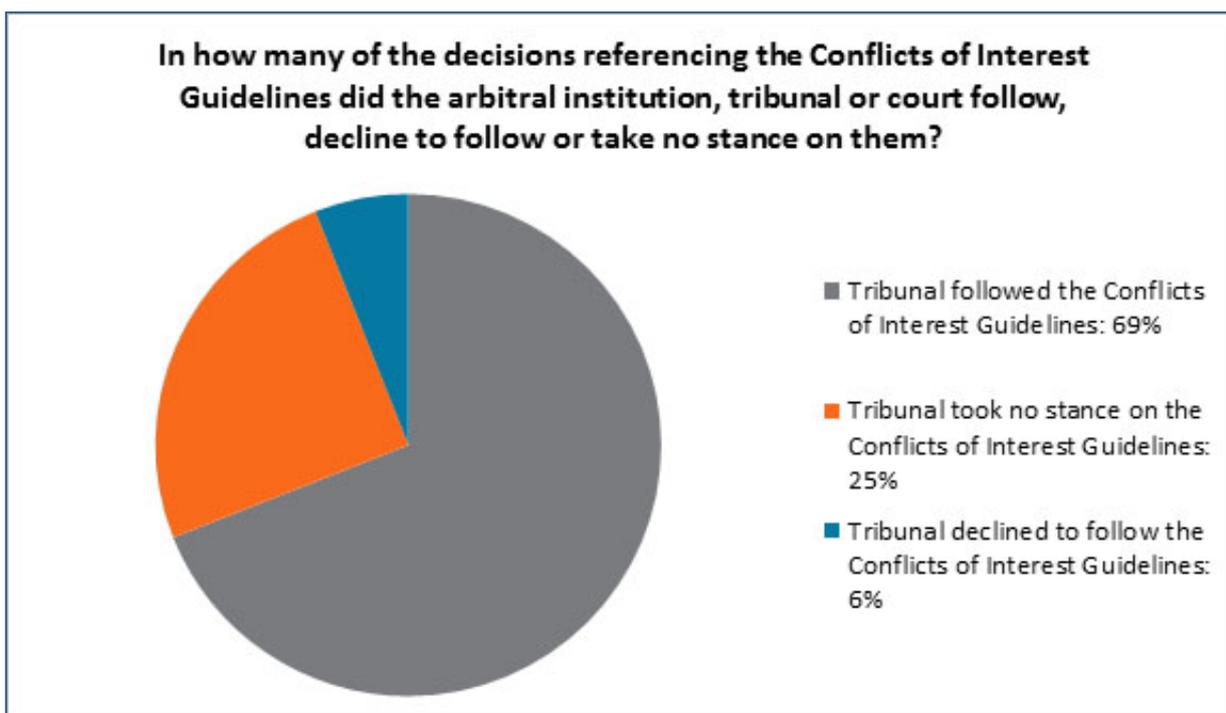
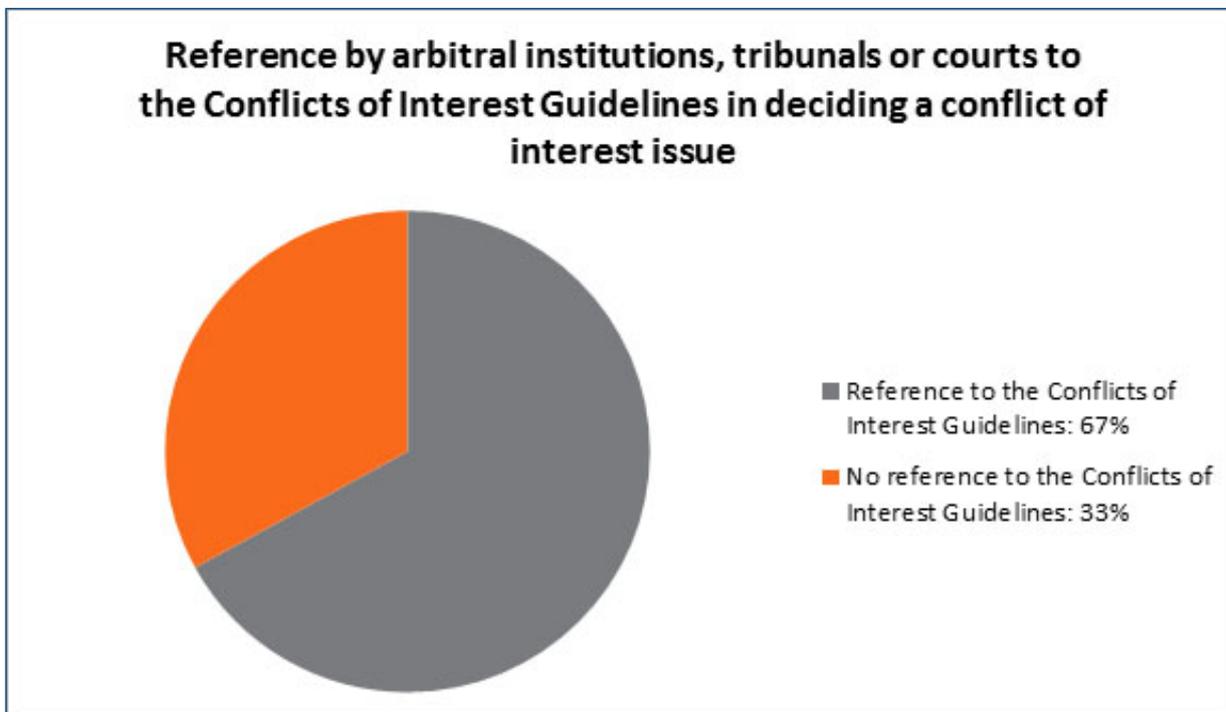
Review or reliance by arbitrators on the Conflicts of Interest Guidelines in making a disclosure to the parties and arbitral institution



REFERENCE TO THE CONFLICTS OF INTEREST GUIDELINES BY DECISION-MAKERS IN REACHING DECISIONS

113. Finally, the survey confirms that the Conflicts of Interest Guidelines were often referenced by the relevant decision-maker (arbitral institutions, tribunals or courts) in reaching a decision on the existence of a conflict of interest. At a global level, the Conflicts of Interest Guidelines were referenced in 67 per cent of decisions resolving issues of conflicts of interest.
114. At a regional level, Asia Pacific stands out as the region in which decision-makers referred to the Conflicts of Interest Guidelines most frequently (88 per cent), followed by Europe (69 per cent), North America (65 per cent), Latin America (63 per cent), the Middle East (42 per cent) and Africa (29 per cent).

115. Significantly, the decision-maker chose to follow the Conflicts of Interest Guidelines in 69 per cent of the decisions that referenced the guidelines in solving a conflict of interest issue. Only six per cent of those decisions declined to follow the Conflicts of Interest Guidelines, whereas 25 per cent of them simply took no stance.



REGIONAL ANALYSIS

116. The survey responses indicate that the Conflicts of Interest Guidelines appeared to have been well received in jurisdictions with a more developed arbitration practice, regardless of the

region, and less so in jurisdictions where the use of arbitration was less prevalent. In addition, the Country Reports suggest that practitioners who were familiar with the Conflicts of Interest Guidelines tended to approve of them and find them useful (in varying degrees), regardless of their location and legal background.

Europe

117. In Europe, the Conflicts of Interest Guidelines were referenced or consulted in 51 per cent of cases known to the respondents. This, however, does not imply uniformity in the use of the Conflicts of Interest Guidelines. There are countries that had many references, whereas others had none.
118. For example, the Conflicts of Interest Guidelines were frequently used and referenced in the following jurisdictions:
- In Lithuania, the fact that the Conflicts of Interest Guidelines were referenced in 83 per cent of cases involving conflicts of interest at the time of the constitution of the arbitral tribunal indicates that the Conflicts of Interest Guidelines were the main tool used to deal with these issues.
 - In Spain, survey responses reveal that the Conflicts of Interest Guidelines were viewed as an indispensable tool in arbitrations involving arbitrators' conflicts of interest. The survey results record that, out of the reported cases in which conflicts of issue arose at the time of the constitution of the arbitral tribunal, 76 per cent referenced the Conflicts of Interest Guidelines.
 - In France, the Conflicts of Interest Guidelines were referenced in 60 per cent of cases in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal. The respondents reported that, out of 293 arbitrations known to them that involved arbitrator conflicts of interest issues,⁵⁸ counsel referred to the Conflicts of Interest Guidelines in 50 per cent of cases when selecting arbitrators. The President of the Association Française d'Arbitrage (AFA), a French arbitral institution, also emphasised the importance of the Conflicts of Interest Guidelines in harmonising ethical standards in international arbitration.
 - In Switzerland, the survey reveals that the Conflicts of Interest Guidelines were widely used. In the last five years, they were referenced in almost 57 per cent of the arbitrations in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal. According to the survey, counsel consulted them very frequently (in more than 70 per cent of cases) when selecting international arbitral tribunals if there was a conflict of interest issue. Arbitrators also consulted them frequently (in 51 per cent of cases), notably when accepting appointments, and rather less frequently (38 per cent) when making disclosures. In addition, arbitral institutions, arbitral tribunals or courts ruling on conflicts of interest issues referred to them in 79 per cent of cases, and followed them in 93 per cent of cases.
 - In Portugal, the Conflicts of Interest Guidelines appeared to have acquired widespread acceptance: out of the reported arbitrations in which issues of conflicts arose at the time of the constitution of the arbitral tribunal, 64 per cent referenced the Conflicts of Interest Guidelines. Portugal's most active arbitration centre (the Centro de Arbitragem Comercial

⁵⁸ Please note that all absolute numbers include arbitrations that have been counted more than once.

da Câmara de Comércio e Indústria Portuguesa) made a formal reference to the Conflicts of Interest Guidelines in its criteria for the appointment of arbitrators, noting that, as a rule, the president of the centre shall not accept the appointment of an arbitrator who falls into a situation described in the non-waivable Red List. In line with this, decision-makers in Portugal, whether the arbitral institution, tribunal or court, appeared to rely frequently on the Conflicts of Interest Guidelines when deciding on situations of conflicts of interest: out of the reported arbitrations in which conflicts of issue arose, decision-makers referenced the guidelines in 71 per cent of cases (34 out of a total of 48 reported cases). Of those 34 cases, the decision-maker followed the Conflicts of Interest Guidelines in 31 cases, declined to follow them in one case and was neutral in two cases.

- In Romania, while a large number of cases in which conflicts of interest arose at the time of the constitution of the tribunal referenced the Conflicts of Interest Guidelines (78 per cent), the respondents acting as counsel consulted them less frequently when selecting arbitrators (51 per cent of the time) and even less frequently when acting as arbitrators (40 per cent of the time when accepting appointments and 32 per cent of the time when making disclosures).
- In Germany, the Conflicts of Interest Guidelines were referenced in 64 per cent of arbitrations in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal. Practitioners acting as counsel consulted or relied on the Conflicts of Interest Guidelines frequently when selecting arbitrators (77 per cent of the time), but rather less frequently when acting as arbitrators (49 per cent of the time when accepting appointments and 43 per cent of the time when making disclosures).
- In Russia, the Country Report notes that there were no reported arbitral awards making reference to the Conflicts of Interest Guidelines. However, the survey results indicate that the Conflicts of Interest Guidelines were referenced in 64 per cent of reported arbitrations. Notably, the respondents acting as counsel or arbitrators consulted or relied on the Conflicts of Interest Guidelines 100 per cent of the time when selecting arbitrators, accepting an appointment or making a disclosure, but the small sample size may make this figure unreliable. The survey also indicates that, when deciding issues of conflicts of interest, the relevant decision-makers referenced the Conflicts of Interest Guidelines in 100 per cent of cases (out of a total of nine reported cases). The decision-makers followed the Conflicts of Interest Guidelines in eight of these cases and made no stance in one case.
- In Poland, the Conflicts of Interest Guidelines were referenced in 60 per cent of arbitrations in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal. Polish practitioners seemed to make the greatest practical use of the Red, Orange and Green Lists attached to the Conflicts of Interest Guidelines, as the respondents answered many times that the 'lists' were referenced in these arbitrations. However, no concrete article of the Conflicts of Interest Guidelines was referenced.
- In Italy, the Conflicts of Interest Guidelines were referenced in 53 per cent of arbitrations in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal. The survey responses also reveal that practitioners acting as counsel or arbitrators consulted the Conflicts of Interest Guidelines frequently when deciding to take on or make an appointment, or make a disclosure.
- In England and Wales, roughly half of the arbitrations involving arbitrator conflicts of interest referred to the Conflicts of Interest Guidelines. The most referenced articles were Articles

1, 2–4 and 5–7. Where the respondents acted as counsel in arbitrations involving arbitrator conflicts of interest, they consulted the Conflicts of Interest Guidelines in 90 per cent of cases, and they consulted the guidelines to decide whether or not to take on an appointment in 61 per cent of cases.

119. By contrast, in other countries in Europe, the Conflicts of Interest Guidelines appeared to be used with some frequency but were rarely referenced or, if referenced, hard data is unavailable:
- In Finland, the Conflicts of Interest Guidelines were only cited in 23 per cent of cases known to the respondents where issues of conflicts of interest arose at the time of the constitution of the arbitral tribunal. However, the conclusion was that, overall, even though formal reference to the Conflicts of Interest Guidelines was only rarely made, guidelines were often consulted as general guidance and an interpretative tool.
 - In Ireland, out of all the arbitrations accounted for by the five respondents, 16 per cent referred to one set of the Conflicts of Interest Guidelines in some way, but the result is not very helpful given the extremely small sample size.
 - In Belgium, although according to the survey the Conflicts of Interest Guidelines were referenced in only ten per cent of arbitrations in which issues of conflicts arose at the time of the constitution of the arbitral tribunal (four out of 38 reported cases), the Country Report notes that arbitrators in Belgium frequently relied on the guidelines, as there are no specific provisions containing such standards on conflicts of interest in the Belgian Arbitration Law. The Conflicts of Interest Guidelines were also regularly used as guidance by the relevant body within the Belgian Centre for Arbitration and Mediation (CEPANI) in case of objections and challenges to arbitrators.
 - In Austria, the results of the survey are inconclusive due to the small sample size. However, the Country Report notes that the Conflicts of Interest Guidelines were regularly applied either as a guideline or directly in a large number of arbitration proceedings. That said, as awards or procedural orders rendered in such proceedings are almost never published, precise data is not available.
 - In Norway, the Country Report notes that ‘[w]hile it is safe to assume that a significant number of procedural orders in Norway do make reference to IBA Guidelines and Rules, no such procedural orders or awards have been published thus far’.⁵⁹ Due to the small sample size, the results of the survey are unreliable.
120. There are also countries that do not identify any reference to the Conflicts of Interest Guidelines, such as Bulgaria and Slovenia.
121. From a regional perspective, the survey results suggest that, in Europe, during the last five years, the Conflicts of Interest Guidelines were referenced in approximately 50 per cent of instances in which issues of conflicts arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 63 per cent of cases when selecting arbitrators. When acting as arbitrators, European practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 53 per cent of cases when deciding on whether to accept an appointment, and in

⁵⁹ Norway Country Report, p 2. The relevance of this statement may be mitigated by the fact that it refers to all the IBA Rules and Guidelines.

45 per cent of cases when making a disclosure.

122. Despite their widespread use among practitioners in Europe, few express references to the Conflicts of Interest Guidelines in arbitral awards or terms of reference were identified, probably due to the confidential nature of most arbitrations. One notable example can be found in Switzerland, in the context of an arbitration before the Court of Arbitration for Sport (CAS), where the arbitral tribunal (the CAS panel) invoked the Conflicts of Interest Guidelines (among other factors) to deny a document production request aimed at establishing the panel's independence.⁶⁰ This award also contains a noteworthy statement by Matthieu Reeb, Secretary General of the CAS, who testified during the proceedings that, 'if an arbitrator was challenged by a party, Swiss law was applied primarily and the IBA Guidelines on Conflicts of Interest in International Arbitration... were also taken into consideration'.⁶¹
123. In terms of the resolution of issues of conflict of interest, European decision-makers (the arbitral institution, local court or arbitral tribunal, depending on the circumstances) referred to the Conflicts of Interest Guidelines in 69 per cent of cases when making their decision. The decision-maker followed the Conflicts of Interest Guidelines in 70 per cent of these cases, declined to follow them in three per cent of these cases and took no stance in 27 per cent of these cases.
124. As noted above, local arbitral institutions in various jurisdictions applied the Conflicts of Interest Guidelines or used them as guidance in deciding arbitrator challenges. By contrast, the International Court of Arbitration of the International Chamber of Commerce (the 'ICC Court'),⁶² while acknowledging that the Conflicts of Interest Guidelines are a 'commendable effort to try to identify uniform standards for disclosure related to conflicts of interest',⁶³ it has repeatedly stated that it is not bound by the Conflicts of Interest Guidelines.⁶⁴ Instead, the ICC Court applies its own test to establish the impartiality and independence of arbitrators. Under Article 11(2) of the ICC Arbitration Rules (previously Article 7(2) of the 1998 ICC Arbitration Rules), arbitrators are required to disclose 'any facts or circumstances which might be of such a

60 *Union des Associations Européennes de Football (UEFA) v FC Sion/Olympique des Alpes SA*, CAS 2011/O/2574, Award, 31 January 2012. The respondent had challenged the jurisdiction of the CAS and the independence of the members of the CAS Panel vis-à-vis the plaintiff (the UEFA), and had requested the production of a number of documents, including past appointments and nominations of arbitrators by the UEFA, to assess the panel's independence. The CAS panel denied this request, noting that the 'closed list' system of CAS arbitration is compatible not only with Swiss case law, but also with the Conflicts of Interest Guidelines, because 'sports law is a kind of arbitration subject to [the exception contained in the orange list, footnote 5] provided by the IBA Guidelines'. The award also contains a noteworthy statement by Matthieu Reeb, Secretary General of the CAS, who testified during the proceedings that, 'if an arbitrator was challenged by a party, Swiss law was applied primarily and the IBA Guidelines on Conflicts of Interest in International Arbitration... were also taken into consideration'. Footnote 5 of the Orange List provides an exception to the rule at para 3.1.3, noting that '[i]t may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice'.

61 *Union des Associations Européennes de Football (UEFA) v FC Sion/Olympique des Alpes SA*, CAS 2011/O/2574, Award, 31 January 2012.

62 Whereas, strictly speaking, the ICC Court should not be attributed to any particular region (its arbitrations are seated in many jurisdictions), we have analysed it within Europe because it is formally based in Paris.

63 A-M Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators', [2008] ICC Bulletin, Special Supplement 2007 Independence of Arbitrators 36. While this article refers to the 2004 version of the Conflicts of Interest Guidelines, it is still useful to understand the interaction between the IBA and ICC standards.

64 A Carlevaris, R Digón, 'Arbitrator Challenges under the ICC Rules and Practice', [2016] ICC Dispute Resolution Bulletin, Vol 1, p 27. See also, A-M Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators', [2008] ICC Bulletin, Special Supplement 2007 Independence of Arbitrators 36. See also, J Fry, S Greenberg, 'The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases', and its Appendix: S Greenberg, JR Feris, 'References to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases,' both in 2009 ICC Bulletin, Vol 20, Issue 2, pp 17, 33. Whereas these publications refer to the 2004 version of the Conflicts of Interest Guidelines, they are still useful to understand the interaction between the IBA and ICC standards.

nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality'.⁶⁵ Because this is a subjective test that requires the arbitrator to assess how facts or circumstances would appear 'in the eyes of the parties', it has been said to be 'fundamentally incompatible' with the objective list system recommended by the Conflicts of Interest Guidelines.⁶⁶ This does not mean that the Conflicts of Interest Guidelines are ignored by the ICC Court. On the contrary, the recently issued ICC Guidance Note on conflict disclosures by arbitrators, which contains a non-exhaustive list of situations that arbitrators or prospective arbitrators are invited to take into consideration in assessing whether a disclosure should be made, is said to have been in 'large part inspired by the IBA Guidelines on Conflicts of Interest'.⁶⁷ Moreover, the ICC Court has confirmed that the Conflicts of Interest Guidelines are frequently invoked by the parties when objecting to an arbitrator's confirmation or when making a challenge, or by arbitrators when justifying non-disclosures.⁶⁸ While the ICC Court will consider this when deciding whether to confirm an arbitrator or uphold a challenge, its decision will be based on an assessment of all the circumstances of the case, and the fact that a situation may fall under one of the Conflicts of Interest Guidelines' lists will not be outcome determinative.⁶⁹ According to research conducted by the ICC Court, many arbitrators have been challenged successfully or denied confirmation as a result of situations not contemplated by the Conflicts of Interest Guidelines, or as a result of situations where the Guidelines indicated that no disclosure would be necessary.⁷⁰

North America

125. The Conflicts of Interest Guidelines appeared to have been extremely well received in arbitral practice in North America.⁷¹ The survey figures suggest that, in North America, during the last five years, the Conflicts of Interest Guidelines were referenced in approximately 65 per cent of the cases in which issues of conflicts arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 77 per cent of cases when selecting arbitrators. When acting as arbitrators, practitioners in North America consulted or relied on the Conflicts of Interest Guidelines in approximately 84 per cent of cases when deciding on whether to accept an appointment, and in 91 per cent of cases when making a disclosure.

126. In terms of the resolution of issues of conflicts of interest, decision-makers in North America (the arbitral institution, local court or arbitral tribunal, depending on the circumstances)

65 Art 11(2) of the ICC Arbitration Rules (2012). In addition, as of 2016, the ICC includes in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration a non-exhaustive list of circumstances that an arbitrator should take into consideration when assessing what circumstances, if any, are of the nature that would call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality.

66 A-M Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators', [2008] ICC Bulletin, Special Supplement 2007 Independence of Arbitrators 36.

67 A Moure, 'Message from the President', [2016] ICC Dispute Resolution Bulletin, Vol 1.

68 J Fry, S Greenberg, 'The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases', and its Appendix: S Greenberg and JR Feris, 'References to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases', both in 2009 ICC Bulletin, Vol 20, pp 17–18, 33.

69 J Fry, S Greenberg, 'The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases', and its Appendix: S Greenberg and JR Feris, 'References to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases,' both in [2009] ICC Bulletin, Vol 20.

70 Appendix: S Greenberg, JR Feris, 'References to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases,' [2009] ICC Bulletin, Vol 20, pp 33–39.

71 Although, strictly speaking, Mexico is in North America, for the purposes of our study, we have included it in Latin America. As a result, in this Report, North America, is composed of the US and Canada only.

referred to the Conflicts of Interest Guidelines in 65 per cent of cases when making their decision on conflicts of interest issues. The decision-maker followed the Conflicts of Interest Guidelines in 64 per cent of these cases, declined to follow them in 15 per cent of these cases and took no stance in 21 per cent of these cases.

- In the US, out of the reported arbitrations over the last five years in which conflicts of interest arose at the time of the constitution of the arbitral tribunal, 63 per cent referenced the Conflicts of Interest Guidelines in resolving the potential conflict. When serving as counsel, the respondents consulted or relied on the Conflicts of Interest Guidelines in 78 per cent of occurrences where issues of conflicts arose when appointing an arbitrator. The respondents who served as arbitrators consulted or referred to the Conflicts of Interest Guidelines 84 per cent of the time when accepting an appointment, and 83 per cent of the time when making disclosures. There were only a few cursory references to the Conflicts of Interest Guidelines in arbitrations, presumably because most arbitral awards and decisions are not published and may be subject to confidentiality and non-disclosure agreements.
- In Canada, out of the reported arbitrations in which issues of conflict of interest arose at the time of the constitution of the arbitral tribunal, 70 per cent referenced the Conflicts of Interest Guidelines. In addition, investor–state arbitrations frequently cite the Conflicts of Interest Guidelines under Chapter 11 of the North American Free Trade Agreement (NAFTA). The Country Report cited five arbitration orders involving conflicts of interest to illustrate that arbitral tribunals applied the Conflicts of Interest Guidelines or took them into account when rendering decisions regarding conflicts of interest issues.⁷²

Latin America

127. The Conflicts of Interest Guidelines had an uneven reception in Latin America. While they appeared to have been widely applied in some jurisdictions, in others, their use was much more limited. This phenomenon seemed to be related to the familiarity of arbitration practitioners with the Conflicts of Interest Guidelines rather than to their intrinsic value. Indeed, in countries with an active domestic or international arbitration practice (such as Brazil, Mexico and Peru), the Conflicts of Interest Guidelines tended to be used more frequently and with approval. By contrast, in countries with a less active arbitration practice (whether domestic or international), the Conflicts of Interest Guidelines were less known and therefore less applied. Several reporters noted the need to promote the Conflicts of Interest Guidelines in their jurisdictions in Spanish.⁷³
128. The survey results suggest that, in Latin America, during the last five years, the Conflicts of Interest Guidelines were referenced approximately 59 per cent of the times in which issues of conflict of interest arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines

⁷² *Lone Pine Resources Inc v Canada*, ICSID Case No UNCT/15/2, Procedural Order No 1, 11 March 2015, stating that the arbitral tribunal will apply the Conflicts of Interest Guidelines as published in 2004; *Windstream Energy LLC v Canada*, UNCITRAL, PCA Case No 2013-22, Procedural Order No 1, 16 September 2013, stating that the Arbitral Tribunal will take into account the Conflicts of Interest Guidelines (2004); *Mesa Power Group, LLC v Canada*, UNCITRAL, PCA Case No 2012-17, Procedural Order No 1, 21 November 2012, stating that the arbitral tribunal will take into account the Conflicts of Interest Guidelines (2004); *Vito G Gallo v Canada*, UNCITRAL, PCA Case No 55798, Decision on Challenge to Arbitrator's Appointment, 14 October 2009, where General Standard 2(c) of the Conflicts of Interest Guidelines was cited in a decision regarding whether there were justifiable doubts regarding the impartiality and independence of one of the arbitrators; *Clayton v Canada*, UNCITRAL, PCA Case No 2009-04, Procedural Order No 1, 9 April 2009, stating that the Conflicts of Interest Guidelines will apply to arbitrators, and that members of the arbitral tribunal shall make disclosures required by the guidelines within 14 days after the date of the order.

⁷³ However, as already noted above, a Spanish language version of the Conflicts of Interest Guidelines already exists.

in approximately 68 per cent of cases when selecting arbitrators. When acting as arbitrators, practitioners from Latin America consulted or relied on the Conflicts of Interest Guidelines in approximately 85 per cent of cases when deciding on whether to accept an appointment, and in 73 per cent of cases when making a disclosure.

129. In terms of the resolution of issues of conflicts of interest, decision-makers in Latin America (the arbitral institution, local court or arbitral tribunal, depending on the circumstances) referred to the Conflicts of Interest Guidelines in roughly 62 per cent of cases when making their decision. The decision-maker followed the Conflicts of Interest Guidelines in 66 per cent of these cases, declined to follow them in six per cent of these cases, and took no stance in 28 per cent of these cases.

130. The Conflicts of Interest Guidelines appeared to have gained most acceptance in the following jurisdictions:

- In Peru, in the last five years, the Conflicts of Interest Guidelines were invoked in 65 per cent of cases in which conflicts of interest arose at the time of the constitution of the arbitral tribunal. The respondents serving as counsel consulted the Conflicts of Interest Guidelines in 88 per cent of cases when selecting arbitrators, while the respondents acting as arbitrators consulted them in 89 per cent of cases when deciding to take on an appointment and in 85 per cent of cases when making a disclosure. Notably, the Conflicts of Interest Guidelines appeared to be routinely applied by local arbitral institutions to decide on challenges, in particular, the Arbitration Centre of the Lima Chamber of Commerce (La Cámara de Comercio de Lima (CCL)) and the American Chamber of Commerce (AmCham). Indeed, the CCL's model, Acta de Instalación, a form of terms of reference, invites users to make the Conflicts of Interest Guidelines – as well as the other IBA Rules and Guidelines – binding, a practice that the parties appeared to accept in roughly 50 per cent of cases. The reporter for Peru was able to provide references to 15 examples of challenges decided by arbitral institutions that had invoked the Conflicts of Interest Guidelines. According to the survey results, decision-makers in Peru referenced the Conflicts of Interest Guidelines in 68 per cent of cases (81 out of 119 reported cases).
- In Brazil, in the last five years, the Conflicts of Interest Guidelines were referenced in 60 per cent of cases known to the respondents in which issues of conflicts of interest arose at the time of the constitution of the arbitral tribunal. The respondents serving as counsel consulted the Conflicts of Interest Guidelines in 55 per cent of cases in which issues of conflicts arose, whereas the respondents acting as arbitrators consulted them in 88 per cent of cases when deciding to take on an appointment, and in 90 per cent of cases when making disclosures. In addition, the most active arbitral institutions in Brazil⁷⁴ tended to apply the Conflicts of Interest Guidelines when deciding challenges.
- In Mexico, the Conflicts of Interest Guidelines were applied in some way in 56 per cent of local arbitrations in which issues of conflict of interest arose at the time of the constitution of the arbitral tribunal. The respondents serving as counsel consulted the Conflicts of Interest Guidelines in 98 per cent of cases when selecting arbitrators, whereas the respondents acting as arbitrators consulted them in 80 per cent of cases when deciding to take on an

⁷⁴ Specifically, the Arbitration and Mediation Center of the Brazil–Canada Chamber of Commerce (CAM-CCBC), the Arbitration and Conciliation Chamber of FGV (FGV-RJ), the Arbitration Chamber of São Paulo (Conselho Arbitral do Estado de São Paulo (CAESP)) and the Chamber of Conciliation, Mediation and Arbitration of the Center of Industries of the State of São Paulo (CIESP/FIESP).

appointment, and in 63 per cent of cases when making a disclosure. However, the decision-makers in Mexico referenced the Conflicts of Interest Guidelines in only 50 per cent of cases.

- In Costa Rica, whereas the number of arbitration cases reported was lower, the percentage of cases in which the Conflicts of Interest Guidelines were applied was high: out of the reported arbitrations in which conflicts of interest issues arose at the time of the constitution of the arbitral tribunal, 90 per cent referenced the Conflicts of Interest Guidelines. In addition, two local arbitral institutions⁷⁵ use criteria inspired by the Conflicts of Interest Guidelines to decide on challenges, and decision-makers in Costa Rica also appeared to have referenced the Conflicts of Interest Guidelines in 90 per cent of arbitrations.
- In Argentina, while the Conflicts of Interest Guidelines did not appear to be consulted or applied in arbitrations administered by local institutions, their use appeared to be more widespread in ad hoc arbitrations and institutional arbitrations administered by international arbitral institutions. In the last five years, the Conflicts of Interest Guidelines were referenced in 80 per cent of cases in which issues of conflict arose at the time of the constitution of the arbitral tribunal. Arbitrators consulted or relied on them in 79 per cent of cases when taking on an appointment, and 74 per cent of cases when making a disclosure.

131. The level of familiarity and acceptance of the Conflicts of Interest Guidelines was lower in other Latin American jurisdictions. According to the Country Reports from Chile, Colombia, Ecuador and Paraguay, local practitioners seemed to be mostly unfamiliar with the Conflicts of Interest Guidelines, and their use appeared to be limited to a handful of arbitrators who consulted the Conflicts of Interest Guidelines prior to accepting an appointment or making a disclosure. The following statistics appear to confirm these statements:

- In Chile, the Conflicts of Interest Guidelines were referenced in 50 per cent of the reported arbitrations in which issues of conflicts of interest arose at the time of the constitution of the tribunal, and arbitrators consulted or relied on the Conflicts of Interest Guidelines 68 per cent of the time when accepting an appointment. By contrast, counsel relied on the Conflicts of Interest Guidelines only ten per cent of the times in which they selected arbitrators, and arbitrators relied on them in only 36 per cent of cases in which they made a disclosure.
- In Ecuador, the Conflicts of Interest Guidelines were referenced in 30 per cent of the reported arbitrations in which issues of conflict of interest arose at the time of the constitution of the tribunal, and counsel relied on the Conflicts of Interest Guidelines 42 per cent of the time when they selected arbitrators. The results with respect to use by arbitrators are unreliable. According to the survey, decision-makers referred to the Conflicts of Interest Guidelines in 32 per cent of cases, and the reporters were able to identify at least two arbitrations in which the Conflicts of Interest Guidelines were applied to decide a challenge.⁷⁶
- In Colombia, while the Conflicts of Interest Guidelines were referenced in 80 per cent of the reported arbitrations in which issues of conflict of interest arose at the time of the constitution of the tribunal, the small sample size may reduce the value of this statistic; only five cases were reported. In addition, none of the respondents indicated having consulted or relied on the Conflicts of Interest Guidelines, whether acting as counsel or arbitrators. That being

75 Specifically, the Centro Internacional de Conciliación y Arbitraje of the American-US Chamber of Commerce (CICA) and the Centro de Conciliación y Arbitraje of the Costa Rican Chamber of Commerce (CCA).

76 One was an ad hoc case, whereas the other was a case under the rules of the Arbitration Center of AmCham-Quito.

said, the Conflicts of Interest Guidelines appeared to have been invoked in at least three international arbitrations before the Bogotá Chamber of Commerce (BCC), the main centre for institutional arbitration in Colombia.

132. Finally, as a general matter, practitioners in Bolivia, the Dominican Republic, Guatemala, Honduras, Uruguay and Venezuela appeared to be unfamiliar with the Conflicts of Interest Guidelines.⁷⁷

Asia Pacific

133. The Conflicts of Interest Guidelines were widely used in local arbitral practice in most jurisdictions in the Asia Pacific region, notably in the following:

- In South Korea, the Conflicts of Interest Guidelines were referenced in 95 per cent of reported cases that involved conflicts of interest. Most of the respondents (89 per cent) consulted or relied on the Conflicts of Interest Guidelines when selecting arbitrators for international tribunals when acting as counsel. The most referenced part of the Conflicts of Interest Guidelines appears to be the section that provides for the Green/Orange/Red waivable and non-waivable Lists. The Korean Commercial Arbitration Board has also created its own Code of Ethics for Arbitrators which is, for the most part, consistent with the Conflicts of Interest Guidelines.
- In Japan, when the respondents acted as counsel in arbitrations involving arbitrator conflicts of interest, they consulted the Conflicts of Interest Guidelines 61 per cent of the time. When the respondents acted as arbitrators in arbitrations involving arbitrator conflicts, they consulted the Conflicts of Interest Guidelines 89 per cent of the time.
- In Singapore, the Conflicts of Interest Guidelines were referenced in arbitrations in which issues of conflicts arose at the time of the constitution of the tribunal in 96 per cent of cases. In addition, 69 per cent of the respondents who acted as counsel in arbitrations consulted or relied on the Conflicts of Interest Guidelines. Fifty two per cent of the respondents who acted as arbitrators consulted or relied on the Conflicts of Interest Guidelines in deciding whether to take on an appointment, and 67 per cent of them also consulted or relied on the Conflicts of Interest Guidelines in making their disclosure to the parties and arbitral institution.

134. By contrast, the Conflicts of Interest Guidelines were used less frequently in the following jurisdictions:

- In New Zealand, the Conflicts of Interest Guidelines are referenced in the policies of the New Zealand International Arbitration Centre (NZIAC) Rules for International Commercial Arbitration (Article 5.6), which provide: ‘Where it appoints an arbitrator under these Rules, NZIAC will have regard to, but is not bound to apply, the International Bar Association Guidelines on Conflicts of Interest in International Commercial Arbitration current at the Date of the Notice of Arbitration.’⁷⁸ Despite this, the results of the survey show an uneven pattern: out of the reported arbitrations in which issues of conflict of interest arose, only 20 per cent referenced the Conflicts of Interest Guidelines. However, where there appeared to be an actual conflict, the decision-maker consulted the Conflicts of Interest Guidelines every

⁷⁷ We did not receive Country Reports for El Salvador, Guatemala or Honduras, so the results noted above for these countries rely only on the survey results. Additionally, the survey apparently did not receive responses from Nicaragua or Panama.

⁷⁸ See DAR Williams QC and A Kawharu, *Williams & Kawharu on Arbitration* (2011), Chapter 24, p 686.

time, and followed the Conflicts of Interest Guidelines in 89 per cent of those cases and was neutral in 11 per cent of those cases. That being said, these answers may not be representative of a trend in the country because the data sample was small and questions were answered only by a few of the respondents. Finally, the reporter noted that the Conflicts of Interest Guidelines were rarely referenced in domestic arbitrations.

- The Conflicts of Interest Guidelines did not appear to be widely used in India. Only 40 per cent of the reported cases in which issues of conflict of interest arose referred to the Conflicts of Interest Guidelines. The Country Report explains that it is difficult to determine the manner and extent of reliance on or reference to the Conflicts of Interest Guidelines in local arbitral practice because arbitration proceedings are private. One reason for the limited reliance on the Conflicts of Interest Guidelines may be that almost 95 per cent of arbitrations in India are ad hoc and individual arbitrators determine the procedure. Likewise, most arbitral institutions have developed their own rules and guidelines but they are silent on conflicts. Without referring to the Conflicts of Interest Guidelines expressly, the Indian Arbitration and Conciliation (Amendment) Act, 2015 incorporates many of the Conflicts of Interest Guidelines, including a verbatim recitation of the non-waivable Red List, the waivable Red List and the Orange List.
- In Malaysia, according to the Country Report, no local arbitrations have referred to the Conflicts of Interest Guidelines. However, the survey responses indicated that the Conflicts of Interest Guidelines were referred to in approximately half of the occasions featuring potential conflicts of interest. Arbitration counsel and arbitrators expressed gratitude for the assistance the Conflicts of Interest Guidelines provide.
- In Taiwan, a few of the respondents stated that they had seen the Conflicts of Interest Guidelines referred to in international arbitration proceedings, but not in Taiwanese arbitration.
- Finally, the Conflicts of Interest Guidelines were used to some extent in Thailand. Out of the reported arbitrations that involved arbitrator conflicts of interest, 48 per cent made reference to the Conflicts of Interest Guidelines. When acting as counsel in arbitrations involving arbitrator conflicts, the respondents consulted or relied on the Conflicts of Interest Guidelines 94 per cent of the time. When acting as arbitrators in arbitrations involving arbitrator conflicts, they consulted the Conflicts of Interest Guidelines half of the time. However, the results could be misleading because some respondents misunderstood some of the questions and the sample size was very small. Only ten arbitrations were reported to have referenced the Conflicts of Interest Guidelines.

135. As for China, we can draw a clear distinction between mainland China and Hong Kong SAR:

- In Mainland China, the Conflicts of Interest Guidelines were referenced in 69 per cent of arbitrations (46 out of 67 reported cases). The respondents acting as counsel relied on or consulted the Conflicts of Interest Guidelines in only 17 per cent (12 out of 70) arbitrations involving arbitrator conflicts of interest. When acting as arbitrators, the respondents only consulted the Conflicts of Interest Guidelines in 37 per cent of cases when deciding to accept an appointment (16 out of 43 reported cases), and in 35 per cent of cases when making a disclosure (15 out of 43 reported cases).
- In Hong Kong SAR, the respondents reported that 96 per cent of arbitrations in which conflicts of interest issues arose made reference to the Conflicts of Interest Guidelines. When

acting as counsel, the respondents consulted the Conflicts of Interest Guidelines in 72 per cent of cases. When acting as arbitrators, the respondents consulted the Conflicts of Interest Guidelines in 67 per cent of cases. Again, these figures could be statistically insignificant due to the small sample size.

136. The survey figures suggest that, in the Asia Pacific region during the last five years, the Conflicts of Interest Guidelines were referenced in approximately 73 per cent of cases in which issues of conflict of interest arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 68 per cent of cases when selecting arbitrators. When acting as arbitrators, practitioners in the region consulted or relied on the Conflicts of Interest Guidelines in approximately 55 per cent of cases when deciding on whether to accept an appointment, and in 63 per cent of cases when making a disclosure.
137. In terms of the resolution of issues of conflicts of interest, decision-makers in the Asia Pacific region (the arbitral institution, local court or arbitral tribunal, depending on the circumstances) referred to the Conflicts of Interest Guidelines in roughly 88 per cent of cases when making their decision. The decision-maker followed the Conflicts of Interest Guidelines in 82 per cent of these cases, declined to follow them in six per cent of these cases, and took no stance in 14 per cent of these cases.

The Middle East

138. There is little information on the reception of the Conflicts of Interest Guidelines in local arbitral practice in the Middle East. Only certain jurisdictions provided meaningful responses to the survey, and even then, the information provided by the reporters, with the exception of the UAE, was scarce. The reports for Lebanon, Qatar and Turkey explain that this lack of information may be due to the confidential nature of arbitration, as well as the absence of a database. Consequently, the results recorded below may be misrepresentative.
139. According to the survey results and the Country Reports, the Conflicts of Interest Guidelines did not appear to be referenced very often in arbitrations in this region, except in certain jurisdictions. However, arbitrators and counsel appeared to rely frequently on the Conflicts of Interest Guidelines, even if they were not referenced expressly:
- In the UAE, 61 per cent of cases in which conflicts of interest issues arose at the time of the constitution of the tribunal referenced the Conflicts of Interest Guidelines. Counsel relied on the Conflicts of Interest Guidelines 100 per cent of the time when they selected arbitrators,⁷⁹ and arbitrators consulted or relied on the Conflicts of Interest Guidelines 100 per cent of the time when accepting an appointment or making a disclosure.⁸⁰ The UAE report also notes that counsel and arbitrators often followed the Conflicts of Interest Guidelines when dealing with potential challenges to the tribunal's independence and impartiality. It also appeared that the parties regularly wished to include the Conflicts of Interest Guidelines in their terms of reference. However, a respondent also shared his experience of an arbitral decision in the UAE and explained that 'in almost all the challenges against an arbitrator involving conflict

79 In 20 out of 20 reported cases.

80 In 24 out of 24 reported cases.

of interest DIAC, while they are consulting the guidelines and applying their provisions, they do not cite such provisions in their decision but rather cite provisions of the applicable law dealing with conflict of interest'.⁸¹

- In Israel, the Conflicts of Interest Guidelines were referenced in 64 per cent of the reported arbitrations in which issues of conflict of interest arose at the time of the constitution of the tribunal. By contrast, practitioners acting as counsel relied on the Conflicts of Interest Guidelines only 36 per cent of the time when they selected arbitrators, whereas arbitrators consulted or relied on the Conflicts of Interest Guidelines 30 per cent of the time when accepting an appointment or making a disclosure.
- In Lebanon, the Conflicts of Interest Guidelines were referenced in 50 per cent of the reported arbitrations in which issues of conflict of interest arose at the time of the constitution of the tribunal. Counsel relied on the Conflicts of Interest Guidelines 44 per cent of the time when they selected arbitrators. Arbitrators consulted or relied on the Conflicts of Interest Guidelines 69 per cent of the time when accepting an appointment, and 62 per cent of the time when making a disclosure. The report for Lebanon also explains that some arbitral institutions in Lebanon 'confessed' to using the waivable Red List of the Conflicts of Interest Guidelines as guidance in situations where there was an objective conflict of interest.
- In Egypt, only 27 per cent of the reported arbitrations in which issues of conflicts arose at the time of the constitution of the tribunal referenced the Conflicts of Interest Guidelines.⁸²
- In Turkey, the Conflicts of Interest Guidelines were referenced in 100 per cent of the reported arbitrations in which issues of conflicts arose at the time of the constitution of the tribunal, but the small sample size means this result may not be representative of a trend in this country. Only two arbitrations were reported.
- For Qatar, the responses to the survey do not record any arbitrations in which the Conflicts of Interest Guidelines were referenced. However, the Country Report notes that, although the use of the Conflicts of Interest Guidelines may not be apparent, the 'word-of-mouth impression' is that counsel in arbitration cases do in fact refer to the Conflicts of Interest Guidelines when necessary, although this does not happen frequently.

140. The survey results suggest that, in the Middle East during the last five years, the Conflicts of Interest Guidelines were referenced approximately 54 per cent of the times in which issues of conflict of interest arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 65 per cent of cases when selecting arbitrators. When acting as arbitrators, practitioners in the region consulted or relied on the Conflicts of Interest Guidelines in 79 per cent of cases when deciding on whether to accept an appointment, and in 88 per cent of cases when making a disclosure.

141. In terms of the resolution of issues of conflicts of interest, decision-makers in the Middle East (the arbitral institution, local court or arbitral tribunal, depending on the circumstances) referred to the Conflicts of Interest Guidelines in roughly 42 per cent of cases when making their decision. The decision-maker followed the Conflicts of Interest Guidelines in 78 per cent of these cases, declined to follow them in five per cent of these cases and took no stance in 18 per cent of these cases.

81 UAE, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 5, p 23.

82 We received no Country Report for Egypt. The results noted above for Egypt rely only on the survey results.

Africa

142. We have very little information on the reception of the Conflicts of Interest Guidelines in Africa:
- The survey was only answered by respondents in Angola, Ethiopia, Ghana, Mozambique and Nigeria, and the rate of responses was very low.
 - In addition, we only received Country Reports for Angola and Mozambique.
 - Finally, information related to the use of the Conflicts of Interest Guidelines could only be found in the Nigeria survey, in which two respondents gave a very brief overview of arbitral decisions citing the Conflicts of Interest Guidelines without specifying the references.
143. Consequently, the results of the survey for Africa are of limited value. For the sake of completeness, we present them below.
144. The answers to the survey suggest that, in Africa and during the last five years, the Conflicts of Interest Guidelines were referenced approximately 47 per cent of the times in which issues of conflicts of interest arose at the time of the constitution of the arbitral tribunal. When acting as counsel, practitioners consulted or relied on the Conflicts of Interest Guidelines in approximately 58 per cent of cases when selecting arbitrators. When acting as arbitrators, practitioners in Africa consulted or relied on the Conflicts of Interest Guidelines in approximately 35 per cent of cases when deciding on whether to accept an appointment, and in 42 per cent of cases when making a disclosure.
145. In terms of the resolution of issues of conflicts of interest, decision-makers in Africa (the arbitral institution, local court or arbitral tribunal, depending on the circumstances) referred to the Conflicts of Interest Guidelines in roughly 29 per cent of cases when making their decision.
146. In addition, the respondents in Africa made the following comments with respect to decisions on issues of conflicts:
- One respondent referred to a case in which the arbitral tribunal considered that an arbitrator who had ‘10 years [of] previous professional representation against [a] vaguely related corporate entity was not preclusive’.⁸³
 - A second respondent also mentioned a case where the ‘court relying on the guidelines held that [the] arbitrator should have decided the appellant as he was counsel to one of the parties to the arbitration’.⁸⁴

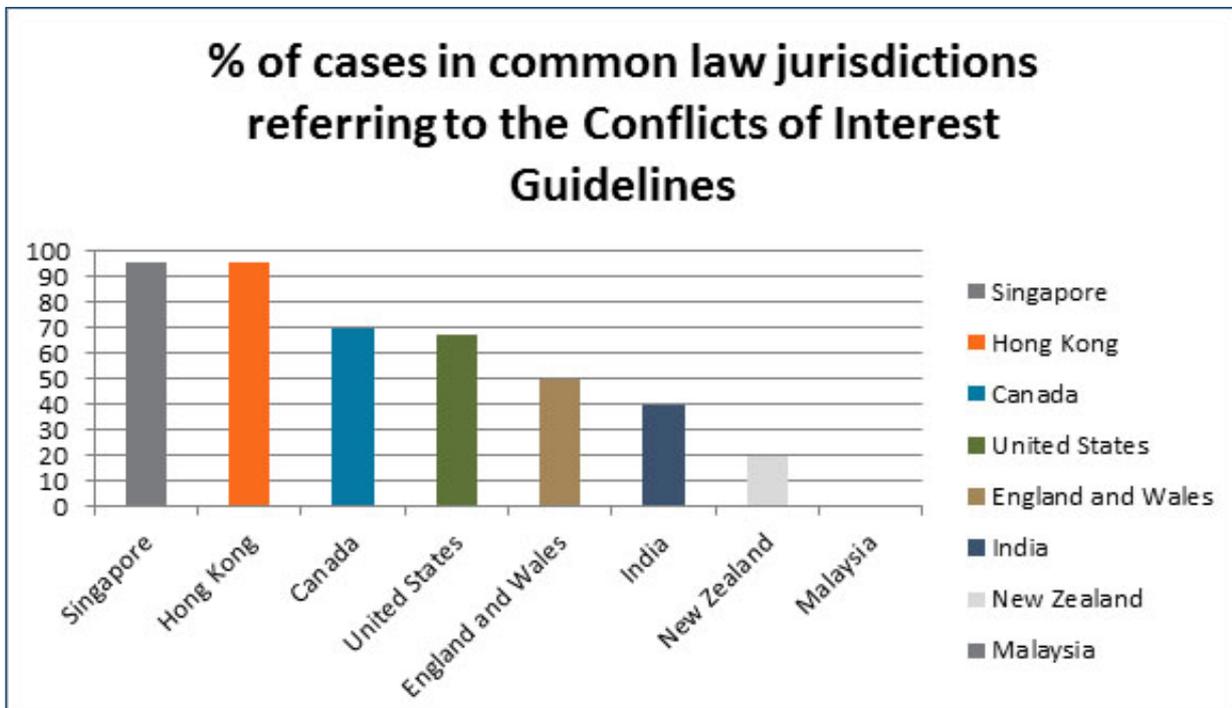
THE USE OF THE CONFLICT OF INTEREST GUIDELINES IN COMMON AND CIVIL LAW JURISDICTIONS

147. The survey results summarised above suggest that the Conflicts of Interest Guidelines have been well received in both common law and civil law jurisdictions. While the Conflicts of Interest Guidelines appeared to be more widely used in certain key common law jurisdictions than in certain popular civil law arbitral seats, other civil law jurisdictions showed a surprisingly high use of the Conflicts of Interest Guidelines.
148. Indeed, the jurisdictions where the Conflicts of Interest Guidelines were referenced more frequently at the time of the constitution of the tribunal are mostly common law jurisdictions:

83 Nigeria, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 4, p 19.

84 Nigeria, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 14, p 61.

Hong Kong SAR (96 per cent), Singapore (96 per cent), Canada (70 per cent) and the US (67 per cent). But these results are not uniform across all common law jurisdictions: the Conflicts of Interest Guidelines were referenced rather less frequently in England and Wales (50 per cent), and significantly less frequently in India (40 per cent), New Zealand (20 per cent) and Malaysia (zero per cent). The survey results for Australia, Ireland and Scotland are unreliable due to the small sample size.



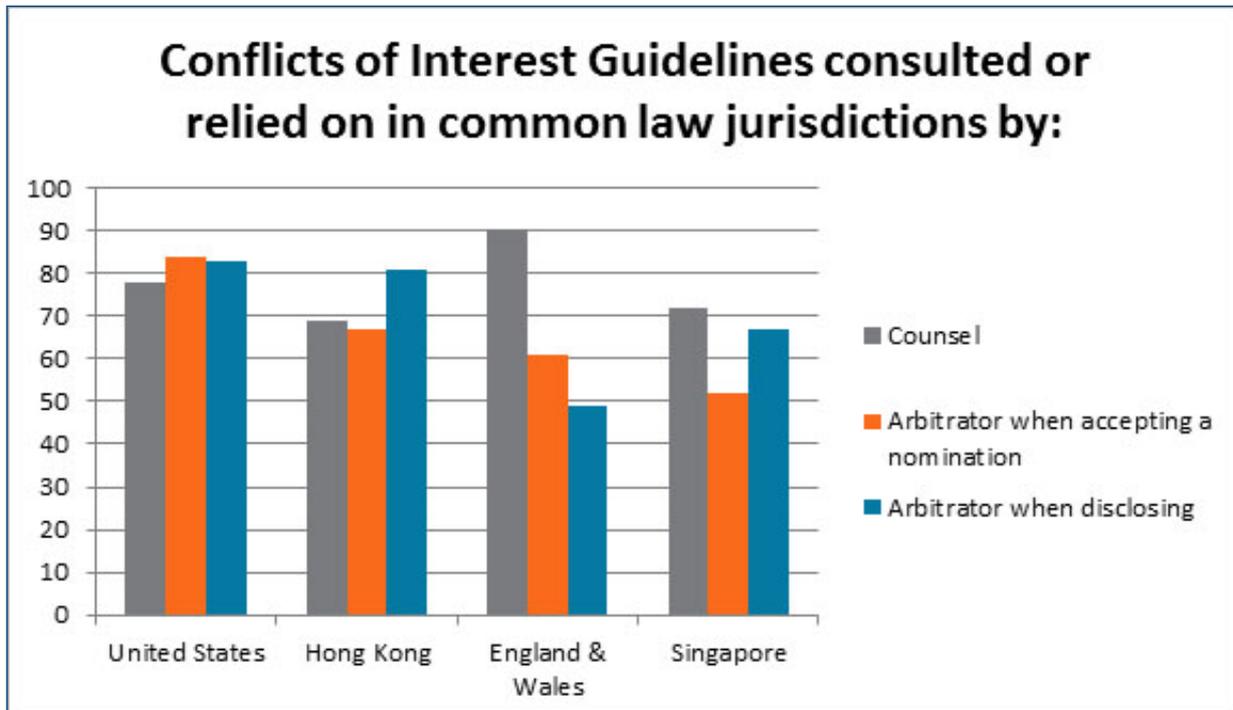
149. By contrast, while reference to the Conflicts of Interest Guidelines was slightly lower in civil law jurisdictions traditionally used as arbitral seats, the survey shows that they were frequently referenced in civil law jurisdictions that are less popular internationally but have a developed arbitral practice. Thus, whereas the Conflicts of Interest Guidelines were referenced slightly less frequently in the most common European seats, such as France (60 per cent), Switzerland (57 per cent), Germany (64 per cent) and Italy (53 per cent), this percentage was much higher in less popular civil law seats, such as South Korea (96 per cent), Costa Rica (90 per cent), Lithuania (83 per cent), Argentina (80 per cent), Colombia (80 per cent), Romania (78 per cent) and Spain (76 per cent).



150. Reliance on the Conflicts of Interest Guidelines by counsel and arbitrators seemed to follow the same trend: whereas practitioners in common law jurisdictions appeared to rely more frequently on the Conflicts of Interest Guidelines when acting as counsel or arbitrators than in popular civil law jurisdictions, practitioners in certain less popular civil law seats tended to rely on the Conflicts of Interest Guidelines very frequently. Specifically:

- Practitioners in certain popular common law jurisdictions consulted or relied on the Conflicts of Interest Guidelines very frequently when acting as counsel (eg, England and Wales (90 per cent), the US (78 per cent), Hong Kong SAR (72 per cent) and Singapore (69 per cent)). Practitioners in the US and Hong Kong SAR also relied on the Conflicts of Interest Guidelines very frequently when acting as arbitrators, whether when accepting appointments (the US (84 per cent) and Hong Kong SAR (67 per cent)) or when making disclosures (the US (83 per cent) and Hong Kong SAR (81 per cent)), whereas practitioners in England and Wales and Singapore relied on them rather less frequently when accepting appointments (England and Wales (61 per cent) and Singapore (52 per cent)) or making disclosures (England and Wales (49 per cent) and Singapore (67 per cent)).
- These percentages were slightly lower in popular civil law seats. For instance, in France, counsel referred to the Conflicts of Interest Guidelines in 48 per cent of cases when selecting arbitrators, 37 per cent of the time when accepting appointments and 38 per cent of the time when making disclosures. In Switzerland, counsel consulted the Conflicts of Interest Guidelines frequently when selecting arbitrators (70 per cent), but rather less frequently when acting as arbitrators (51 per cent of cases when accepting appointments and 38 per cent of cases when making disclosures).
- By contrast, the Conflicts of Interest Guidelines were consulted much more frequently in certain less popular civil law arbitral seats. For instance, practitioners acting as counsel relied very frequently on the Conflicts of Interest Guidelines when appointing arbitrators in the UAE

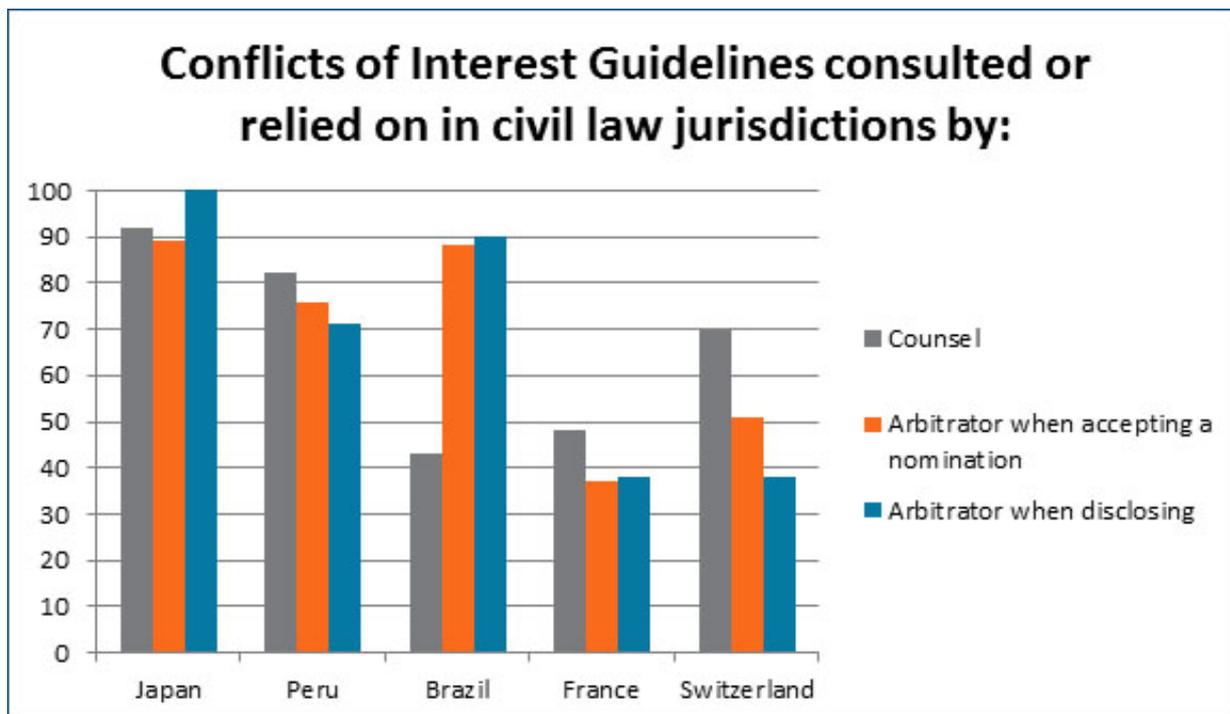
and Russia (100 per cent),⁸⁵ Mexico (98 per cent), Japan (92 per cent), South Korea (89 per cent), Peru (82 per cent) and Argentina (78 per cent). Similarly, arbitrators in certain civil law jurisdictions relied very frequently on the Conflicts of Interest Guidelines when accepting appointments (eg, 100 per cent of the time in the UAE and Russia,⁸⁶ 89 per cent of the time in Japan, 88 per cent of the time in Brazil and 76 per cent of the time in Peru) or when making disclosures (eg, 100 per cent of the time in Japan and Russia,⁸⁷ 90 per cent of the time in Brazil, 75 per cent of the time in Argentina and 71 per cent of the time in Peru).



85 These figures may be unreliable due to the small sample size.

86 These figures may be unreliable due to the small sample size.

87 These figures may be unreliable due to the small sample size.

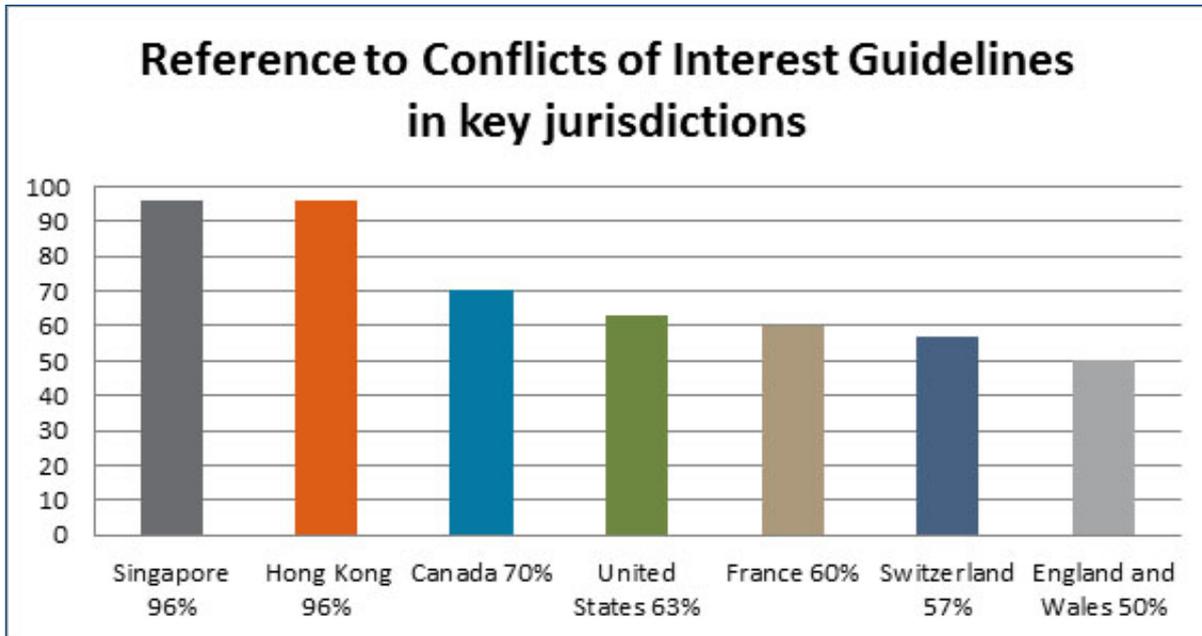


151. The above suggests that the nature of a particular legal system is not determinative of whether users in that jurisdiction rely on the Conflicts of Interest Guidelines. Alternatively, they could also suggest that the Conflicts of Interest Guidelines are more widely accepted in developed common law arbitral seats than developed civil law arbitral seats, where practitioners may rely on domestic ethical or legal rules to determine issues of conflicts of interest. By contrast, less traditional civil law arbitral seats may rely on the Conflicts of Interest Guidelines to fill in gaps in their own legal systems.

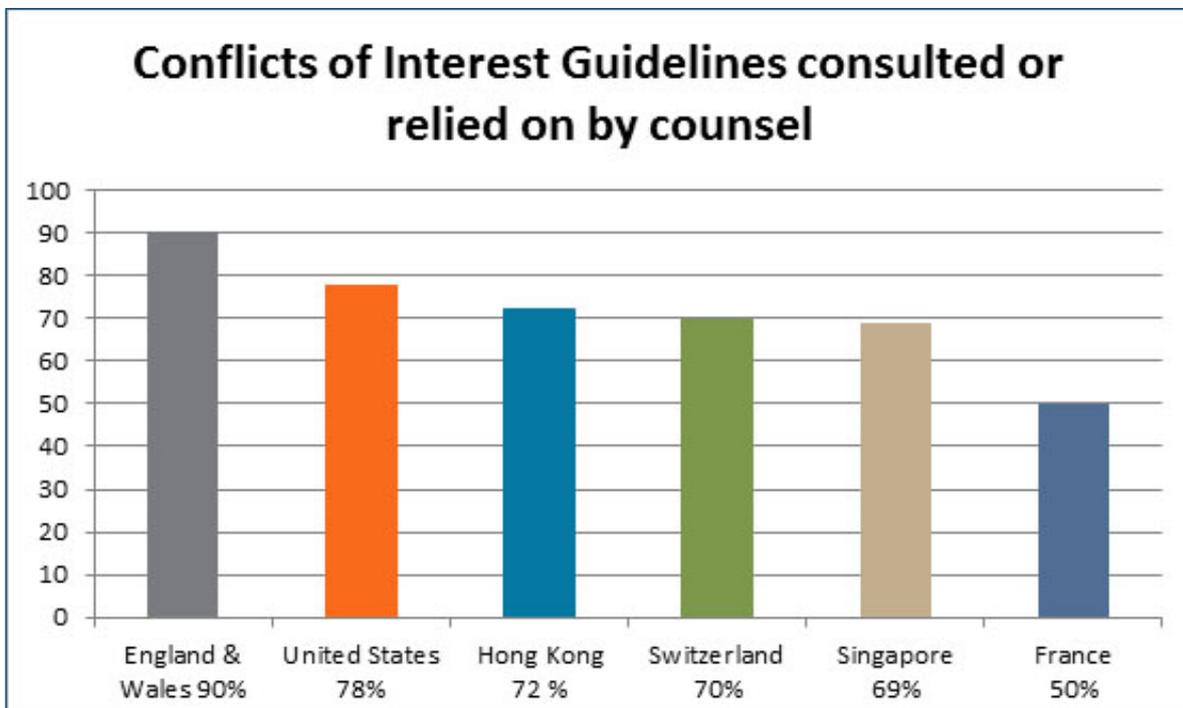
2. *The use of the Conflicts of Interest Guidelines in key jurisdictions*

152. The survey results suggest that the use of the Conflicts of Interest Guidelines in popular arbitral seats is relatively high.

153. The Conflicts of Interest Guidelines were referenced particularly frequently in arbitrations involving conflicts of interest in key jurisdictions in Asia, such as Hong Kong SAR (96 per cent) and Singapore (96 per cent), as well as North America, with Canada at 70 per cent and the US at 63 per cent. References to the Conflicts of Interest Guidelines in cases involving issues of conflicts were also high in key European jurisdictions, such as France (60 per cent) and Switzerland (57 per cent), while slightly less in England and Wales (50 per cent). Notably, the Conflicts of Interest Guidelines were also frequently referenced in jurisdictions that are less popular internationally but have a relatively developed domestic arbitral practice, such as Spain (76 per cent), Peru (65 per cent), the UAE (61 per cent), Brazil (60 per cent) and Mexico (56 per cent).



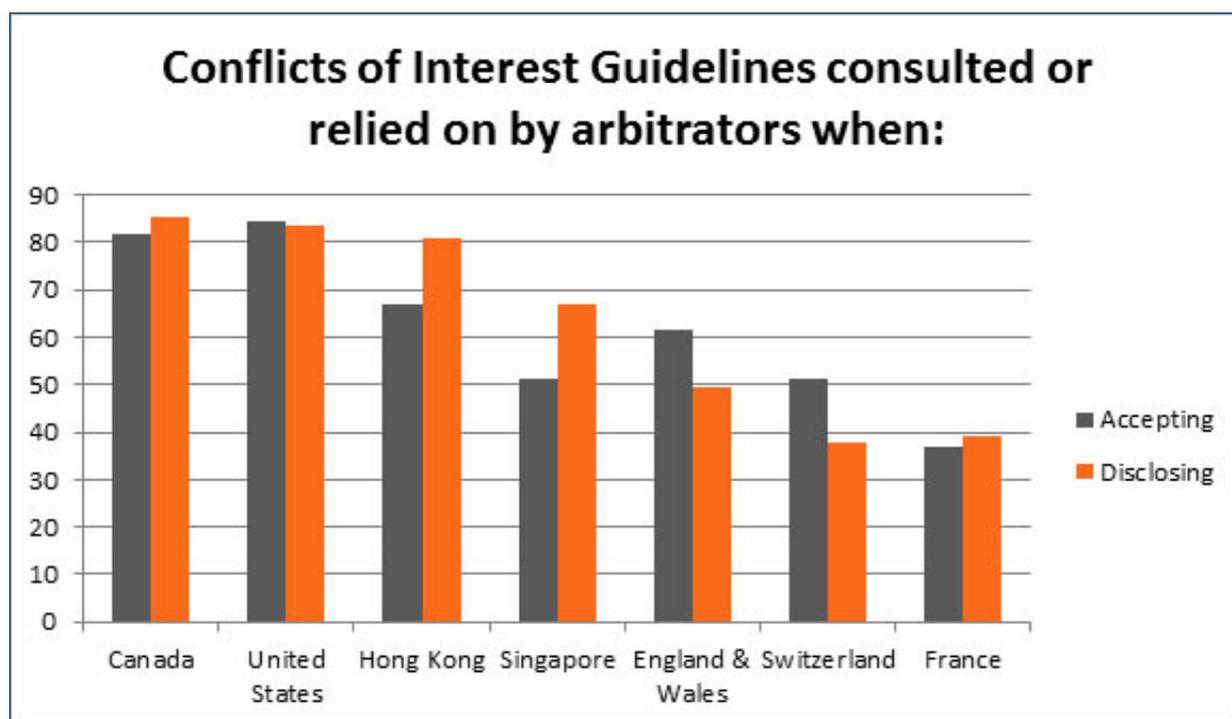
154. In line with these results, the Conflicts of Interest Guidelines were also frequently consulted or relied on by counsel in popular arbitral seats. As reflected in the following chart, the respondents who acted as counsel consulted or relied on the Conflicts of Interest Guidelines when selecting arbitrators in 90 per cent of cases in England and Wales, 78 per cent in the US, 72 per cent in Hong Kong SAR, 70 per cent in Switzerland and 69 per cent in Singapore, but only 50 per cent in France. This percentage was even higher in less traditional arbitral seats, such as the UAE (100 per cent), Mexico (98 per cent) and Peru (88 per cent), but fell sharply in Brazil (55 per cent).



155. Arbitrators in key jurisdictions consulted or relied on the Conflicts of Interest Guidelines somewhat less frequently, with some exceptions. This may suggest that arbitrators in these jurisdictions are more experienced and the arbitration laws are more developed concerning when and how impartiality and independence should be analysed. In Singapore, arbitrators

consulted or relied on the Conflicts of Interest Guidelines 52 per cent of the time when deciding to accept an appointment, and 67 per cent of the time when making a disclosure. In England and Wales, arbitrators consulted the Conflicts of Interest Guidelines 61 per cent of the time when accepting appointments and 49 per cent of the time when making disclosures. In Switzerland, arbitrators consulted the Conflicts of Interest Guidelines 51 per cent of the time when accepting appointments, but only 38 per cent of the time when making disclosures. In France, arbitrators consulted the Conflicts of Interest Guidelines 37 per cent of the time when accepting appointments and 39 per cent of the time when making disclosures. A notable exception is the US, where arbitrators consulted or relied on the Conflicts of Interest Guidelines 84 per cent of the time when deciding to accept an appointment, and 83 per cent of the time when making a disclosure. Hong Kong SAR is another exception, where arbitrators consulted or relied on the Conflicts of Interest Guidelines 67 per cent of the time when deciding to take on an appointment, and 81 per cent of the time when making a disclosure.

156. By contrast, in other active but less traditional arbitral seats, arbitrators tended to rely more frequently on the Conflicts of Interest Guidelines. In Brazil, arbitrators consulted the Conflicts of Interest Guidelines in 88 per cent of cases when deciding to take on an appointment, and in 90 per cent of cases when making disclosures. Similarly, in Peru, arbitrators relied on the Conflicts of Interest Guidelines 89 per cent of the time when deciding to take on an appointment, and 85 per cent of the time when making a disclosure. In Mexico, arbitrators consulted the Conflicts of Interest Guidelines 80 per cent of the time when deciding whether to take on an appointment, and 63 per cent of the time when making disclosures. Finally, in the UAE, arbitrators consulted the Conflicts of Interest Guidelines 100 per cent of the time, whether to decide to take on an appointment or in making disclosures. However, the UAE figures may be unreliable due to the small sample size.



3. *What are the specific provisions referenced?*

157. As to the provisions of the Conflicts of Interest Guidelines being used by the international arbitration community, the survey results show that no particular part of the Conflicts of Interest Guidelines seemed to be consulted or relied on significantly more often than others. The aggregate responses not only indicated many different provisions from both Part I (General Standards) and Part II (Practical Application of the General Standards), but also many individual practitioners reported having used ‘various’ or ‘all’ provisions, the ‘entire set’ of the Conflicts of Interest Guidelines or the ‘general standards and the lists’.

4. *What is the status of the Conflicts of Interest Guidelines in the arbitrations in which they are referenced?*

158. The survey has no data on whether or to what extent the Conflicts of Interest Guidelines have been used with a binding nature, or only as guidelines (non-binding nature).

159. That being said, some Country Reports reveal that certain arbitral institutions either recommend their incorporation into the terms of reference at the beginning of the arbitration, thereby inducing the parties to make them binding, or routinely apply the Conflicts of Interest Guidelines when deciding on issues of conflicts of interest (thereby making them binding at the decision stage). The following cases are worth noting:

- In Peru, the model *Acta de Instalación* (a form of terms of reference) of the Lima Chamber of Commerce (La Cámara de Comercio de Lima (CCL)) includes a provision stating that the Conflicts of Interest Guidelines, as well as the other IBA Rules and Guidelines, will apply to the arbitration. According to the Country Report, this practice is accepted by the parties in roughly 50 per cent of cases. The CCL and two other arbitral institutions in Peru routinely apply the Conflicts of Interest Guidelines when deciding issues of conflicts of interest.⁸⁸
- In Portugal, the Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa makes a formal reference to the Conflicts of Interest Guidelines in its criteria for the appointment of arbitrators, noting that, as a rule, the president of the centre shall not accept the appointment of an arbitrator who falls into a situation described in the non-waivable Red List.
- In South Korea, the Korean Commercial Arbitration Board has created its own Code of Ethics for Arbitrators that is largely consistent with the Conflicts of Interest Guidelines.
- In Costa Rica, one of the four main arbitral institutions, the Centro Internacional de Conciliación y Arbitraje of the American-US Chamber of Commerce (CICA), issued a directive that includes some of the provisions of the Conflicts of Interest Guidelines. Similarly, in 2011, the Centro de Conciliación y Arbitraje of the Costa Rican Chamber of Commerce (CCA) established a directive inspired by the Conflicts of Interest Guidelines, according to which all persons approached to act as arbitrators must disclose, among other things, how many times the same party and/or law firm has appointed them in the past five years.

⁸⁸ The reporter for Peru was able to provide references to 15 examples of challenges decided by arbitral institutions that had invoked the Conflicts of Interest Guidelines.

C. The Conflicts of Interest Guidelines in case law

160. References to the Conflicts of Interest Guidelines by local courts are rare. This does not necessarily mean that courts do not apply or take into consideration the Conflicts of Interest Guidelines: the reporters for several jurisdictions noted that the absence of a case law database or search engine made the search for jurisprudence difficult. As a result, the Country Reports may not be an accurate reflection of the available case law referring to the Conflicts of Interest Guidelines.
161. That being said, it appears undisputed that the rate at which the Conflicts of Interest Guidelines were referred to or relied on 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. This may be due to a number of reasons, in particular:
- lack of knowledge/familiarity of domestic judges with the Conflicts of Interest Guidelines;
 - the existence of domestic ethical codes that courts must (or prefer) to use instead of the Conflicts of Interest Guidelines;
 - in some cases, the Conflicts of Interest Guidelines may have been raised or relied on by the parties, but courts ultimately may not have found it necessary to refer to them in their decision; and
 - given the limited grounds on which the courts can become involved in an arbitration before, during or after proceedings, courts do not have many opportunities to comment on the use of the Conflicts of Interest Guidelines.
162. The following paragraphs aim at presenting how the Conflicts of Interest Guidelines were applied by local courts in all six regions.

Europe

163. In Europe, the application of the Conflicts of Interest Guidelines by local courts varies significantly from one jurisdiction to the other, and information on judicial case law is scarce. However, where available, the data suggests that local courts refer to the Conflicts of Interest Guidelines with approval.
164. Reported citations tend to come from Superior Courts or Courts of Appeal or, in some instances, the Supreme Court, when dealing with challenges to arbitrators or challenges of arbitral awards. For instance:
- In Spain, case law shows general acceptance of the Conflicts of Interest Guidelines, as they are consistently used by domestic courts as persuasive authority. The wide use of this particular IBA product could be attributed to two reasons. First, the Conflicts of Interest Guidelines are useful not only with regard to international arbitration but also in relation to domestic arbitration. Second, Article 17 of the Spanish Arbitration Act (pursuant to which the arbitrator must be ‘independent and impartial’ during the arbitration proceeding and has the duty to disclose any circumstance that may affect said independence or impartiality) is an open provision and the practical approach of the colour-coded lists provides concrete guidance that is useful in applying Article 17’s broad standard. There are many recent citations to

the Conflicts of Interest Guidelines from the Superior Court of Justice.⁸⁹ For example, in *Frio Montrans v Telecomunicaciones Palomo*,⁹⁰ the court analysed the impartiality of the arbitral institution by taking into consideration the Conflicts of Interest Guidelines. Particularly, the court relied on the Conflicts of Interest Guidelines and concluded that it is not only the members of the arbitral tribunal who are obliged to be impartial, but this obligation extends also to the institutions that administer the arbitration proceedings.

- In Switzerland, in the last five years, the Swiss Federal Supreme Court has referred to the Conflicts of Interest Guidelines in five cases. In four of these cases, the parties had invoked the Conflicts of Interest Guidelines,⁹¹ whereas in one of them, the court referred to the Conflicts of Interest Guidelines on its own motion.⁹² While the court considered the Conflicts of Interest Guidelines in two of these cases when coming to its decision,⁹³ its position on the Conflicts of Interest Guidelines (first articulated in 2008)⁹⁴ is that ‘one should not overestimate the weight to be given to these formal grounds. It should not be forgotten that, although these guidelines represent a useful tool (in determining issues of conflicts of interest), they do not have force of law. Consequently, the particular circumstances of a case and the relevant case law will remain the determining factor in deciding a question of conflicts of interest.’⁹⁵
- In Austria, the Austrian Supreme Court has cited the Conflicts of Interest Guidelines on four occasions in the last five years. One of these cases concerned a challenge to an arbitral award on the grounds of lack of impartiality of one of the arbitrators,⁹⁶ whereas the other three concerned challenges – all relating to the same facts – to the same sole arbitrator in two parallel proceedings.⁹⁷ In three of these cases, the plaintiff had invoked the Conflicts of Interest Guidelines to support its challenge.⁹⁸ In all four decisions, the Supreme Court referred to the Conflicts of Interest Guidelines as such in its reasoning, but referred to particular provisions of the Conflicts of Interest Guidelines to support its reasoning in only two of those decisions.⁹⁹ Notably, in all these cases, the Supreme Court stated that, absent an

89 *Cárnicas 7 Hermanos SA v Compañía Española de Seguros de Crédito a la Exportación (CESCE) SA*, Superior Court of Justice of Madrid (Civil and Criminal Chambers, s 1), Judgment No 93/2015, 17 December 2015 (Claim No 11/2015); *Consultores Integrales de Telecomunicación Consulintel SL v Telefónica Investigación y Desarrollo, SAU*, Superior Court of Justice of Madrid, Judgment No 68/2015, 6 October 2015 (Claim No 14/2015); *Frio Montrans SL v Telecomunicaciones Palomo SL*, Superior Court of Justice of Madrid, Judgment No 65/2015, 17 September 2015 (Claim No 106/2014); *Iberpistas SACE, Corporación Industrial Bankia, SAU v Desarrollo de Concesiones Viarias Uno, SL, Corporación Industrial Bankia, SA, SACYR, SA*, Superior Court of Justice of Madrid, Judgment No 61/2015, 2 September 2015 (Claim No 64/2014); *Constructora de Viviendas Unifamiliares, SL, v BBVA*, Superior Court of Justice of Madrid, 26 May 2015 (Claim No 63/2011); *Repos i Repàs, SL v BBVA*, Superior Court of Justice of Madrid, Judgment, 28 January 2015 (Claim No 20/2014); *Indispensable Europea, SL v Technology Hotels, SL*, Superior Court of Justice of Madrid, Judgment, 24 September 2014 (Claim No 15/2014); *Delforca 2008, Sociedad de Valores, SA v Banco Santander, SA*, Madrid Court of Appeals, Judgment, 30 June 2011 (Claim No 3/2009).

90 *Frio Montrans, SL v Telecomunicaciones Palomo, SL*, Superior Court of Justice of Madrid, Judgment No 65/2015, 17 September 2015 (Claim No 106/2014).

91 Decision of the Swiss Federal Supreme Court No 4A_458/2009 of 10 June 2010; Decision of the Swiss Federal Supreme Court No 4A_110/2012 of 9 October 2012; Decisions of the Swiss Federal Supreme Court Nos 4A_258/2009 of 11 January 2009 and 4A_256/2009 of 11 January 2009.

92 Decision of the Swiss Federal Supreme Court No 4A_234/2010 of 29 October 2010.

93 In the other three cases, the Swiss Federal Supreme Court dismissed the challenge as untimely. Decision of the Swiss Federal Supreme Court No 4A_110/2012 of 9 October 2012, and decisions of the Swiss Federal Supreme Court Nos 4A_258/2009 of 11 January 2009 and 4A_256/2009 of 11 January 2009.

94 Decision of the Swiss Federal Supreme Court No 4A_506/2007 of 20 March 2008, para 3.3.2.2.

95 Decision of the Swiss Federal Supreme Court No 4A_458/2009 of 10 June 2010, para 3.3.3.1 (English working translation).

96 OGH 17 June 2013, 2 Ob 112/12b.

97 OGH 05 August 2014, 18 ONc 1/14p, OGH 05 August 2014, 18 ONc 2/14k, and OGH 19 April 2016, 18 ONc 3/15h.

98 OGH 17 June 2013, 2 Ob 112/12b, OGH 05 August 2014, 18 ONc 2/14k and OGH 05 August 2014, 18 ONc 1/14p.

99 In decision OGH 17 June 2013, 2 Ob 112/12b, the Supreme Court noted in its reasoning that the facts described did not fall into the Conflicts of Interest Guidelines’ non-waivable Red List, and therefore it ultimately dismissed the challenge. In decision OGH 19 April 2016, 18 ONc 3/15h, in addition to referring to Austrian case law, the Supreme Court referred to s 12b) and c) of the Conflicts of Interest Guidelines, and found that a neutral and reasonable third party in knowledge of the relevant facts would have considered it probable that the arbitrator’s decision-making was not limited to the facts of the case, but was also influenced by other facts or circumstances. It also found that the Conflicts of Interest Guidelines’ standard corresponded to Austrian case law in that regard.

agreement of the parties, the Conflicts of Interest Guidelines are not binding, but may still serve as a guide to assess the impartiality or independence of an arbitrator.¹⁰⁰

- In Belgium, in the last ten years, the courts have referred to the Conflicts of Interest Guidelines in at least two instances. In a 2011 decision, the Brussels Court of Appeals – recognising that the Conflicts of Interest Guidelines are non-binding guidelines – rejected the plaintiff’s reliance on the Orange List, as these only call for disclosure in the case of two or more repeat appointments by the same party, whereas the case in question revolved around the appointment of an arbitrator in another unrelated matter by one of the parties.¹⁰¹ In the famous *Schwebel* case¹⁰² in 2007, the Brussels Court of Appeals referred expressly to the general principle that the non-disclosure of a potential conflict of interest does not in itself lead to the automatic disqualification of the arbitrator. This principle set out in the Orange List of the Conflicts of Interest Guidelines was the basis for the court’s decision to refuse to set aside an award because the arbitrator had not disclosed that he had been appointed twice by the same party.
- In Sweden, the Conflicts of Interest Guidelines have been referenced in two cases decided by the Swedish Supreme Court in the last ten years. In the first case, after relying on the Conflicts of Interest Guidelines for guidance, the Supreme Court found that an arbitrator’s failure to disclose a relationship with a law firm representing the respondent was a sufficient ground to set aside the award.¹⁰³ In the second case, the Supreme Court dismissed a challenge against an award based on the alleged lack of independence of one of the arbitrators, considering among other factors that the Conflicts of Interest Guidelines do not provide a sanction for non-disclosure.¹⁰⁴
- In England and Wales, the Conflicts of Interest Guidelines were referred to in two cases: *A v B*,¹⁰⁵ and *W Limited v M Sdn Bhd*.¹⁰⁶ The latter case was especially significant because it addressed the changes introduced in the Conflicts of Interest Guidelines in 2014, and it also expressed some disapproval towards the drafting of the Conflicts of Interest Guidelines. Knowles J, CBE identified ‘weaknesses’ in the Conflicts of Interest Guidelines regarding the coloured-lists classification system.
- In Germany, the Conflicts of Interest Guidelines have been explicitly referred to in at least two decisions of the German state courts.¹⁰⁷ Notably, in the most recent decision, a German court ruled that section 3.3.7 of the Conflicts of Interest Guidelines could neither be applied directly nor by way of an *argumentum a fortiori*. According to the court, the Conflicts of Interest Guidelines contain a definitive list of the relationships that require disclosure, and cases of failure to disclose generally only result in secondary claims against the arbitrator and do not constitute grounds for a challenge.¹⁰⁸

100 OGH 17 June 2013, 2 Ob 112/12b, OGH 05 August 2014, 18 ONc 1/14p, OGH 05 August 2014, 18 ONc 2/14k and OGH 19 April 2016, 18 ONc 3/15h.

101 Brussels Court of Appeals, 6 December 2011, ‘Brussel 6 december 2011’, 2014 b-Arbitra 215, Vol 1.

102 *Poland v Eureko & Stephen M Schwebel*, Brussels Court of Appeals, Decision, 29 October 2007 (unpublished).

103 *AJ v Ericsson AB*, NJA 2007 p 841.

104 *AB Fortum Värme v Korsnäs AB*, NJA 2010 p 317.

105 [2011] EWHC 2345 (Comm).

106 [2016] EWHC 422 (Comm).

107 Both relevant decisions were rendered by the Oberlandesgericht Frankfurt am Main (Higher Regional Court of Frankfurt am Main; ‘OLG Frankfurt’): OLG Frankfurt, [2008] SchiedsVZ 96 *et seq*; OLG Frankfurt, [2014] BeckRS 12967.

108 OLG Frankfurt, [2014] BeckRS 12967.

- In the Czech Republic, the Supreme Court referred explicitly to the Conflicts of Interest Guidelines in a case of a court's exclusion of an arbitrator from a dispute.¹⁰⁹
- In Lithuania, there was one recorded case in which the Court of Appeal, when considering the impartiality and independence of an arbitrator, referred to Article 1.1 of the Red List of the Conflicts of Interest Guidelines.¹¹⁰
- In Norway, there have not been any explicit references to the Conflicts of Interest Guidelines in *published* case law.¹¹¹ However, the reporters were aware of at least one *unpublished* decision of the Trondheim District Court where General Standard 6 of the Conflicts of Interest Guidelines was explicitly referenced in the court's reasoning.¹¹²
- In Russia, there were no cases explicitly referencing the Conflicts of Interest Guidelines, but the Supreme Arbitrazh (Commercial) Court has referenced the Conflicts of Interest Guidelines (specifically, section 1.2 of the non-waivable Red List) in its review of court practice on the application of the public policy exception.¹¹³

165. By contrast, in other jurisdictions, judicial courts tended not to apply or refer to the Conflicts of Interest Guidelines at all. This was the case in France, Italy and the Netherlands.

- In France and Italy, there appeared to be no cases referencing the Conflicts of Interest Guidelines.
- In Ireland, there were no reported court decisions from 2010 onwards that make reference to the Conflicts of Interest Guidelines.
- By contrast, in the Netherlands, at least one court affirmatively refused to apply the Conflicts of Interest Guidelines. This was a case before the Court of Rotterdam¹¹⁴ in which the plaintiff had invoked the Conflicts of Interest Guidelines to challenge an award on the basis of an arbitrator's alleged impartiality. However, the court specifically refused to apply the Conflicts of Interest Guidelines when deciding on this matter.

166. The reluctance of these courts to apply the Conflicts of Interest Guidelines may be due to the existence of well-settled domestic ethical codes. This appeared to be particularly the case in Italy, at least with respect to domestic arbitrations, where the independence and impartiality of arbitrators may be deemed to be sufficiently addressed by the Italian Code of Civil Procedure and the Deontological Code for Italian lawyers.

167. That being said, as shown in paragraphs 162 *et seq* above, the dearth of judicial case law in these jurisdictions does not mean that the Conflicts of Interest Guidelines are not used. The survey results show that the Conflicts of Interest Guidelines have been referenced or relied on by parties in a large percentage of cases in which issues of conflicts arose. Indeed, while the domestic law of many European jurisdictions imposes on arbitrators a duty of independence and impartiality (eg, the French Code of Civil Procedure (Article 1456),¹¹⁵ the Belgian Judicial Code (Article

109 Decision of the Supreme Court of the Czech Republic No 23 Cdo 3150/2012 of 30 September 2014.

110 '*Sativa Group*' OÜ v UAB '*Galinta ir partneriai*', Court of Appeal of Lithuania, civil case No 2T-84/2014, Ruling, 29 September 2014.

111 However, because only the decisions of the Supreme Court and of the six appeals courts are systematically published, there is a possibility that there may be decisions from the district courts with explicit reference to the Conflicts of Interest Guidelines that have not been published.

112 Decision of the Trondheim District Court of 26 September 2008 (TTRON-2008-20883).

113 Information Letter of the Supreme Arbitrazh Court No 156 dated 26 February 2013 'Review of Arbitrazh Court Practice in Applying the Public Policy Exception as a Ground for Refusal to Recognize and Enforce Foreign Judgments and Arbitral Awards'.

114 Bureau Veritas-Inspection-Valuation Assessment and Control-BIVAC BV/[unknown], Rb Rotterdam, 11 May 2011, ECLI:NL:RBROT:2011:BQ6204.

115 Art 1456 of the French Code of Civil Procedure provides: 'Before he accepts his mission, the arbitrator must reveal all the information which could affect his impartiality or independence. He must also reveal any similar information that could arise after he accepts his mission.'

1685 section 2)¹¹⁶ and the Dutch Code of Civil Procedure (Article 1033),¹¹⁷ these provisions do not set out any specific standard nor do they refer to given situations where a conflict of interest may arise. As a result, in practice, parties often refer to the Conflicts of Interest Guidelines as guidance, although this use may not be then reflected in the resulting judicial decisions.

168. Finally, in yet another set of jurisdictions, the lack of case law referencing the Conflicts of Interest Guidelines appeared to be mainly the result of a lack of familiarity with the guidelines.

North America

169. The number of references to the Conflicts of Interest Guidelines in judicial case law in North America is minimal:

- In Canada, only two reported cases referenced the Conflicts of Interest Guidelines. In one case, the court concluded that the applicant failed to rebut the presumption of impartiality. It noted that the Conflicts of Interest Guidelines are ‘widely recognized as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases’.¹¹⁸ The court awarded costs to the respondent on a substantial indemnity scale in an effort to ‘deter losing parties in international commercial arbitrations from launching baseless ex post facto challenges to an arbitrator’s impartiality’.¹¹⁹ In the second case, the court ordered the removal of the chairperson from a case in which she would have been required to rule on whether the decision of another partner in her law firm in another arbitration case constituted issue estoppel in the present case. The court found that the Conflicts of Interest Guidelines shed light ‘directly on the issue of this Chairperson through the lens of the arbitration community’.¹²⁰ The court found that the relationship between the chairperson and her partner, the arbitrator in the other case, was akin to example 2.3.3 in the Conflicts of Interest Guidelines and ordered the chairperson’s removal.
- In the US, the 2004 Conflicts of Interest Guidelines have been referenced in written decisions in the federal courts at least three times, but the more recent Conflicts of Interest Guidelines have not appeared in federal court cases.

Latin America

170. There is very little publicly available information regarding the application of the Conflicts of Interest Guidelines by local courts in Latin America. In some jurisdictions, this lack of information may be due to the lack of a systematised database in which such cases may be searched. However, even in countries where such a database is available, the search yielded virtually no results. This shows that the Conflicts of Interest Guidelines have not yet gained acceptance among local courts.

116 Art 1685 of the Belgian Judicial Code provides: ‘The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to the provisions of § 3 and § 4 of this article and the general requirement of independence and impartiality of the arbitrator or of the arbitrators.’

117 Art 1033(1) of the Dutch Code of Civil Procedure provides: ‘An arbitrator may be challenged if there are justifiable doubts as to his impartiality or independence.’

118 *Jacob Securities Inc v Typhoon Capital BV*, 2016 ONSC 604, para 41.

119 *Jacob Securities Inc v Typhoon Capital BV*, 2016 ONSC 604, para 64.

120 *Telesat Canada v Boeing Satellite Systems International Inc*, 2010 ONSC 4023, para 154.

171. Indeed, the results of the survey and the Country Reports suggest that most local courts in Latin America tend *not* to apply the Conflicts of Interest Guidelines, either because of a lack of familiarity with them they prefer to apply domestic rules to decide on challenges based on conflicts of interest or the parties do not invoke them.
172. Only one judicial decision referring to the Conflicts of Interest Guidelines was identified in the Latin American jurisdictions studied: an annulment recourse decided by the Lima Commercial High Court in Peru, in which the court agreed with the challenging party that, under the Conflicts of Interest Guidelines, the arbitrator had a duty to disclose a certain fact to the parties. However, the court ultimately ruled that the recourse was inadmissible because it had not been filed in a timely fashion.¹²¹

Asia Pacific

173. Following the same trend, citations to the Conflicts of Interest Guidelines in the Asia Pacific region are also rare. For example:
- In New Zealand, in *Child Cancer Foundation Inc v Piessé*,¹²² the panel dismissed a challenge to an expert's independence and impartiality where the expert had been a former law partner of the counsel for the complainant 13 years earlier and had received 11 instructions from his former law firm over the 13 years he had been at the bar. The panel looked to the section of the 2004 Conflicts of Interest Guidelines providing that an arbitrator can continue to act if there is no objection from either party within 30 days of disclosure, a provision that is also in the 2014 version of the guidelines. The panel distinguished the case from items on the Orange List on the basis of the length of time between the end of the partnership and the present engagement, and the fact that experts in domain name disputes, the subject of the case, were appointed in a manner that protects against improprieties.
 - In India, in one case,¹²³ the Bombay High Court determined that no bias could be attributed to an arbitrator who was engaged by solicitors of one of the parties in an unrelated matter. When the appellant cited a judgment from the Delhi High Court that had considered the Conflicts of Interest Guidelines,¹²⁴ the respondents successfully distinguished their case.
 - There have been no significant references made to the Conflicts of Interest Guidelines in Malaysia's case law, although counsel have made arguments that have relied on the Conflicts of Interest Guidelines. In *MMC Engineering Group Bhd & Anor v Wayss & Freytag (Malaysia) Sdn Bhd & Anor*,¹²⁵ for example, counsel cited the Conflicts of Interest Guidelines to support the argument that arbitrators are to be independent and impartial and that disclosure should be the default rule. The court referenced counsel's argument, but did not comment on it.

The Middle East

174. There is no case law referring to the Conflicts of Interest Guidelines in any of the jurisdictions

121 *Química Suiza v Dongo-Soria, Gaveglho y Asociados*, Lima Commercial High Court, Case No 155-2012, Court Order No 43, Decision regarding the annulment of the Arbitral Award, 6 June 2012.

122 *Child Cancer Foundation Inc v Piessé*, 21 March 2014, DRS Ref 897.

123 *Perma Container (UK) Line Limited v Perma Container Line (India) Ltd* MANU/MH/0615/2014.

124 *Shakti Bhog foods Limited v Kola Shipping Ltd*, 21 August 2012, MANU/DE/3955/2012.

125 *MMC Engineering Group Bhd & Anor v Wayss & Freytag (Malaysia) Sdn Bhd & Anor*, [2015] 1 LNS 705.

reviewed from the Middle East. However, this lack of case law does not necessarily reflect mistrust towards the Conflicts of Interest Guidelines. Several Country Reports have given different explanations for these negative findings:

- the report for Israel states that it may be due to an underdeveloped local arbitration market;
- the report for Kuwait also explains this is due to a lack of awareness of the existence of Conflicts of Interest Guidelines, not necessarily a negative view of the guidelines;
- the report for Qatar justifies this situation by the fact that Qatari courts typically do not publish their decisions, and the country relies on a civil code system rather than a judicial precedent system;
- the report for Turkey similarly explains that Turkish High Court decisions generally do not discuss the whole case but only refer to the litigious matter in question in their final reports, which would explain the lack of reference to a soft law instrument such as the Conflicts of Interest Guidelines; and
- the report for Lebanon states that these negative results illustrate a general lack of knowledge of the Conflicts of Interest Guidelines, which can be explained by the fact that the Conflicts of Interest Guidelines have not yet been implemented in Lebanon due to the ‘lack of practical guidance from arbitral institutions’;¹²⁶ the report also explains that differences in language and legal culture may contribute to practitioners’ lack of familiarity with the existence of the Conflicts of Interest Guidelines.

Africa

175. We have not been provided with any case law referring to the Conflicts of Interest Guidelines in the African jurisdictions studied, nor do we have any separate knowledge of any decisions.

D. The Conflicts of Interest Guidelines in legal publications

176. The Conflicts of Interest Guidelines have caught the attention of legal scholars across the globe, particularly in jurisdictions with active arbitration communities. In those jurisdictions, scholars tend to view the Conflicts of Interest Guidelines as a useful soft law tool in arbitration practice. For instance, authors such as Yves Derains, Grégoire Bertrou and Quentin De Margerie have opined that the Conflicts of Interest Guidelines have led to an autoregulated system, progressively creating custom in arbitration practice, and have contributed to improving arbitration practice.¹²⁷

177. The following paragraphs present how the Conflicts of Interest Guidelines were cited in publications in all six regions.

Europe

178. The Conflicts of Interest Guidelines have been frequently cited in publications in Europe, when conflicts of interest and/or challenges of arbitrators are discussed. The Conflicts of Interest Guidelines are sometimes the focus of the publication, and other times are discussed in more general treatises on arbitration. For instance:

¹²⁶ Lebanon, Country Report, s 1.1.3, p 5.

¹²⁷ Y Derains, ‘Le Professionnalisme des arbitres’, 2012 Cahiers de droit de l’entreprise No 4, dossier 19; G Bertrou, Q De Margerie, ‘Obligation de révélation de l’arbitre: tentative de synthèse après la publication des nouvelles règles de l’IBA’, 2015 Les Cahiers de l’Arbitrage 33, Vol 1; M De Boissésou, ‘La “Soft Law” dans l’arbitrage’, 2014 Les Cahiers de l’Arbitrage 520, Vol 3.

- In Belgium, the Conflicts of Interest Guidelines have received particular attention in an article by Caroline Verbruggen¹²⁸ in which she gave a detailed explanation of their influence on Belgian case law. However, the Belgian Country Report specifies that, for most authors, the Conflicts of Interest Guidelines may only serve as a starting point for arbitrators, even more so in a ‘small legal community such as Belgium where lawyers active in arbitration are bound to meet in other capacities’.¹²⁹
- In France, the Conflicts of Interest Guidelines have been referenced in a number of legal publications relating to international arbitration.¹³⁰ They have also been specifically discussed in a large number of articles dealing with conflicts of interest.¹³¹
- In Switzerland, the Conflicts of Interest Guidelines are referenced in a number of leading arbitration commentaries,¹³² as well as publications focused on the guidelines themselves.¹³³
- In Poland, the Conflicts of Interest Guidelines are referenced in academic publications on arbitration and commercial law, and collections of essays that are published as a tribute to individuals or to mark anniversaries of institutions. The Conflicts of Interest Guidelines also come up in numerous shorter articles in professional journals that discuss select aspects of arbitration and are more practice-orientated.¹³⁴
- In Germany, several legal publications make reference to or deal directly with the Conflicts of Interest Guidelines, predominantly from a practitioner’s point of view.¹³⁵
- In Russia, unlike courts and arbitrators, legal writings demonstrate some interest in the Conflicts of Interest Guidelines. The majority of publications use the Conflicts of Interest Guidelines to exemplify current international best practice in the field.¹³⁶

128 C Verbruggen, ‘The Arbitrator as a Neutral Third Party’ in G Keutgen (ed), *Walking a Thin Line, What an Arbitrator Can do, Must Do, or Must Not Do* (2010), pp 39–40.

129 Belgium, Country Report, IBA Arbitration Guidelines and Rules Subcommittee, s 1.3.3.

130 In the latest international arbitration treaty published in France in 2013, authors refer to the IBA Rules and Guidelines as regulatory norms that can be adopted by the parties and may be referred to by arbitrators for the conduct of the proceedings, see C Seraglini, J Ortscheidt, *Droit de l’Arbitrage Interne et International* (2013), paras 66-852. Previous treatises on international commercial arbitration published or updated before 2010 also contained references to the IBA Rules and Guidelines; eg, P Fouchard, E Gaillard, B Goldman, *Traité de l’arbitrage commercial international* (1996), the treatise refers to the IBA Rules and Guidelines describing them as reflecting harmonised practice and emphasising their importance in international arbitration, paras 355, 356, 362, 1044, 1129, 1160, 1401 concerning the IBA Guidelines on Conflicts of Interest.

131 S Lazareff, ‘De l’immoralité présumée de l’arbitre’, 2009 *Gazette du Palais* 3, Vol 199; D Bensaude, ‘Présentation des Règles IBA 2010 sur l’administration de la preuve, par Denis Bensaude’, 2011 *Revue de l’Arbitrage*, p 1113, Issue 4; Y Derains, ‘Le Professionnalisme des arbitres’, 2012 *Cahiers de droit de l’entreprise dossier* 19, Vol 4; M de Boissésou, ‘La “Soft Law” dans l’arbitrage’, 2014 *Les Cahiers de l’Arbitrage* 522, Vol 3; C Benson, ‘The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration’, 2014 *Les Cahiers de l’Arbitrage* 47, Vol 1; G Bertrou, Q De Margerie, ‘Obligation de révélation de l’arbitre: tentative de synthèse après la publication des nouvelles règles de l’IBA’, 2015 *Les Cahiers de l’Arbitrage* 33, Vol 1.

132 M Arroyo (ed), *Arbitration in Switzerland: the Practitioner’s Guide* (2013); B Berger, F Kellerhals, *International and Domestic Arbitration in Switzerland* (2nd ed, 2010); T Göksu, *Schiedsgerichtsbarkeit* (2014); G Kaufmann-Kohler, A Rigozzi, *International Arbitration – Law and Practice in Switzerland* (2015).

133 N Voser, AM Petti, ‘The Revised IBA Guidelines on Conflicts of Interest in International Arbitration’ 2015 *ASA Bulletin* 6, Vol 33; B Gottlieb, ‘Authority of Para-Regulatory Texts in International Arbitration’, 2012 *Selected Papers on International Arbitration* 35, Vol 2; M Leemann, ‘Challenging international arbitration awards in Switzerland on the ground of lack of independence and impartiality of an arbitrator’, 2011 *ASA Bulletin* 10, Vol 29.

134 A Szumański (ed), *System Prawa Handlowego. Tom 8. Arbitraż Handlowy* (2015); M Łaszczuk et al (eds), *Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi* (2012); B Gessel-Kalinowska vel Kalisz (ed), *The Challenges and the Future of Commercial and Investment Arbitration. Liber Amicorum Professor Jerzy Rajski* (2015); J Okolski et al (eds), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie* (2010).

135 Cf, inter alia, C Wolf, N Eslami, in V Vorwerk, C Wolf (eds), *Beck’scher Online Kommentar zur ZPO*, s 1036 paras 11 *et seq*; W Voit, in HJ Musielak, W Voit (eds), *Zivilprozessordnung*, s 1036, paras 5 *et seq*; J Münch, in T Rauscher, P Wax, J Wenzel (eds), *Münchener Kommentar zur Zivilprozessordnung*, s 1049, paras 5 *et seq*; JH Nedden, in J Nedden, AB Herzberg (eds), *Praxiskommentar zu den Schiedsgerichtsordnungen*, Art 14 ICC Rules, para 29; JH Nedden, J Büstgens, ‘Die Beratung des Schiedsgerichts – Konfliktpotential und Lösungswege’, [2015] *SchiedsVZ* 169; R Dendorfer, ‘Aktives Vergleichsmanagement – Best Practice oder Faux pas schiedsrichterlicher Tätigkeit?’, [2009] *SchiedsVZ* 276; SH Elsing, ‘Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds’, [2011] *SchiedsVZ* 114; K Pörnbacher, P Duncker, S Baur, ‘Gaspreisanpassungs-Schiedsverfahren – Hintergründe und prozessuale Besonderheiten’, [2012] *SchiedsVZ* 289.

136 AA Korchin, ‘The Fight Against “Pocket” International Commercial Arbitrations and Issues of Independence and Impartiality of Arbitrators in Russian Judicial Practice’, *International Commercial Arbitration Newsletter*, 2013, No 1; RM Khodykin, ‘Independence and Impartiality of Arbitrators in Investment Disputes’, *Tretyksiy Sud*, 2011, No 4.

North America

179. The situation in North America is divided: while in the US the Conflicts of Interest Guidelines have been referenced in numerous publications, 137 in Canada, the guidelines are referred to in only a few publications.¹³⁸

Latin America

180. The Conflicts of Interest Guidelines have not received much discussion in legal publications in Latin America, with some notable exceptions, usually in jurisdictions with a more active arbitration culture. Even then, these publications are usually not devoted to the Conflicts of Interest Guidelines themselves, but rather to more general issues in international arbitration.

181. The Conflicts of Interest Guidelines have been widely discussed in legal publications only in some jurisdictions in Latin America: notably, in Argentina, Brazil, Chile, Mexico, Peru and Uruguay. Based on the publications identified by the reporters, Brazil had by far the largest number of publications referencing the Conflicts of Interest Guidelines,¹³⁹ followed by

137 Notably in D D'Allaire, R Trittman, 'Disclosure Requests in International Commercial Arbitration: Finding A Balance Not Only Between Legal Traditions but Also Between the Parties' Rights', 2011 *Am Rev Int'l Arb* 119, Vol 22; SF Ali, 'The Morality of Conciliation: An Empirical Examination of Arbitrator "Role Moralities" in East Asia and the West', 2011 *Harv Negot L Rev* 1, Vol 16; KM Blankley, 'Lying, Stealing, and Cheating: The Role of Arbitrators As Ethics Enforcers', 2014 *U Louisville L Rev* 443, Vol 52; G Bottini, 'Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration', 2009 *Suffolk Transnat'l L Rev* 341, Vol 32; NM Crystal, F Giannoni-Crystal, "'One, No One and One Hundred Thousand"...Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration', 2013 *Miss C L Rev* 283, Vol 32, p 293; OE García-Bolívar, 'Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes', 2006 *Disp Resol J* 76, Vol 60; RA Holtzman, 'The Role of Arbitrator Ethics', 2009 *DePaul Bus & Com LJ* 481, Vol 7; P Horn, 'A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration', 2014 *NYU JL & Bus* 349, Vol 11; J Levine, 'Dealing with Arbitrator 'Issue Conflicts' in International Arbitration', 2006, *Disp Resol J* 60, Vol 61; ML Moses, 'Ethics in International Arbitration: Traps for the Unwary', 2012 *Loy U Chi Int'l L Rev* 73, Vol 10; MK Niedermeyer, 'Ethics for Arbitrators at the International Level: Who Writes the Rules of the Game?', 2014 *Am Rev Int'l Arb* 481, Vol 25.

138 JB Casey, *Arbitration Law of Canada: Practice and Procedure* (2nd ed, 2011); J Kenneth McEwan, LB Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (2014).

139 AT de AC Boscolo, GV Benetti, 'O Consensualismo como Fundamento da Arbitragem e os Impasses Decorrentes do Dissenso', 2014 *Revista de Direito Empresarial* 303, Vol 2; CA Carmona, 'Em Torno do Árbitro', 2011 *Revista de Arbitragem e Mediação* 47, Vol 28; T Cavalieri, 'Imparcialidade na Arbitragem', 2014 *Revista de Arbitragem e Mediação* 117, Vol 41; J Dolinger, 'O Árbitro da Parte - Considerações Éticas e Práticas', 2005 *Revista Brasileira de Arbitragem* 29, Vol 2; RC Figueiredo, '*Urbaser SA e Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina* (ICSID case n. ARB/07/26): A Decisão Sobre o Pedido de Desqualificação de Árbitro de 12.08.2010', 2011 *Revista de Arbitragem e Mediação* 313, Vol 29; G Giusti, 'A Ética das Instituições de Arbitragem', 2013 *Revista Brasileira de Arbitragem* 78, Vol 10, Issue 40; JM Júdice, DG Henriques, 'Regras para Nomeação de Árbitros: O Exemplo do Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa', 2015 *Revista de Arbitragem e Mediação* 241, Vol 46; JB Lee, MC Procopiak, 'A Obrigação da Revelação do Árbitro - Está Influenciada por Aspectos Culturais ou Existe um Verdadeiro Standard Universal?', 2007 *Revista Brasileira de Arbitragem* 9, Vol 4, Issue 14; SMF Lemes, 'A independência e a Imparcialidade do Árbitro e o Dever de Revelação', 2010 *Revista Brasileira de Arbitragem*-21, Vol 7, Issue 26; PH Lucon, 'Imparcialidade na Arbitragem e Impugnação aos Árbitros', 2013 *Revista de Arbitragem e Mediação* 39, Vol 39; RD Marques, 'Breves Apontamentos sobre a Extensão do Dever de Revelação do Árbitro', 2011 *Revista Brasileira de Arbitragem* 59, Vol 31; RD Marques, MM Muchiuti, 'As Diretrizes da IBA relativas a Conflitos de Interesses em Arbitragem Internacional', 2014 *Migalhas*, www.migalhas.com.br/dePeso/16,MI213334,21048-As+diretrizes+da+IBA+relativas+a+conflitos+de+interesses+em accessed 22 February 2017; AC Martins, 'Deveres de Imparcialidade e Independência dos Peritos em Arbitragem: Uma Reflexão sob a Perspectiva da Prática Internacional', 2013 *Revista de Arbitragem e Mediação* 99, Vol 39; NFC Moreira, 'The Arbitrators' Duty of Disclosure Analyzed Through Case-law: Are the IBA Guidelines on Conflict of Interest in International Arbitration Enough to Create Consistency?', 2014 *Revista de Arbitragem e Mediação* 115, Vol 40; MC Procopiak, 'As Diretrizes do International Bar Association sobre Conflitos de Interesses na Arbitragem Internacional', 2007 *Revista Brasileira de Arbitragem* 7, Vol 4, Issue 14; FSM dos Santos, 'Impedimento e Suspeição do Árbitro: O Dever de Revelação', 2012 *Revista de Arbitragem e Mediação* 35, Vol 35; A Wald, 'A Ética e a Imparcialidade na Arbitragem', 2013 *Revista de Arbitragem e Mediação* 17, Vol 39.

Argentina,¹⁴⁰ Chile,¹⁴¹ Colombia,¹⁴² Mexico,¹⁴³ Peru¹⁴⁴ and Uruguay.¹⁴⁵

182. In most cases, the Conflicts of Interest Guidelines have been referenced in general publications relating to arbitration or, more specifically, in the context of publications dealing with conflicts of interest. Only in Brazil was it possible to identify publications devoted exclusively to the Conflicts of Interest Guidelines.¹⁴⁶

Asia Pacific

183. References to the Conflicts of Interest Guidelines in legal publications are also unevenly distributed in the Asia Pacific region. In Singapore, several publications have addressed the Conflicts of Interest Guidelines from a Singaporean perspective.¹⁴⁷ The Conflicts of Interest Guidelines are also discussed in some publications in mainland China,¹⁴⁸ and in important texts on arbitration in Hong Kong SAR.¹⁴⁹

The Middle East

184. The Conflicts of Interest Guidelines have been discussed in legal publications only in certain jurisdictions, notably in Lebanon, where some publications refer directly to the Conflicts of

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- 140 H Grigera Naón, 'La ley modelo sobre arbitraje comercial internacional y el derecho argentino', [1989] La Ley 1021; JC Rivera, *Arbitraje Comercial Internacional y Doméstico*, Lexis-Nexis (2007), p 238 *et seq.*; ML Velazco, 'La causal genérica de recusación en el Reglamento CEMA', [2013] MEDyAR Centro de Mediación y Arbitraje; RJ Caivano, V Sandler Obregón, 'El contrato entre las partes y los árbitros en el Código Civil y Comercial', [2015] RCCyC p 143; RJ Caivano, 'Independencia e imparcialidad de los árbitros y buena fe procesal', [2013] La Ley F175.
- 141 E Barros Bourie, A Germain Ronco, 'Los Conflictos de Interés en el Arbitraje Internacional', 2015 Santiago Arbitration and Mediation Center, ADR Papers.
- 142 A Collazos Ortíz, 'The importance of ethics in the role of arbitrators', 2013 Revista Análisis Internacional 7, Universidad Tadeo Lozano, p 39 *et seq.*; LM Escobar-Martínez, 'La independencia, imparcialidad y conflicto de interés del árbitro', 2009 Revista Colombiana de Derecho Internacional 15, Pontificia Universidad Javeriana, p 181 *et seq.*; JA García-Muñoz, A Collazos Ortíz, 'El deber arbitral de revelar información relevante', Revista Internacional Foro de Derecho Mercantil 20, Legis, p 93 *et seq.*; JC González, 'Las directrices de la IBA sobre imparcialidad e independencia de los árbitros', Ámbito Jurídico, Marzo de 2015; N Giraldo Carrillo, 'The 'repeat arbitrators' issue: A subjective concept', 2011 Revista Colombiana de Derecho Internacional 19, Pontificia Universidad Javeriana, p 75 *et seq.*; F Mantilla-Serrano, 'Ética y Arbitraje', Ámbito Jurídico, Febrero de 2011; A Zuleta Londoño, JC Fandiño-Bravo, M Escobar et al, 'Colombia', 2016 Commercial Arbitration Know-How, Global Arbitration Review.
- 143 C von Wobeser, 'Mexico', 2013 Arbitration Guide, IBA Arbitration Committee; Instituto Mexicano de Arbitraje, *Legislación Mexicana de Arbitraje Comercial Comentada* (2015).
- 144 G Arribas 'Designando Árbitros', 2015 Enfoque derecho, <http://enfoquederecho.com/internacional/designando-arbitros/>; F De Trazegnies 'Conflictuando el conflicto: los conflictos de interés en el arbitraje', 2015 Revista de Derecho Themis 57, Vol 53; F Osterling, G Miró Quesada, 'Conflicto De Intereses: El Deber De Declaración Y Revelación De Los Árbitros', 2013 Osterling Firm 14.
- 145 L Formento, V Nuñez, 'Conflicto de Interés y Exequatur de Laudos Arbitrales Extranjeros', 2014 Revista de Derecho de la Universidad de Montevideo 249, Vol 26.
- 146 MC Procopiak, 'As Diretrizes do International Bar Association sobre Conflitos de Interesses na Arbitragem Internacional', 2007 Revista Brasileira de Arbitragem 7, Vol 4, Issue 14; NFC Moreira, 'The Arbitrators' Duty of Disclosure Analyzed Through Case-law: Are the IBA Guidelines on Conflict of Interest in International Arbitration Enough to Create Consistency?', 2014 Revista de Arbitragem e Mediação 115, Vol 40; RD Marques, MM Muchiuti, 'As Diretrizes da IBA relativas a Conflitos de Interesses em Arbitragem Internacional', 2014 Migalhas, www.migalhas.com.br/dePeso/16,MI213334,21048-As+diretrizes+da+IBA+relativas+a+conflitos+de+interesses+em accessed 22 February 2017.
- 147 LS Chan, *Singapore Law on Arbitral Awards* (2011), pp 152, 172; S Menon, D Brock (eds), *Arbitration in Singapore: A Practical Guide* (2014), pp 184–185, 521–525; S Menon, 'Keynote Address – International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' in ICCA Congress Series No 17 (2013), p 3; D Jones, 'Comments on the Speech of the Singapore Attorney General' in ICCA Congress Series No 17 (2013), p 29; B Giaretta, 'Duties of Arbitrators and Emergency Arbitrators under the SIAC Rules', 2012 Asian International Arbitration Journal 196, Vol 8, Issue 2; LS Chan, 'Arbitrators' Conflicts of Interest: Bias By Any Name', 2007 Singapore Academy of Law Journal 245, Vol 19; S Chong, 'Singapore Institute of Arbitrators Annual Dinner 6 November 2013 – Speech by the Attorney General', 2013 Singapore Institute of Arbitrators Newsletter 3, Issue 8.
- 148 K Fan, *Arbitration in China: a legal and cultural analysis* (2013); Q Ren, ('Arbitrators' Recusals in International Investment Arbitration', a Master's dissertation in Chinese submitted to Southwest University of Political Science & Law in 2012; W Sun, M Willems, *Arbitration in China: a practitioner's guide* (2015); A Ye, HH Liu, (Whether to abolish the prohibition of lawyers from representing clients in arbitration administered by the arbitration commission(s) where the lawyer used to act or still currently acts as an arbitrator), published/posted on Chinalawinsight.com on 15 July 2013; Z Zhang, (A brief summary in Chinese to help the readers understand the IBA Guidelines on Conflicts of Interest in International Arbitration), 5 November 2015, www.huanzhonglaw.com accessed 22 February 2017.
- 149 F van Eupen, 'Chapter 11: Arbitrators', in *Arbitration in Hong Kong SAR: A Practical Guide*, 3rd ed; J Choong and J R Weeramantry, The Hong Kong SAR Arbitration Ordinance: Commentary and Annotations.

Interest Guidelines,¹⁵⁰ and in the UAE in more general publications on arbitration.¹⁵¹

Africa

185. We have not been provided with nor have we knowledge of legal publications referring to the Conflicts of Interest Guidelines in the African jurisdictions previously listed.

E. Need to amend the Conflicts of Interest Guidelines and suggestions in that regard

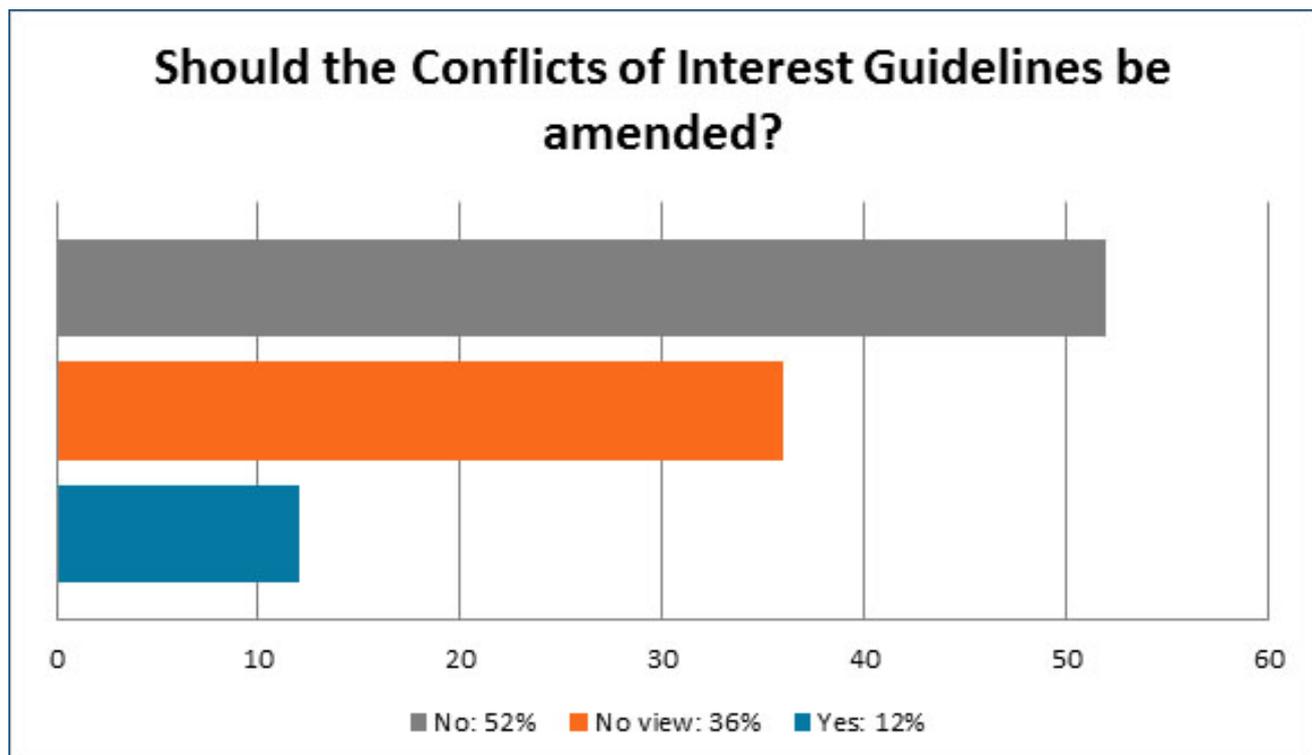
186. In general, the Conflicts of Interest Guidelines appeared to have been well received across the various jurisdictions surveyed. However, the respondents in various countries answered affirmatively to the question on whether the Conflicts of Interest Guidelines need revision. For instance:

- in France, the majority (78 per cent) of practitioners are satisfied with current Conflicts of Interest Guidelines. However, a minority pushed for their revision (four out of 28);
- six respondents in Canada believed that the IBA Arbitration Committee should revise the Conflicts of Interest Guidelines, whereas only two believed they are not in need of revision;
- in the US, 14 per cent of the respondents believed the Conflicts of Interest Guidelines should be changed;
- the majority of the respondents in Nigeria (11 out of 12, or 92 per cent) appeared to be satisfied with the Conflicts of Interest Guidelines (ie, they either had no view or did not feel that the Conflicts of Interest Guidelines needed to be revised); and
- within the surveys carried out in Middle-Eastern countries, the general trend shows that a majority of practitioners were satisfied with the Conflicts of Interest Guidelines (22 out of 24 in the combined surveys, or 92 per cent).

150 P N Ziade 'The Conflicts of Interests in International Arbitration in theory and Practice', 2013 *Journal of Arab Arbitration* 71, Vol 20; M Bou Saber, 'Appointment of an Arbitrator, his independency and impartiality', 2010 *Journal of Arab Arbitration* 649, Vol 8 bis; A El Ahdab, 'Impartiality and Independency of Arbitrators', *Encyclopedia of Arbitration, International Arbitration* 214, Vol 3.

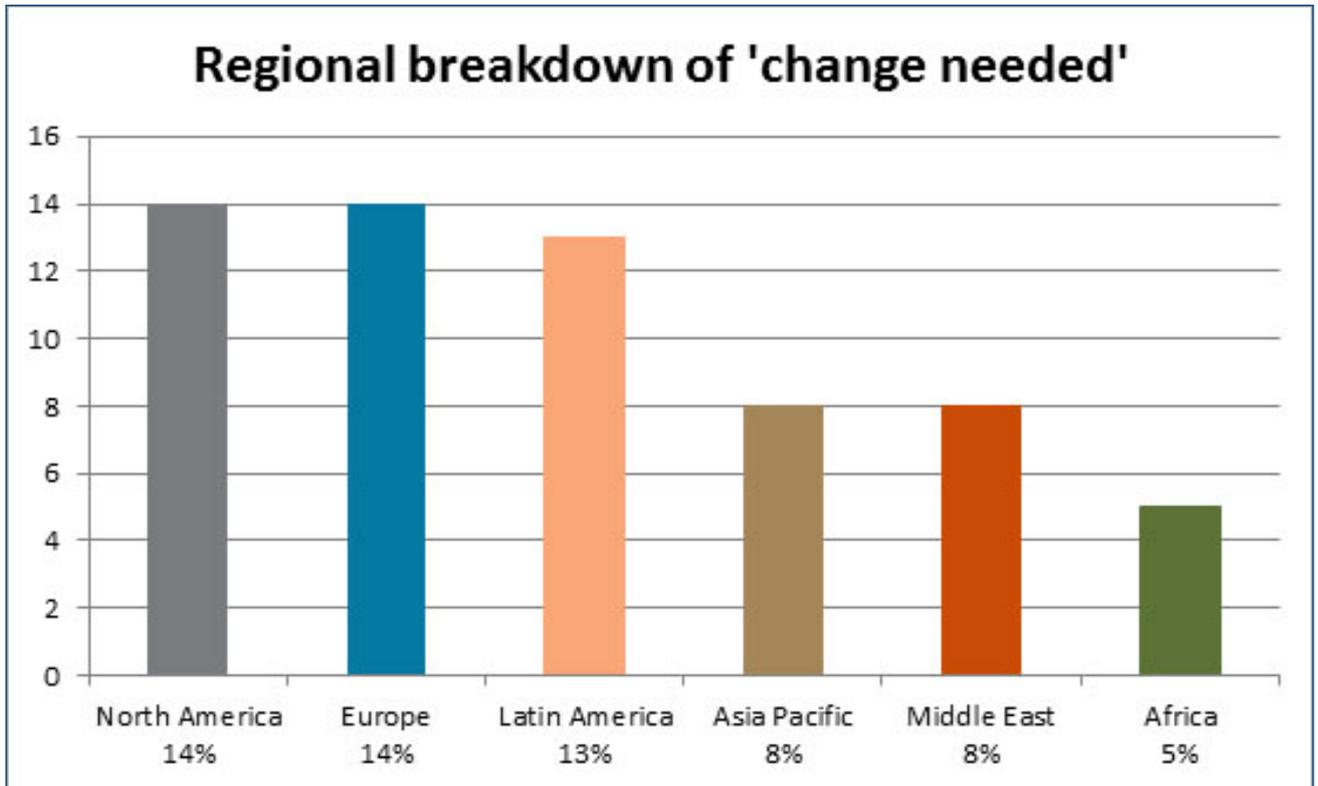
151 G Blanke, C Abi Habib Kanakr, 'Arbitration in Dubai: A Basic Primer', *Austrian Yearbook on International Arbitration* (2011), p 217; R Mohtashami, 'Recent Arbitration-related Developments in the UAE', 2008 *Journal of International Arbitration* 631, Vol 25, Issue 5.

187. The global reception of the Conflicts of Interest Guidelines is demonstrated in the following chart:



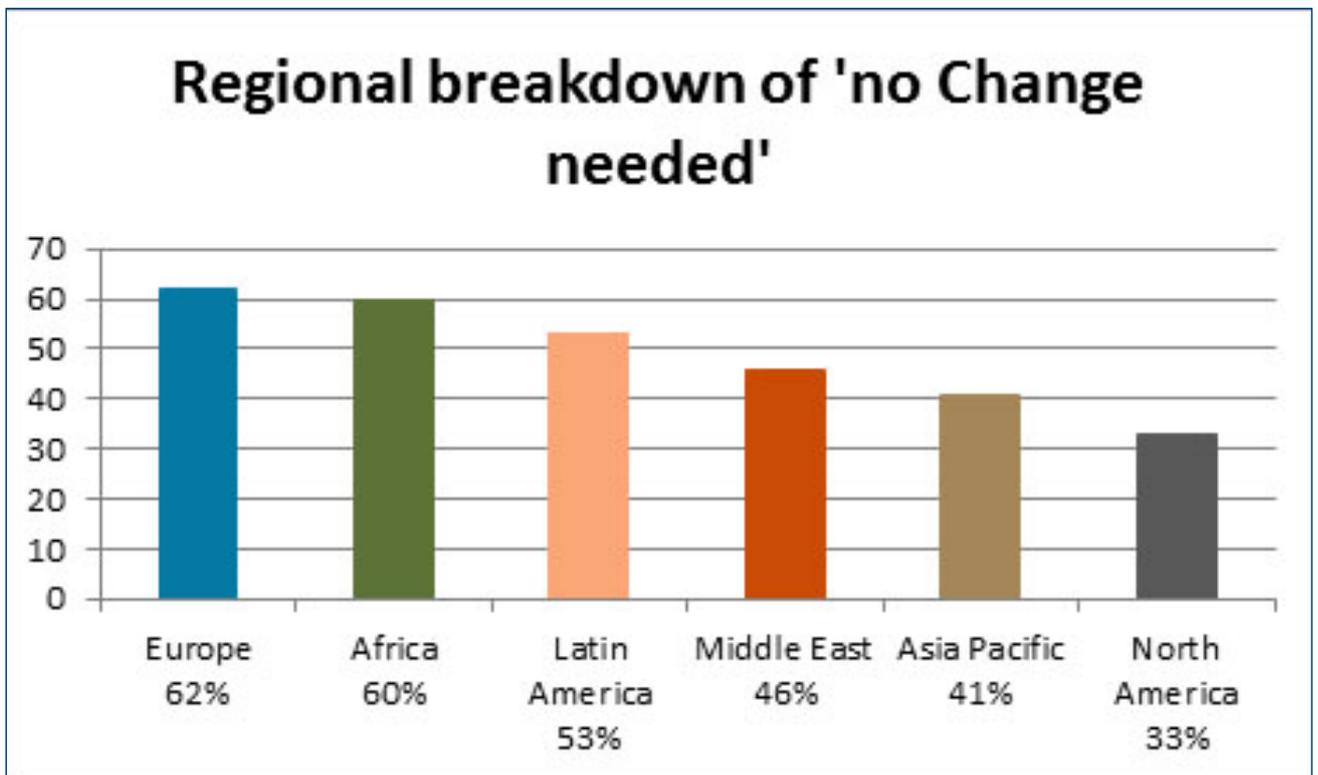
188. Compared to answers to the same question regarding the other IBA Rules and Guidelines (Rules on Evidence and Party Representation Guidelines), a large proportion of the respondents considered that the Conflicts of Interests Guidelines should be amended (12 per cent as opposed to nine per cent and eight per cent for the other IBA Rules and Guidelines, respectively). Nonetheless, this percentage remains low compared to those who believe they should not be amended (ie, 52 per cent), which is a meaningful percentage when compared to the results obtained for this same answer regarding whether the Rules on Evidence and the Party Representation Guidelines should remain unchanged (ie, 54 per cent and 36 per cent, respectively).

189. The following chart illustrates the percentage of respondents by region that believed that the Conflicts of Interest Guidelines needed to be amended.



190. The respondents from Europe and Latin America, regions that frequently use the Conflicts of Interest Guidelines, generated the highest percentage of votes in favour of amendment. Africa and Asia Pacific, on the other hand, generated the lowest percentage of votes in favour of amendment – only around five per cent and eight per cent, respectively.

191. The following chart illustrates the percentage of respondents by region that believed that the Conflicts of Interest Guidelines did not require amendment.



192. Interestingly, though, apart from the respondents from Africa, it is also the respondents from

Europe and Latin America who led the support for not revising the Conflicts of Interest Guidelines (with 62 per cent and 53 per cent, respectively). Sixty per cent of the respondents from Africa did not favour a change.

193. Broadly speaking, the different comments fall under the following categories: (i) promotion; (ii) guidance; (iii) update; (iv) adaptation; and (v) revision. These will be discussed below.

194. **Promotion:** There are many countries that are unfamiliar with the Conflicts of Interest Guidelines. Therefore, the first step is to promote them in those countries in order for practitioners to be aware of them. This comment was made in the Country Reports or responses for most African jurisdictions, Austria, Costa Rica, Dominican Republic, Ecuador, Peru, Russia, and Thailand, among others.

195. **Guidance:** Once the Conflicts of Interest Guidelines are known, the respondents noted that they needed to be explained in particular cases. For example:

- in Germany, practitioners asked for guidance as to connections between counsel and the arbitrator;
- in the Czech Republic and Portugal, they requested particular examples so as to identify clearly the situations in which the Conflicts of Interest Guidelines can be used;
- one respondent from Canada indicated that ‘there is a need to provide greater clarity on some categories and to assist in circumstances where experts serve as counsel or on situations where counsel are arbitrators in assessing arguments raised in the current case’. Another indicated that ‘[i]t would be useful to add guidelines on conflicts of interest for experts, and grounds for expert disqualification’;
- one respondent from Mexico stated that disclosure obligations could be better explained, for instance, with more practical examples and commentaries, in order to better understand when a disclosure is necessary. This was noted as important because overuse of disclosures leads to superfluous challenges.
- in Singapore, one respondent suggested ‘clearer guidance on the meaning of “law firm” given the different ways in which law practices are now organised, especially across jurisdictions’ and that ‘perhaps more clarity on obligation to disclose how many times a particular law firm or commercial entity has previously appointed or nominated that same arbitrator’;
- in Japan, a respondent pointed out that it is unclear whether the Conflicts of Interest Guidelines’ revisions should apply to cases where the arbitrator’s decision on disclosure has already been made;
- one respondent from Nigeria suggested that the Conflicts of Interest Guidelines should be reviewed in order ‘[t]o clarify degrees of social or familial relationship of party appointed arbitrator to his appointed counsel’;¹⁵² and
- one respondent from the UAE suggested that ‘[t]he arbitration institutions in the region should apply these rules in a proper way. Nothing [is] clear yet [on how to] apply these rules’.¹⁵³

196. **Update:** Other comments referred to the need to update the Conflicts of Interest Guidelines to the evolution of the law or to new technological trends. For example:

¹⁵² Nigeria, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 4, p 19.

¹⁵³ UAE, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 8, p 36.

- in France, one of the recurring requests is to take into account the evolution of case law in the General Principles of the Conflicts of Interest Guidelines: ‘Account should be taken on the evolutions in case law in a number of jurisdictions (for example France) in clarifying some of the Guidelines’;
- also in France, a more specific request was that the three lists included in the Conflicts of Interest Guidelines should also be revised in order to provide examples of more recent conflict situations: ‘Red, Orange and Green lists should be revisited in light of current trends’;
- also in France, it was suggested by a respondent that revised Conflicts of Interest Guidelines should ‘[c]ontemplate further situations’ by including examples of new practices that could raise potential conflicts of interest. This respondent highlighted the risk of mechanisms such as third-party funding;
- in Germany, the respondents asked for an update to account for social media;
- in Poland, the respondents mentioned the need to deal with conflicts of interests connected with academic activities;
- one respondent from the Netherlands suggested that ‘[t]he conflicts of interest relating to influence in the work sphere could be elaborated (eg, an arbitrator has a lower position in the organization than a party appointed expert)’;¹⁵⁴
- a respondent from Argentina said that the Conflicts of Interest Guidelines should seek to reduce the gaps in situations referenced in the different lists; that is, a situation referenced in one list (ie, Red List) that is also referenced in another list (ie, Orange List) in different circumstances;
- a respondent from Mexico stated that the number of cases and time periods considered in the Conflicts of Interest Guidelines could be revisited; and
- a respondent from Peru stated that the Conflicts of Interest Guidelines should refer [more] to the situation of repeat appointments.

197. **Adaptation:**

- The respondents from both Norway and Sweden expressed their concern with the need for the Conflicts of Interest Guidelines to be adapted to smaller jurisdictions, where they are too strict considering the number of people available for appointment as arbitrators.
- A respondent from Sweden also asked for a revision of the Conflicts of Interest Guidelines to take into account global law firms.
- A respondent from Brazil suggested that the IBA Arbitration Committee should consider the cultural backgrounds of other countries because the Rules on Evidence are very common law-orientated.

198. **Revision:** Some respondents requested the incorporation of new categories or the elimination of current categories. For instance:

- in the common law jurisdiction Country Reports, there appeared to be a desire to have the Conflicts of Interest Guidelines address the issue of conflicts arising from different roles assumed by barristers in the same chambers; for example, one respondent from England found it indefensible that barristers from the same chambers can be counsel and arbitrator in the same proceeding;

¹⁵⁴ The Netherlands, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 6, p 28.

- a respondent from the US suggested a renewed focus on ‘[t]wo areas at least: relationships involving barristers in the same chambers; clarification and perhaps more nuanced approach to understanding of the concept of the “arbitrator’s firm”, in light of the size and geographic dispersion of modern law firms and the variety of kinds of relationships that arbitrators may have with law firms – non-equity partner, counsel to firm, non-employee consultant, etc’;
- another respondent from the US wrote that ‘[a]n arbitrator should not sit on a panel in a case where one of the party’s counsel is also adverse counsel in another case against the same arbitrator. Thus, in one case the arbitrator is opposing counsel and in another it acts as arbitrator’;
- another comment was that the Red, Orange and Green Lists should be revisited to ensure that they capture the key scenarios that arise in practice, and to grant more flexibility; one respondent from the US stated that Section 3.2.1 should ‘be moved to the red list’ because ‘[t]his issue affects the integrity of the process as viewed from the outside and leads to collateral dispute’;
- a respondent from Argentina suggested that ‘[i]nvolvement as counsel adverse to one of the parties or to counsel to one of the parties – short of enmity but possibly generating a bias – should be identified as a source of conflict under the colour codes (probably waivable or even non-waivable red)’;
- one respondent from Argentina and another from Venezuela stated that the Conflicts of Interest Guidelines should develop more issue conflict situations;
- the respondents from Brazil, Costa Rica and El Salvador stated that the Conflicts of Interest Guidelines should be routinely reviewed to take into consideration new situations that are not currently contemplated;
- a respondent from Peru suggested that the Conflicts of Interest Guidelines should refer to the consequences of the lack of disclosure and impartiality on the annulment of the award;
- in South Korea, a respondent suggested that the Conflicts of Interest Guidelines should differentiate between cases where an arbitrator had been appointed but the case was terminated before an award was issued or early in the proceedings from regular proceedings;
- another respondent from South Korea took issue with Article 3.1.5, commenting that serving as arbitrator in another arbitration on a related issue involving one of the parties should not automatically suggest a lack of independence/impartiality;
- in Thailand, one respondent suggested that the IBA should make it absolutely clear that neutrality is a requirement, and if an arbitrator is found to have not acted neutrally, his or her name should be disclosed;
- one respondent from Israel suggested that ‘[i]t would be helpful for the guidelines to address a prospective arbitrator’s discussion of unrelated potential matters with a party’s counsel’; and
- a respondent from Lebanon suggested that Articles 3.3.6 and 3.7.7 be removed because of the difficulty to assess friendship and enmity between an arbitrator and counsel in practice.

F. Additional comments by the respondents

199. Some respondents to the survey made additional comments regarding the use of the Conflicts of Interest Guidelines that cannot be properly characterised as a request for revision:

- The comments in the French survey illustrated the positive view of a majority of participants

towards the Conflicts of Interest Guidelines. For instance, two respondents added that the Conflicts of Interest Guidelines were a ‘very useful tool. Realistic and practical,’¹⁵⁵ and they generally encouraged the initiative from the Arbitration Committee to supervise the use and application of the Conflicts of Interest Guidelines in French case law: ‘Always good to monitor’.¹⁵⁶

- A respondent from Singapore found the Conflicts of Interest Guidelines to be a ‘useful touchstone’, but was concerned that parties or arbitrators often resolve matters ‘by taking the line of least resistance’. As a result, he explained that it was rare for matters to require a decision by a tribunal or court. This cautious approach ‘leads to an inference of conflict where none exists particularly in the case of unsophisticated (or trouble-making) parties’.
- Another respondent from Japan noted that each country has its own conflict of interest rules, some of which could be even more stringent than the Conflicts of Interest Guidelines, and it would be helpful if those countries/institutions could share their experience in applying those rules.
- A respondent in Thailand noted that, as counsel in Thai ad hoc arbitrations, the respondent sends a copy of the Conflicts of Interest Guidelines as a matter of course to someone who is sought for potential appointment as an arbitrator.

IV. The IBA Guidelines on Party Representation in International Arbitration

A. Executive summary

200. The key findings from the survey with respect of the Party Representation Guidelines are as follows:

201. The Party Representation Guidelines were the least frequently used of the three IBA Rules and Guidelines, with references to the Party Representation Guidelines being made in less than 20 per cent of arbitrations involving issues of counsel conduct. That being said, the Party Representation Guidelines appeared to be more frequently used in common law jurisdictions than civil law jurisdictions.

202. In arbitrations in which the Party Representation Guidelines were referenced, tribunals usually only consulted the Party Representation Guidelines and did not feel bound by them.

203. There is no clear indication in the survey results that certain parts of the Party Representation Guidelines were cited considerably more frequently than other parts.

204. No public cases making reference to the Party Representation Guidelines could be identified. Legal publications usually only provide information on the Party Representation Guidelines and recommend using them. However, in at least one key arbitral jurisdiction (Switzerland), there has been considerable criticism with regard to the Party Representation Guidelines.

155 France, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, respondent No 3, p 15.

156 France, National Survey, IBA Arbitration Guidelines and Rules Subcommittee, p 5.

205. A majority of the respondents had no view as to whether the Party Representation Guidelines should be amended. Of the remaining respondents, a considerably larger number did not consider amendments necessary. The view that amendments should be made was held in particular by the respondents from Europe.

B. The Party Representation Guidelines in arbitral practice

1. How often are the Party Representation Guidelines referred to in arbitral practice?

206. According to survey results, the Party Representation Guidelines are the least frequently used of the three IBA Rules and Guidelines. Overall, the respondents identified 1,358 arbitrations in which issues of counsel conduct had arisen. Among these, a total of 16 per cent (218 out of 1,358) referenced the Party Representation Guidelines, as illustrated by the following chart:



207. However, there have been no published arbitration cases referencing the Party Representation Guidelines across the 54 jurisdictions. Most Country Reports commented that it was difficult to unearth references to the Party Representation Guidelines in local arbitral practice because most arbitral awards and decisions are confidential.

208. On the other hand, in most cases, the respondents skipped the questions regarding the relevance of the Party Representation Guidelines. That being said, insofar as the cases in which the respondents did provide answers, it appeared that, in a clear majority of the arbitrations in which the Party Representation Guidelines were referenced (almost 81 per cent), tribunals only consulted the Party Representation Guidelines as non-binding guidance. Tribunals felt bound by the Party Representation Guidelines only in 19 per cent of cases. Moreover, in arbitrations in which tribunals were bound by the Party Representation Guidelines, it was estimated that, in 83 per cent of cases, the Party Representation Guidelines

were incorporated in the terms of reference or the first procedural order. Conversely, the reference to the Party Representation Guidelines stemmed from the arbitration agreement only in 17 per cent of relevant arbitrations. The respondents also estimated that, out of the cases in which tribunals consulted the Party Representation Guidelines, tribunals followed the Party Representation Guidelines in almost 72 per cent of cases.¹⁵⁷

2. *The use of the Party Representation Guidelines in key jurisdictions*

209. Survey results for individual countries confirm that the Party Representation Guidelines were referenced rather infrequently. At least with regard to key jurisdictions, there is also a clear divide between civil law and common law countries, with arbitrations involving the respondents from common law countries referencing the Party Representation Guidelines more frequently.
- According to the respondents from France, the Party Representation Guidelines were very rarely referenced. In total, only six per cent of cases involving counsel conduct referenced the Party Representation Guidelines.
 - Out of the large number of reported arbitrations invoked by respondents from Switzerland in which issues of counsel conduct had arisen, only seven per cent referenced the Party Representation Guidelines.
 - Out of the large number of reported arbitrations involving issues of counsel conduct reported by the respondents from Germany, six per cent referenced the Party Representation Guidelines in some way.
 - For England and Wales, the respondents reported over 100 arbitrations in which issues of counsel conduct had arisen. Of these, it was said that 22 per cent referred to the Party Representation Guidelines.
 - With respect to the US, a large number of arbitrations were identified that involved issues of counsel conduct and, of those, 34 per cent referenced the Party Representation Guidelines.
 - Out of the arbitrations reported by the respondents from Singapore in which issues of counsel conduct arose, 38 per cent referenced the Party Representation Guidelines. It should be noted that this represents the experience of only six out of 20 respondents because the remaining 14 respondents who answered the question did not encounter any issues of counsel conduct.
 - The survey responses from mainland China were somewhat unexpected. Out of the reported arbitrations involving issues of counsel conduct, 79 per cent in some way referenced the Party Representation Guidelines. However, caution is needed before concluding that a relatively high percentage of arbitrations in mainland China adopt the Party Representation Guidelines. The survey was conducted in English only. As a result, the survey may only have received responses from those practitioners who have strong English language skills and may not have taken into account the full extent of Chinese domestic arbitration practice where the Guidelines may be less frequently relied on.
 - For Mexico, the survey indicates that the Party Representation Guidelines were not well known or regularly consulted by the respondents. According to the responses to the survey, 23 per cent of arbitrations involving counsel conduct referred to the Party Representation Guidelines.

¹⁵⁷ No breakdown by key jurisdictions has been prepared because, for most jurisdictions, the numbers of cases reported is too low to arrive at meaningful conclusions.

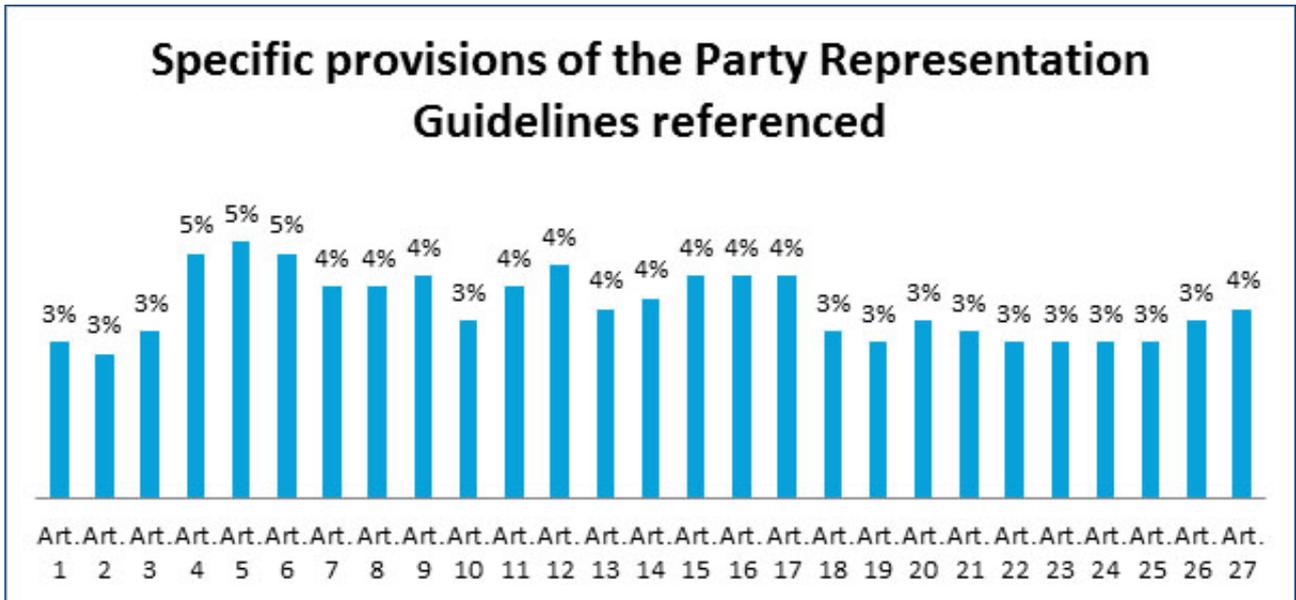
- The survey results indicate that the respondents from Brazil appeared to be less familiar with the Party Representation Guidelines compared to the other IBA Rules and Guidelines. Out of the arbitrations known to respondents from Brazil over the last five years in which issues of counsel conduct arose, 22 per cent referenced the Party Representation Guidelines.
- For Ecuador, the survey shows that the Party Representation Guidelines were used quite frequently in arbitrations involving issues of counsel conduct, albeit such arbitrations were rather rare. Specifically, 54 per cent of arbitrations involving issues of counsel conduct referenced the Party Representation Guidelines.
- According to the respondents from Peru, the Party Representation Guidelines were referenced in 12 per cent of the high number of reported arbitrations involving issues of counsel conduct.
- The respondents from Argentina accounted for 15 arbitrations in which party conduct issues arose and stated that, in 33 per cent of these, the Party Representation Guidelines were used or referenced.

3. *What are the specific provisions referenced?*

210. As to the specific provisions referenced in arbitrations, the respondents frequently stated that no specific provisions were invoked, but the Party Representation Guidelines as a whole had been referenced. Otherwise, the most referenced provisions were:

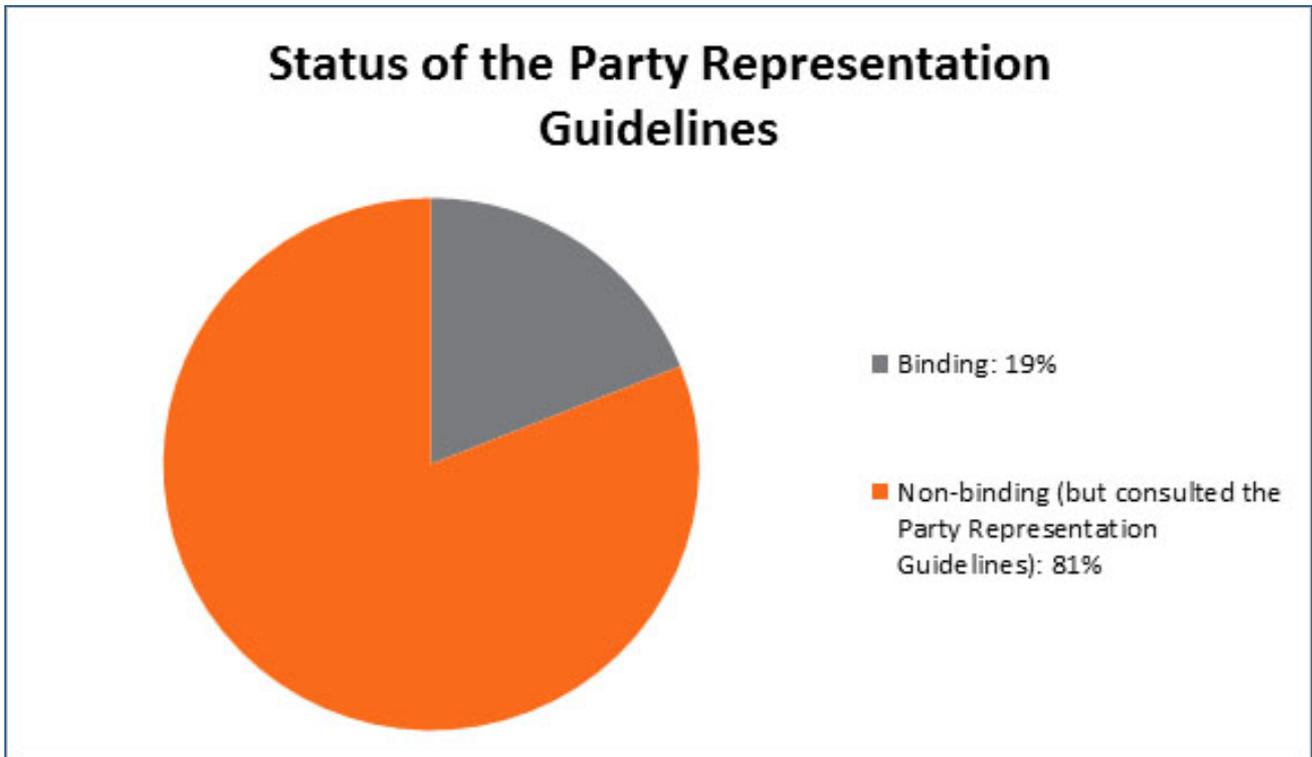
- Guidelines 4–6 dealing with conflicts of interest between the tribunal and party appointed representatives;
- Guidelines 7–8 dealing with communications between a party representative and arbitrator or potential arbitrator concerning the arbitration;
- Guidelines 9 and 11 dealing with submissions to the tribunal and concerning the responsibility of party representatives when making submissions and tendering evidence to the tribunal;
- Guidelines 12–17 relating to the conduct of party representatives in connection with information exchange and disclosure; and
- Guidelines 26–27 dealing with potential remedies to address misconduct by party representatives.

211. The frequency of references to those and other provisions is illustrated as follows:



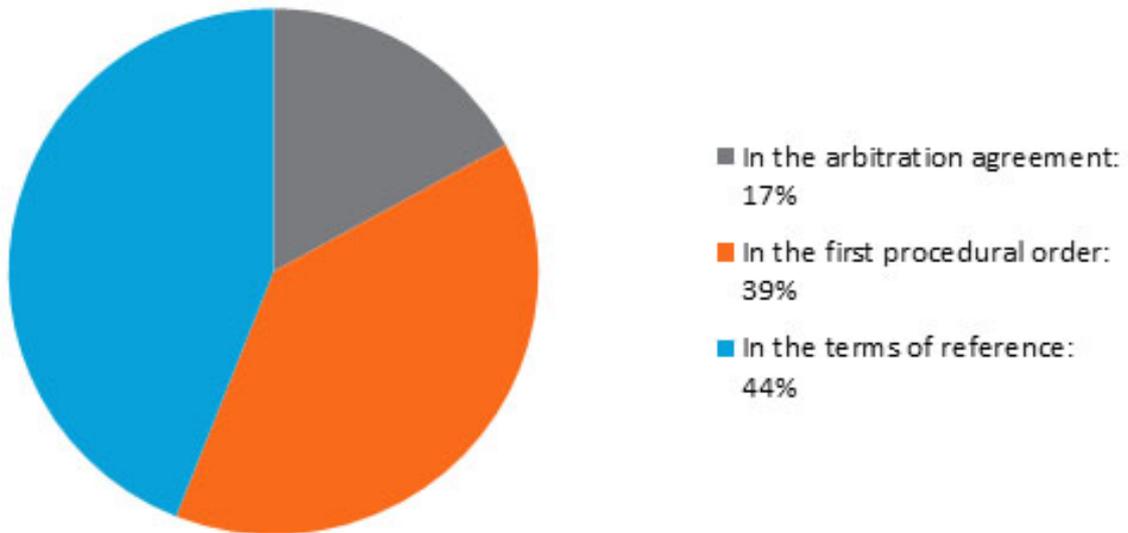
4. *What is the status of the Party Representation Guidelines in the arbitrations in which they are referenced?*

212. The Party Representation Guidelines are predominantly considered non-binding (81 per cent of referenced cases), as is illustrated in the following chart:



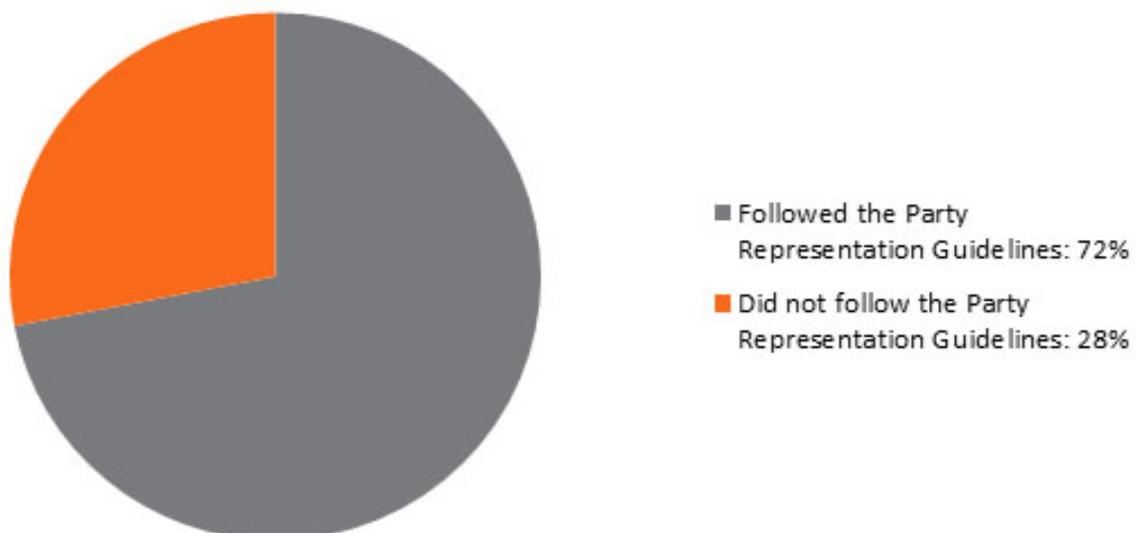
213. According to the survey responses, of the cases in which the Party Representation Guidelines were considered binding, such a binding nature was determined most frequently in the terms of reference (44 per cent) and the first procedural order (39 per cent). In 17 per cent of cases, the application of the Party Representation Guidelines had been stipulated in the arbitration agreement. That being said, due to the low number of cases in which the Party Representation Guidelines were referred to and considered binding, it is questionable whether this split is statistically meaningful.

Stages at which the status of the Party Representation Guidelines is decided



214. Moreover, according to the survey, 72 per cent of the tribunals that referred to the Party Representation Guidelines followed those guidelines, with 28 per cent of tribunals declining to do so. Again, due to the small sample size, it is questionable whether this split is statistically meaningful.

Tribunals following the Party Representation Guidelines



C. The Party Representation Guidelines in case law

215. Across the 57 jurisdictions for which there are Country Reports, there have been no reported litigation cases referencing the Party Representation Guidelines. Consequently, for all the jurisdictions considered in the Country Reports, judicial familiarity with, and response to, the Party Representation Guidelines remains unknown.

D. The Party Representation Guidelines in legal publications

216. Finally, the number of references to the Party Representation Guidelines in publications is negligible in all jurisdictions except Europe, where legal writers have demonstrated some interest in the Party Representation Guidelines. Legal publications usually have an informative character and approve of the use of the Party Representation Guidelines. An exception is in Switzerland, where the Swiss Arbitration Association (Association Suisse de l'Arbitrage (ASA)) Board published 'Comments and Recommendations' regarding the Party Representation Guidelines and expressed 'serious reservations', issuing the recommendation that tribunals should not apply the remedies for misconduct of party representatives set out in the Party Representation Guidelines, especially in the absence of express consent by both parties.¹⁵⁸ Moreover, ASA's former president, Michael E Schneider, has also criticised the Party Representation Guidelines in strong terms.¹⁵⁹

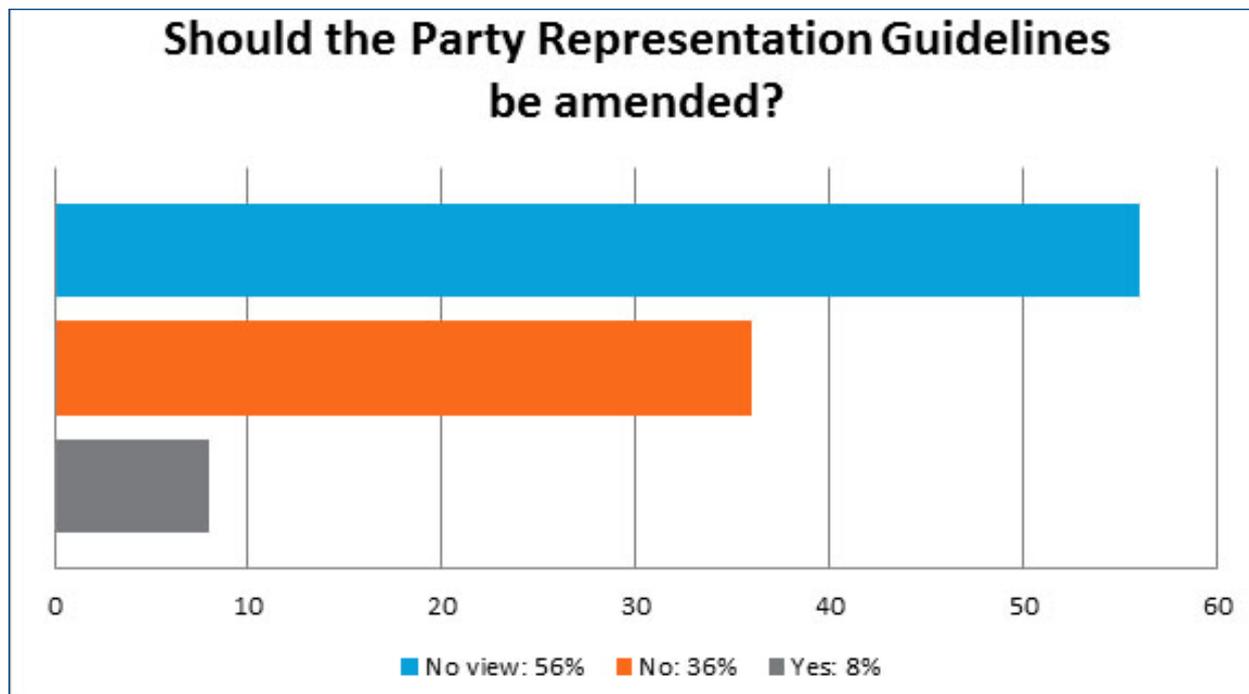
E. Need to amend the party representation guidelines and suggestions in that regard

217. Few of the respondents thought that the IBA Arbitration Committee should revise the Party Representation Guidelines. While the majority of the respondents expressed no view on possible amendments to the Party Representation Guidelines, a fair amount opined that there was no need for amendments.¹⁶⁰

158 Comments and Recommendations by the Board of the Swiss Arbitration Association (ASA), 4 April 2014.

159 ME Schneider, 'President's Message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation', 2013 ASA Bulletin 497, Vol 31.

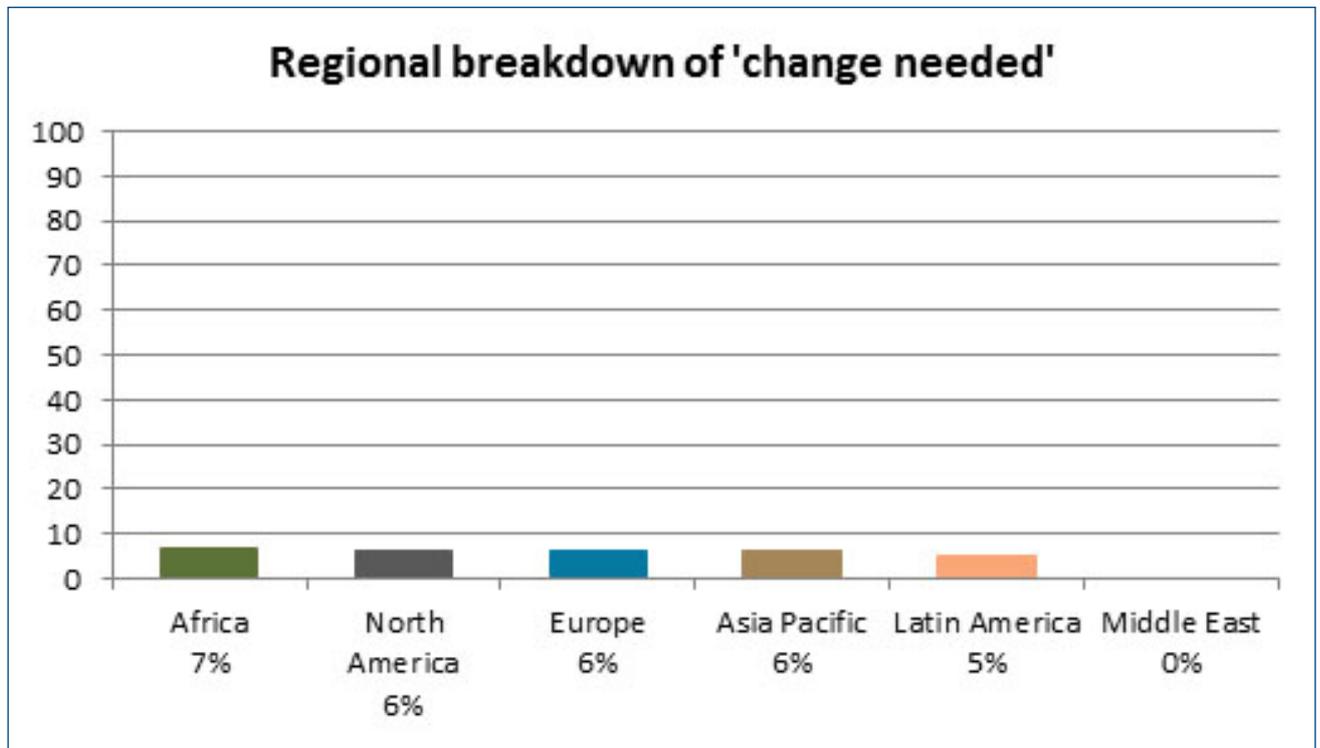
160 Only eight per cent of the respondents considered that the IBA Arbitration Committee should revise the Party Representation Guidelines. The majority of the respondents (56 per cent) expressed no view on the subject while a considerable amount (36 per cent) stated that there was no need for amendments.



218. Africa followed by Asia Pacific and Europe were the regions with the most appetite for amendments to the Party Representation Guidelines.¹⁶¹ It is worth mentioning that 48 per cent of the respondents from Europe that expressed a need to modify the Party Representation Guidelines were from Switzerland.

219. The percentage of respondents with ‘no view’ as to whether the Party Representation Guidelines should be amended or not is the highest compared to the respondents with ‘no view’ on this issue regarding the other sets of IBA Rules and Guidelines (37 per cent for the Rules on Evidence and 35 per cent for the Conflicts of Interest Guidelines). Likewise and comparatively, a low proportion of respondents considered that the Party Representation Guidelines should or should not be amended; indeed, only eight per cent considered they should be amended as opposed to nine per cent for the Rules on Evidence and 12 per cent for the Guidelines on Conflicts of Interest on one the hand, and 36 per cent considered they should not be amended as opposed to the more significant percentages of 54 per cent for the Rules on Evidence and 52 per cent for the Guidelines on Conflicts of Interest on the other hand.

¹⁶¹ Africa had the highest percentage (seven per cent) of respondents proposing changes to the Party Representation Guidelines, followed by the Asia Pacific region (six per cent), Europe (six per cent), North America (six per cent) and Latin America (five per cent). Interestingly, in the Middle East, none of the 65 respondents expressed a desire to revise the Guidelines.



220. In general, several respondents argued that all of the Party Representation Guidelines should be dispensed with, given that any aggrieved parties could turn to their tribunal or relevant bar association. Indeed, many respondents pointed out an alleged bias for common law within the Party Representation Guidelines. For example, some comments suggested that the Party Representation Guidelines do not represent the ethical standards in civil law systems. Reference was made in particular to the appropriateness of paying witnesses in civil law countries, even if it is only to compensate for the amount of time spent. Other respondents stated that, although a lawyer cannot lie to an arbitral tribunal, there should be no ethical duty to tell the client to preserve documents that may go against his case. With regard to specific provisions, it was suggested that Guidelines 12, 13, 15, 16, 17, 19, 26 and 27 be eliminated or that the application of these guidelines be subject to the express consent of the parties.

221. Interesting suggestions were made on the exclusion of party representatives and sanctions on counsel. For instance, it was argued that an arbitral tribunal should not have the right to exclude a party representative, whereas another respondent stated that the Party Representation Guidelines should not vest tribunals with the ability to impose sanctions on counsel. Some other interesting proposals included a revision of the provision that contemplates a duty to preserve documents pending arbitration (Guideline 12) because there is no international consensus on such duty; a relaxation of the provisions on interviewing and coaching witnesses (Guidelines 18–25); and the addition of a provision stating that a party representative should be allowed to trust the information he or she receives from the client unless there are extremely compelling reasons to doubt the accuracy of the information provided.

222. In most jurisdictions considered by this Report, neither the judiciary nor arbitration practitioners were familiar with the Party Representation Guidelines. Indeed, in some jurisdictions, the existence of the Party Representation Guidelines was unknown to some

respondents. In respect of legal publications, the Party Representation Guidelines have not yet garnered much attention compared to other IBA Rules and Guidelines.

V. Analysis and the way forward

223. The IBA Rules and Guidelines continue to represent the high level of self-regulation that has become one of the defining features of international arbitration. The purpose of the Subcommittee's survey was to gain insight into the application and reception of these IBA Rules and Guidelines among practitioners.
224. The steering group reviewed with great interest the 845 meaningful responses received through the survey. These provide a snapshot of arbitral practice at an international level, as well as trends in regional arbitration markets of varying levels of sophistication. The steering group noted that, in their comments, respondents across the globe did not identify any significant gaps or flaws in the IBA Rules and Guidelines. The steering group is thus of the opinion that these soft law instruments remain sufficiently robust and relevant to international arbitration practitioners. There is no pressing requirement to consider amending or revising them at the present time.
225. The steering group also observed that the respondents from both civil and common law jurisdictions concurred that the IBA Rules and Guidelines are important value additions to their practice toolkit. This is a testimony to the IBA Rules and Guidelines' success in providing a balance between common and civil law traditions – a feature that earned praise from several of respondents who applauded their neutral nature.
226. Indeed, the IBA Rules and Guidelines provide general best practice principles, a *de minimis* standard that may be used by parties and practitioners from different regions and legal systems. They are not detailed regulations. The IBA Rules and Guidelines do not aim to address all possible factual and legal scenarios that may be at issue in a given arbitral proceeding. Instead, they consciously leave room for innovation by the users of the arbitral process. This reflects the fundamental characteristic of arbitration itself: a dynamic method of dispute resolution wherein novel scenarios may require parties, counsel and the arbitral tribunal to act together to find solutions.
227. The steering group was mindful of the particular nature of the IBA Rules and Guidelines as described above when it analysed the comments and suggestions for amendments received in the survey. Thus, although some respondents pointed out specific facts and circumstances that the Rules and Guidelines do not address fully, these examples are not necessarily indicative of shortcomings. Notwithstanding the foregoing caveat, the steering group has identified certain issues highlighted by the respondents, which may provide a useful starting point for potential future work. These are set out in greater detail below.

A. IBA Rules and Guideline(s): specific observations

1. Rules on Evidence

228. The steering group views the Rules on Evidence as a successful soft law instrument, as reflected in the survey results, where the Rules on Evidence closely followed the Conflicts of Interest Guidelines in terms of being referenced by practitioners.¹⁶² Among the numerous comments received from the respondents, questions regarding the meaning of certain terms, relevance of the burden of proof in deciding document production requests, powers of tribunal-appointed experts and scope of document production were identified as prevalent subjects.
229. Article 3.3(b) of the Rules on Evidence states that document production requests should refer to documents ‘relevant to the case and material to its outcome’. These terms are repeated in Article 9.2(a) of the Rules on Evidence, according to which an arbitral tribunal can deny a request to produce documents for ‘lack of sufficient relevance to the case or materiality to its outcome’. These articles have been identified as a source of confusion and ambiguity by the respondents.¹⁶³ In particular, some of them considered it useful to clarify the scope of and distinction between the terms ‘relevant’ and ‘material’, as neither have been defined in the Rules on Evidence.
230. It is recalled that the aforementioned provisions have already been subject to review, as the 2010 iteration of the Rules on Evidence attests. However, the impact and practical usefulness of this revision, as well as the need to include both terms, appears to be in doubt. Some respondents viewed the distinction as superfluous and adding little to the standard existing under this provision. Thus, the absence of specificity as to what the terms ‘relevant’ and ‘material’ entail may provide the basis for frivolous objections during document production, which would in turn impact the duration and cost of the proceedings. It could thus be useful to provide clarity on the meaning of these two terms, and eventually assess whether it is necessary to maintain both.
231. For similar reasons, it was mentioned that the formulation of Article 3.3(a) (ii) of the Rules on Evidence, which requires documents requested to be of a ‘narrow and specific requested category’ warrants clarification. This is because it is unclear what a ‘category’ of documents means, and may also provide an impetus for objections to requests for production. One respondent suggested removing ‘categories’ altogether so that requests would have to identify documents individually.¹⁶⁴ It may thus be useful to consider providing an explanation for this term.
232. The respondents also drew attention to the lack of guidance as to the relevance of the burden of proof in the context of a tribunal’s decision to grant or deny a document production request.¹⁶⁵ It is difficult to formulate a bright line rule as to whether burden of proof should be a factor in determining the outcome of a request for document production. However, this question has been raised in arbitral practice with parties objecting to the production of documents related to issues that the requesting party did not have the onus to prove.

162 See para 19 above.

163 See para 87 above.

164 See para 87 above.

165 See para 90 above.

233. A reference to burden of proof as one of the factors to be considered in the tribunal’s analysis of a document production request might thus be apposite. For example, the weight to be given to this element of the request could be decided by the tribunal, rather than being a dispositive ground for denying a request. Burden of proof could thus be viewed as a factor similar to ‘commercial or technical confidentiality’ which, as per Article 9.2(e) of the Rules on Evidence, would constitute grounds for denying a request only when the tribunal determines them to be ‘compelling’.
234. Another area for consideration is Article 6 of the Rules on Evidence, which sets out the terms and conditions related to the work of tribunal-appointed experts. For instance, it has been suggested that these provisions could incorporate language indicating that arbitrators should not delegate their decision-making powers to these experts. Such delegation could be limited to submissions made by party-appointed experts to the arbitral tribunal. In practice, the failure to particularise the scope and function of tribunal-appointed experts could have far-reaching effects on the integrity of the arbitration process. This may include unwarranted interference with the adjudication of the parties’ claims – a mandate vested exclusively with the tribunal – and additional costs, as well as unjustified delays and due process concerns.
235. Some respondents were also of the view that the Rules on Evidence are too broad or too open regarding document production.¹⁶⁶ Because document production has now become a routine practice in international arbitration proceedings, there may be a need to fine-tune Articles 3, 4 and 9 of the Rules on Evidence, which provide guidance on this process. However, most of the criticism regarding the expansive nature of document production comes from the respondents with limited experience in the field, and from jurisdictions where international arbitration is still in its nascent stage. As a result, this opinion does not appear to be symptomatic of the international arbitration community in general. In fact, a larger number of respondents praised the Rules on Evidence for striking an appropriate balance between civil and common law traditions.
236. The respondents affirmed by an overwhelmingly large margin that there is no need to amend the Rules on Evidence.¹⁶⁷ Accordingly, there is no immediate need for review at the moment. The Arbitration Committee may consider issuing a report on the use of the Rules on Evidence together with the survey results and appropriate clarifications. A full revision may be considered on the ten-year anniversary of the Rules on Evidence in 2020. A task force could be set up for this purpose around 2018.

2. *Conflicts of Interest Guidelines*

237. The survey results show that the Conflicts of Interest Guidelines are the most commonly referenced soft law instrument on international arbitration issued by the IBA.¹⁶⁸ The respondents identified certain aspects of the Conflicts of Interest Guidelines that may make them better suited to the current trends in the arbitration market. These include questions related to the

166 See para 87 above.

167 See para 77 above.

168 See para 99 above.

relationship between counsel and arbitrators from the same barristers' chambers and adaptation for smaller jurisdictions, as well as rethinking the distinction between waivable and non-waivable situations.

238. General Standard 6 of the Conflicts of Interest Guidelines sets out the types of conflict issues as regards to the relationship between an arbitrator and his/her law firm. The respondents have urged that the application of this guideline to barristers' chambers be clarified and strengthened.¹⁶⁹
239. The Explanation to General Standard 6 makes a distinction between barristers' chambers and law firms, stating that '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 and counsel'.
240. It could be apt to reformulate this statement because currently, as one respondent pointed out, barristers from the same chambers may appear as counsel and arbitrator in the same proceeding.¹⁷⁰ In the present market scenario, where there is little difference in the manner in which law firms and barristers' chambers operate and advertise themselves to the public, there are strong reasons to argue that such a position has become inappropriate and should be addressed.¹⁷¹
241. This reality was taken into account in the International Centre for Settlement of Investment Disputes (ICSID) case *Hrvatska Elektroprivreda v The Republic of Slovenia*. In that decision, the tribunal rejected a respondent's attempt to instruct, as counsel, a barrister of the same chambers as the chairman.¹⁷² In so doing, the tribunal highlighted the increasingly 'collective connotation' of chambers in the market for legal services, a factor that may compromise the independence and impartiality of a barrister.¹⁷³
242. Some respondents have also argued that the standards set out in the Conflicts of Interest Guidelines should be relaxed in jurisdictions where the pool of arbitrators may be small on account of a nascent arbitration market.¹⁷⁴ However, it could be argued that making any such piecemeal adjustments to the principles of conflicts of interest would run counter to the general purpose of the Conflicts of Interest Guidelines and be unsuitable in view of the other jurisdictions that have well-established arbitration markets. Equally, it might be impractical to make regional concessions and exceptions based on market size because it would be difficult to monitor their growth.
243. Nevertheless, repeat appointments are indeed a genuine issue faced by parties from small jurisdictions. Even in more developed jurisdictions, and although not specifically mentioned by the respondents, parties face a similar problem when seeking a practitioner who specialises in a niche field, such as oil and gas. Again, this reflects the practical difficulty of reconciling absolute

169 See para 198 above.

170 See para 198 above.

171 M Polkinghorne, E Gonin, 'Barristers from the same Chambers Appearing as Counsel and Arbitrator: Independence Revisited?', *Dispute Resolution International* 2, Vol 5, pp 175–176.

172 *Hrvatska Elektroprivreda d d v Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, p 15.

173 *Hrvatska Elektroprivreda d d v Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, paras 17–20.

174 See para 197 above.

standards of disqualification, such as the one set out by the non-waivable Red List¹⁷⁵ with the need to appoint competent arbitrators.

244. The Orange List already attempts to address this issue, albeit to a limited extent. It sets out a carve-out from the obligation to disclose repeat appointments in case of certain types of disputes that require arbitrators with very specific specialisations, thus limiting the number of potential arbitrators available. Maritime, sports and commodities arbitrations are specified as examples of such niche arbitrations. It is also specified that the disclosure of repeat appointments in such cases is not obligatory only if all parties are familiar with the custom and practice of appointing the same persons in such types of arbitrations.¹⁷⁶ This carve-out may be difficult to implement in practice because it gives rise to additional issues as to how it would be determined that both parties view a certain type of arbitration as being one that requires skills that are limited to certain select individuals, thus making repeat appointments unavoidable. It is also insufficient to resolve the problems faced by parties from jurisdictions where the international arbitration market is still in its nascent stage, as described in paragraph 244 above.

245. In order to give due deference to the principle of party autonomy, one solution could be for the non-waivable Red List to be eventually assimilated into the waivable Red List. In view of the continuing move towards casting a wider net in terms of the types of relationships that merit disclosure in international arbitration, such a relaxation of absolute bars would act as an important counterbalance that would respect the will of the parties, and maintain the high quality of professionals engaged as arbitrators. There is support for the proposition that fully informed, sophisticated parties represented by counsel should be able to waive any potential conflicts as they are the ones best placed to be aware of their interests and the extent to which they may be impaired by the appointment of a particular arbitrator. Such a process would be much more suited to market realities, where there is a high demand for a limited number of practitioners. It could be argued that such a revision of the Conflicts of Interest Guidelines would also address, to some extent, the issues related to developing jurisdictions and niche industries as highlighted above.

246. The present iteration of the Conflicts of Interest Guidelines was adopted in 2014,¹⁷⁷ and is thus relatively recent. With the passage of time, a clearer picture of the pragmatic relevance of the Conflicts of Interest Guidelines will emerge. There is no need to review them at the moment; however, the issues noted above may be taken into consideration in a few years.

3. *Party Representation Guidelines*

247. The Party Representation Guidelines are rarely referenced and unknown to several

175 Conflicts of Interest Guidelines General Standard 2: 'An arbitrator shall decline to accept an Appointment... if he or she has any doubt as to his or her ability to be impartial or independent... Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List'.

176 Conflicts of Interest Guidelines, Orange List, para 3.1.3, footnote 5: 'It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice'.

177 The first version of the Conflicts of Interest Guidelines was issued in 2004.

respondents.¹⁷⁸ They have not been taken up by the international arbitration community to the same extent as the other IBA Rules and Guidelines.

248. While the other IBA Rules and Guidelines filled a gap in international arbitration, it is less clear whether the Party Representation Guidelines have served that function. The limited use by the arbitration community of the Party Representation Guidelines seems to suggest that they have not responded to a real gap. However, this may also be explained by the fact that issues of counsel conduct arise far less frequently than issues of evidence or conflicts of interest, and may be regulated by other legal or ethical norms.

249. It should be noted that common law practitioners have referenced the Party Representation Guidelines more frequently than their civil law counterparts.¹⁷⁹ Despite this, the Rules on Evidence enjoy much wider acceptance compared to the Party Representation Guidelines in key common law jurisdictions.¹⁸⁰

250. The Party Representation Guidelines are also relatively new; they were adopted in 2013. Given the short time frame during which they have been in use, it would be premature to consider their revision.

B. General remarks

1. Harmonisation of the IBA Rules and Guidelines

251. The IBA Rules and Guidelines have several areas of overlap, and it is necessary to ensure that, with respect to these aspects, they are consistent and speak in one voice. Some existing or potential issues that may be addressed through such a harmonisation process are described below.

DOCUMENT PRODUCTION

252. With respect to document production, there is an overlap between the Party Representation Guidelines and Rules on Evidence. This overlap could be harmonised as set out below.

253. Guideline 13 of the Party Representation Guidelines bars counsel from raising objections aimed at harassing or causing unnecessary delays during document production. This could be included as a separate ground for denying a document production request, or a particular example of procedural impropriety in Article 9 of the Rules on Evidence.

254. Guidelines 14 and 17 of the Party Representation Guidelines direct counsel to advise the party of the consequences of the failure to produce documents. It could be useful to specify such consequences in this guideline by stating that an adverse inference as described in Article 9(6) of the Rules on Evidence – if those rules apply to that specific arbitration – could be made against the party on the basis of its failure to produce documents.

178 See paras 206–208 above.

179 See para 209 above.

180 For instance, compare the percentage of references to the Party Representation Guidelines on the one hand and Rules on Evidence on the other hand; see paras 209 and 44 above.

255. Guideline 15 of the Party Representation Guidelines directs counsel to ensure that the party conducts a reasonable search for documents and produces all non-privileged responsive documents. An express duty of this nature could be imposed on the party itself and incorporated in Article 3 of the Rules on Evidence as well.
256. Guideline 16 of the Party Representation Guidelines directs counsel to refrain from advising clients to suppress or conceal documents requested or ordered to be produced. This guideline could also specify that this could lead to an adverse inference as described in Article 9(6) of the Rules on Evidence.

WITNESS TESTIMONY

257. In addition to the overlaps between the Party Representation Guidelines and Rules on Evidence in relation to document production, an overlap can also be found in respect of witness testimony.
258. Guidelines 20 and 24 of the Party Representation Guidelines direct counsel to ensure that a witness testimony reflects the witness's own account of events in the process of assisting with the preparation of a witness statement. Such a principle could be incorporated into Article 4(3) of the Rules on Evidence, which states broadly that it would not be improper for legal representatives or the parties to discuss the prospective testimony of witnesses with them.
259. Guideline 11 of the Party Representation Guidelines requires counsel to take remedial measures when it comes to light that false witness testimony has been previously submitted in the proceedings. These measures include urging the witness or expert to correct or withdraw the false evidence (Guideline 11(c)). However, the Rules on Evidence specify at Article 4(6) that revised and additional witness statements can be submitted provided revisions 'respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration'. This would not allow the correction of false testimony. This situation could be harmonised with the Party Representation Guidelines to allow the correction of statements that have been consequently discovered to be incorrect.

DUTY OF PARTIES TO MAKE DISCLOSURES

260. Beyond evidence-related concerns, the Party Representation Guidelines overlap with the Conflicts of Interest Guidelines in respect of disclosure.
261. General Standard 7(c) on Conflicts of Interest mandates that parties perform reasonable enquiries to comply with the requirement under General Standard 7(a) to inform the arbitrator and other party of any relationship with the arbitrator. The duties of counsel in the Party Representation Guidelines could be revised to include advising clients to make these enquiries and disclosures.
262. General Standard 7(b) on Conflicts of Interest requires that a party inform an arbitrator of the identity of its counsel and any relationship between the counsel and the arbitrator, including specifically, membership of the same barristers' chamber. Thus, this General Standard expressly views membership of the same barristers' chamber as constituting a relationship between counsel and the arbitrator. The requirement to disclose such membership by the party arguably should

extend to arbitrators as well. The language of General Standard 6 discussed at paragraph 240 above, which only refers to the arbitrator's law firm, could be revised to incorporate 'barristers' chambers' in the language of the guideline itself to make it consistent with General Standard 7(b).

DEFINITIONS

263. In terms of definitions, there does not seem to be any inconsistency between the three instruments at the moment. However, if and when new items are added to the list of definitions in either the Rules on Evidence or Party Representation Guidelines, such changes should be made consistently.

2. *Promotion of the IBA Rules and Guidelines*

264. Several respondents underscored the need to better promote awareness regarding the potential benefits of using the IBA Rules and Guidelines. Others indirectly demonstrated the need to increase awareness by suggesting improvements already implemented in the IBA Rules and Guidelines. Such efforts should be directed towards jurisdictions where the knowledge and application of the IBA Rules and Guidelines is particularly limited. Based on the survey results, this should include Africa, Latin America and the Middle East.¹⁸¹

265. The steering group proposes that the IBA reach out in particular to law students and young practitioners to ensure the IBA Rules and Guidelines are known by the new generation of arbitration practitioners at an early stage of their career. At IBA events organised in these jurisdictions, the IBA could recruit some of its speakers to liaise with local bar councils and law schools to provide an introduction to the IBA Rules and Guidelines.

3. *Timeline for a periodic review of the IBA Rules and Guidelines*

266. The IBA Rules and Guidelines need to keep abreast with the arbitration market to continue to be robust practice tools. It would be useful to set up a timeline for periodic assessments and review. This would ensure that the IBA Arbitration Committee engages with practitioners on an ongoing basis to monitor the market and anticipate key issues that may need to be addressed in subsequent iterations of the IBA Rules and Guidelines. A review of the IBA Rules and Guidelines every ten years seems to be an appropriate timeframe.

VI. Conclusions

267. The survey results affirm that the IBA Rules and Guidelines enjoy the distinctive status of being well-received soft law instruments among members of the international arbitration community, albeit to varying degrees. The Conflicts of Interest Guidelines are the most commonly referenced, appearing in more than half (57 per cent) of the arbitrations reported in the survey. The Rules on Evidence come in a close second, having been referenced in almost half (48 per cent) of the arbitrations known to the respondents. By contrast, the Party Representation Guidelines have not yet attracted much attention, appearing in less than a quarter (16 per cent)

¹⁸¹ See paras 27, 35, 38, 127 and 194 above.

of the arbitrations reported. Certain interesting trends from the study of the responses and the Country Reports form the basis of the emerging brief concluding remarks set out in this section. When assessing these trends, it is important to bear in mind that how often the Rules or Guidelines are referred to depends on how often the relevant issues arise. For example, issues of evidence arise more regularly than counsel conduct.

268. The most popular of the three IBA Rules and Guidelines – the Conflicts of Interest Guidelines – have been well received across all the regions surveyed. They are of particular importance at the stage of constituting the arbitral tribunal. The respondents noted that counsel consulted the Guidelines in two-thirds (67 per cent) of cases in which conflicts issues arose at the time of the appointment of arbitrators. Equally, decision-makers frequently made reference to the Conflicts of Interest Guidelines when seised with issues involving conflicts of interest (67 per cent of reported cases). Interestingly, no particular provision of the Conflicts of Interest Guidelines stands out as being the most frequently cited.
269. The second most popular IBA soft law instrument is the Rules on Evidence. Unlike the Conflicts of Interest Guidelines, there is a significant level of regional variance in their reception. The Rules appeared to be less frequently used in Africa (25 per cent) and Latin America (30 per cent) while being relied upon in more cases (over 50 per cent) in all other regions (ie, Asia Pacific, Europe, the Middle East and North America). The general view, however, is that the popularity of the Rules on Evidence will continue to grow. The survey results also highlighted that Article 3 on document production and Article 9 on the admissibility of evidence are the most frequently cited provisions of the Rules on Evidence.
270. Both the Conflicts of Interest Guidelines and the Rules on Evidence were followed by a remarkable majority of decision-makers who referenced them. The Conflicts of Interest Guidelines were followed in nearly three quarters (69 per cent) of cases where they were referenced. The Rules on Evidence were followed in almost all (93 per cent) of the cases in which references were made although they were considered binding in a limited number of instances (20 per cent) in which they were referenced.
271. As compared to the Conflicts of Interest Guidelines and the Rules on Evidence, the Party Representation Guidelines were less frequently cited. Interestingly, common law practitioners seemed to have been more welcoming to the Party Representation Guidelines than their civil law counterparts. Although most of the respondents did not have a view as to whether the Party Representation Guidelines should be amended, the cause of their limited use can be inferred from the comments. For instance, certain respondents pointed out that the limited popularity of the Party Representation Guidelines was to be expected given that they were still relatively new.
272. Other respondents suggested that the Party Representation Guidelines were rarely referenced because the judiciary and arbitration practitioners followed local laws or local institutional rules for conduct in arbitral proceedings and that these might not mirror (and may even depart from) the standards set out in the Party Representation Guidelines. Some also stated that issues of counsel conduct only come up rarely, so the Party Representation Guidelines do not become relevant very often.
273. Certain respondents from civil law jurisdictions harshly criticised the Party Representation Guidelines

on the grounds of overburdening and overregulating the arbitral process, as well as allowing for disruptive applications by the parties. A large number of such respondents were from Switzerland.

274. For the sake of completeness, it should be mentioned that even the Conflicts of Interest Guidelines and the Rules on Evidence are somewhat less well known in a limited number of regions and/or jurisdictions. This may be attributable to a combination of several factors. First, the survey results suggest that references to them are less common in jurisdictions with a less active international arbitration practice. For example, many respondents from Africa, Latin America and the Middle East insisted on a general lack of awareness of the existence of the Rules on Evidence, and pointed to the need to advertise and distribute them more broadly, particularly in regions where arbitration is growing.¹⁸² Second, practitioners in some jurisdictions rely on legislation or arbitral institution rules that might include provisions regulating the issues addressed by the IBA Rules and Guidelines, rendering the latter unnecessary.
275. Similarly, with respect to the Conflicts of Interest Guidelines, it is worth noting that, even in jurisdictions where they are widely used, the Conflicts of Interest Guidelines are not necessarily referenced in the respective terms of reference or appointment, or in awards or court decisions. This may be due to the following factors:
- Non-binding nature: because their application is usually not binding, practitioners do not need to explicitly cite the Conflicts of Interest Guidelines in specific cases, even if they are consulted and used as a reference.
 - Confidentiality of arbitrations: even when the Conflicts of Interest Guidelines are referenced in awards or terms of reference, these documents are seldom available to the public.
 - Prevalence of domestic ethical codes: domestic courts and arbitral institutions often apply their own ethical codes or standards to decide on issues of conflicts of interest. As a result, even if the Conflicts of Interest Guidelines have been invoked by the parties, the decision-maker may ignore these references or omit them in their decisions.
276. A recurring comment in the survey responses and Country Reports was that more efforts should be made to promote all three of the IBA Rules and Guidelines among arbitration users globally, whether by the IBA, domestic bar associations, arbitral institutions or universities. In particular, the respondents called for steps to promote the IBA Rules and Guidelines in jurisdictions where arbitration practitioners are unfamiliar with them.
277. The steering group is of the view that the above proposal to make sustained and concrete efforts to disseminate information and expertise with respect to the IBA Rules and Guidelines is a useful one, and may be considered by the Subcommittee as part of its mandate. This and certain other interesting recommendations developed on the basis of the survey responses have been set out in this Report in the section entitled 'Analysis and the Way Forward'. These provided food for thought, including better defining phrases such as 'relevant' and 'material' in Article 3.3(b) of the Rules on Evidence, limiting the scope of work of tribunal appointed experts, and an elimination of absolute standards of disqualification based on the Conflicts of Interest Guidelines. These views reflect the experience of the users of the IBA Rules and Guidelines and thus provide a unique insight into how these instruments are perceived and applied in practice.

¹⁸² Interestingly, a number of respondents seemed to be unaware that the IBA Rules and Guidelines are currently available in various languages, because they requested the translation of the IBA Rules and Guidelines into languages other than English.

VII. Definitions

278. **Africa:** we received data from five countries in Africa: Angola, Ethiopia, Ghana, Mozambique and Nigeria.
279. **Asia Pacific:** we received data from 13 countries in Asia Pacific: Australia, China, Hong Kong SAR, India, Indonesia, Japan, Malaysia, Nepal, New Zealand, Singapore, South Korea, Taiwan and Thailand.
280. **Conflicts of Interest Guidelines:** the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).
281. **Country Report(s):** analysis of the IBA Rules and Guidelines survey responses collected in a country and of the use of the IBA Rules and Guidelines as reflected in domestic arbitral jurisprudence and doctrine. The Subcommittee received 23 Country Reports from Europe, 13 from Latin America, nine from Asia Pacific, eight from the Middle East, two from North America and two from Africa.
282. **Decision-maker:** an umbrella term used to refer to the arbitral institution, local court or arbitral tribunal.
283. **Europe:** we received data from 25 countries in Europe: Austria, Belgium, Bosnia, Cyprus, Czech Republic, England, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Scotland, Slovakia, Slovenia, Spain, Sweden and Switzerland.
284. **IBA Rules and Guidelines:** collectively, the Rules on Evidence, Conflicts of Interest Guidelines and Party Representation Guidelines.
285. **Latin America:** we received data from 16 countries in Latin America: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru, Uruguay and Venezuela.
286. **Meaningful response:** a survey response containing an answer to at least one substantive question; that is, one question beyond those questions identifying the respondent, his/her jurisdiction and his/her profession.
287. **Middle East:** we received data from nine countries in the Middle East: Egypt, Israel, Jordan, Kuwait, Lebanon, Qatar, Saudi Arabia, Turkey and the UAE.
288. **National Survey:** data set of responses to the IBA Rules and Guidelines survey received from a particular country.
289. **North America:** we received data from two countries in North America: Canada and the US.
290. **Party Representation Guidelines:** the IBA Guidelines on Party Representation in International Arbitration (2013).
291. **Reporter:** an individual drafting a Country Report on the IBA Rules and Guidelines.
292. **Respondent:** an individual answering the survey on the IBA Rules and Guidelines.

293. **Rules on Evidence:** the IBA Rules on the Taking of Evidence in International Arbitration (2010).
294. **The Report:** this Report on the Reception of the IBA Arbitration Soft Law Products.
295. **The Subcommittee:** the IBA Arbitration Committee organised the IBA Arbitration Guidelines and Rules Subcommittee to conduct a worldwide survey on the use of the IBA arbitration practice guidelines and rules.

ANNEX I – BIBLIOGRAPHY

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ANNEX II – SURVEY

IBA Arbitration Committee – IBA Arbitration Guidelines and Rules Subcommittee

Survey Instructions

Greetings,

Thank you for agreeing to participate in the survey of the Arbitration Guidelines and Rules Subcommittee of the Arbitration Committee of the International Bar Association. We have sought your participation because the Arbitration Committee has endeavoured to review the use of the IBA practice rules and guidelines for arbitration worldwide and to learn how they are being applied in different jurisdictions.

Compiled below is a brief survey concerning the use of three IBA practice rules and guidelines: the IBA Rules on the Taking of Evidence in International Arbitration (2010), the IBA Guidelines on Party Representation in International Arbitration (2013), and the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) – all of which are available online at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

Your response to this survey will help the IBA Arbitration Committee, through its Arbitration Guidelines and Rules Subcommittee, to better understand local practices and developments involving or impacting the practice rules and guidelines. With this understanding, the Subcommittee will endeavour to identify potential areas of clarification or improvement to the IBA practice rules and guidelines. The Subcommittee will then periodically make recommendations it deems necessary or when requested to do so to the Arbitration Committee for adjustments to the practice rules and guidelines.

The survey may be accessed electronically by navigating to this web address:

www.surveymonkey.com/r/IBAGuidelines.

Due to the nature of the survey platform, the survey must be completed in its entirety as partial progress cannot be saved. We therefore recommend reviewing the questions in the survey below, or reviewing online all four pages of the survey in advance of completing it.

You are free to identify yourself or not identify yourself in providing a response to the survey. We ask, however, that you at least identify the jurisdiction in which you primarily practice as to permit us to gather data about the local practices and developments within that jurisdiction. The collective and collated answers received by the Subcommittee will be made available on the IBA website and published on an ongoing basis.

We would very much appreciate your prompt response to the survey. You have the Arbitration Committee and Subcommittee's sincere appreciation and thanks for your assistance in this important endeavour. If you have any questions, please feel free to contact the reporter from whom you received these instructions.

Respondent information

As mentioned on the preceding page, your responses to the below questions are entirely voluntarily, except to the extent that we ask you **please to identify your country of primary practice** as this information will allow us to develop data about the global, regional and national use of the IBA practice guidelines and rules. You may provide further identifying information if you wish to do so. To the extent that further information is (or is not) provided, you will be aiding us in gathering data about a number of topics which will be of use in further studies, including the rate of response for individuals versus institutions and preferences with respect to anonymity versus identification. Information about your identity will not be shared without your permission (aside from information about your country of practice, which was detailed above, shall be aggregated to develop certain data). However, to the extent you would like your contribution to be acknowledged publicly, you can indicate as much in your response to Question no 3 below. You may also indicate there whether you would prefer to be identified privately, and not publicly (that is, identified only to the IBA Arbitration Committee/Arbitration Guidelines and Rules Subcommittee), or not to be identified at all (and submit this information anonymously, except with respect to your country of primary practice).

1. (REQUIRED) Country of primary practice?
2. Respondent's information:
 - (a) Name _____
 - (b) Company _____
 - (c) City/Town _____
 - (d) State/Province _____
- 3 I wish my contribution to be acknowledged as follows:
 - (a) Publicly – please include me on the IBA Arbitration Guidelines and Rules Subcommittee website as having contributed to this endeavour.
 - (b) Privately – please identify my contribution to this endeavour only internally within the IBA Arbitration Guidelines and Rules Subcommittee, and to the IBA Arbitration Committee.
 - (c) Anonymously – please do not publicly or privately provide any identifying information in connection with this response (except as to my country of primary practice).

IBA Rules on the Taking of Evidence in International Arbitration (2010)

1. In how many of the arbitrations known to you over the last five years (and in your jurisdiction) have the Rules on the Taking of Evidence been referenced?
 - a) Total number of arbitrations known to you: _____.
 - b) _____ of those cases referenced the Rules on the Taking of Evidence.
2. What provisions of the Rules on the Taking of Evidence were referenced?
3. Of those arbitrations that referenced the Rules on the Taking of Evidence, in how many of those decisions was the tribunal bound by the Rules and in how many of those decisions did the tribunal simply consult the Rules?
 - a) _____ bound by Rules on the Taking of Evidence.
 - b) _____ consulted Rules on the Taking of Evidence.
4. Of those arbitrations where the tribunal was bound by the Rules on the Taking of Evidence, in how many of those arbitrations were the Rules on the Taking of Evidence made applicable in the arbitration agreement, in the Terms of Reference (or equivalent document), or in the first procedural order?
 - a) _____ Rules on the Taking of Evidence stated in arbitration agreement.
 - b) _____ Rules on the Taking of Evidence stated in Terms of Reference (or equivalent document).
 - c) _____ Rules on the Taking of Evidence stated in first procedural order.
5. In how many of those decisions in which the tribunal referenced the Rules on the Taking of Evidence did the tribunal follow the Rules or decline to follow the Rules?
 - a) _____ followed Rules on the Taking of Evidence.
 - b) _____ declined to follow Rules on the Taking of Evidence.
6. How many of those arbitrations that referenced the Rules on the Taking of Evidence were investment arbitrations? How many of those arbitrations were commercial arbitrations?
 - a) _____ Investment Arbitrations.
 - b) _____ Commercial Arbitrations.
7. Please provide a brief summary of any decisions by arbitral institutions or courts citing the Rules on the Taking of Evidence.
8. Based on your survey, should the IBA Arbitration Committee revise the Rules on the Taking of Evidence?
 - a) Yes
 - b) No

9. If your answer to the previous question was 'yes', please explain which provisions should be revised and how.
10. Please provide any additional comments or questions about the IBA Rules on the Taking of Evidence.

IBA Guidelines on Party Representation in International Arbitration (2013)

1. Of the arbitrations known to you over the last five years (and in your jurisdiction) in which issues of counsel conduct have arisen, how many of those arbitrations have referenced the Guidelines on Party Representation?
 - a) Total number of arbitrations known to you and involving issues of counsel conduct: _____
 - b) _____ that referenced the Guidelines on Party Representation.
2. What provisions of the Guidelines on Party Representation were referenced?
3. Of those arbitrations that referenced the Guidelines on Party Representation, in how many of those decisions was the tribunal bound by the Guidelines in making its decision and in how many of those decisions did the tribunal simply consult the Guidelines in making its decision?
 - a) _____ bound by Guidelines on Party Representation.
 - b) _____ consulted Guidelines on Party Representation.
4. Of those arbitrations where the tribunal was bound by the Guidelines on Party Representation, in how many of those arbitrations were the Guidelines on Party Representation made applicable in the arbitration agreement, in the Terms of Reference (or equivalent document), or in the first procedural order?
 - a) _____ Guidelines on Party Representation stated in arbitration agreement.
 - b) _____ Guidelines on Party Representation stated in Terms of Reference (or equivalent document).
 - c) _____ Guidelines on Party Representation stated in first procedural order.
5. Of those arbitrations where the tribunal was not bound by the Guidelines on Party Representation, in how many of those arbitrations was there a request by a party (or the tribunal) to abide by the Guidelines on Party Representation that was ultimately rejected?
 - a) _____ request to abide by Guidelines on Party Representation rejected.
6. In how many of those decisions where the tribunal consulted the Guidelines on Party Representation did the tribunal follow the Guidelines or decline to follow the Guidelines?
 - a) _____ followed Guidelines on Party Representation.
 - b) _____ declined to follow Guidelines on Party Representation.
7. Please provide a brief summary of any decisions by arbitral institutions or courts citing the Guidelines on Party Representation:
8. Should the IBA Arbitration Committee revise the Guidelines on Party Representation?

Yes

No

9. If your answer to the previous question was 'yes', please explain which provisions should be revised and how.
10. Please provide any additional comments or questions about the IBA Guidelines on Party Representation.

IBA Guidelines on Conflicts of Interest in International Arbitration (2014)

1. Of the arbitrations known to you over the last five years (and in your jurisdiction) in which conflicts of interests issue have arisen at the time of constitution of the tribunal, in how many of those arbitrations have the Guidelines on Conflicts of Interest been referenced?
 - a) Total number of arbitrations known to you and involving issues of arbitrator conflicts of interest: _____ .
 - b) _____ that referenced the Guidelines on Conflicts of Interest.
2. What provisions of the Guidelines on Conflicts of Interest were referenced?
3. When acting as counsel, in how many of those arbitrations involving arbitrator conflicts of interest did you consult or rely on the Guidelines on Conflicts of Interest in selecting arbitrators for international tribunals?
 - a) Total number of instances acting as counsel: _____.
 - b) _____ consulted or relied on Guidelines on Conflicts of Interest.
4. When acting as arbitrator, in how many of those arbitrations involving arbitrator conflicts of interest did you consult or refer to the Guidelines on Conflicts of Interest in deciding to take on an appointment?
 - a) Total number of instances acting as arbitrator: _____.
 - b) _____ consulted or referred to Guidelines on Conflicts of Interest.
5. When acting as an arbitrator, in how many of those arbitrations involving arbitrator conflicts of interest did you consult or refer to the Guidelines on Conflicts of Interest in making your disclosure to the parties and the arbitral institution?
 - a) _____ consulted or referred to Guidelines on Conflicts of Interest.
6. Of the arbitrations and cases known to you over the last five years (and in your jurisdiction) in which conflicts of interests issue have arisen at the time of constitution of the tribunal, in how many of those arbitrations did the arbitral institution, the tribunal or a court reference the Guidelines on Conflicts of Interest in making its decision as to the existence of a conflict of interest?
 - a) Total number of decisions on conflicts of interest: _____
 - b) _____ referenced Guidelines on Conflicts of Interest.
7. In how many of those decisions referencing the Guidelines on Conflicts of Interest did the arbitral institution, the tribunal or the court follow the Guidelines, decline to follow the Guidelines, or take no stance on them?
 - a) followed Guidelines on Conflicts of Interest.
 - b) declined to follow Guidelines on Conflicts of Interest.

- c) neutral on Guidelines on Conflicts of Interest.
8. Please provide a brief summary of any decisions by arbitral institutions or courts citing the Guidelines on Conflicts of Interest:
 9. Should the IBA Arbitration Committee revise the Guidelines on Conflicts of Interest?
 - a) Yes
 - b) No
 10. If your answer to the previous question was 'yes', please explain which provisions should be revised and how.
 11. Please provide any additional comments or questions about the IBA Guidelines on Conflicts of Interest.

ANNEX III – GLOBAL LIST OF PUBLICATIONS

During the data collection phase, the reporters were asked to list the important publications concerning the IBA Rules and Guidelines in their jurisdiction.

These country lists received from each reporter have been included in three sections below:

I. Conflicts of Interest Guidelines; II. Rules on Evidence; and III. Party Representation Guidelines.

I. Conflicts of Interest Guidelines

Judicial case law

BELGIUM

- Court of Appeal Brussels, 6 December 2011, b-Arbitra 2014/1, pp 215 *et seq.*
- *Poland v Eureko & Stephen M Schwebel*, Court of Appeal Brussels, 29 October 2007, unpublished (A (correct) summary of the relevant facts and findings can, however, be found at C Verbruggen, ‘The Arbitrator as a Neutral Third Party’ in G Keutgen (ed), *Walking a Thin Line. What an Arbitrator Can Do, Must Do, or Must Not Do*, Brussels, Bruylant, 2010, pp 68–69).

CANADA

- *Jacob Securities Inc v Typhoon Capital BV*, 2016 ONSC 604.
- *Telesat Canada v Boeing Satellite Systems International, Inc*, 2010 ONSC 4023.

CZECH REPUBLIC

- Decision of the Supreme Court of the Czech Republic No 23 Cdo 3150/2012 of 30 September 2014.

ENGLAND AND WALES

- *A v B* [2011] EWHC 2345 (Comm).
- *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm).
- *Cofely Ltd v Anthony Bingham* [2016] EWHC 240 (Comm).
- *Sierra Fishing Co v Hasan Said Farran* [2015] EWHC 140 (Comm).
- *W Limited v M Sdn Bhd* [2016] EWHC 422 (Comm).

FINLAND

- *Koponen and Nevanlinna v Aina Group Oyj*, Helsinki District Court, Case No L 13/27848, 27 June 2014.

PORTUGAL

- Supremo Tribunal de Justiça, Processo No 170751/08.7YIPRT.L1.S1, 12 July 2011 www.dgsi.pt/jstjf.nsf/954f0ce6ad9dd8b980256b5f003fa814/7b883192d7b22be380257b900033ed1e?OpenDocument.
- Tribunal da Relação de Lisboa, Processo No 1361/14.0YRLSB.L1-1, 24 March 2015 www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d7f471fde47d350980257e2a004b026c?OpenDocument.
- Tribunal da Relação do Porto, Processo No 583/12.2TVPRT.P1, 03 June 2014 www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/55fc83b4d067572280257d47003b6b91?OpenDocument.

RUSSIA

- Information Letter of the Supreme Arbitrazh Court No 156 dated 26 February 2013 ‘Review of Arbitrazh Court Practice in Applying the Public Policy Exception as a Ground for Refusal to Recognize and Enforce Foreign Judgments and Arbitral Awards’.

SPAIN

- *Cárnicas 7 Hermanos, SA v Compañía Española de Seguros de Crédito a la Exportación (CESCE), SA*, Superior Court of Justice of Madrid, Case No 11/2015, Judgment, 17 December 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&database=match=AN&reference=7584170&links=&optimize=20160127&publicinterface=true).
- *Constructora de Viviendas Unifamiliares, SL, v BBVA*, Superior Court of Justice of Madrid, Case No 63/2011, Judgment, 26 May 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&database=match=AN&reference=7418224&links=&optimize=20150626&publicinterface=true).
- *Consultores Integrales de Telecomunicacion Consulintel SL v Telefónica Investigación y Desarrollo, SAU*, Superior Court of Justice of Madrid, Case No 14/2015, Judgment, 6 October 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&database=match=AN&reference=7514881&links=&optimize=20151110&publicinterface=true).
- *Delforca 2008, Sociedad de Valores, SA v Banco Santander, SA*, Madrid Court of Appeals, Case No 3/2009, Judgment, 30 June 2011 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&database=match=AN&reference=6136724&links=&optimize=20111005&publicinterface=true).
- *Frio Montrans, SL v Telecomunicaciones Palomo, SL*, Superior Court of Justice of Madrid, Case No 106/2014, Judgment, 17 September 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&database=match=AN&reference=7498290&links=&optimize=20151021&publicinterface=true).

- *Iberpistas SACE, Corporación Industrial Bankia, SAU v Desarrollo de Concesiones Viarias Uno, SL, Corporación Industrial Bankia, SA, SACYR, SA*, Superior Court of Justice of Madrid, Case No 64/2014, Judgment, 2 September 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7493538&links=&optimize=20151016&publicinterface=true).
- *Indispensable Europea, SL v Technology Hotels, SL*, Superior Court of Justice of Madrid, Case No 15/2014, Judgment, 24 September 2014 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7236928&links=&optimize=20141229&publicinterface=true).
- *Repos i Repàs, SL v BBVA*, Superior Court of Justice of Madrid, Case No 20/2014, Judgment, 28 January 2015 (full text in Spanish: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7322752&links=&optimize=20150312&publicinterface=true).

SWEDEN

- NJA 2007 p 841.
- NJA 2010 p 317.

SWITZERLAND

- *Adrian Mutu v Chelsea Football Club Limited*, decision by the Swiss Federal Supreme Court No 4A_458/2009 of 10 June 2010.
- *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA) and Union Cycliste Internationale (UCI)*, BGE/ATF 136 III 605, 29 October 2010.
- *X v Association Y*, decision by the Swiss Federal Supreme Court No 4A_506/2007 of 20 March 2008.
- *X v AY Holding BV*, decision by the Swiss Federal Supreme Court No 4A_256/2009 of 11 January 2010.
- *X v Union Cycliste Internationale (UCI) and Fédération Z*, decision by the Swiss Federal Supreme Court No 4A_110/2012 of 9 October 2012.
- *X v Y*, decision by the Swiss Federal Supreme Court No 4A_258/2009 of 11 January 2010.

URUGUAY

- *Univen Refinaria de Petróleo Ltda Recurso de Anulación contra Laudo CCI 13.967/05. IUE 2-1821/2008*. Judgment No i74/2011, Civil Court of Appeal 1st Circuit.

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- *Clayton v Canada*, PCA Case No 2009-04, Procedural Order No 1, 9 April 2009, www.italaw.com/sites/default/files/case-documents/italaw1146.pdf.
- *Gallo v Canada*, PCA Case No 55798, Decision on Challenge to Arbitrator's Appointment, 14 October 2009, www.italaw.com/sites/default/files/case-documents/ita0352.pdf.
- *Lone Pine Resources Inc v Canada*, ICSID Case No UNCT/15/2, Procedural Order No 1, 11 March 2015, www.italaw.com/sites/default/files/case-documents/italaw4252.pdf.
- *Mesa Power Group, LLC v Canada*, PCA Case No 2012-17, Procedural Order No 1, 21 November 2012, www.italaw.com/sites/default/files/case-documents/italaw1200.pdf.
- *Windstream Energy LLC v Canada*, Procedural Order No 1, 16 September 2013, www.italaw.com/sites/default/files/case-documents/italaw1588.pdf.

CZECH REPUBLIC

- *ECE Projektmanagement v The Czech Republic*, Award of 19 September 2013, UNCITRAL, PCA Case No 2010-5.

ECUADOR

- *Juan Carlos Chaparro Álvarez v The Republic of Ecuador*, Ad-hoc Tribunal, Decision on Challenge to the Arbitrator Santiago Cuesta-Caputti, Gaceta Arbitral No 1, 2013, Quito Ecuador.
- *Pablo Punina Vásquez v Gonzalo Dueñas Iturralde*, Case No 004-13, Centre of Arbitration of Amcham-Quito, Decision on Challenge to the Arbitrators Patrick Barrera-Sweeney, Alfredo Corral-Borrero and Sasha Mandakovic-Falconí.

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- AmCham Court – Disqualification Decision dated 5 November 2008.
- CCL Case No 1451-083-2008 dated 14 December 2011.
- CCL Case No 1769-018-2010 dated 5 June 2013.
- CCL Case No 1861-110-2010 dated 1 June 2012.
- CCL Case No 2251-2012-CCL dated 27 March 2013.
- CCL Case No 2277-2012-CCL dated 22 August 2012.
- CCL Case No 2367-2012-CCL dated 15 August 2012.

- CCL Case No 2373-2012-CCL dated 5 September 2012.
- CCL Case No 2518-2013-CCL dated 26 June 2013.
- CCL Case No 2594-2013-R dated 18 September 2013.
- CCL Case No 2609-2013-CCL dated 2 October 2013.
- CCL Case No 2806-2014-CCL dated 30 April 2014.
- CCL Case No 2913-2014-CCL dated 20 August 2014.
- OSCE Case No 310-2015-OSCE/PRE – Disqualification Decision dated 18 September 2015.

SWITZERLAND

- *Union des Associations Européennes de Football (UEFA) v FC Sion/Olympique des Alpes SA*, CAS 2011/O/2574, Award, 31 January 2012, Lausanne.

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- ML Velazco, ‘La causal genérica de recusación en el Reglamento CEMA’, [2013], MEDyAR Centro de Mediación y Arbitraje www.medyar.org.ar.
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- H Van Houtte, K Cox, S Cools, ‘Overzicht van rechtspraak: Arbitrage (1972–2006)’, *RDC/TBH*, 2007/2.
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